

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON AND EDELMAN JJ

COMMISSIONER OF TAXATION FOR THE
COMMONWEALTH OF AUSTRALIA

APPELLANT

AND

TOMARAS & ORS

RESPONDENTS

Commissioner of Taxation v Tomaras
[2018] HCA 62
13 December 2018
B9/2018

ORDER

1. *The question of law stated by the trial judge for the opinion of the Full Court of the Family Court of Australia should be answered as follows:*

Question

"Does s 90AE(1)-(2) of the Family Law Act 1975 (Cth) grant the court power to make Order 8 of the final orders sought in the amended initiating application of the [w]ife?",

where proposed Order 8 was amended to read:

"Pursuant to section 90AE(1)(b) of the Family Law Act 1975 (Cth), in respect of the [wife's] indebtedness to the Commissioner of Taxation for the Commonwealth of Australia [for] taxation related liabilities in the amount of \$256,078.32 as at 9 August 2016 plus General Interest Charge (GIC), the [husband] be substituted for the [wife] as the debtor and the [husband] be solely liable to the Commissioner of Taxation for the said debt."

Answer

Although in relation to a debt owed to the Commonwealth by a party to a marriage s 90AE(1) confers power to make an order that the Commissioner be directed to substitute the husband for the wife in relation to that debt, it is otherwise inappropriate to answer the question without it being found, or agreed, that, within the meaning of s 90AE(3), the making of the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage, and it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full; and without the court being satisfied that, in all the circumstances, it is just and equitable to make the order.

2. *Appeal otherwise dismissed.*

On appeal from the Family Court of Australia

Representation

S B Lloyd SC with L T Livingston for the appellant (instructed by Australian Government Solicitor)

M L Robertson QC with S J Carius for the first respondent (instructed by Hartnett Lawyers)

No appearance for the second respondent

Submitting appearance for the third respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Commissioner of Taxation v Tomaras

Family law – Matrimonial cause – Proceedings to alter property interests – Where wife was indebted to Commissioner for certain taxation related liabilities plus general interest charge – Where wife applied for order that husband be substituted for wife as debtor and husband be solely liable to Commissioner for debt – Where s 90AE(1)(b) of *Family Law Act 1975* (Cth) permitted court to make order directed to creditor of one party to marriage to substitute other party to marriage in relation to debt owed to creditor – Whether s 90AE bound Commissioner in relation to debt owed to Commonwealth – Whether s 90AE(1)-(2) of *Family Law Act* granted court power to make order sought by wife.

Practice and procedure – Question stated – Where question of law stated by Federal Circuit Court of Australia under s 94A(3) of *Family Law Act* for opinion of Full Court of Family Court of Australia – Where question concerned jurisdiction to make order – Where preconditions to making of order in s 90AE(3) of *Family Law Act* unlikely to be satisfied – Whether stated case procedure was appropriate.

Words and phrases – "bind the Crown", "case stated", "common probability of fact", "creditor", "Crown immunity", "debt of a party to a marriage", "party to a marriage", "person", "presumption", "property of the parties to a marriage", "property settlement proceedings", "question of law", "rights, liabilities or property interests of a third party", "tax debt", "third party".

Family Law Act 1975 (Cth), ss 79, 80, 90AA, 90AC, 90ACA, 90AD, 90AE, 94A, Pts VIII, VIIIAA.

1 KIEFEL CJ AND KEANE J. We agree with Gordon J that under s 90AE of the *Family Law Act 1975* (Cth) ("the Act") the court has power to order the Commissioner of Taxation to substitute one party to a marriage for the other in relation to a debt owed to the Commonwealth for income tax. Accordingly, the appeal must be dismissed. Gratefully adopting her Honour's summary of the factual background, the relevant legislation, and the reasons of the Full Court of the Family Court of Australia, we proceed to explain our reasons for that conclusion.

2 Since the decision of this Court in *Bropho v Western Australia*¹ it has been settled that the presumption of statutory construction that general words in a statute do not bind the Crown may be displaced without the use of express words or words of necessary intendment. If the legislative provision in question, when construed in context, discloses an intention to apply to the circumstances of the particular case, then effect must be given to that intention. In this case the intention of the Act is not in doubt.

3 Within Pt VIII of the Act, a court considering the exercise of its jurisdiction in property settlement proceedings under s 79 must, by reason of s 75(2)(ha), take into account the effect of any proposed order on the ability of a creditor of a party to the marriage to recover the creditor's debt. Nothing in Pt VIII of the Act suggests an intention to differentiate between Commonwealth, State and Territory revenue authorities or an intention to differentiate between revenue authorities and other creditors. Further, s 80(1)(f) provides that a court exercising its powers under s 79 may "order that payments be made ... to a public authority for the benefit of a party to the marriage". It is not disputed that this provision contemplates the making of an order that one party to a marriage pay the taxation liability of another to a revenue authority. Thus it is apparent that, in Pt VIII of the Act, the term "creditor" is apt to include the Commonwealth and indeed any other revenue authority.

4 Within Pt VIIIAA of the Act, s 90AA states that the object of that Part is to allow the court to make an order in relation to the property of a marriage under s 79 of the Act that is directed to, or alters the rights, liabilities or property interests of, a third party. Within Pt VIIIAA, s 90AE(1)(b) provides that in proceedings under s 79, the court may make "an order directed to a creditor of one party to a marriage to substitute the other party ... to the marriage for that

1 (1990) 171 CLR 1 esp at 16-17, 22; [1990] HCA 24. See also *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 346-347 [16]-[17]; [1999] HCA 9; *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 27-28 [41]-[42]; [2007] HCA 38.

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party in relation to the debt owed to the creditor". Part VIII A is thus explicitly ancillary to s 79 of the Act.

5 Given that Pt VIII A is ancillary to Pt VIII, a suggestion that a "creditor" in Pt VIII A is different from a "creditor" in Pt VIII would be difficult to sustain. Nothing in the language of Pt VIII A affords any support to such a suggestion. Further, nothing in the extraneous materials referred to by the parties targets a mischief that might be remedied only by giving "creditor" a narrower scope in Pt VIII A than it has in Pt VIII.

6 It must be understood, however, that the power of the court under Pt VIII A to make an order directed to a third party is not at large. The power to make an order under s 90AE(1) is conditioned by s 90AE(3). Such an order may be made only if, among other things:

"(a) the making of the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage; and

(b) if the order concerns a debt of a party to the marriage – it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full; and

...

(d) the court is satisfied that, in all the circumstances, it is just and equitable to make the order".

7 Some statutes may differentiate between ordinary creditors and revenue authorities. In such cases the general consideration of equality before the law, which tends against the application of the presumption that the Crown is not bound by a statute, can be seen to have been displaced in favour of the public interest specifically associated with governmental functions such as the protection of the revenue². The Act is not such a statute.

8 Any concern for the protection of the revenue – Commonwealth, State or Territory – is met by the terms of s 90AE(3)(b). If this condition is not satisfied, the power to make an order under s 90AE(1)(b) is not enlivened. The observance of this condition by the court is apt to ensure that the interests of the revenue authorities, and other creditors for that matter, are not adversely affected by the making of an order under s 90AE(1)(b). The scope of this power should not be

2 *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 410 [35], 430 [106]; [1999] HCA 5.

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distorted by attributing to the Parliament an unfounded apprehension that the courts cannot be trusted to ensure that the statutory conditions upon which the power may be exercised are satisfied.

9 Given that, so far as appears from the record in the present case, the husband is a bankrupt and the wife is solvent, it is not possible to see how the condition in s 90AE(3)(b) could be satisfied in this case. More generally, it is difficult to see how any case where there is a real prospect that the substitution of one spouse for another as the debtor of the revenue authority would create or enhance a risk of non-payment would not fall foul of s 90AE(3)(b) of the Act.

10 It might also be suggested that the prospect that an order for substitution might render the substituted party liable for a revenue debt without the benefit of rights of objection available exclusively to the other party to the marriage as "the taxpayer" under the relevant revenue legislation would mean that the condition in s 90AE(3)(d) is not satisfied. This suggestion raises a question of no little complexity. The circumstance that the income tax liability of the substituted party could not be contested by that party would not necessarily make it unjust or inequitable to order substitution. It may be, for example, that any challenge to the tax liability asserted by the Commissioner would clearly be resolved in favour of the Commissioner. In such a case, an inability to contest the tax liability would not occasion substantial injustice to the substituted party. However, it will rarely be the case that a court trying proceedings between the parties to a marriage will be able responsibly to come to a firm view as to the likely outcome of such a contest.

11 As a practical matter, where a real question arises as to whether a party to a marriage would be substantially prejudiced by an order for substitution, the better course for the court would usually be to conclude that it cannot be satisfied that the condition in s 90AE(3)(b) could be met. In the present case, given that on the material in the record the condition in s 90AE(3)(b) could not be satisfied, it is unnecessary to reach a conclusion in relation to s 90AE(3)(d).

12 For those reasons, we agree with the terms of the answer proposed by Gordon J to the question posed by the stated case.

13 As to the procedure adopted in this case, we would observe that it is regrettable that the primary judge was invited by the parties to state a question of law for the Full Court. While the primary judge cannot fairly be criticised for acceding to the course proposed by the parties, it would have been more efficient, in terms of the administration of justice, if the wife's application for substitution had been allowed to proceed to a determination on the merits. Given the difficulty confronting the wife's application for substitution by reason of the condition in s 90AE(3)(b), the question stated for the opinion of the Full Court was unlikely ever to be of other than academic interest.

14 GAGELER J. The question of law stated by the Federal Circuit Court for the consideration of the Full Court of the Family Court under s 94A(3) of the *Family Law Act 1975* (Cth) ("the Act"), at the urging of the Commissioner of Taxation, was whether the Federal Circuit Court has power under s 90AE(1) or (2) of the Act to order that a husband be substituted for a wife in relation to a taxation debt owed by the wife to the Commonwealth of Australia. Although the question was cast in terms of power, the argument of the Commissioner, as refined in the course of submissions in the appeal by special leave to this Court from the order embodying the affirmative answer given by the Full Court of the Family Court, was cast primarily in terms of jurisdiction.

15 The Commissioner argued that the Federal Circuit Court lacks power to make such an order under s 90AE(1) or (2) because the jurisdiction conferred on the Federal Circuit Court by s 39(5AA) with respect to matters arising under the Act in respect of matrimonial causes constituted by "proceedings between the parties to a marriage with respect to the property of the parties to the marriage"³ is not extended by s 90AD(1) for the purpose of Pt VIIIAA of the Act to encompass proceedings between the parties to a marriage regarding the taxation debts owed by one or both of those parties to the Commonwealth. The Commissioner argued that the jurisdiction of the Federal Circuit Court is not so extended because a taxation debt owed to the Commonwealth is excluded from the instruction in s 90AD(1) that, for the purpose of Pt VIIIAA, "a debt owed by a party to a marriage is to be treated as property" for the purpose of a matrimonial cause as defined. The Commissioner relied for that exclusion on the common law presumption that a statute does not "bind the Crown".

