IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

NO B 9 OF 2018

BETWEEN: **COMMISSIONER OF TAXATION FOR THE COMMONWEALTH OF AUSTRALIA**
Appellant

AND: **TOMARAS**
First Respondent

AND **TOMARAS**
Second Respondent

AND **OFFICIAL TRUSTEE IN BANKRUPTCY**
Third Respondent

APPELLANT'S SUBMISSIONS

Part I: Publication on the internet

1. The appellant (**Commissioner**) certifies that this submission is in a form suitable for publication on the internet.

Part II: The issues on the appeal

2. First ground of appeal: Is the common law presumption that the Crown is not bound by general words in a statute engaged in the construction of s 90AE of the *Family Law Act 1975* (Cth) (**FLA**)?

3. Second ground of appeal: If the presumption does apply, is it rebutted in respect of s 90AE of the FLA?

4. Third ground of appeal: Upon the proper construction of s 90AE, particularly having regard to the detailed code constituted by the Commonwealth taxation statutes, does "creditor" in s 90AE(1) and "third party" in s 90AE(2) include the Commissioner or the Commonwealth and does "debt" in s 90AE(1) include tax-related liabilities?

Prepared by the Appellant

The Australian Government Solicitor
Level 11
145 Ann St
Brisbane QLD 4000
DX 119 Brisbane

Date of this document: 11 May 2018
Contact: Suzannah Auld
File ref: 18002557
Telephone: 07 3360 5742
Facsimile: 07 3360 5799
E-mail: Suzannah.Auld@ags.gov.au

Part III: Notices under s 78B of the *Judiciary Act 1903* (Cth)

5. The Commissioner has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) and has concluded that no such notice is necessary.

Part IV: Citation of the decision below

6. The decision of the Full Court is *Tomaras & Tomaras and Anor and Commissioner of Taxation* (2017) FLC ¶93-806, [2017] FamCAFC 216.[1]

Part V: Relevant facts

7. The first respondent (**Wife**) and second respondent (**Husband**)[2] were married on 11 July 1992. They separated on 15 July 2009: J[3] (Core Appeal Book (**CAB**) 34).[3]

8. During the marriage, the Commissioner issued assessments requiring the Wife to pay income tax and the Medicare levy. The Wife failed to pay those amounts and did not lodge any objection to the assessments: J[3] (CAB 34). On 12 November 2009, the Commissioner obtained a default judgment against the Wife in the District Court of New South Wales for $127,669.36, comprising income tax, the Medicare levy, penalties, and the general interest charge (**GIC**): J[4] (CAB 34).[4] GIC has continued to accrue on the judgment sum.[5]

9. As at 9 August 2016, the Wife's liabilities to the Commissioner stood at $256,078.32, comprising 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.[6]

10. On 20 December 2013, the Wife commenced proceedings in the Federal Circuit Court against the Husband seeking orders under s 79 of the FLA for the alteration of their

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1 The decision was approved for publication under a pseudonym pursuant to s 121(9)(g) of the FLA.

2 The Special Case stated in the Federal Circuit Court on 22.8.16 at [14] recorded that the Husband was declared bankrupt in November 2013 and, provided there was no objection, would be eligible for discharge from bankruptcy in November 2016 (CAB 14). As the Full Court observed at [5] (CAB 34), it was common ground below that nothing turned on this for the purpose of answering the question stated in the Special Case.

3 Special Case stated in the Federal Circuit Court on 22.8.16 at [1] (CAB 12).

4 Special Case stated in the Federal Circuit Court on 22.8.16 at [11] (CAB 12).

5 Special Case stated in the Federal Circuit Court on 22.8.16 at [11]-[12] (CAB 12).

6 Special Case stated in the Federal Circuit Court on 22.8.16 at [12] (CAB 12).

property interests. Relevantly, the Wife's application included Orders 8 and 9, as follows:[7]

> 8. *That the* [Husband] *be responsible for all income tax assessment 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] *against any liability present or contingent including tax and bank liabilities, in respect of the* [Husband] *or a related party of the* [Husband].

11. On 9 February 2016, Judge Purdon-Sully granted the Commissioner leave to intervene in the proceedings in relation to Orders 8 and 9.[8]

12. On 22 August 2016, her Honour granted the Wife leave to amend Order 8 to seek the following relief (at J[7] CAB 34):[9]

> *Pursuant to s 90AE(1)(b) of the* Family Law Act 1975 *(Cth), 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.*

13. On the same day, her Honour stated a special case for the opinion of the Full Court pursuant to s 94A(3) of the FLA. The question stated was as follows (at J[8] CAB 34):[10]

> *Does s 90AE(1)-(2) of the* Family Law Act 1975 *grant the Court power to make Order 8 of the final orders sought in the amended initiating application of the Wife?*

14. The Full Court answered the stated question as follows (at J[59]-[60] CAB 45):[11]

> *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].

Part VI: The appellant's argument

First appeal ground: The presumption was engaged

15. At J[16]-[20] (CAB 37-38), Thackray and Strickland JJ concluded that the presumption that a statute expressed in general terms does not "bind the Crown" has

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7 Special Case stated in the Federal Circuit Court on 22.8.16 at [15] (CAB 15).

