

IN THE HIGH COURT OF AUSTRALIA  
BRISBANE OFFICE OF THE REGISTRY

BETWEEN:

No. B60 of 2017  
THE COMMISSIONER OF TAXATION OF  
THE COMMONWEALTH OF AUSTRALIA  
Appellant

MARTIN ANDREW THOMAS  
Respondent

BETWEEN:

No. B61 of 2017  
THE COMMISSIONER OF TAXATION OF  
THE COMMONWEALTH OF AUSTRALIA  
Appellant

MARTIN ANDREW PTY LTD  
Respondent

BETWEEN:

No. B62 of 2017  
THE COMMISSIONER OF TAXATION OF  
THE COMMONWEALTH OF AUSTRALIA  
Appellant

THOMAS NOMINEES PTY LTD  
Respondent

BETWEEN:

No. B63 of 2017  
THE COMMISSIONER OF TAXATION OF  
THE COMMONWEALTH OF AUSTRALIA  
Appellant

MARTIN ANDREW THOMAS  
Respondent

## APPELLANT'S OUTLINE OF ORAL ARGUMENT

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Filed on behalf of the Appellant, the Commissioner of Taxation of  
the Commonwealth of Australia

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## **Part I: Certification**

1. This outline of oral submissions is in a form suitable for publication on the Internet.

## **Part II: Argument**

2. **The central issue for these appeals.** Each appeal turns on whether the FCAFC was correct to conclude that, in tax proceedings under Part IVC of the *Taxation Administration Act 1953* (TAA) (**Part IVC proceedings**) before the Federal Court, the Appellant (the **Commissioner**) was bound by a declaration made by the Supreme Court of Queensland (**Supreme Court**), and that the Federal Court could not decide the true tax law position in such proceedings.
3. **The Respondents' tax returns.** The Respondents filed tax returns which generated deemed assessments of income under s 166A of the 1936 Act on the basis that Div 207 constitutes franking credits as a species of income separate from the franked distributions which generate them and capable of allocation between beneficiaries in different proportions to the allocation of those franked distributions (**Bifurcation**). The steps were:
  - (a) The trust deed permitted differential allocation of income or expenses between beneficiaries: clause 4(2)-(5), AB vol 2, 891-892;
  - (b) The income of the trust constituted primarily dividends or distributions which in the main were franked: AB vol 2, 609-610 and 621;
  - (c) The trustee passed two resolutions. For example, in 2006, one (AB vol 2, 904), in conventional form, allocated the net income differentially between Mr Thomas and MAPL, with the weighting to MAPL. The other (AB vol 2, 902) allocated the franking credits in a different proportion, with the weighted towards Mr Thomas;
  - (d) No resolution was passed concerning expenses. AB vol 3, 1410 (FCA [496]); and
  - (e) The tax returns recorded an allocation of income between MAPL and Mr Thomas on the assumption that Div 207 permitted Bifurcation. The tax returns are consistent with one resolution applying the net income (including the franked distributions) in the proportions it stated, whereas the other purported to apply the franking credits in a radically different set of proportions: AB vol 4, 1827; AB vol 2, 611-612 and AB vol 3, 902-904.
4. **The Commissioner' statutory powers and duties.** Once the deemed assessments were created, the Commissioner's statutory tasks, at the stage of amendment of assessments pursuant to s 170(1) of the 1936 Act and decision on objections under s 14ZY of the TAA, were to determine the correct construction and application of Div 207 to the "taxable facts"

before him.

