

BETWEEN:

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

10

AND:

TOMARAS
First Respondent

AND:

TOMARAS
Second Respondent

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AND:

OFFICIAL TRUSTEE IN BANKRUPTCY
Third Respondent

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FIRST RESPONDENT'S OUTLINE OF ORAL ARGUMENT

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Part I: Certification

1 These submissions are in a form suitable for publication on the Internet.

Part II: Submissions on “property” within s 79 of the *Family Law Act 1975 (Cth)* (“the FLA”) and Argument

2 The Wife will address the meaning of “property” of a party to the marriage within s 79
FLA, the inability identified in *Ascot Investments v Harper* (1980) 148 CLR 337
(‘Ascot’) of the Court to exercise the s 79 power to alter the parties’ interests in certain
types of property effectively, and the novel power introduced by Part VIII A A FLA to
10 finalise the financial relations between the parties as soon as practicable.

3 Sections 79 and 90AE FLA are textually intertwined and deal with the same subject
matter. A party’s right to a tax refund is both property of the parties to the marriage
within s 79 and a liability of a third party in relation to the marriage under s 90AE.
Under s 90AE a third party whose liabilities can be altered may also have its “rights”
and “property interests”, including debts in relation to the marriage altered in order to
effect a division of property between the parties in s 79 proceedings. There is no
scope for the Commonwealth to be partially excluded as a third party. Any possible
implications for exclusion are denied by s 90AC FLA and, in any event, none exist:
the assessment and objections regime is unaffected by a s 90AE order.

20 4 “Property” is defined in s 4 FLA. In *Kennon v Spry* (2008) 238 CLR 366 at 390
French CJ said:

The word "property" in s 79 is to be read as part of the collocation "property of the parties to
the marriage". It is to be read widely and conformably with the purposes of the Family Law
Act.

5 The s 79 power to alter the parties’ interests in property can be exercised where their
liabilities exceed the value of that property: see *Lemnos v Lemnos* (2009) 223 FLR 53.

A statutory right to money is property within s 79 FLA

6 The design of the Tax Acts means that a “taxpayer” often has a statutory right to be
paid money by the Commonwealth. See ss 166 *Income Tax Assessment Act 1936*
30 (Cth) (ITAA36) (refundable tax offsets), s 172 ITAA36 (refunds of overpayments), s
35-5 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (negative net
amounts). Each right, although not an ordinary chose in action (see *FCT v Official*
Trustee (1956) 95 CLR 300, JBA Tab 26), comfortably falls with the meaning of
property of the parties to the marriage within s 79 FLA.

*The special Part IVC tax procedure for disputes about the correct operation of the Tax Acts is
irrelevant to the character of a right to money as property within s 79.*

7 A party might claim in a tax return or a BAS an entitlement to \$1 million from the
Commonwealth. The Commissioner may dispute that claim, and issue an assessment
admitting a claim of only \$300,000. Whether the right is worth \$300,000 or \$1
million depends on the correct operation of the Tax Acts, to be usually resolved in Part
IVC TAA proceedings. The Court is empowered to adjourn the s 79 proceedings until
the dispute is resolved: s 79(5) FLA.

Problems with altering a party's interests in certain types of property

8 In *Ascot* the High Court identified that the Court under s 79 FLA was not empowered
to alter, or perfect the alteration of, interests in certain types of property. It was held
10 that s 79 FLA did not empower the Court to order company directors to register a
transfer of shares from a husband to a wife. Murphy J (in dissent as to the Court's
power) and Gibbs J gave other examples of property interests not within the Court's
power to alter because they were inalienable or needed a third party's consent.

9 These impediments to the s 79 alteration power (absent s 90AE) can be said to exist in
relation to a statutory right to money. The Court might consider it just and equitable
that 60% of a husband's right to refund be paid directly to the wife when it falls due,
rather than be paid in full first to the husband (who might have a history of
recalcitrance as in *Ascot*). But the Commissioner's obligation to pay is limited to
payment directly to a bank account of the husband or of the husband *and* a third party
20 nominated by the husband (see s 8AAZLH TAA).

Part VIIIAA FLA

10 Section 90AE can only be exercised for the purpose of s 79 proceedings. It directly
addresses the *Ascot* impediments to the alteration of the parties' interests in property.

11 In the case of a party's statutory right to money as s 79 property, the Commonwealth
is the third party and its liability is to pay that money to that party.

12 Accordingly, in the example at para [9] above, the Court may order under s 90AE(2)
the Commonwealth to pay 60% of that liability to the wife. In anticipation of *Ascot*-
type arguments levelled at this new power, Parliament enacted s 90AC FLA.

13 Subsection 90AC(1) overrides any conflicting law that the Commonwealth need only
30 pay the money to one party to the marriage or both parties jointly. It gives primacy to
the plain words of s 90AE. Moreover, without limiting the overriding force of s
90AC(1), the Commissioner's compliance with the Court order is deemed by s
90AC(2) not to be in contravention of any law, e.g., s 8AAZLH TAA.

14 No scope exists for any construction that the Commonwealth is not a third party
within s 90AE, for the husband's s 79 property is necessarily the Commonwealth's

90AE liability. Furthermore, there is no presumption because the order would not affect any rights or interests of the Commonwealth, which is unaffected by whether its liability to the husband is discharged by proportional payments to the husband and the wife.

Conversely, the Commonwealth is a third party and creditor within s 90AE FLA

15 As set out above, the Crown is a third party within s 90AE(2) in respect of its liabilities which are property of the parties to the marriage within s 79 FLA. That concludes the issue of construction here as identified in appeal ground 3, for that section also gives the Court the power to alter that third party's "rights" and "property
10 interests".

16 That is, the above analysis applies equally where the operation of the Tax Acts gives rise to a liability of a party to the marriage, rather than a right to refund. That liability conditions what property is available for division, so cannot be artificially ignored.

17 If a party's tax liability is disputed, then again the Court can adjourn the s 79 proceedings until the dispute is finalised.

18 Moreover, it is common ground that the Commonwealth is a creditor in s 79 proceedings and has a right to intervene if its tax debt might be affected by a s 79 order: see s 79(10) and s 79A. See *Tomaras* [55]. By conferring rights upon "creditors" to become parties to s 79 property proceedings which may affect the
20 recovery of their debts, Parliament is to be taken as intending that the Court may use the powers conferred for the purpose of s 79, including the s 90AE power to deal with those debts.

A section 90AE order has no effect on the assessment, objection and appeals regime

19 Section 90AE's purpose is to assist in finalising the division of property as soon as practicable in accordance with the Court's duty under s 81 FLA. That the other party is substituted for the taxpayer in relation to a tax debt does not affect the Commissioner's power to assess the taxpayer, nor transfer objection rights to the other party. If the Commissioner subsequently amends the taxpayer's assessment, the same consequences follow as would have followed if another way to divide the property had
30 been ordered.

20 That is, a s 90AE order deals with the payment of money between the parties as one element of the final division of property. If a party to the marriage is later reassessed to a greater or less liability to tax than was considered by the Court to exist when the s 79 order was made, a new monetary right or liability is created, irrespective of the way in which the property of the marriage had been previously divided.



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