8 Special Case stated in the Federal Circuit Court on 22.8.16 at [16]-[17] (CAB 15).

9 Special Case stated in the Federal Circuit Court on 22.8.16 at [18] (CAB 15); order made on 22.8.16 at CAB 10. The further amended initiating application was filed by the Wife in the Federal Circuit Court, pursuant to this leave, on 14.3.18 (CAB 17-28).

10 Special Case stated in the Federal Circuit Court on 22.8.16 (CAB 15).

11 Order 1 made on 13.10.17 (CAB 51-52).

"no place" in the construction of s 90AE. This was the primary basis upon which their Honours answered the stated question, notwithstanding that the Full Court had not received argument on this issue: J[15], [21], [63] (CAB 37, 38, 45). In so reasoning, their Honours erred in two respects: the first error is addressed in paragraphs 16 to 22 below; the second in paragraphs 23 to 26 below.

16. ***Presumption not dependent on whether legislation operates to the Crown's prejudice:*** The plurality erred in concluding at J[16] (CAB 37) that the presumption that the Crown is not bound by a statute "applies only to provisions which impose an obligation or restraint on the Crown." Justice Aldridge at J[71] (CAB 47) correctly held that the issue of benefit to or burden upon the Crown is not a threshold issue. The plurality erred in failing to recognise that the principle articulated in *Bropho v Western Australia*[12] adopted a more flexible approach, which superseded statements in earlier authorities[13] that had treated as decisive a dichotomy between benefit and prejudice.

17. In *Bropho*, this Court rejected any inflexible rule for determining whether general words in a statute should be read down to exclude "the Crown" – meaning the members, employees, and agents of the executive government.[14] Instead, the Court endorsed an approach that recognises the presumption as a starting point that is displaced if the provisions of a statute, construed as a whole in light of their subject matter and apparent purpose and policy, disclose an intention that the Crown should be bound.[15]

18. Subsequent decisions of this Court have reaffirmed the flexible expression of the rule. In *Commonwealth v Western Australia*, Gleeson CJ and Gaudron J said:[16]

> *It would be preferable, in our view, and more consonant with our constitutional arrangements, if the presumption that a statute "does not bind the Crown" were expressed as a presumption that a statute which regulates the conduct or rights of individuals does not apply to members of the executive government of any of the polities in the federation, government instrumentalities and authorities intended to have the same legal status as the*

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[12] (1990) 171 CLR 1 at 22-24 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[13] *British Broadcasting Corporation v Johns (Inspector of Taxes)* [1965] Ch 32 at 78-79 (Lord Diplock); *Madras Electric Supply Corporation v Boarland* [1955] AC 667 at 685; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 649 (Stephen J), 656 (Mason J, with whom Aickin J agreed).

[14] (1990) 171 CLR 1 at 22 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[15] (1990) 171 CLR 1 at 22-24 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); see also at 28 (Brennan J).

[16] (1999) 196 CLR 392 at [33].

executive government, their servants or agents. For ease of reference, we shall refer to that presumption as the presumption that legislation does not apply to members of the executive government.

Subsequently, in *Bass v Permanent Trustee Co Ltd*, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said:[17]

Where the legislative provisions in question are concerned with the regulation of the conduct of persons or individuals, it will often be more appropriate to ask whether it was intended that they should regulate the conduct of the members, servants and agents of the executive government of the polity concerned, rather than whether they bind the Crown in one or other of its capacities. ... [W]here legislation regulates the use of land or other property, it will usually be more pertinent to ask whether the legislation was intended to apply to land or property owned by or on behalf of the polity in question.

19. A strict application of a dichotomy between benefit and prejudice, as reflected in the reasoning of Thackray and Strickland JJ, is inconsistent with these more recent decisions of this Court. The plurality did not refer to these authorities, which have expressed the flexible test adopted in *Bropho* as applying where the statute "regulates" the conduct or rights of persons or "regulates" the use of property. In each case, the question is whether it was intended that the statute should "regulate" the conduct of the members, servants and agents of the executive government or should "apply to" property owned by or on behalf of the polity. A law may regulate, or apply to, a person or polity, or their property, without disadvantaging them necessarily or at all. Both presumptions – against construing s 90AE as regulating the conduct or rights of the Commonwealth and against construing it as regulating the use of property owned by or on behalf of the Commonwealth (such as a chose in action constituted by the right to recover tax) – are engaged by s 90AE.

20. Further, a criterion that turns upon a dichotomy between benefit and prejudice should no longer be regarded as good law in Australia, if it ever was, because its doctrinal foundation lies in the historical characterisation of the presumption as an aspect of the royal prerogative: see, eg, the decision of the House of Lords in *Madras Electric Supply Corporation v Boarland*,[18] which Thackray and Strickland JJ cited at J[16] (CAB 16).

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[17] (1999) 198 CLR 334 at [18]. To the same effect, see *NT Power Generation Pty Ltd v Power & Water Authority* (2004) 219 CLR 90 at [163] (McHugh ACJ, Gummow, Kirby, Callinan and Heydon JJ); and *Australian Competition & Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at [41]-[42] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[18] [1955] AC 667 at 671-672, 675-676, 685, 687-689, 691, 694.