16 Because the question stated concerns the jurisdiction of the Federal Circuit Court and because the Commissioner's argument that the Federal Circuit Court lacks jurisdiction turns entirely on statutory construction, I see no reason to doubt that the discretion conferred by s 94A(3) of the Act was appropriately exercised by the Federal Circuit Court to state the question for the consideration of the Full Court of the Family Court. That the question is one of general significance for the administration of taxation laws and that it has been raised in other pending cases are additional considerations which support the appropriateness of adopting a procedure to ensure its early and authoritative resolution.

17 That said, I share the view of the Full Court of the Family Court in the decision under appeal that the question is not at all difficult to answer. Rejecting the Commissioner's argument that the reference in s 90AD(1) to "a debt owed by a party to a marriage" excludes a taxation debt owed to the Commonwealth, I would answer the question to the effect that, subject to s 90AE(3), the Federal Circuit Court has power under s 90AE(1)(b) or (2)(b) of the Act to order that the

3 See s 4(1) of the Act (para (ca) of the definition of "matrimonial cause").

husband be substituted for the wife in relation to the taxation debt. The affirmative answer given to the question by the Full Court of the Family Court, although less precise, is substantially to that effect.

18 Stated sufficiently for present purposes, the presumption of the common law of Australia that a statute does not "bind the Crown" is a presumption that a statute enacted by an Australian legislature does not operate to impair the legal position of the body politic or executive government of the Commonwealth, a State or a self-governing Territory⁴. Underlying the presumption is the understanding that a statute applicable to a citizen has the potential to operate with different force and with different consequences if applied to a government⁵. The strength of the presumption has varied through time. Applied as here to a statute enacted after 1990⁶, as applied to a statute enacted before 1947⁷, the presumption is displaced simply where an affirmative intention to alter the legal position of the Commonwealth, State or self-governing Territory appears from the text, structure, subject matter or context of the statute.

19 Here, in my opinion, the presumption is displaced by the appearance of an affirmative legislative intention to confer jurisdiction on a court to alter, by an order under s 90AE(1) or (2), the interest of the Commonwealth or a State or a self-governing Territory in a debt owed to it by a party to a marriage. That affirmative intention appears sufficiently from the text and structure of Pt VIIIAA when read in context with s 79 in Pt VIII of the Act.

20 The object of Pt VIIIAA, as expressed in s 90AA, is to allow a court in proceedings under s 79 to make an order "that is directed to, or alters the rights, liabilities or property interests of a third party". The same terminology is repeated in s 90AE(2)(b) in empowering a court to make an order that "alters the rights, liabilities or property interests of a third party in relation to the marriage".

4 *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at 151-152 [166]-[170]; [2004] HCA 48; *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646 at 654-655 [21]-[24]; [2005] HCA 55, referring to *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 393-394; [1955] HCA 72.

5 *Roberts v Ahern* (1904) 1 CLR 406 at 418; [1904] HCA 17, quoting *United States v Hoar* (1821) 26 Fed Cas 329 at 330. See also *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 410 [35]; [1999] HCA 5.

6 *Bropho v Western Australia* (1990) 171 CLR 1 at 23-24; [1990] HCA 24.

7 *Jacobsen v Rogers* (1995) 182 CLR 572 at 585-586; [1995] HCA 6, referring to *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58. See also *Roberts v Ahern* (1904) 1 CLR 406 at 418.

The term "creditor" in s 90AE(1)(a), (b) and (c) plainly refers to a "third party" whose property interest is in a debt owed by one or both of the parties to the marriage.

21 Section 90AB defines "third party", in relation to a marriage, for the purposes of Pt VIIIAA, to mean "a person who is not a party to the marriage". By operation of s 2C of the *Acts Interpretation Act 1901* (Cth), which by force of s 2A of that Act "binds the Crown in each of its capacities", the reference to a "person" within that definition must be taken to "include a body politic or corporate as well as an individual" absent something in the Act to indicate a contrary intention. Unlike the *Trade Practices Act 1974* (Cth), in relation to which an intention to exclude a body politic from general references to a "person" was found in specific provisions of that Act which addressed the extent to which that Act was to "bind" the Crown "in right of the Commonwealth" and the Crown "in right of a State"⁸, the Act contains nothing to evince an intention contrary to the operation of s 2C of the *Acts Interpretation Act*.

22 When combined with the statement in s 90AC(1)(a) of the Act that Pt VIIIAA "has effect despite anything to the contrary in ... any other law (whether written or unwritten) of the Commonwealth, a State or Territory", s 90AA as interpreted in accordance with s 2C of the *Acts Interpretation Act* rather indicates a legislative intention that the powers conferred on a court by the Part are to be available in any proceeding under s 79 of the Act to provide for the alteration of the rights, liabilities or property interests of a body politic to which a party to a marriage is indebted, in the same way as the Part provides for the alteration of the rights, liabilities or property interests of a body corporate to which, or an individual to whom, a party to a marriage is indebted.

23 The comprehensiveness and uniformity of the intended operation of Pt VIIIAA in relation to debts owed by one or both of the parties to the marriage to all third parties are confirmed by the narrowness and specificity of the sole exclusion in s 90ACA. The exclusion is of the powers of a court under the Part in relation to "superannuation annuities (within the meaning of the *Income Tax Assessment Act 1997*)", a subject matter which falls within the separate scheme in Pt VIIIB of the Act.

24 The Commissioner's argument that Pt VIIIAA cannot have been intended to cover taxation debts to the Commonwealth because the *Income Tax Assessment Act 1936* (Cth) ("the ITAA") and the *Taxation Administration Act 1953* (Cth) ("the TAA") comprise a complete and exhaustive scheme governing the taxation obligations of a party to a marriage is belied by the express

8 See *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 347-349 [20]-[24]; [1999] HCA 9.

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subordination in s 90AC(1)(a) of all other Commonwealth laws to the operation of the Part. Given that s 90AC(1)(a) creates no exception for the operation of the ITAA or the TAA, neither of those statutes operates to prevent the making of an order under s 90AE(1) or (2) in proceedings under s 79 where the preconditions in s 90AE(3) can be met.

25 The Commissioner points to the potential for an order under s 90AE(1) or (2) to operate to impede the availability and operation of the Commissioner's power to amend assessments under s 170 of the ITAA, to impede the availability and operation of a taxpayer's objection, review and appeal rights under Pt IVC of the TAA, to impede the exercise by the Commissioner of recovery powers conferred by Sch 1 to the TAA, and to impact adversely on the accrual of the general interest charge under Pt IIA of the TAA. The mere potential for those impediments and that adverse impact to exist does not mean that the application of s 90AE(1) or (2) of the Act to a taxation debt owed by a party to a marriage to the Commonwealth is so problematic that an intention to confer jurisdiction to permit such an order cannot reasonably be imputed to the Parliament.

26 All of the potentialities to which the Commissioner points are considerations available and appropriate to be taken into account by a court, called upon to make an order under s 90AE(1) or (2), in determining under s 90AE(3)(d) whether "the court is satisfied that, in all the circumstances, it is just and equitable to make the order". The extent to which one or more of those potentialities would, if realised, impact on the determination to be made under s 90AE(3)(d) might be expected to vary from case to case. Factors relevant to the determination to be made under s 90AE(3)(d) in a given case include a range of statutory discretions which the Commissioner might have exercised or might be prepared to exercise, a variety of arrangements which the Commissioner might have entered into or might be prepared to enter into in the exercise of the general powers of administration conferred by s 8 of the ITAA and by s 3A of the TAA, and the power of a court under s 79(5) of the Act to grant an adjournment of proceedings to allow processes under the ITAA and TAA to run their course.

27 Whether s 90AE(3) would permit the exercise of power under s 90AE(1)(b) or (2)(b) in the circumstances of this case is not within the scope of the question that has been stated. It is a topic on which I therefore express no opinion.

28 For these reasons, I would dismiss the appeal.

29 GORDON J. Part VIII of the *Family Law Act 1975* (Cth) provides for spousal maintenance and the division of the property of the parties to a marriage. In proceedings with respect to the property of the parties to a marriage⁹, s 79 in Pt VIII provides that a court may make such order as it considers appropriate altering the interests of the parties to the marriage in the property¹⁰, but that the court shall not make such an order unless it is satisfied that in all the circumstances it is just and equitable to make the order¹¹. In considering what order (if any) should be made, the court must take into account prescribed matters¹². One matter the court must consider is the effect of any proposed order on the ability of a creditor of a party to the marriage to recover the creditor's debt, so far as that effect is relevant¹³.

30 Part VIII¹⁴ of the *Family Law Act* was introduced in 2003¹⁴ to, relevantly, allow a court to make an order under s 79 that "is directed to, or alters the rights, liabilities or property interests of a third party"¹⁵. One of the orders the court may make binding a third party under Pt VIII¹⁴ is an order directed to a creditor of one party to the marriage to substitute the other party to the marriage in relation to the debt owed to that creditor¹⁶.

31 This appeal from a judgment of the Full Court of the Family Court of Australia, on a question of law stated by a judge of the Federal Circuit Court of Australia under s 94A(3) of the *Family Law Act*, is concerned with the interaction between Pts VIII and VIII¹⁴ and, in particular, whether a court in proceedings under s 79 in Pt VIII has power under s 90AE(1) in Pt VIII¹⁴ to make an order directed to the appellant, the Commissioner, to substitute the husband for the wife in relation to a debt owed to the Commonwealth which

9 Included in the definition of "property settlement proceedings" in s 4(1) of the *Family Law Act*.

10 s 79(1)(a) of the *Family Law Act*.

11 s 79(2) of the *Family Law Act*.

12 s 79(4) of the *Family Law Act*.

13 ss 79(4)(e) and 75(2)(ha) of the *Family Law Act*.

14 Part VIII¹⁴ had a deferred commencement: see s 2(1) of the *Family Law Amendment Act 2003* (Cth).

15 s 90AA of the *Family Law Act*.

16 s 90AE(1)(b) of the *Family Law Act*.

arises under a taxation law¹⁷. The Commissioner contended that he was not bound by s 90AE. The wife contended that the Commissioner was bound, and that the court had power to order the Commissioner to substitute the husband for the wife in relation to a debt owed to the Commonwealth arising under a taxation law.

32 These reasons will show that, under Pt VIII AA, the court has *jurisdiction* over debts owed to the Commonwealth; and the court has the *power* under s 90AE in that Part to order the Commissioner to substitute the husband for the wife in relation to a debt owed to the Commonwealth arising under a taxation law. But these reasons will also show that there will seldom, if ever, be occasion to exercise that power.

Case stated

33 The question of law stated by the trial judge for the opinion of the Full Court was as follows:

"Does s 90AE(1)-(2) of the [*Family Law Act*] grant the court power to make Order 8 of the final orders sought in the amended initiating application of the [w]ife?"

34 Order 8 was in the following terms:

"Pursuant to section 90AE(1)(b) of the [*Family Law Act*], in respect of the [wife's] indebtedness to the [Commissioner] [for] taxation related liabilities in the amount of \$256,078.32 as at 9 August 2016 plus General Interest Charge (GIC), the [husband] be substituted for the [wife] as the debtor and the [husband] be solely liable to the [Commissioner] for the said debt."