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5. **The nature of the taxation appeal.** Once the Commissioner gave a decision adverse to the Respondents on the objections, the Respondents had the options under Part IVC of merits review to the AAT or “appeal” to the Federal Court. The question before the AAT or the Federal Court would be the same ultimate one as before the Commissioner.
6. **The Queensland Supreme Court proceedings** These proceedings were incapable of generating any “taxable fact” which bound the Commissioner or precluded the Federal Court from deciding the appeal on the correct construction and application of Div 207:
- (a) The Commissioner was not a party to those proceedings and thus not bound by any res judicata or issue estoppel (even if, which is denied, it would have been proper to join him): AB vol 3, 1134, 1142;
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- (b) Under s 96 and 97 of the *Trustee Act*, the proceedings were capable of providing protection to the trustee if it acted in accordance with any directions given but was later sued; but were not capable of generating resolution of legal issues against third parties: *Macedonian Orthodox Community Church* (2008) 237 CLR 66, [64] and [65];
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- (c) As inter partes (albeit un-contradicted) proceedings for rectification, the proceedings were potentially capable of producing an order reforming the terms of the resolutions, which were one of the taxable facts before the Commissioner; but the rectification suit was dismissed, creating a res judicata between the Respondents that the resolutions are in the form correctly intended by the trustee;
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- (d) So far as the proceedings were designed to induce a Court outside the Part IVC process to rule that Div 207 on its proper construction permitted Bifurcation such that the tax returns achieved their intended effect, the proceedings sought a *taxation conclusion* not a taxable fact. Whatever conclusion Applegarth J reached on those questions could rise no higher than a persuasive opinion before the Commissioner or the Court: AB vol 3, 1135-1166.
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7. **The Declaration.** See QSC Orders, AB vol 3, 1182-1183; AS B60 [65]-[67]; AS B62 [12]-[17]. Properly construed, the Declaration assumed Bifurcation and was, to that extent, based on a false legal premise. Paragraph 1(b)(iii) of the Declaration is not capable of being read in isolation (or severed) from the other paragraphs. See: AS B60 [78]-[83]; Greenwood J (FCA) at [421]-[423], AB 1391-1392.

8. **FCAFC.** Notwithstanding the matters described in paragraphs 6 and 7, Pagone J considered that Federal Court was bound, even in Part IVC proceedings, to give effect to paragraph 1(b)(iii) of the Declaration. The error is revealed in Pagone J (at FCAFC [27], AB 1834):

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...the rights of the beneficiaries flowing as against the Commissioner from Div 207 of the 1997 Act depended wholly upon the effect of the rights created as between the trustee and the beneficiary by whatever the resolutions may have achieved.

The rights to be created by the trustee as against the Commissioner were a matter wholly within the control of the trustee. ...

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9. **The limits of *Executor Trustee*.** *Executor Trustee* [1939] HCA 35; (1939) 62 CLR 545 holds that the general law rights of trustee and beneficiary *inter se*, once defined by a decision made in duly constituted proceedings, are so defined as against the Commissioner unless that decision is set aside. Part IVC of the TAA both *creates a statutory obligation on the Commissioner* to decide whether to allow any objection to an assessment pursuant to s14ZY and sets out *the exclusive means of resolving any dispute* in respect of such decision. See: AS B60 [53]-[59] (Part IVC); AS B60, [60]; *Barraclough v Brown* (1897) AC 615, 620, 622, 623 per Lord Herschell; *DCT v Brown* [1958] HCA 2; (1958) 100 CLR 32, 42; *Dorney v FCT* (1980) 1 NSWLR 404, 408-413 per Hutley J; *FCT v Futuris Corporation Ltd* [2008] HCA 32; (2008) 237 CLR 146, 156 [23]. *Executor Trustee* does not bind the Commissioner or a court to accept a prior declaration as resolving tax law issues. See: AS B60 [68]-[77].

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10. **Correct construction of Div 207.** Contrary to the view of Applegarth J, Div 207 permits neither Bifurcation nor the result sought by the tax returns: Pagone J at [10]-[16], AB 1817-1822, c.f., Greenwood J (FCA) at [499] AB 1410 and [519], AB 1415.
11. **Correct application of Div 207.** The (provisional) analysis of the Resolutions by Pagone J at [20]-[21] AB 1829-30 correctly applied Div 207 to the facts; to similar effect, see Greenwood J at [488]-[499].
12. **Disposition.** The appeals should be allowed and the balance of the proceedings ought to be remitted to the FCAFC.

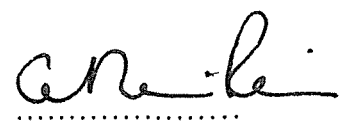
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50 Dated: 10 April 2018

  
 JT Gleeson SC

  
 PA Looney QC

  
 JA Watson

  
 CM Pierce