21. By contrast, in *Bropho*, this Court affirmed that considerations deriving from the royal prerogative, or regard for the "dignity and majesty of the Crown", provide no ongoing justification for the maintenance of the presumption in contemporary Australia.[19] The strength of the presumption in each particular case now depends upon the particular circumstances, including the content and purpose of the relevant provision and the identity of the entity in respect of which the question of the applicability of the provision arises.[20] As Gleeson CJ and Gaudron J said in *Commonwealth v State of Western Australia*,[21] referring to observations of Gibbs ACJ in *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd*,[22] the modern rationale of the presumption lies in the circumstance "that legislation 'may have a very different effect when applied to the government of a State from that which it has in its application to ordinary citizens'".

22. In particular cases, it may be relevant that the provision in question operates to the executive's benefit or detriment, as Aldridge J correctly recognised at J[71] (CAB 47), but this cannot be regarded as a starting point or a threshold issue. The class of legislation regulating the conduct of the members, servants and agents of the executive government or which applies to property owned by or on behalf of the polity is not confined to those provisions which, if applicable to the executive government, would impair or frustrate its activities or functions. Consistently with its modern rationale, the presumption is engaged by the broader class of legislation as identified in the more recent authorities in this Court referred to in paragraphs 18 and 19 above.

23. ***Orders under s 90AE do not "benefit" the Crown:*** Justices Thackray and Strickland JJ erred in concluding at J[17]-[20] (CAB 37-38) that s 90AE can only inure to the benefit of the Crown, and that any possibility of the Commissioner being adversely affected by an order made under s 90AE does not arise by the operation of the FLA itself.

24. As Aldridge J observed at J[72] (CAB 47), an order under s 90AE operates to interfere with and vary the rights of the third party, which is no longer entitled to deal

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[19] (1990) 171 CLR 1 at 15, 18-19.

[20] (1990) 171 CLR 1 at 23 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); see also at 28 (Brennan J).

[21] (1999) 196 CLR 392 at [35]-[36].

[22] (1979) 145 CLR 107 at 123.

with a party or parties to the marriage in accordance with its legal rights, but rather must do so subject to the imposition made under s 90AE. The protections in ss 90AE(3) and 90AJ are designed to ensure that the creditor will not be disadvantaged, but that is quite different to receiving a benefit: J[73] (CAB 47). Situations may be envisaged where the creditor may ultimately be disadvantaged as the result of an order made under s 90AE: J[73] (CAB 47).

10 25. The circumstance that s 90AE permits the reallocation of the creditor's chose in action against one person to be against another person without its consent is an interference with the creditor's property rights. Further, ss 90AE(1)(a) and (b) authorise orders compelling the creditor to take certain steps and thus "bind" or "direct" the creditor. The requirement for the creditor to come to court to argue that there should be no interference with its property is itself a burden.

20 26. Finally, having regard to the special characteristics given to tax debts by the taxation statutes, as discussed below, the adverse consequences for the Commissioner are even clearer than for other creditors.

Second and third appeal grounds: The presumption is not rebutted - s 90AE does not apply to the Commissioner or the Commonwealth or to tax-related liabilities

30 27. ***Incorrect sequence of analysis:*** Whether the presumption has been rebutted – and, if so, to what extent – depends upon all the circumstances, including the nature of the provision and the governmental activities purportedly affected by it.[23] Legislative intent to rebut the presumption can only be found in the statutory text, subject matter and purpose, construed in context, including by permissible extrinsic aids.[24]

28. At J[11] (CAB 36), Thackray and Strickland JJ concluded that the Commissioner was,
40 *prima facie*, a "third party" for the purposes of s 90AE. At J[12] (CAB 36), their Honours said that the terms "debt" and "creditor" may be taken as having their "everyday meaning", before observing that the *Taxation Administration Act 1953* (Cth) (**TAA**) treats a "tax-related liability" that is due and payable as being "a debt due to the Commonwealth" and "payable to the Commissioner" (Sch 1, s 255-5). It thus appears that their Honours proceeded on the assumption that tax-related

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[23] *Bropho* (1990) 171 CLR 1 at 23-24, 28; *ACCC v Baxter Healthcare* (2007) 232 CLR 1 at [41]-[42].
[24] *Bropho* (1990) 171 CLR 1 at 21-22.

liabilities are *prima facie* "debts", and the Commissioner is *prima facie* a "creditor", within the meaning of s 90AE.

29. Their Honours made these observations before turning, at J[13] (CAB 36-37), to identify the principles in *Bropho* and then, at J[16] to [20] (CAB 37-38), to consider whether the presumption applied in the construction of s 90AE. Thereafter, when their Honours turned to consider whether that presumption had been rebutted, on the alternative hypothesis that the presumption did apply (at J[21] CAB 38), the question they posed was whether the Court ought to accept the Commissioner's arguments for "the proposition that s 90AE *does not* evince a legislative intention to bind the Crown" (emphasis added).