35 The Full Court answered that question:

Yes, but with the proviso that s 90AE(1) confers power only to make an order that the Commissioner be directed to substitute the husband for the wife in relation to the debt owed by the wife to the Commissioner.

17 A "taxation law" means an Act of which the Commissioner has the general administration: s 995-1(1) of the *Income Tax Assessment Act 1997* (Cth) ("the 1997 Act"). The Commissioner has the general administration of the *Income Tax Assessment Act 1936* (Cth) (s 8), the 1997 Act (s 1-7) and the *Taxation Administration Act 1953* (Cth) (s 3A).

36 As is apparent, the Full Court rejected the Commissioner's contention that, upon the proper construction of s 90AE in Pt VIIIAA, the court did *not* have power to make an order under s 90AE directed to the Commissioner.

37 But the question of law stated for the opinion of the Full Court, and therefore the answer provided by the Full Court, said nothing about the fact that, upon the proper construction of Pt VIIIAA, read with Pt VIII of the *Family Law Act*, a court would rarely, if ever, make such an order directed to the Commissioner in relation to a debt owed to the Commonwealth which arises under a taxation law. In other words, the confined nature of the power conferred was relevant, and was not fully explored.

38 In the circumstances of this matter, the stated case procedure was inappropriate, and the answer given incomplete.

Background

39 The wife and husband, the first and second respondents, married in July 1992. They separated in July 2009. During the marriage, the Commissioner issued various assessments requiring the wife to pay, among other things, income tax, the Medicare levy, penalties and the general interest charge ("GIC"). The wife failed to pay the amounts assessed, and did not lodge objections under Pt IVC of the *Taxation Administration Act 1953* (Cth) ("the TAA"). On 12 November 2009, the Commissioner obtained default judgment against the wife for \$127,669.36. GIC continues to accrue on that judgment debt.

40 The husband was declared bankrupt on 5 November 2013. On 20 December 2013, the wife commenced proceedings in the Federal Circuit Court against the husband seeking, relevantly, orders under s 79 for alteration of their property interests. The wife's application, as originally filed, sought, among other things, the following orders:

- "8. That the [husband] be responsible for all income tax assessed on income received or deemed to have been received by the [wife] for the income tax year ending 30 June 2009 to the date of payment under Order 2.
9. The [husband] shall do all acts and things and sign all documents as are necessary to release the [wife] from and indemnify the [wife] against any liability present or contingent including tax and bank liabilities, in respect of the [husband] or a related party of the [husband]."

41 In February 2016, the trial judge granted the Commissioner leave to intervene in the proceedings in relation to those orders. As at 9 August 2016, the wife's liabilities to the Commissioner stood at \$256,078.32, comprised of the judgment debt of \$127,669.36, income tax credits and credit interest on

overpayments in the amount of \$516.77, and further GIC in the amount of \$128,925.73. That month, the trial judge granted the wife leave to amend Order 8 in the terms set out above¹⁸ and stated the question of law for the opinion of the Full Court.

Full Court

42 As noted earlier, the Full Court (Thackray and Strickland JJ, Aldridge J agreeing generally, but writing separately) answered the question in the affirmative but with the proviso that s 90AE(1) confers power to make only an order that the Commissioner be directed to substitute the husband for the wife in relation to the debt owed by the wife to the Commissioner. Thackray and Strickland JJ held that the additional words sought by the wife – that the husband be solely liable to the Commissioner for the debt – could create the impression that whatever rights the wife had to challenge the debt were extinguished by the order. Given that their Honours were not persuaded such rights would be extinguished, they declined to make the additional order.

43 In formulating that answer, all members of the Court considered the question of Crown immunity from statute at some length.

44 Two members of the Court, Thackray and Strickland JJ, held that the presumption that the Crown is not bound by statute applies only to provisions which impose an obligation or restraint on the Crown¹⁹; and that there was no place for the presumption if the provision, properly construed, conferred a benefit on the Crown²⁰.

45 Thackray and Strickland JJ were of the view that it was reasonably arguable that s 90AE could *only impose a benefit* on the Crown on the basis, among other things, that the Commissioner would have a greater chance of recovering a tax liability given that s 90AE allowed substitution of one party or for both parties to be jointly responsible for the debt, and that, in accordance with s 90AE(3)(b), the order could not be made where it was foreseeable the debt would not be paid. In light of those matters, their Honours saw no place for the presumption.

18 See [34] above.

19 *Tomaras v Tomaras* (2017) 327 FLR 228 at 232 [16], citing *British Broadcasting Corporation v Johns* [1965] Ch 32 and *Bropho v Western Australia* (1990) 171 CLR 1 at 16; [1990] HCA 24.

20 *Tomaras* (2017) 327 FLR 228 at 232 [16], citing *Madras Electric Supply Corporation Ltd v Boarland* [1955] AC 667 and *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 656; [1979] HCA 19.

46 In case they were wrong on the question of benefit, Thackray and Strickland JJ also considered, and rejected, arguments advanced by the Commissioner that the presumption applied and that s 90AE did not rebut that presumption. Two key arguments were advanced by the Commissioner. First, other provisions in the *Family Law Act* provided means through which one spouse could be made responsible for the taxation liability incurred by the other spouse. Second, the construction advanced by the wife would create absurdities in the application of the taxation law because s 90AE could not operate to transfer the objection, review and appeal rights associated with the tax debt.

47 In relation to the first argument, Thackray and Strickland JJ accepted that other provisions in the *Family Law Act* provided the means through which one spouse could be directed to meet the taxation liability incurred by the other spouse, but held that such an order provided the original taxpayer with no defence against a claim by the Commissioner; and, further, that the same argument could be made about any other kind of debt.

48 In relation to the second argument – the impact of s 90AE on the application of the taxation law – despite not wishing to express a firm view, Thackray and Strickland JJ were not persuaded that the rights of objection, review and appeal would not pass to the substituted spouse in the event that a s 90AE order were made; and that, if they were wrong in relation to the transferability of objection rights, their Honours were of the view that the Crown would *derive a benefit* rather than suffer a detriment.

49 Their Honours further noted that the Commissioner had always been treated as a "creditor" for the purposes of ss 79 and 79A. Given the express link between s 79 and s 90AE, it would be "surprising"²¹, their Honours said, if different meanings were given to the words "creditor" and "debt" appearing in those linked sections. Their Honours further held that the failure of Parliament to include an express carve out, together with the purported benefits that flow to the Commissioner from the making of orders under s 90AE, suggested a legislative intention that the Commissioner be bound by s 90AE.

50 Aldridge J agreed with Thackray and Strickland JJ, subject to certain provisos. First, the principle in relation to Crown immunity now to be applied was that articulated in *Bropho v Western Australia*²². Aldridge J held that whilst the issue of benefit to, or burden upon, the Crown might be a relevant consideration in determining whether the Crown was bound by a statute, it could not be considered as a starting point or threshold issue. As his Honour observed,

21 *Tomaras* (2017) 327 FLR 228 at 237 [54].

22 (1990) 171 CLR 1 at 23-24, quoted in *Tomaras* (2017) 327 FLR 228 at 239-240 [70].

a historically rigid conception of Crown immunity, whereby an Act of Parliament would not bind the Crown unless by express provision or necessary implication, was discarded in *Bropho*²³; and that was a rejection, at least in part, of the earlier decisions which had endorsed the benefit or burden dichotomy²⁴.

51 Second, contrary to the views of Thackray and Strickland JJ, his Honour concluded that, given that an order under s 90AE operates to *interfere* with the legal rights and entitlements of the third party, it is *not* legislation beneficial to the Crown. Aldridge J was also doubtful that one spouse could be substituted for the other in relation to rights of objection and appeal in respect of tax liabilities. However, his Honour was of the view that the issue was not of critical significance because, among other things, it was unlikely that any orders would be made under s 90AE if there were genuine issues of substance that would justify an objection or appeal.

Crown immunity

52 The relevant provisions of the *Family Law Act* do not expressly state that they bind the Crown. The presumption that general words of statutory provisions will not bind the Crown operates as no more than a general principle of statutory construction²⁵; or an aid to statutory construction²⁶. In certain circumstances²⁷, the presumption may represent little more than the starting point of the ascertainment of the relevant legislative intent²⁸. The ultimate question must be whether the presumption has, in all the circumstances, been rebutted and, if it has, the extent to which it was the legislative intent that the relevant statutory provisions should bind the Crown²⁹. The "circumstances include the terms of the statute, its subject matter, the nature of the mischief to be redressed, the general

23 (1990) 171 CLR 1 at 16-17, 22.

24 *Tomaras* (2017) 327 FLR 228 at 239-240 [66]-[70]. See, eg, *Madras Electric* [1955] AC 667 at 685; *BBC v Johns* [1965] Ch 32 at 78-79; *McGraw-Hinds* (1979) 144 CLR 633 at 656. See also *Jacobsen v Rogers* (1995) 182 CLR 572 at 585; [1995] HCA 6.

25 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 27 [40]; [2007] HCA 38, citing *Bropho* (1990) 171 CLR 1 at 15.

26 *Bropho* (1990) 171 CLR 1 at 16.

27 Such as those described in *Bropho* (1990) 171 CLR 1 at 23.

28 *Bropho* (1990) 171 CLR 1 at 15-16, 23.

29 *Baxter* (2007) 232 CLR 1 at 27 [41], quoting *Bropho* (1990) 171 CLR 1 at 23-24.

purpose and effect of the statute, and the nature of the activities of the Executive Government which would be affected if the Crown is bound"³⁰. That list is by no means exhaustive.

53 As identified by Gleeson CJ and Gaudron J in *The Commonwealth v Western Australia (Mining Act Case)*, a rationale for the presumption of Crown immunity is that, in general, acts of the legislature are meant to regulate and direct the acts and rights of citizens and, in most cases, the reasoning applicable to them applies with very different, and often contrary, force to the government itself³¹. Thus, in applying the presumption in ascertaining legislative intent, the operation of the legislation – its impact or effect on the Crown – is relevant³². The task is to construe the statute in context, adopting a flexible approach to construction which takes into account the nature of the statutory provisions in question and the activities of government to which they might apply³³.

54 The impact of a legislative provision on the Crown is not a new consideration. It has also arisen in the context of subjects of the Crown seeking to claim the benefit of the immunity. Kitto J in *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)*³⁴ referred to the need to consider the impact on the Crown when identifying classes of cases where a statutory provision not binding on the Crown should be denied an incidence on a *subject* of the Crown because that incidence would be a legal effect upon the Crown. Relatedly, in *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation*³⁵, Mason CJ, Deane, Toohey and Gaudron JJ stated that it was clear from *Bropho* that the presumption that general words do not bind the Crown must yield to the circumstances involved, including the content and purpose of the provision; the way the provision would operate; and whether the provision would bind servants or agents of the government in relation to acts they do or property which they own or occupy in that capacity. Their Honours went on to

30 *Bropho* (1990) 171 CLR 1 at 28. See also *Baxter* (2007) 232 CLR 1 at 28 [42].

31 (1999) 196 CLR 392 at 410 [35]; [1999] HCA 5, quoting *United States v Hoar* (1821) 26 Fed Cas 329 at 330. See also *Mining Act Case* (1999) 196 CLR 392 at 410-411 [35]-[36].

