



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

AGRINOVA PTY LTD ACN 629 285 589
Applicant

and

CHIEF COMMISSIONER OF STATE REVENUE (NSW)
First Respondent

NEW SOUTH WALES CIVIL AND ADMINISTRATIVE TRIBUNAL
Second Respondent

FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Publication

This outline is in a form suitable for publication on the internet.

Part II: Outline of Oral Submissions

(A) Section 90 has no possible application to the relevant duty

1. On its proper construction, s 90 of the *Family Law Act 1975* (Cth) (**JBA Vol 1 Tab 4 p 157**) does not apply to duty charged under s 8 of the *Duties Act 1997* (NSW) (**JBA Vol 1 Tab 5 p 267**) on a transfer of dutiable property: **RS [17]–[22]**.
2. The words “subject to” in the chapeau to s 90 are synonymous with “liable to”, so that the section only purports to remove a State or Territory duty or charge levied on an instrument. The argument that the words “subject to” mean “burdened by” does not assist the applicant. The duty charged by s 8 of the *Duties Act* is levied on the underlying dutiable transaction, not an instrument.

Parliamentary Debates, Senate, 13 December 1973, 2831 (**JBA Vol 9 Tab 68 p 2849**); Explanatory Memorandum, *Family Law Bill 1974* (Cth), [34] (**JBA Vol 9 Tab 70 p 2878**); Senate Explanatory Memorandum, *Family Law Amendment Bill 1983* (Cth), p 23 (**SCB 328**); see also House of Representatives version (**JBA Vol 9 Tab 69 p 2865**); *Chief Commissioner of State Revenue v Benidorm Pty Ltd* (2020) 104 NSWLR 232 (**JBA Vol 8 Tab 59 p 2497**) at [46]–[50], [53]–[62], [66]–[70]

3. The argument that s 90 purports to apply in this case requires the provision to be substantially rewritten to apply to transactions, contrary to its text and legislative history. Section 90 was amended in 1987, 1991 and 2005 but never expanded to cover duty on

transactions. Between 1987 and 2001, the ACT, NSW, Victoria, Queensland and Tasmania all moved to the modern duties legislation that charges duty on transactions.

Family Law Amendment Act 1987 (Cth) s 50; *Family Law Amendment Act 1991* (Cth) s 20 + Sch; *Family Law Amendment Act 2005* (Cth) Sch 1, items 86–89

Stamp Duties Amendment Act 1987 (NSW); *Duties Act 1997* (NSW); *Duties Act 1999* (ACT); *Duties Act 2000* (Vic); *Duties Act 2001* (Qld); *Duties Act 2001* (Tas)

(B) *Gazzo v Comptroller of Stamps (Vic)* (1981) 149 CLR 227 should not be reopened

4. If it is necessary to decide, *Gazzo* (**JBA Vol 4 Tab 40 p 1192**) should not be reopened. The majority's reasoning involves the application of established principles to a contestable question of characterisation on which reasonable minds will necessarily differ. Such a decision is quintessentially one that should not be reopened. The contention that the majority's reasoning involves errors of principle is not made out: **RS [23]–[33]**.

Gazzo (1981) 149 CLR 227 at 233–240 (Gibbs CJ), 241–244 (Stephen J), 264–272 (Aickin J); see also 245–246, 248 (Mason J); *Spence v Queensland* (2019) 268 CLR 355 (**JBA Vol 5 Tab 49 p 1585**) at 405 [57], 406 [59], 409 [69]

(C) Section 90(1)(a) is wholly invalid

5. If *Gazzo* is reopened, it should be concluded that s 90(1)(a) is wholly invalid. It is erroneous to reason that if an order is validly made under Part VIII of the *Family Law Act* that is sufficient to bring s 90(1)(a) within power. One must consider the rights and duties changed, regulated and abolished by s 90(1)(a), not the rights and duties changed, regulated and abolished by another law authorising the making of orders: **RS [40]–[44]**.
6. Section 90(1)(a) does not have a direct legal operation on marriage, divorce or matrimonial causes. *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 (**JBA Vol 4 Tab 33 p 875**) is clearly not relevant: **RS [37]–[39]**.

Spence v Queensland (2019) 268 CLR 355 at 411 [74]

7. Section 90(1)(a) is not within the implied incidental aspect of either s 51(xxi) or (xxii) (**RS [45]–[53]**):
 - (a) It does not have a purpose of protecting the integrity and practical efficacy of orders made under the *Family Law Act*, or encouraging settlements. The proposition that

s 90(1)(a) is intended to ensure that the order under Part VIII is the final word on how the matrimonial parties' assets and finances should be distributed is unreal.

Income Tax Assessment Act 1997 (Cth) ss 126-10, 126-15

- (b) It is radically ill-adapted to the purpose of making divorce proceedings cheaper for the parties to the marriage. In any event, that a Commonwealth law reduces the financial burdens on the parties to the marriage arising as a consequence of divorce or divorce proceedings is an insufficient connection with s 51(xxi) or (xxii).

(D) Alternatively, s 90(1)(a) does not validly apply to the duty levied in this case

- 8. If s 90(1)(a) is not wholly invalid, it must be read down (partially disapplied): **RS [54]–[56]**. It cannot apply to the duty assessed on the transfers to the applicant in this case:

- (a) Both transfers to the applicant were to a third party (i.e. not a party to the marriage) in respect of non-matrimonial property.
- (b) The contention that s 90(1)(a) can apply validly to a transfer to a third party of non-matrimonial property made in accordance with an order under Part VIII provided the order is necessary to enable a party to the marriage to perform a different order in favour of the other party to the marriage should be rejected. In any event, any such principle is not engaged on the facts here: **SCB 125, 169, 171, 172; RS [9]–[13], [51], [59]**.

(E) Answers to questions of law reserved for the Full Court

- 9. If the argument at paragraph 1 is accepted, the questions of law should be answered:
(1) Unnecessary to answer; (2) Unnecessary to answer; (3) None; (4) The applicant.
- 10. If the argument at paragraph 1 is not accepted, the questions of law should be answered:
(1) No; (2) Unnecessary to answer; (3) None; (4) The applicant.

Dated: 13 October 2026



Thomas Prince



Myles Pulsford