30. The presumption that legislation expressed in general terms does not apply to the executive or its employees or agents is a starting point for the task of construing the relevant provision. It is not a principle that stands outside or is "superimposed" on the constructional exercise.[25]

31. In posing the question whether s 90AE *does not* evince a legislative intention to bind the Crown (at J[21] CAB 38), Thackray and Strickland JJ inverted the proper sequence of analysis: they directed attention to whether the presumption was supported, rather than whether it was rebutted. The question which their Honours ought to have posed was whether s 90AE *does* demonstrate a legislative intention that it should apply to the Commissioner or the Commonwealth and to tax-related liabilities.

32. The incorrect question led to error, because it caused their Honours to attribute the wrong significance to their analysis of the parties' competing arguments. Properly understood (and putting to one side for present purposes the merits of the competing arguments), the arguments on behalf of the Commissioner which their Honours identified as "neutral" (at J[22]-[25], [32]-[35], [45]-[47], [48]-[49] CAB 38-39, 40-41, 42-43, 43) were, by reason of being neutral, necessarily incapable of contributing to the displacement of the presumption. Conversely, the rejection of the Commissioner's other arguments for not departing from the presumption (at J[26]-

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[25] *Madras Electric Supply Corporation v Boarland* [1955] AC 667 at 685 (Lord MacDermott), 688-689 (Lord Reid); *Bropho* (1990) 171 CLR 1 at 15 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[28], [29]-[31], [36]-[44] CAB 39, 40, 41-42) did not identify any affirmative ground for its rebuttal. Yet their Honours treated both sets of conclusions as reasons for determining that the presumption had been rebutted with respect to s 90AE.

33. The only argument in favour of rebuttal which Thackray and Strickland JJ accepted was the Wife's contention that, in enacting Part VIIIAA of the FLA, the Parliament must be taken to have known that the Commissioner was treated as a "creditor" for the purposes of ss 79 and 79A, and that if the Parliament had intended that s 90AE not apply to tax-related liabilities, it could have provided an express exclusion to that effect, as it did in s 90ACA (at J[55]-[56] CAB 44).[26] However, this argument turned on the absence of an indication that the Commissioner was *not* to be treated as a creditor for the purposes of s 90AE, rather than any positive indication that he was to be treated as such. For the reasons that are developed in paragraphs 62 to 70 below, the argument should not have been accepted.

34. The sequence of the analysis by Thackray and Strickland JJ failed to give effect to the fundamental nature of the *presumption*. Their Honours analysed whether the presumption was supported, rather than whether it was rebutted. In so reasoning, their Honours inverted the proper analysis. That inversion of analysis led into error by a failure to identify correctly the interaction between Pt VIIIAA of the FLA and the provisions of the taxation laws governing the recovery of tax and the exercise by a taxpayer of objection, review and appeal rights.

35. ***The special nature of tax-related liabilities precludes their identification as "debts" for the purpose of s 90AE*:** As developed in further detail in paragraph 48 below, the taxation statutes comprise a complete and exhaustive code of the respective rights and obligations of the Commissioner and of taxpayers.

36. By ss 166 and 169 of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 36**), the Commissioner is obliged to assess the taxable income of taxpayers and the tax payable thereon and, by s 174, to serve a notice of assessment "upon the person liable to pay the tax". The amount of income tax due and payable by a person is the amount stated in the assessment: *Income Tax Assessment Act 1997* (Cth) (**ITAA 97**), s 5-5(2).

[26] The significance of s 90ACA is addressed in paragraph 63 below.

The assessed amount is a "tax-related liability": TAA, Sch 1, s 250-10(2) Item 37, s 255-1.

37. An amount of a tax-related liability that is due and payable is a debt due to the Commonwealth and is payable to and may be recovered by the Commissioner.[27] The Commissioner may amend an assessment, at any time, in the event of fraud or evasion.[28]

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38. However, some caution is required before treating a tax-related liability as falling within general terms such as "debt", or cognate expressions, where used in other legislation. As this Court observed in *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd*:[29]

> *Undoubtedly the tax legislation by force of its provisions creates what it identifies as debts due to the Commonwealth... The legislature may create a duty or obligation to pay money, in particular liquidated amounts, and an action in debt is then the appropriate remedy for which the general law provides. But in creating such a duty or obligation, the legislature may attach special incidents or characteristics which do not pertain to debts owed by one citizen to another within the sense of the general law. The true construction of the statute determines the degree of the analogy.*

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39. In a different context, the Full Court of the Family Court has recognised that the Commissioner is unlike a commercial creditor because, rather than extending credit, he becomes a creditor by virtue of the operation of the taxation legislation.[30] However, the differences between the Commissioner and commercial creditors, and tax-related liabilities and commercial debts, are both more extensive and more specific.

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40. Schedule 1 to the TAA creates special incidents attaching to tax-related liabilities, which give the Commissioner wide powers to facilitate the recovery of such liabilities and the protection of the revenue.

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41. The production of a notice of assessment is conclusive evidence of the due making of the assessment of a taxation liability and, except in proceedings under Pt IVC of the TAA, that the amount and all the particulars of the assessment are correct.[31] This

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[27] Former ss 208 and 209 of the ITAA 36, now s 255-5 of Sch 1 to the TAA.

[28] ITAA 36, s 170(1), item 5. Further, an assessed amount of tax may later be altered in a variety of circumstances.