32 See *Bropho* (1990) 171 CLR 1 at 23.

33 *Baxter* (2007) 232 CLR 1 at 27 [41], citing *Bropho* (1990) 171 CLR 1. See generally *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 270; [1996] HCA 32.

34 (1955) 93 CLR 376 at 393-394; [1955] HCA 72.

35 (1993) 178 CLR 145 at 171-172; [1993] HCA 1.

state that there was now no basis for applying the presumption that the Crown was not bound by statute unless the provision in issue would operate to have *some effect upon the government*³⁶.

55 Whether the relevant provisions of the *Family Law Act* apply to, and bind, the Crown as creditor cannot be determined without first identifying how those provisions operate³⁷. And, here, the operation of the relevant provisions must be understood in the context of the whole of the *Family Law Act*, but with particular reference to Pt VIII and then Pt VIIIAA.

Statutory framework

Part VIII

56 Part VIII of the *Family Law Act* provides for spousal maintenance and the division of the property of parties to a marriage. Proceedings with respect to the maintenance of a party to a marriage are referred to as "spousal maintenance proceedings"³⁸. Proceedings with respect to the property of the parties to a marriage, or either of them, are defined as "property settlement proceedings"³⁹. The right of a spouse to maintenance is separate from, but inextricably linked to, the division of property. In relation to the parties to a marriage, or either of them, "property" is defined, relevantly, to mean property to which one or both of the parties are entitled "whether in possession or reversion"⁴⁰.

57 In property settlement proceedings, s 79 in Pt VIII provides that a court may make such order as it considers appropriate altering the interests of the parties to the marriage in the property⁴¹. However, the court must not make an order under s 79 unless it is satisfied that in all the circumstances it is just and equitable to make the order⁴² and, in considering what order (if any) should be made in property settlement proceedings, the court must take into account certain

36 *Registrar of the Accident Compensation Tribunal* (1993) 178 CLR 145 at 171-172.

37 See *Bropho* (1990) 171 CLR 1 at 23.

38 ss 4(1) and 74 of the *Family Law Act*.

39 s 4(1) of the *Family Law Act*.

40 s 4(1) of the *Family Law Act*.

41 s 79(1)(a) of the *Family Law Act*.

42 s 79(2) of the *Family Law Act*.

matters⁴³. Those matters include the financial and non-financial contributions, both direct and indirect, by the parties to the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage⁴⁴; the effect of any proposed order on the earning capacity of either party to the marriage⁴⁵; any other order made under the *Family Law Act* affecting a party to the marriage⁴⁶; and the matters referred to in s 75(2), so far as they are relevant⁴⁷.

58 The matters listed in s 75(2) are the matters to be taken into consideration by the court in exercising its jurisdiction in relation to spousal maintenance. The list includes the income, property and financial resources of each of the parties⁴⁸ and the effect of any proposed order on the ability of a creditor of a party to the marriage to recover the creditor's debt⁴⁹. That list recognises that when determining what orders the court might make under s 79, the financial resources of the parties to a marriage must be considered; and that also relevant are liabilities owed to the creditors of the parties to the marriage and the effect of any order on the ability of those creditors to recover their debt.

59 The duty of the court, so far as is practicable, is to make orders that will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them⁵⁰. In exercising its powers under Pt VIII, the court may make a variety of orders⁵¹ including: that a specified transfer or settlement of property be made by way of maintenance for a party to a marriage⁵²; that payments be made direct to a party to a marriage, to a trustee to be appointed or into court or to a public authority for the benefit of a party to the

43 s 79(4) of the *Family Law Act*.

44 s 79(4)(a)-(b) of the *Family Law Act*.

45 s 79(4)(d) of the *Family Law Act*.

46 s 79(4)(f) of the *Family Law Act*.

47 s 79(4)(e) of the *Family Law Act*.

48 s 75(2)(b) of the *Family Law Act*.

49 s 75(2)(ha) of the *Family Law Act*.

50 s 81 of the *Family Law Act*.

51 s 80 of the *Family Law Act*.

52 s 80(1)(ba) of the *Family Law Act*.

marriage⁵³; and any other order which the court thinks it is necessary to make to do justice⁵⁴.

60 The Commissioner did not dispute that, for the purposes of s 80(1)(f) of the *Family Law Act*, the Commonwealth was a "public authority" or that a court may direct a party to a marriage to pay a debt owed to the Commonwealth by the other party.

61 Consistent with the dual objectives of finality and justice in Pt VIII of the *Family Law Act*, the court has power to adjourn property settlement proceedings if the court is of the opinion that, among other things, there is likely to be a significant change in the financial circumstances of the parties to the marriage and, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings⁵⁵.

62 Further, where an application is made for an order under s 79 by a party to the marriage then certain persons, whose interests would be affected by the making of the order, are "entitled to become a party" to the proceedings⁵⁶. Relevantly, a creditor of a party to the proceedings may do so if the creditor *may* not be able to recover their debt if the order were made⁵⁷. As Thackray and Strickland JJ noted, the Commissioner has always been treated as a "creditor" for the purposes of ss 79 and 79A.

63 Part VIII recognises, however, that although the orders being made under s 79 are intended to be final, circumstances change. Therefore, s 79A provides that *a person affected by an order* made under s 79 may apply for that order to be varied or set aside and, if appropriate, another order substituted in its place. But for another order to be substituted, the court must be satisfied that at least one of the circumstances prescribed in s 79A(1) exists. Those circumstances include that⁵⁸: there has been a miscarriage of justice; it is impracticable, in the circumstances that have arisen since the order was made, for the order, or for a part of the order, to be carried out; or a person has defaulted in carrying out an obligation imposed on that person by the order and, as a result of that default,

53 s 80(1)(f) of the *Family Law Act*.

54 s 80(1)(k) of the *Family Law Act*.

55 s 79(5)(a) of the *Family Law Act*.

56 s 79(10) of the *Family Law Act*.

57 s 79(10)(a) of the *Family Law Act*.

58 s 79A(1)(a)-(c) of the *Family Law Act*.

it is just and equitable to vary the order or to set the order aside and make another order in substitution for that order. A creditor of a party to the proceedings in which the order under s 79 was made is deemed to be a person whose interests are affected by the order *if the creditor may not be able to recover their debt* because the order has been made⁵⁹. Put in different terms, it is difficult to identify a circumstance where any order would be made under s 79 if it diminished the ability of any creditor to recover a debt owed to them by one or both parties to the marriage.

64 It is against that background that Pt VIII A must be construed.

Part VIII A

65 Part VIII A was introduced into the *Family Law Act* by the *Family Law Amendment Act 2003* (Cth). Its stated object is, relevantly, to allow a court, in relation to the property of a party to a marriage, to make an order in property settlement proceedings under s 79 in Pt VIII that "is directed to, or alters the rights, liabilities or property interests of a third party"⁶⁰. A "third party", in relation to a marriage, means a person who is not a party to the marriage⁶¹. The Commissioner accepted that the Commonwealth was a third party for the purposes of Pt VIII A.

66 Section 90 A provides that Pt VIII A "does not affect the operation of any other provision" of the *Family Law Act*. Indeed, the example given in the statute is that certain provisions of s 90 A "do not limit the operation of any other provisions of [the *Family Law Act*] that require or permit the court to take matters into account in making an order in proceedings under section 79". In other words, Pt VIII A is to be construed as sitting alongside, and ancillary to, Pt VIII. That view of Pt VIII A is reinforced by further provisions.

67 First, for the purposes of Pt VIII A *only*, s 90 A(1) provides that a debt owed by a party to a marriage is "to be treated as property for the purposes of paragraph (ca) of the definition of matrimonial cause" in s 4(1) of the *Family Law Act*⁶². This provision was necessary to give the court in s 79 proceedings the

59 s 79 A(4) of the *Family Law Act*.

60 s 90 A A of the *Family Law Act*.

61 s 90 A B of the *Family Law Act*.

62 The jurisdiction of the court in relation to "matrimonial causes" is addressed in Pt V of the *Family Law Act*.

authority to deal with a debt owed by a party to a marriage⁶³. Having expanded the jurisdiction of the court over those debts, Pt VIII AA also confers specific powers on the court in relation to that jurisdiction. With the expansion of jurisdiction in Pt VIII AA, in property settlement proceedings under s 79 in Pt VIII the orders that the court is empowered to make include orders specifically directed to, or against, third parties. Part VIII AA confers powers to make orders directed to, or altering the rights, liabilities or property interests of, a third party.

68 Second, the orders that a court may make under s 79 and s 90AE which bind a third party are confined by the terms of s 90AE. Sub-sections (1) and (2) of s 90AE identify the third party orders that the court may make as:

"(1) ...

- (a) an order directed to a creditor of the parties to the marriage to substitute one party for both parties in relation to the debt owed to the creditor;
- (b) an order directed to a creditor of one party to a marriage to substitute the other party, or both parties, to the marriage for that party in relation to the debt owed to the creditor;
- (c) an order directed to a creditor of the parties to the marriage that the parties be liable for a different proportion of the debt owed to the creditor than the proportion the parties are liable to before the order is made;

...

(2) ... any other order that:

- (a) directs a third party to do a thing in relation to the property of a party to the marriage; or
- (b) alters the rights, liabilities or property interests of a third party in relation to the marriage."

69 Having identified the orders that the court is empowered to make under s 90AE(1) or (2), s 90AE(3) provides that a court may *only* make an order under s 90AE(1) or (2) if:

⁶³ See generally *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 593 [48]; [2011] HCA 10 and the authorities cited therein.

- "(a) the making of the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage; and
- (b) *if the order concerns a debt of a party to the marriage – it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full; and*
- (c) the third party has been accorded procedural fairness in relation to the making of the order; and
- (d) the court is satisfied that, in all the circumstances, it is just and equitable to make the order; and
- (e) the court is satisfied that the order takes into account the matters mentioned in [s 90AE(4)]." (emphasis added)

70

The matters listed in s 90AE(4) are:

- "(a) the taxation effect (if any) of the order on the parties to the marriage;
- (b) the taxation effect (if any) of the order on the third party;
- ...
- (e) *if the order concerns a debt of a party to the marriage – the capacity of a party to the marriage to repay the debt after the order is made;*
- (f) the economic, legal or other capacity of the third party to comply with the order;
- (g) if, as a result of the third party being accorded procedural fairness in relation to the making of the order, the third party raises any other matters – those matters;
- (h) any other matter that the court considers relevant." (emphasis added)

71

Section 90AE was intended to cover, and covers, a range of possible arrangements that a party to the marriage may have which involve a third party, including ownership of life insurance products, shares in corporate entities and the creditors of the parties to a marriage whether they are family, friends or

financial institutions⁶⁴. The range of available orders was "intended to be broad and include[d] substitution of the party liable for a debt, adjusting the proportion of a debt that each party is liable for or ordering the transfer of shares between the parties to the marriage"⁶⁵.