[29] (2008) 237 CLR 473 at [51] (Gummow ACJ, Heydon, Crennan and Kiefel JJ). See also *Bell Group NV (in liq) v State of Western Australia* (2016) 90 ALJR 655, 331 ALR 408 at [60] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

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[30] *FCT v Worsnop* (2009) 74 ATR 401 at [86] (Bryant CJ, Warnick and Cronin JJ).

[31] Former s 177 of the ITAA 36, now item 2 of the table in s 350-10(1) of Sch 1 to the TAA.

reflects "a long-standing legislative policy to protect the interests of the revenue"[32] and to facilitate proceedings for the recovery of the tax.[33] Save for the relevantly limited jurisdiction conferred by s 39B of the *Judiciary Act 1903* (Cth),[34] proceedings under Pt IVC are the only avenue by which the correctness of an assessment may be challenged.

42. Under ss 14ZZM and 14ZZR of the TAA, the Commissioner may proceed to recover tax-related liabilities even though proceedings under Pt IVC seeking review of, or appealing from, the corresponding assessments are pending. This feature makes tax debts unique among debts in that the determination of the debt is divorced from the recovery of the debt, such that debts can change after recovery has occurred.

43. Only a "tax-related liability" – defined to mean a pecuniary liability to the Commonwealth "arising directly under a taxation law"[35] – attracts the various advantages for the Commissioner conferred by Sch 1 to the TAA. In proceedings for the recovery of tax-related liabilities, certificates and statements or averments issued by the Commissioner are *prima facie* evidence of the matters that they record (Subdiv 255-C). In respect of such liabilities, the Commissioner may vary the time for payment (Subdiv 255-B), require a security deposit (Subdiv 255-D), or issue a form of statutory garnishee notice (Subdiv 260-A). Special provision is made for recovery from a liquidator (Subdiv 260-B), from a receiver (Subdiv 260-C), from an agent winding up a business for a foreign resident principal (Subdiv 260-D) and from a deceased person's estate (Subdiv 260-E).

44. Further, when a tax-related liability arises in respect of the topics identified in column 3 of the table in s 8AAB(4) of the TAA, the person is liable to pay the GIC under the provisions listed in columns 1 and 2. The GIC is calculated at a rate significantly higher than the base interest rate published by the Reserve Bank of Australia: ss 8AAC-8AAD.

45. Thus, tax-related liabilities are statutorily created debts, actions for the recovery of which have special incidents. In these respects, as this Court observed in *Bell Group*

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[32] *DCT v Broadbeach Properties Pty Ltd* (2008) 237 CLR at [44].
[33] *FCT v Futuris Corp Ltd* (2008) 237 CLR 146 at [64] (Gummow, Hayne, Heydon and Crennan JJ).
[34] *FCT v Futuris Corp Ltd* (2008) 237 CLR 146 at [69].
[35] TAA, Sch 1, s 255-1.

NV (In Liq) v Western Australia,[36] the ITAA 36 and the TAA ascribe to Commonwealth tax debts characteristics pertaining to their existence, quantification, enforceability and recovery, which differ from other debts.

46. Part IVC of the TAA regulates the exercise of objection, review and appeal rights in respect of assessments and decisions by the Commissioner in relation to taxation objections. Although s 14ZL of the TAA states that Pt IVC applies if a provision of an Act or of regulations provides that "a person" who is dissatisfied with an assessment may object against it, contrary to the reasons of Thackray and Strickland JJ at J[41] (CAB 42), it does not follow that the class of persons who may make an objection is wider than the person against whom the assessment was made. Rather, s 175A(1) of the ITAA 36 provides that a "taxpayer" who is dissatisfied with an assessment "made in relation to the taxpayer" may object against it in the manner set out in Pt IVC of the TAA. A "taxpayer" is defined as "a person deriving income or deriving profits or gains of a capital nature".[37]

47. The effect of s 14ZL of the TAA is to confer objection, review and appeal rights under Pt IVC upon the person described in s 175A(1) of the ITAA 36, namely 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 (a "person" making a taxation objection must comply with certain administrative requirements), s 14ZY (the Commissioner must decide a taxation objection and serve written notice of the decision "on the person") and s 14ZZ (if "the person" is dissatisfied with the objection decision, "the person" may seek review in the Administrative Appeals Tribunal or appeal to the Federal Court). Those provisions ensure that no tax is incontestable, by conferring upon a taxpayer the right to contest the imposition, upon that taxpayer, of taxation.[38]

48. ***The interaction between the taxation legislation and Part VIIIAA of the FLA***: The taxation statutes have been described by this Court as "a complete and exhaustive code of the rights and obligations of the Commissioner ... to members of the general

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[36] (2016) 90 ALJR 655, 331 ALR 408 at [60] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

[37] ITAA 36, s 6(1).

[38] *FCT v Futuris Corp Ltd* (2008) 237 CLR 146 at [9]; *MacCormick v FCT* (1984) 158 CLR 622 at 639-641 (Gibbs CJ, Wilson, Deane and Dawson JJ).

public ... and of those members of the general public to his department".[39] The "whole scheme" of the ITAA 36 is "to confine the liability to pay income tax to persons who can be assessed under the Act and upon whom is conferred" the rights of objection, review and appeal now found in Pt IVC of the TAA.[40] The provisions "operate and operate only between the Commissioner and some particular member of the public".[41] The liability of any person to pay a debt for unpaid tax is conditional upon the right of the Commissioner to assess that person and upon the correlative right of that person to object, seek review and appeal.[42] The legislative scheme is "complete upon its face", defines the obligations and liabilities of taxpayers "in comprehensive terms", and "relevantly cover[s] the field".[43]

49. An order under s 90AE(1) relieving the taxpayer of his or her tax-related liability and substituting a person who did not derive the relevant income, profits, or capital gains would cut across this entire scheme. Liability to pay taxation would no longer be confined to persons who can be, and are, assessed under the taxation statutes and upon whom is conferred the rights of objection, review and appeal in Part IVC of the TAA. The taxation statutes would no longer operate only between the Commissioner and some particular member of the public who is the taxpayer. It is unlikely that, in enacting s 90AE, the Parliament intended to disrupt the unified scheme of the taxation laws, as recognised in this Court, in any of these various respects.

50. As this Court observed in *Bruton Holdings Pty Ltd (in liq) v FCT*,[44] the decisions in *DCT v Broadbeach Properties Pty Ltd*[45] and *DCT v Moorebank Pty Ltd*[46] may be seen as supporting a proposition that, in the event of conflict, preference is given to specific schemes in the TAA to protect the revenue over the more general scheme of other Commonwealth legislation, such as the *Corporations Act 2001* (Cth). This is a

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[39] *FCT v Official Receiver* (1956) 95 CLR 300 at 310 (Williams J, with whom Dixon CJ agreed); *DCT v Brown* (1958) 100 CLR 32 at 49 (Williams J).

[40] *DCT v Brown* (1958) 100 CLR 32 at 49 (Williams J).

[41] *DCT v Brown* (1958) 100 CLR 32 at 50 (Williams J).

[42] *DCT v Brown* (1958) 100 CLR 32 at 51-52 (Williams J).

[43] *DCT v Moorebank Pty Ltd* (1988) 165 CLR 55 at 64-67 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

[44] (2009) 239 CLR 346 at [18] (French CJ, Gummow, Hayne, Heydon and Bell JJ).

[45] (2008) 237 CLR 473 at [40]-[58] (Gummow ACJ, Heydon, Crennan and Kiefel JJ).

[46] (1988) 165 CLR 55 at 64-67.

manifestation of the principle of construction that a specific regime, in cases where it applies, excludes more general provisions which otherwise might be engaged.[47]

51. Further, as in *Bruton* itself,[48] there are cases in which the TAA may not be strictly at odds, and in need of reconciliation, with another set of provisions in Commonwealth law but where, rather, the former assists in the construction of the latter.

52. In the judgment under appeal, at J[40]-[41] (CAB 41-42), Thackray and Strickland JJ emphasised that s 90AE(1) permits the court to make orders directing a creditor to "substitute" one party to the marriage for the other in relation to the debt. Observing that "substitution" involves the "putting of one person or thing in place of another", their Honours concluded that there was "no reason" why other laws of the Commonwealth would not be interpreted so as to confer on the party substituted all of the rights of the person in whose place they have been obliged to stand, by an order made under s 90AE(1).

53. Their Honours' conclusion is not reconcilable with the specific terms of the relevant tax provisions. As noted in paragraph 43 above, the special powers and advantages conferred on the Commissioner by Sch 1 of the TAA apply only to a "tax-related liability", being a pecuniary liability to the Commonwealth "arising *directly* under a taxation law" (s 255-1, emphasis added). If the other spouse were to be substituted for the taxpayer under s 90AE(1) of the FLA, the liability of the substituted spouse for that tax-related liability could not be said to be a liability that arises *directly* under a taxation law: rather, his or her liability would arise directly under the order made under s 90AE(1).

54. Further, as noted in paragraph 44 above, the Commissioner is only entitled to levy the GIC when the relevant tax-related liability is identified in s 8AAB(4) of the TAA. That sub-section does not identify any provisions of the FLA.

55. Finally, as noted in paragraphs 46 and 47 above, s 175A of ITAA 36 has the effect that the objection, review and appeal rights in Part IVC of the TAA are available only

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[47] *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 (Gavan Duffy CJ and Dixon J). *Minister for Immigration and Multicultural & Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at [44]-[59] (Gummow and Hayne JJ), [149], [162]-[165] (Heydon and Crennan JJ).

[48] (2009) 239 CLR 346 at [21], referring to *Re MUA; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397 at [28]-[29] and *Re Wilcox; Ex parte Venture Industries Pty Ltd* (1996) 66 FCR 511 at 530.

to the "taxpayer" "in relation to" whom the assessment has been made. A "substituted" spouse under an order made under s 90AE(1) of the FLA would not answer that description. Further, and in any event, there would be a risk of serious injustice to the "substituted" spouse. As a non-party to the taxable transactions, it is likely that the "substituted" spouse would lack knowledge of, or access to documents or information concerning, the transactions which generated the tax-related liability. Such knowledge or information will often be practically necessary in order to discharge the burden of proof[49] and thus exercise, in a practical sense, any purportedly "substituted" right of objection, review or appeal.