72 However, the circumstances in which the orders may be made against a third party are confined. Relevantly for the purposes of this appeal, the court may only make an order concerning a debt of a party to a marriage which binds a third party if "it is *not foreseeable* at the time that the order is made that to make the order would result in the debt not being paid in full"⁶⁶ (emphasis added). As will become apparent, this provision is important in applying s 90AE to a debt owed to the Commonwealth which arises under a taxation law.

73 Part VIIIAA is facultative and protective. It relevantly provides that Pt VIIIAA has effect despite anything to the contrary in any other law (written or unwritten) of the Commonwealth, a State or Territory, and anything in a trust deed or other instrument⁶⁷, and that a third party in relation to a marriage is not liable for loss or damage suffered by any person because of things done (or not done) by the third party in good faith in reliance on an order made by a court in accordance with Pt VIIIAA⁶⁸.

74 Finally, the drafters specifically addressed the effects of the provisions on the executive functions of government. That is evident in two separate ways. First, s 90AE imposes a duty on the court to be satisfied that any order takes into account the taxation effect (if any) of the order on the parties to the marriage and on the third party as well as the social security effect (if any) of the order on the parties to the marriage⁶⁹. Second, Pt VIIIAA had a deferred commencement.

64 Australia, Senate, *Family Law Amendment Bill 2003*, Revised Explanatory Memorandum at 24 [147]; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 12 February 2003 at 11571.

65 Australia, Senate, *Family Law Amendment Bill 2003*, Revised Explanatory Memorandum at 24 [148].

66 s 90AE(3)(b) of the *Family Law Act*. See also Australia, Senate, *Family Law Amendment Bill 2003*, Revised Explanatory Memorandum at 24 [149].

67 s 90AC(1) of the *Family Law Act*.

68 s 90AH of the *Family Law Act*.

69 s 90AE(3)(e) and (4)(a)-(c) of the *Family Law Act*.

The Senate's Supplementary Explanatory Memorandum explained that the purpose of the deferred commencement was to⁷⁰:

"ensure that any affected third parties, such as banks or financial services bodies, are given sufficient time to make any necessary changes, for example to their operating systems, as a result of the introduction of these provisions. The deferred commencement will also ensure that any necessary consequential amendments, such as amendments to taxation or social security legislation, can be made before the provisions commence."

No subsequent consequential amendment to the taxation or social security legislation was identified in argument.

Parts VIII and VIIIAA: The application of Crown immunity

75 The presumption that Pt VIIIAA does not apply to the Crown has, in all the circumstances, been rebutted.

76 First, Pts VIII and VIIIAA disclose a legislative intent that the relevant provisions of Pt VIIIAA bind the Crown, when regard is had to: the generality of the language and the express reach of the provisions (including s 90AC); the fact that Pt VIIIAA was introduced specifically to address third parties and restrictions on the ability of a court to direct a third party to act in order to give effect to property settlements⁷¹; the fact that a purpose of Pts VIII and VIIIAA is to finalise financial relationships between the parties to a marriage⁷²; and, finally, the fact that the effect of the provisions on third parties is confined in the manner described earlier.

77 Second, the Commissioner's contention that, although the Commissioner was a "creditor" for the purposes of ss 79 and 79A, he was not a "creditor" for the purposes of Pt VIIIAA is misplaced and should be rejected. The Commonwealth, not the Commissioner, was and remains the creditor. Moreover, the contention finds no support in the language of the two Parts and, in fact, is contrary to the express words of the relevant provisions as well as the mischief that Pt VIIIAA was intended to address. For example, Pt VIIIAA must be construed in light of the Commissioner's acceptance that Pt VIII permits the

70 Australia, Senate, *Family Law Amendment Bill 2003*, Supplementary Explanatory Memorandum at 2 [3].

71 Australia, Senate, *Family Law Amendment Bill 2003*, Revised Explanatory Memorandum at 22 [134]. See generally *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337; [1981] HCA 1.

72 See s 81 of the *Family Law Act*.

making of orders affecting a "public authority"; and that "public authority" includes the Commonwealth. Further, Pt VIII⁷³ operates to extend the powers in s 79 in Pt VIII. There is no logical basis for distinguishing between the treatment of the Commonwealth in Pt VIII (as a creditor, and subject to that Part) and the treatment of the Commonwealth in Pt VIII⁷³ (which extends the court's powers under Pt VIII).

78 Third, the conclusion that Pts VIII and VIII⁷³ disclose a legislative intent that the relevant provisions of Pt VIII⁷³ bind the Crown is reinforced when one considers the application of s 90AE to the Commonwealth as creditor as well as the Commissioner, as a holder of a statutory office, with responsibilities in relation to debts owed to the Commonwealth under a taxation law. As was stated earlier, the impact or effect on the Crown of specific legislation, and whether it was intended by Parliament that the legislation have this impact or effect, are relevant. Here, in the application of s 90AE, there is, and there can be, no relevant impact or effect on the Commonwealth, or on the Commissioner, as a holder of a statutory office, with responsibilities in relation to debts owed to the Commonwealth under a taxation law. This is because of s 90AE(3): the Commonwealth is not treated differently from any other third party, and, contrary to the Commissioner's submissions, the Commonwealth can be no worse off. When looked at from an operational perspective, not only is the Commonwealth revenue protected but Pt VIII⁷³ does not "disrupt" the taxation law. That last statement requires further explanation.

79 As we have seen, s 90AE(3)(b) provides that the court may *only* make an order concerning a debt of a party to a marriage which binds a creditor under s 90AE(1) if "it is *not foreseeable* at the time that the order is made that to make the order would result in the debt not being paid in full" (emphasis added). Practically, a s 90AE order would rarely, if ever, be made substituting one party of the marriage for another party in relation to a debt owed to the Commonwealth arising under or as a result of the application of a taxation law.

80 The fact that a court will rarely, if ever, make an order under s 90AE in relation to a tax debt – a debt owed to the Commonwealth – may be illustrated by considering a primary tax debt arising from an assessment issued by the Commissioner under Div 155 of Sch 1 to the TAA.

81 A "tax debt" is a "primary tax debt" (relevantly defined to mean any amount due to the Commonwealth directly under a taxation law⁷³ including any amount that is not yet payable) or a "secondary tax debt" (defined to mean an amount that is not a primary tax debt but is due to the Commonwealth in

73 See fn 17 above.

connection with a primary tax debt)⁷⁴. An amount due under an assessment issued by the Commissioner is an example of a primary tax debt. An amount due to the Commonwealth under an order of a court made in a proceeding for recovery of a primary tax debt is an example of a secondary tax debt.

82 The relevant primary tax debt in this appeal was income tax. Income tax is only due and payable when the Commissioner makes an assessment of income tax⁷⁵. That assessed amount is a "tax-related liability"⁷⁶ – a pecuniary liability to the Commonwealth arising directly under a taxation law⁷⁷.

83 A tax-related liability that is due and payable is a debt due to the Commonwealth and is payable to the Commissioner⁷⁸ and the Commissioner may sue to recover any amount of that tax-related liability that remains unpaid after it becomes due and payable⁷⁹. Not only is the notice of assessment conclusive evidence that the assessment was properly made and, except in proceedings under Pt IVC of the TAA, that the amounts and particulars of the assessment are correct⁸⁰, but the Commissioner may proceed to recover that tax-related liability even though the taxpayer has commenced proceedings under Pt IVC of the TAA⁸¹.

84 Moreover, the Commissioner has certain statutory rights to assist in the recovery of tax-related liabilities⁸². Some of those rights extend beyond the

74 See the definitions of "tax debt", "primary tax debt" and "secondary tax debt" in s 995-1(1) of the 1997 Act read with s 8AAZA of the TAA.

75 s 5-5(2) of the 1997 Act. See also ss 166 and 174(1) of the *Income Tax Assessment Act 1936* (Cth).

76 Item 37 of the table in s 250-10(2), and s 255-1, of Sch 1 to the TAA.

77 s 255-1 of Sch 1 to the TAA.

78 s 255-5(1) of Sch 1 to the TAA.

79 s 255-5(2) of Sch 1 to the TAA.

80 Item 2 of the table in s 350-10(1) of Sch 1 to the TAA. Except for the limited jurisdiction conferred by s 39B of the *Judiciary Act 1903* (Cth), proceedings under Pt IVC of the TAA are the only avenue to challenge the correctness of an assessment: see generally *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146; [2008] HCA 32.

81 ss 14ZZM and 14ZZR of the TAA.

82 See, eg, Subdiv 255-D and Div 260 of Sch 1 to the TAA.

person liable to pay an amount of a tax-related liability. And for certain tax-related liabilities⁸³, the amount of the debt continues to accrue on a daily basis because a person is liable to pay the GIC on unpaid amounts⁸⁴. The GIC is charged not only daily⁸⁵ but also at a rate well above the 90-day Bank Accepted Bill rate published by the Reserve Bank of Australia⁸⁶ and is due and payable to the Commissioner at the end of each day⁸⁷.

85 The objection, review and appeal rights under Pt IVC of the TAA in respect of assessments are limited. Although s 14ZL(1) of the TAA relevantly states that Pt IVC applies if a provision of an Act provides that a "person" who is dissatisfied with an assessment may object against it, the "person" is relevantly the person or persons who may, because of a provision of the taxation law, lodge an objection against the assessment. So, for example, s 175A(1) of the *Income Tax Assessment Act 1936* (Cth) ("the 1936 Act") provides that a "taxpayer" who is dissatisfied with an assessment "made in relation to the taxpayer" may object against the assessment in the manner set out in Pt IVC of the TAA. Thus, the effect of s 14ZL of the TAA is to confer objection, review and appeal rights under Pt IVC of the TAA upon the person described in s 175A(1) of the 1936 Act – the "taxpayer" – "in relation to" whom the assessment has been made. It is that taxpayer who is the "person" who has rights and obligations under s 14ZU of the TAA (a "person" making a taxation objection must comply with certain administrative requirements), s 14ZY of the TAA (the Commissioner must make a decision on a taxation objection and serve written notice of the decision "on the person") and s 14ZZ of the TAA (if the "person" is dissatisfied with the objection decision, the "person" may (if the decision is a reviewable objection decision) seek review in the Administrative Appeals Tribunal or appeal to the Federal Court of Australia).

86 The difficulties for any court faced with a request, in relation to a debt owed to the Commonwealth under a taxation law, that it make an order under s 90AE(1) that one party to the marriage be substituted for the other party as the debtor are that these (and other) aspects of the taxation law would appear to prevent a court being satisfied of the two matters identified in s 90AE(3)(b) and (d) – that it is not foreseeable that making the order would result in the debt not

83 See Column 3 of the table in s 8AAB(4) of the TAA.

84 s 8AAC of the TAA.

85 s 8AAC(1) of the TAA.

86 s 8AAD of the TAA.

87 s 8AAE of the TAA.

being paid in full; and that, in all the circumstances, it is just and equitable to make the order.

87 The fact that the husband in this appeal was bankrupt is reason enough not to make the order sought by the wife under s 90AE. But there are other facts, matters and circumstances which compel the same conclusion in this appeal: the inability of the husband to exercise the Pt IVC rights of objection and review (both because the time allowed to the wife for objections has long expired, and because of the difficulties identified above); the fact that the debt owed to the Commonwealth, in relation to which the Commissioner has obtained default judgment, is long overdue; and the fact that the size of that Commonwealth debt continues to increase, not just on a daily basis, but at a higher rate, because of the accruing GIC. That list is not and cannot be exhaustive. However, those facts and matters, or even some of them, compel the conclusion that a court could not be satisfied of the matters prescribed in s 90AE(3) and, therefore, the court would not be empowered to make a substitution order under s 90AE(1) in Pt VIIIAA.