56. The burden on the substituted spouse would be compounded if the Commissioner were subsequently to exercise his power to amend the relevant assessment – such as because the Commissioner later discovers that there has been fraud or evasion. The "substituted" spouse may simply not be in a position to contest those matters, if they pertain to the conduct of the original taxpayer.

57. Accordingly, if s 90AE(1) were to be interpreted as applying to tax-related liabilities, the result would be, at the least, to throw into serious doubt the availability and operation of the special characteristics of tax-related liabilities under Sch 1 to the TAA; the availability and operation of the GIC provisions; and the availability and operation of the taxpayer's objection, review and appeal rights under Pt IVC.

58. These considerations illustrate why the application of s 90AE to tax-related liabilities would have unintended consequences of a kind which weigh against any rebuttal of the presumption that general statutory language does not apply to the executive in this context.[50] There is nothing in s 90AE specifically, in Part VIIIAA of the FLA as a whole, or in any of the extrinsic materials, that manifests a legislative intention that s 90AE would produce such anomalous and unworkable consequences.

59. The operation of all the provisions in the taxation statutes described above, and of the unity of the statutory scheme or code, would be subverted, or at least cast into serious doubt, if a substitution order can be made under s 90AE against the Commissioner or the Commonwealth or in respect of tax-related liabilities. Part VIIIAA, and s 90AE in

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[49] TAA, ss 14ZZK(b), 14ZZO(b).

[50] See *Commonwealth v State of Western Australia* (1999) 196 CLR 392 at [35]-[36] (Gleeson CJ and Gaudron J).

particular, should be read (in light of the presumption) so as not to apply to the Commissioner or the Commonwealth or in respect of tax-related liabilities. In that way, the specific provisions of the taxation legislation prevail over the more general provisions of Pt VIIIAA. Alternatively, the provisions of the taxation legislation assist in construing Pt VIIIAA. By either route, the nature of the statutory scheme or code created by the taxation statutes, which was well settled and well known to – and, no doubt, intended to be preserved by – the Parliament at the time of enacting Pt VIIIAA, is an important matter of context in confirming that the presumption is not rebutted and thereby arriving at the correct construction of s 90AE.

60. For these reasons, the Full Court erred at J[41] to [44] (CAB 42) in considering that s 90AE conferred power, in practical effect, to impose taxation upon a person who is not liable to pay the tax. If, upon its true construction, s 90AE applied to tax-related liabilities, it would empower the Court to change the imposition of taxation and render liable a person upon whom taxation is not imposed by any provision of a law imposing taxation. Further, it would give rise to a real risk that the tax impost upon the substituted spouse would be, in effect, incontestable, since the substituted spouse would not have the right to contest the imposition under Part IVC of the TAA. The unlikelihood of such an intention, and of an intention to bring about any of the other consequences identified above, provides good reason not to attribute any such intention to the Parliament.

61. ***There is no occasion for s 90AC to operate:*** Once the correct construction of s 90AE is identified, it follows that s 90AC is not relevantly engaged. Section 90AC, which is set out in the reasons of the Full Court at J[57] (CAB 44), relevantly provides 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". Section 90AC arises for consideration only after proper effect has been given to the presumption, which has not been rebutted. Upon its proper construction, Part VIIIAA has no application to the Commissioner or the Commonwealth or to tax-related liabilities. Accordingly, the taxation statutes do not relevantly provide "to the contrary" of Part VIIIAA; there is no occasion for s 90AC to operate so as to give "effect [to Part VIIIAA] … despite anything" contained in the taxation statutes.

62. ***The single reason identified by the Full Court for rebutting the presumption should be rejected:*** The sole argument that the Full Court accepted as rebutting the presumption was that, when enacting Pt VIIIAA, Parliament must be taken to have known that the Commissioner had been treated as a "creditor" for the purposes of ss 79 and 79A, to which s 90AE is expressly linked. The Full Court reasoned that, had the Parliament intended to exclude the Commissioner as a "creditor", it could readily have enacted an express exclusion, as it had done in s 90ACA: J[55]-[56] (CAB 44).

63. Reliance upon s 90ACA was inapt. That is an express exclusion with respect to "superannuation annuities". Such annuities are often provided by non-government entities.[51] These annuities are *entitlements* conferred by non-government entities *upon* a party, or parties, to the marriage. The enactment of an exclusion upon that subject is silent, or neutral, as to any legislative intention to bind the Commissioner or the Commonwealth in respect of tax-related *liabilities owed by* a party, or parties, to the marriage. In any event, the existence of the *Bropho* presumption means that it is not necessary to provide expressly that a law does not bind the Crown: the absence of an express exclusion cannot justify departing from a presumption to that very effect.

64. Further, the operation of ss 79 and 79A upon creditors is very different from s 90AE. Section 79 confers protections only upon creditors, in the form of a right to be heard before an order is made(s 79(10)). Section 79A confers protections only upon creditors, in the form of a right, in certain circumstances, to apply to have an order made under s 79 set aside or varied and to have the interests of the creditor taken into account in that regard (ss 79A(2) and (4), read with (1A)).