88 The matter may be tested this way. Part VIII empowers a court to make an order under s 80(1)(f) directing a party to a marriage to pay a debt owed by the other party, which could include a direction to pay a tax debt owed to the Commonwealth. If the husband had cash or another immediately realisable asset or assets to meet that debt, an order would be made under s 80(1)(f) directing the husband to make a payment direct to a public authority for the benefit of the wife. If that form of order could not be made (because of the lack of means to meet such a debt), then, contrary to the requirements of s 90AE(3), it would be foreseeable that if an order were made under s 90AE(1), it would result in the debt not being paid in full *and*, in all the circumstances, it would not be just and equitable to make the order. That is, the fact that the husband could not satisfy an order under s 80(1)(f) strongly suggests, even requires, the conclusion that two requirements of s 90AE(3) – that it must not be foreseeable that if the order were made, it would result in the debt not being paid in full, and that it must be just and equitable to make the order – would not be satisfied.

89 Further, as we have seen, Pt VIII expressly empowers a court to adjourn property settlement proceedings if the court is of the opinion that there is likely to be a significant change in the financial circumstances of the parties to the marriage and, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings⁸⁸. That possibility of an adjournment permits a party to the marriage who owes a debt to the Commonwealth under a taxation law to exercise their rights of objection, review and appeal under Pt IVC of the TAA.

88 s 79(5)(a) of the *Family Law Act*.

90 Thus, the scope for a s 90AE(1) order in the circumstances of a debt owed to the Commonwealth arising under, or as a result of the application of, the taxation law is limited.

91 A statute may give some kinds of debts owed to the Commonwealth particular attributes (like the taxation law), but to acknowledge that is to put forward a proposition about statute law, not about some abstract notion of either "the Crown" or "debts owed to the Commonwealth"⁸⁹. The priority of debts owed to the "Crown in right of the Commonwealth" is dealt with by the *Crown Debts (Priority) Act 1981* (Cth) and that Act does not draw any relevant distinction between the classes or sources of debts owed to the Crown in right of the Commonwealth. Nor should any such distinction be drawn here. The Commissioner's invitation to single out special attributes of a tax debt as a basis for finding that the Commonwealth is not bound by Pt VIIIAA should be rejected. That framing is artificial and apt to mislead. The real question posed in the appeal was whether Pt VIIIAA binds the Commonwealth: for the reasons given above, the answer is yes.

92 Reconciliation of the treatment of debts owed to the Commonwealth under a taxation law, on the one hand, and property settlement proceedings under Pt VIII of the *Family Law Act*, on the other, finds resolution not in the concept of Crown immunity but, rather, in the proper construction and application of Pts VIII and VIIIAA of the *Family Law Act*. In particular, once Pts VIII and VIIIAA are properly construed, what might otherwise appear to be a tension between the treatment of debts arising under, or as a result of, the taxation law and the power of the court under Pt VIIIAA to order substitution of a debtor to the Commonwealth falls away.

Case stated procedure

93 Section 94A(1) of the *Family Law Act* relevantly provides that where a question of law arises which the judge and at least one of the parties wish to have determined by the Full Court of the Family Court before the proceedings are further dealt with, the judge shall state the facts and question in the form of a special case for the opinion of the Full Court and the Full Court must hear and determine the question.

89 cf *Bell Group NV (In liq) v Western Australia* (2016) 260 CLR 500 at 524 [60]; [2016] HCA 21.

94 This procedure should be used only in exceptional circumstances⁹⁰. It is more often than not productive of difficulty, delay and artificiality, and should be adopted cautiously⁹¹.

95 When deciding whether to state a case, it is the obligation of the court to explore all of the options and weigh the advantages and disadvantages in a particular case, to determine whether the stating of the case would be reasonable⁹². The problems inherent in the procedure include that a Full Court may be asked to determine a question of law on incomplete facts or assumptions or in circumstances which render it impossible to answer the question in other than a hypothetical fashion⁹³; the question of law is determined on the basis of a statement of facts agreed by the parties or settled by the judge but those facts may differ from those ultimately established by the evidence; and there is additional delay and cost⁹⁴.

96 In the circumstances of this matter, the stated case procedure was inappropriate. Hearing and determining the property settlement proceedings would have been cheaper and quicker. But, no less importantly, on the proper construction of Pts VIII and VIIIAA, the question of whether the Commonwealth was bound by s 90AE(1) and (2) would not have arisen for determination because of s 90AE(3). That is, even if the Federal Circuit Court had been asked to make the substitution order under s 90AE(1)(b), under s 90AE(3) the Court could only make that order if it was reasonably necessary or reasonably appropriate and adapted to effect a division of property between the parties to the marriage⁹⁵; it was not foreseeable that to make the order would result in the debt not being paid in full⁹⁶; and in all the circumstances, it was just and equitable to make the order⁹⁷. As just explained, given the taxation law, and, further,

90 *In the marriage of Daff and Daff* (1984) FLC ¶91-516 at 79,189.

91 See generally *White v Ridley* (1978) 140 CLR 342 at 362-363; [1978] HCA 38.

92 *B & B and Minister for Immigration Multicultural & Indigenous Affairs* [2002] FamCA 767 at [20].

93 *Re Alcoota Land Claim No 146* (1998) 82 FCR 391 at 394. See also *Australian Commonwealth Shipping Board v Federated Seamen's Union of Australasia* (1925) 36 CLR 442 at 448, 450-452, 462; [1925] HCA 27.

94 *In the marriage of Mullane and Mullane* (1980) FLC ¶90-826 at 75,227.

95 s 90AE(3)(a) of the *Family Law Act*.

96 s 90AE(3)(b) of the *Family Law Act*.

97 s 90AE(3)(d) of the *Family Law Act*.

the circumstances of the husband and the property of the parties to the marriage in this appeal, it is unlikely that s 90AE(3) could ever be satisfied.

Conclusion and orders

97 For those reasons, the appeal should be dismissed but the question of law stated by the trial judge for the opinion of the Full Court should be answered as follows:

"Does s 90AE(1)-(2) of the [*Family Law Act*] grant the court power to make Order 8 of the final orders sought in the amended initiating application of the [w]ife?",

where Order 8 was amended to read:

"Pursuant to section 90AE(1)(b) of the [*Family Law Act*], in respect of the [wife's] indebtedness to the [Commissioner] [for] taxation related liabilities in the amount of \$256,078.32 as at 9 August 2016 plus [GIC], the [husband] be substituted for the [wife] as the debtor and the [husband] be solely liable to the [Commissioner] for the said debt."

Answer: Although in relation to a debt owed to the Commonwealth by a party to a marriage s 90AE(1) confers power to make an order that the Commissioner be directed to substitute the husband for the wife in relation to that debt, it is otherwise inappropriate to answer the question without it being found, or agreed, that, within the meaning of s 90AE(3), the making of the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage, and it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full; and without the court being satisfied that, in all the circumstances, it is just and equitable to make the order.

98 EDELMAN J. The question stated for the Full Court of the Family Court of Australia concerns the power of a court under Pt VIII A A of the *Family Law Act 1975* (Cth) to make an order that binds the Commissioner of Taxation. That question was treated in the Full Court and in submissions in this Court as raising the issue of whether to apply a "presumption" that the Crown, in certain respects, is not bound by Pt VIII A A. To the extent that such a "presumption" is engaged, it has little force and is easily rebutted, as the Full Court concluded.

99 However, a significant part of the Commissioner's submissions ultimately amounted to a claim of inconsistency between provisions in statutes of the same legislature: on the one hand, Pt VIII A A of the *Family Law Act*, and, on the other hand, the *Income Tax Assessment Act 1936* (Cth) and the *Taxation Administration Act 1953* (Cth). For the reasons below, in which the facts and background are gratefully adopted from the reasons of Gordon J, there is no such inconsistency. The appeal must be dismissed.

The nature of a presumption

100 A presumption, in the sense used on this appeal, arises because human experience has shown that Parliament has historically acted in a certain way. A presumption in this sense is not a rule of law. It is a standardised inference that arises from "common probabilities of fact"⁹⁸. The effect of the presumption is that a court is reluctant to give the words of a statute a meaning that "would conflict with recognized principles that Parliament would be *prima facie* expected to respect"⁹⁹. This technique is not unique to the understanding of the meaning of words in statutes. It is a technique common to all speech acts, where inferences about meaning are drawn from expectations based upon past experience.

101 In *Bropho v Western Australia*¹⁰⁰, the joint judgment illustrated a "presumption" in this sense with the example of the principle of legality – "the presumption against the modification or abolition of fundamental rights or principles". Although the presumption has laudable *consequences*¹⁰¹,

98 Wills and Lawes, *The Theory and Practice of the Law of Evidence*, 2nd ed (1907) at 43. See *Thorne v Kennedy* (2017) 91 ALJR 1260 at 1271 [34]; 350 ALR 1 at 12; [2017] HCA 49.

99 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 93; [1925] HCA 53.

100 (1990) 171 CLR 1 at 18; [1990] HCA 24.

101 See *Coco v The Queen* (1994) 179 CLR 427 at 437-438; [1994] HCA 15; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131.

their Honours said that it was *based upon* the improbability that Parliament would modify or abrogate fundamental rights without expressing its intention with irresistible clearness¹⁰². Hence, the presumption would be undermined and could disappear "if what was previously accepted as a fundamental principle or fundamental right ceases to be so regarded"¹⁰³. In *Gifford v Strang Patrick Stevedoring Pty Ltd*¹⁰⁴, McHugh J explained that modern legislatures "regularly enact laws that infringe the common law rights of individuals". Hence, he said, although the presumption remained strong when the right is a fundamental right of our legal system, it is weak, or even non-existent, in relation to "ordinary" common law rights. A more nuanced approach than one which is all-or-nothing might calibrate the strength of the presumption to the unlikelihood of an intention to impair the particular right based on factors including the importance of the right within the legal system and the extent to which it is embedded in the fabric of the legal system within which Parliament legislates.

102 Where a presumption is against the impairment of a right or power, the force of the presumption can also depend upon the extent to which the right or power is impaired. For instance, the principle that a "subject's right of recourse to the courts is not to be taken away except by clear words"¹⁰⁵ is a presumption that was given only weak force in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*¹⁰⁶. In that case, it was recognised that "[a]n intention to alter the settled and familiar role of the superior courts must be clearly expressed"¹⁰⁷, but the force of the presumption was reduced because the ouster of judicial review for non-jurisdictional error concerned only "interim" entitlements; adjudication of "final" rights was preserved¹⁰⁸.

103 Sometimes, the different concept of a rule of interpretation is also, loosely, described as a "presumption". Holdsworth speculated that some presumptions –

102 See also *Potter v Minahan* (1908) 7 CLR 277 at 304; [1908] HCA 63; *Coco v The Queen* (1994) 179 CLR 427 at 437.

103 *Bropho v Western Australia* (1990) 171 CLR 1 at 18.