65. By contrast, s 90AE interferes with, and adjusts, the property rights of creditors. Sub-sections 90AE(1)-(2) empower the court to make orders imposing obligations upon creditors and other third parties directly, and affecting their own rights, liabilities and property interests. This does not merely supplement or carry into effect the power in s 79. As the objects provision in Pt VIIIAA (s 90AA) itself makes plain, that Part confers power upon the court to make orders that are substantively different in their

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[51] "Superannuation annuity" is defined to mean certain income streams "issued by a life insurance company or registered organisation": ITAA 97, s 995-1(1); *Income Tax Assessment Regulations 1997* (Cth), cl 995-1.01(1).

practical and legal operation from orders made under s 79. The Part confers power to make an order that is "directed to, or alters the rights, liabilities or property interests of a third party".

66. These differences in legal and practical operation preclude the drawing of any reliable inference as to a legislative intention that the ambit and effect of the two sets of provisions upon "creditors" and "debts" would be co-extensive. That is particularly so where, as the Full Court acknowledged, the extrinsic materials did not refer at all to tax liabilities or to other debts owed to government agencies: J[46] (CAB 42).

67. It is significant that Pt VIIIAA was introduced, by later amendment, into the FLA some 29 years after s 79 was first enacted.[52] Upon each amendment, a principal statute is reconstituted and thus is to be re-construed as a newly integrated, and adjusted, whole. The principal Act and the amending Act are to be regarded as one connected and combined statement of the will of Parliament.[53] Previously accepted or assumed understandings as to the operation of pre-existing provisions, as they stood prior to the amendment, cannot control the meaning of words, phrases and concepts selected by the Parliament in inserting new provisions in another part of the statute. That proposition applies *a fortiori* where, as here, the amendments comprise the insertion of an entirely new Part (Pt VIIIAA) which introduces new expressions (such as "third party" and "to substitute ... in relation to the debt") which are not used in the pre-existing provisions (ss 79 and 79A).

68. The substantive and remedial differences between s 90AE and s 79, and the circumstance that the former was inserted together with the whole of Pt VIIIAA by later amendment, are sufficient to displace any presumption that the word "creditor" is to be given a uniform meaning in the same statute. That presumption is not one "of very much weight" and "readily yields to the context"[54] (as the Full Court conceded at J[54] CAB 44). As the reasons of the majority in *Murphy v Farmer*[55] illustrate, even the same word used in provisions enacted at the same time, appearing in the same part

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[52] Pt VIIIAA commenced operation on 17 December 2004: *Family Law Amendment Act 2003* (Cth), s 2(1) (item 18) and Sch 6.

[53] *Sweeney v Fitzhardinge* (1906) 4 CLR 716 at 735 (Isaacs J); *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463 (Brennan CJ, Dawson, Toohey JJ), 479 (McHugh and Gummow JJ). See also s 11B(1) of the *Acts Interpretation Act 1901* (Cth).

[54] *Murphy v Farmer* (1988) 165 CLR 19 at 27 (Deane, Dawson and Gaudron JJ), quoting *Clyne v DCT* (1981) 150 CLR 1 at 10 (Gibbs CJ) and 15 (Mason J).

[55] (1988) 165 CLR 19 at 27 (Deane, Dawson and Gaudron JJ), *cf* at 23-24 (Brennan and Toohey JJ).

of the legislation and which are linked or closely related in the sense that one provision picks up the other, will not necessarily be construed as having a uniform meaning where the true construction, in context, points to a different meaning. That reasoning applies *a fortiori* here.

69. Finally, as the Court emphasised in *Bropho*, "an Act may, when construed in context, disclose a legislative intent that one of its provisions will bind the Crown while others do not."[56] There is no difficulty in concluding that ss 79 and 79A apply to the Commissioner and the Commonwealth, while s 90AE does not.

70. When weighed against the matters identified above, the sole consideration relied upon by the Full Court at J[55] to [56] (CAB 44) is insufficient to rebut the presumption that "creditor" in s 90AE(1) and "third party" in s 90AE(2) does not include the Commissioner or the Commonwealth and that "debt" in s 90AE(1) does not include tax-related liabilities.

Part VII: Orders sought by the appellant

71. The Commissioner seeks the following orders:

1. Appeal allowed.

2. Set aside the order made by the Full Court of the Family Court of Australia on 13 October 2017 and, in its place, order as follows:

   The question stated for the consideration of the Full Court 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 Wife?
Answer:	No.

3. No order as to costs.

Part VIII: Estimate of time for oral argument

72. The Commissioner estimates that 2.5 hours will be required for the presentation of his oral argument, including submissions in reply.

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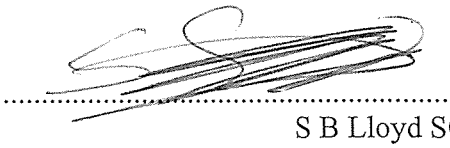
[56] (1990) 171 CLR 1 at 23.

Dated: 11 May 2018



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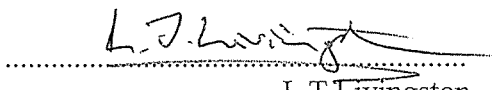

L T Livingston