104 (2003) 214 CLR 269 at 284 [36]; [2003] HCA 33.

105 *Hockey v Yelland* (1984) 157 CLR 124 at 130; [1984] HCA 72; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248 at 258 [34]; 351 ALR 225 at 233; [2018] HCA 4.

106 (2018) 92 ALJR 248; 351 ALR 225.

107 (2018) 92 ALJR 248 at 258 [34]; 351 ALR 225 at 233.

108 (2018) 92 ALJR 248 at 259-260 [39], 274 [102]-[103]; 351 ALR 225 at 235, 254.

in the sense of human experience giving rise to "an obvious inference from facts proved or admitted" – might have been "so frequently drawn that they took upon themselves the character of rules of law ... Some of them were made or became only prima facie rules"¹⁰⁹. In other words, the repeated enunciation of presumptions in the process of statutory interpretation sometimes led to them becoming prima facie rules of statutory interpretation when Parliament subsequently passed legislation on that "working hypothesis ... known both to Parliament and the courts"¹¹⁰.

The "presumption" that the Crown is not bound by legislation

104 In the joint judgment in *Bropho*, six Justices of this Court considered the presumption that the Crown would not be bound unless either there was an express provision to that effect or it was "manifest from the very terms of the statute"¹¹¹. Their Honours effectively held that the presumption in those terms could not be justified as an inference of legislative intention arising from common probability. They said that a presumption in such strict terms was based upon historical considerations that are largely inapplicable to modern conditions¹¹². Those historical considerations included a narrow conception of the Crown, encompassing little more than the Sovereign¹¹³, supporting the inference that the law "is made for subjects and not for the crown"¹¹⁴. As the Crown expanded to include the "mundane tasks of administration in the modern State"¹¹⁵ a presumption in the strict terms that historically applied could no longer be justified.

109 Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 140.

110 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21]; [2004] HCA 40; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [15]; [2010] HCA 23; *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 135 [30]; [2012] HCA 19; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 264 [171], 310 [312]; [2013] HCA 39.

111 (1990) 171 CLR 1 at 18.

112 (1990) 171 CLR 1 at 19; cf Hobbes, *Leviathan* (1651) at 250.

113 (1990) 171 CLR 1 at 18.

114 *Attorney-General v Donaldson* (1842) 10 M & W 117 at 124 [152 ER 406 at 409].

115 New South Wales, Law Reform Commission, *Report of the Law Reform Commission on Proceedings by and against the Crown*, Report No 24 (1975) at 67.

105 However, as five Justices of this Court later observed in *Jacobsen v Rogers*¹¹⁶, prior to the decision in *Bropho* the presumption that a statute is not intended to bind the Crown had "been elevated to a rule of construction that the Crown was only bound by a statute by express mention or necessary implication". The necessary implication "was required to be manifest from the very terms of the statute" so that it was "apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound". In *Bropho*, this Court rejected the rule that had emerged in those terms. The joint judgment concluded that the presumption did not, "of itself, provide an impregnable foundation for its own observance"¹¹⁷. Nevertheless, since it was a rule that might have been observed in the passage of legislation, the joint judgment recognised that, in interpreting statutes enacted prior to publication of the decision in *Bropho*, it may be necessary to take account of the background fact that the legislation had been drafted in a context where courts had said that the Crown would not be bound other than where the intention to do so was express or "manifest from the very terms of the statute" or where the purpose of the statute would be "wholly frustrated"¹¹⁸.

106 The joint judgment in *Bropho* replaced the previous *prima facie* rule with a differently formulated presumption that can apply in the interpretation of legislation. For legislation enacted after the date of the decision, 20 June 1990, their Honours held that the presumption was only that the "Crown is not bound by the general words of statutory provisions", and that the strength of that presumption will "depend upon the circumstances, including the content and purpose of the particular provision and the identity of the entity in respect of which the question of the applicability of the provision arises"¹¹⁹.

107 So enunciated, the "presumption" that legislation does not bind the Crown was restored as an inference of legislative intention that arises from the common probabilities of fact in the circumstances. The common probability was described by Griffith CJ¹²⁰, quoting Story J¹²¹, as arising because "in most cases

116 (1995) 182 CLR 572 at 585; [1995] HCA 6.

117 (1990) 171 CLR 1 at 21; cf *R (Black) v Secretary of State for Justice* [2018] AC 215 at 227-230 [22]-[31].

118 (1990) 171 CLR 1 at 23.

119 (1990) 171 CLR 1 at 23.

120 *Roberts v Ahern* (1904) 1 CLR 406 at 418; [1904] HCA 17. See also *The Commonwealth v Western Australia (Mining Act Case)* (1999) 196 CLR 392 at 410 [35]; [1999] HCA 5.

121 *United States v Hoar* (1821) 26 Fed Cas 329 at 330.

the meaning applicable to [statutes] applies with very different and often contrary force to the Government itself". However, the circumstances, such as whether the subject matter of the legislation could affect the Crown, will determine whether the presumption applies at all¹²². And if the presumption applies, the circumstances will also dictate its strength.

108 One important circumstance affecting the strength of the presumption is the nature of the relevant right or duty. Hence, as the joint judgment explained in *Bropho*¹²³, in circumstances where a statute imposes criminal liability the presumption that it does not bind, and render liable to prosecution, "the Sovereign herself or himself in the right of the Commonwealth or of a State" will be "extraordinarily strong". Similarly, in the circumstance of legislation effecting the divestiture of property¹²⁴ the presumption might also apply with considerable force.

109 On the other hand, if a statute concerns "general provisions designed to safeguard places or objects" then, in relation to persons such as employees of a government corporation, the presumption will represent "little more than the starting point"¹²⁵. Similarly, in relation to general criminal law statutes, the force of the presumption in its application to officers of the Crown would be weak or non-existent¹²⁶. The force of the presumption will also be much weaker if the statute operates to the benefit of the Crown or, to a lesser degree, if it does not necessarily operate to the detriment of the Crown. In other words, if the effect of the statute on the "interests or purposes"¹²⁷ of the Crown is not, as is "ordinarily" the case when the presumption applies, "to destroy or curtail or impair some interest or purpose" of the Crown¹²⁸ then it will have weaker force.

122 *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 171-172; [1993] HCA 1.

123 (1990) 171 CLR 1 at 23.

124 *The Commonwealth v Western Australia (Mining Act Case)* (1999) 196 CLR 392 at 410 [34], 411 [36].

125 *Bropho v Western Australia* (1990) 171 CLR 1 at 23.

126 *Bropho v Western Australia* (1990) 171 CLR 1 at 21.

127 *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 171-172.

128 *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 393; [1955] HCA 72.

The background to, and operation of, s 90AE of the *Family Law Act*

110 Section 79(1)(a) in Pt VIII of the *Family Law Act* provides that in property settlement proceedings the court may make such order as it considers appropriate, "in the case of proceedings with respect to the property of the parties to the marriage or either of them – altering the interests of the parties to the marriage in the property". Property is defined widely, although with circularity, in s 4(1) to mean property to which one or both of the parties are entitled "whether in possession or reversion".

111 Subject to exceptions that are not presently relevant, s 79(10) includes an entitlement for the following to become a party to the s 79 proceedings: (i) a creditor who may not be able to recover his or her debt if the order were made¹²⁹; and (ii) any other person whose interests would be affected by the making of the order¹³⁰.

112 Section 80 provides for powers of the court when acting under Pt VIII, including the powers to make: (i) an "order that any necessary deed or instrument be executed ... or such other things be done as are necessary to enable an order to be carried out"¹³¹; (ii) an "order that payments be made direct to a party to the marriage ... or to a public authority for the benefit of a party to the marriage"¹³²; and (iii) "any other order ... which it thinks it is necessary to make to do justice"¹³³.

113 In *Ascot Investments Pty Ltd v Harper*¹³⁴, the question was whether the Family Court had the power, under s 80 of the *Family Law Act*, to make orders requiring a company to register a transfer of the husband's substantial, but not controlling, shareholding in a private company despite the power in the memorandum of association for the directors to refuse to register a transfer. A majority of this Court held that s 80 did not provide a general power for the Family Court to direct that a company register a transfer of shares. That limit on

129 Section 79(10)(a).

130 Section 79(10)(b).

131 Section 80(1)(d).

132 Section 80(1)(f).

133 Section 80(1)(k).

134 (1981) 148 CLR 337; [1981] HCA 1.

power was addressed in 2003¹³⁵. The Commonwealth Parliament amended the *Family Law Act* to empower the Family Court to "make orders binding third parties to give effect to property settlement proceedings under the [A]ct"¹³⁶. One example, given in the Explanatory Memorandum, of the orders that might be made was an order to replace one spouse with the other spouse as being liable to a creditor for a debt¹³⁷.

114 The 2003 amendments introduced a new Pt VIIIAA into the *Family Law Act*. One object of the Part, recited in s 90AA, is to "allow the court, in relation to the property of a party to a marriage, to ... make an order under section 79". Section 90AE then provides that in proceedings under s 79, the court can make any of the following orders:

"(1) ...

- (a) an order directed to a creditor of the parties to the marriage to substitute one party for both parties in relation to the debt owed to the creditor;
- (b) an order directed to a creditor of one party to a marriage to substitute the other party, or both parties, to the marriage for that party in relation to the debt owed to the creditor;
- (c) an order directed to a creditor of the parties to the marriage that the parties be liable for a different proportion of the debt owed to the creditor than the proportion the parties are liable to before the order is made;

...

(2) ... any other order that:

- (a) directs a third party to do a thing in relation to the property of a party to the marriage; or

¹³⁵ See *Family Law Amendment Act 2003* (Cth), the relevant provisions of which commenced on 17 December 2004.

¹³⁶ Australia, House of Representatives, *Parliamentary Debates* (Hansard), 12 February 2003 at 11571.

¹³⁷ Australia, Senate, *Family Law Amendment Bill 2003*, Revised Explanatory Memorandum at 22 [136].

- (b) alters the rights, liabilities or property interests of a third party in relation to the marriage."

The *Family Law Act* and the "presumption"

115 The Commissioner submitted that the Full Court erred by failing to apply the "presumption" that the Crown was not bound by the *Family Law Act*. The Commissioner's argument had two strands. One strand, addressed in the next section of these reasons, was not really concerned with the presumption. The other, as initially expressed, was that an "onus" rested upon the first respondent to rebut the presumption, and that there was nothing in the *Family Law Act* from which that onus could be discharged. The Commissioner ultimately, and rightly, did not place much weight on this "onus" strand of his submission. Senior counsel for the Commissioner accepted in oral submissions that the presumption should not be understood as an onus of proof.

116 As I have explained, the presumption does not apply independently of the statutory context. The existence and force of the presumption, as a common probability of fact, depends upon all the circumstances. Sometimes the circumstances are so significant that the presumption is described in different terms. For instance, in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*¹³⁸ the presumption that the Crown is not bound by legislation that imposes a criminal penalty was said by four Justices of this Court to be separate from the general presumption that the Crown is not bound by legislation. It was said to be "a different presumption based upon the inherent unlikelihood that the legislature should seek to render the Crown liable to a criminal penalty"¹³⁹.

117 In an attempt to increase the force of the presumption, the Commissioner also changed the terms in which it was expressed. The presumption was not expressed in the general terms of being a presumption that the Crown is not bound. Rather, the Commissioner submitted that the presumption was concerned only with the Commissioner. He also submitted that the presumption applied only in relation to tax debts, and only in relation to tax debts owed to the Crown rather than tax debts owed by the Crown. Finally, with the presumption formulated in this narrow way, the Commissioner submitted that it applied only in relation to Pt VIIIAA of the *Family Law Act*.

118 It is possible that some Crown officers or some Crown property might be bound by legislation but that the general presumption might apply so that other

¹³⁸ (1996) 189 CLR 253; [1996] HCA 32.

¹³⁹ (1996) 189 CLR 253 at 270.

officers or property might not be bound¹⁴⁰. It is also possible for the general presumption to apply so that part of a statute binds the Crown while another part does not¹⁴¹. And it is also possible that the general presumption might apply even if the relevant provision does not necessarily operate to the detriment of the Crown. But the narrow manner in which the presumption was formulated by the Commissioner militates against such a presumption applying as a general or inherent likelihood of fact. The alleged presumption that Pt VIII A does not bind the Commissioner in relation to tax debts owed to the Crown has, at best, weak force. Against that weak force, the plain meaning, in context, of "a creditor of the parties" in Pt VIII A of the *Family Law Act* can include the Commonwealth in respect of a tax debt owed to it. This is particularly so for three reasons.

119 First, it was common ground that Pt VIII of the *Family Law Act* applies to the Commissioner in relation to tax debts. For instance, an order could be made under s 80(1)(f) requiring that payment of one spouse's taxation liability be made by the other spouse. Hence, it was common ground that the Commonwealth can be a "creditor of a party to the proceedings" within the meaning of s 79(10) in Pt VIII, entitled to become a party to proceedings if it may not be able to recover its tax debt due to an order made under s 79. The presumption that Pt VIII A does not bind the Crown in respect of tax debts would therefore require "creditor" in s 90AE(1) to have a meaning different from, and narrower than, its meaning in s 79. And yet, s 90AE is a facilitative provision expressed to apply in proceedings under s 79.

120 Secondly, the property that can be the subject of an order under s 79, within Pt VIII, includes a right to a tax refund including a refundable tax offset¹⁴² or a refund of an overpayment¹⁴³. The consequence of this is that an order can be made under s 90AE(2)(b), "[i]n proceedings under section 79", that alters the liabilities of the Commonwealth as a third party debtor. It would be very curious indeed if, by implication, tax liabilities of the Commonwealth could be altered but tax debts owed to the Commonwealth could not, even though the alteration of the tax debt could not foreseeably cause the Commonwealth not to recover in full¹⁴⁴.

140 *Bropho v Western Australia* (1990) 171 CLR 1 at 23-24.

141 *Bropho v Western Australia* (1990) 171 CLR 1 at 23.

142 *Income Tax Assessment Act 1936* (Cth), s 166.

143 *Income Tax Assessment Act 1936* (Cth), s 172.

144 *Family Law Act 1975* (Cth), s 90AE(3)(b).

121 Thirdly, another provision in Pt VIII AA, namely, s 90AE(2)(a), is also expressed in terms that would, prima facie, include powers to affect the Commissioner in relation to tax debts owed by the Commonwealth. The power of the court in s 90AE(2)(a) is to direct a "third party" to do a thing in relation to the property of a party to the marriage. A "third party" includes "a body politic or corporate"¹⁴⁵.

No inconsistency between the *Family Law Act* and the Taxation Statutes

122 A different strand of the Commissioner's submissions was that the *Income Tax Assessment Act* and the *Taxation Administration Act* ("the Taxation Statutes") were a "complete and exhaustive code of the rights and obligations of the [C]ommissioner ... to members of the general public ... and of those members of the general public to his department"¹⁴⁶.

123 This submission did not concern a common probability of fact that Parliament did not intend to bind the Crown, in particular respects, in Pt VIII AA of the *Family Law Act*. Instead, the Commissioner's argument focused upon the relationship between the Taxation Statutes and the *Family Law Act* as part of a submission that Pt VIII AA of the *Family Law Act* should be construed by excluding from its operation any power concerning tax debts owed to the Commonwealth.

124 The Commissioner submitted that, if s 90AE(1) and (2) applied to the Commissioner in relation to tax debts, there would be conflict between the operation of that section and the availability and operation of: (i) the special characteristics of tax-related liabilities under Sch 1 to the *Taxation Administration Act*; (ii) the general interest charge provisions in Pt IIA of the *Taxation Administration Act*; (iii) the Commissioner's power to amend assessments under s 170 of the *Income Tax Assessment Act*; and (iv) taxpayers' objection, review and appeal rights under Pt IVC of the *Taxation Administration Act*. The effect of the Commissioner's submission was that the words "creditor" and "debt" in s 90AE(1) should be interpreted to have a narrower meaning than their meaning in Pt VIII, excluding tax debts owed to the Commonwealth, in order to avoid conflict with the Taxation Statutes. This submission should not be accepted. Four points should be made.

¹⁴⁵ *Acts Interpretation Act 1901* (Cth), ss 2A, 2C(1).

¹⁴⁶ *Federal Commissioner of Taxation v Official Receiver* (1956) 95 CLR 300 at 310; [1956] HCA 24; *Deputy Federal Commissioner of Taxation v Brown* (1958) 100 CLR 32 at 49; [1958] HCA 2.

125 First, the Commissioner's submission that the Taxation Statutes are a code of the rights of the Commissioner and taxpayers, covering the "field"¹⁴⁷, does not define the subject matter or field over which that code was intended to be exhaustive. Nor does it explain whether a later Act, also of the Commonwealth Parliament, which introduced Pt VIII AA of the *Family Law Act*, was intended to be an exception to any part of the field in which the Taxation Statutes would otherwise be exclusive. The proper approach is to interpret the statutes together "in a way which best achieves a harmonious result"¹⁴⁸.

126 Secondly, it can be immediately accepted that a "tax debt" has particular statutory characteristics concerning its existence, quantification, enforceability, and recovery¹⁴⁹. But so do other statutory debts owed to the Crown as well as other public and private bodies. The identification of different qualities of a particular debt does not establish conflict between Pt VIII AA and the legislation that defines the debt. Nor does it establish a conflict over which the terms of the Taxation Statutes should prevail by reading down the provisions of Pt VIII AA to exclude tax debts owed to, but not by, the Commonwealth. Although a tax refund or overpayment that is payable by the Commonwealth to a spouse has special characteristics, that asset is not excluded from the scope of "property" within s 79.

127 Thirdly, an order under s 90AE(1) or (2) of the *Family Law Act* can only be made if the requirements of s 90AE(3) are satisfied. Those requirements are fivefold:

- "(a) the making of the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage; and
- (b) if the order concerns a debt of a party to the marriage – it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full; and
- (c) the third party has been accorded procedural fairness in relation to the making of the order; and

¹⁴⁷ *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 at 64-67; [1988] HCA 29.

¹⁴⁸ *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at 28 [78], see also at 33 [98]; [2013] HCA 2.

¹⁴⁹ *Bell Group NV (In liq) v Western Australia* (2016) 260 CLR 500 at 524 [60]; [2016] HCA 21. See also *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 at 493-494 [51]; [2008] HCA 41.

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- (d) the court is satisfied that, in all the circumstances, it is just and equitable to make the order; and
- (e) the court is satisfied that the order takes into account the matters mentioned in [s 90AE(4)]."

128 The effect of s 90AE(3)(b) is that the Crown will only be subject to the substitution of a person as its debtor where it is not foreseeable that the substitution would cause the debt not to be paid in full. Further, two of the matters in s 90AE(4) which the court must take into account are (i) the taxation effect (if any) of the order on the parties to the marriage¹⁵⁰, and (ii) any other matters raised by the third party, who must be accorded procedural fairness¹⁵¹. Hence, if the order would have the effect of depriving a spouse of the possible exercise of rights of objection to, review of, or appeal from, the assessment, then this could be a taxation effect (s 90AE(4)(a)) or a reason of justice and equity (s 90AE(3)(d)) that would militate against making the order. Further, to the extent that an order under s 90AE(1) would have an effect on the general interest charge provisions in Pt IIA of the *Taxation Administration Act*, or the Commissioner's power to amend assessments, then these matters would be taken into account by the court when considering, under s 90AE(3)(d), whether it is just and equitable to make the order.

129 Fourthly, to the extent that any conflict would otherwise exist between the Taxation Statutes and Pt VIII AA of the *Family Law Act*, s 90AC(1) of the *Family Law Act* relevantly provides that Pt VIII AA "has effect despite anything to the contrary" in any written law of the Commonwealth. The only exception to this is in relation to superannuation annuities within the meaning of the *Income Tax Assessment Act 1997* (Cth), for which s 90ACA expressly provides that the powers in Pt VIII AA have no application.

130 When these four points are appreciated, there can be no conflict between the Taxation Statutes and Pt VIII AA of the *Family Law Act*, and certainly no conflict that would require the latter to be interpreted as excluding from its reach tax debts owed to the Commonwealth.

The answer to the question reserved and the orders on this appeal

131 There was no dispute in the Full Court or in this Court about the reservation or expression of the question for the Full Court. That question was as follows:

150 Section 90AE(4)(a).

151 Section 90AE(4)(g).

"Does s 90AE(1)-(2) of the *Family Law Act 1975* (Cth) grant the court power to make Order 8 [substituting the husband for the wife as the debtor to the Commissioner] of the final orders sought in the amended initiating application of the Wife?"

132 The question concerned the jurisdiction – that is, the boundaries of the authority – of a court under the *Family Law Act*. The "first duty" or "threshold" consideration "of any Court, in approaching a cause before it, is to consider its jurisdiction"¹⁵². There was no sufficient reason in this case, where jurisdiction was challenged, for the Federal Circuit Court to ignore that challenge and to proceed instead to consider whether to make the order on the assumption that it had the authority to do so. Whether or not the power should be exercised and the order made, it was appropriate for the disputed jurisdictional question to be reserved by the primary judge for the consideration of the Full Court of the Family Court.

133 The Full Court answered the question reserved as follows:

"Yes, but with the proviso that s 90AE(1) confers power only to make an order that the Commissioner be directed to substitute the [husband] for the [wife] in relation to the debt owed by the [wife] to the Commissioner of Taxation for the Commonwealth of Australia."

134 The Full Court's answer properly concerned only the existence of the power, not whether the preconditions to its exercise were satisfied. For the reasons above, the answer given by the Full Court was correct. The appeal should be dismissed.

152 *Hazeldell Ltd v The Commonwealth* (1924) 34 CLR 442 at 446; [1924] HCA 36. See also *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398 at 415; [1911] HCA 31; *Old UGC Inc v Industrial Relations Commission (NSW)* (2006) 225 CLR 274 at 290 [51]; [2006] HCA 24; Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (2012) at 35-36.

