

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

FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues arising

2 The First Respondent (the **Wife**) is indebted to the Crown in right of the Commonwealth for (i) a judgment debt that, before judgment was entered in the Commonwealth's favour, comprised a tax-related liability*¹ for assessed income tax, for which the Wife no longer has the right to object under Part IVC of the *Taxation Administration Act 1953* (Cth) (**TAA**) and (ii) a tax-related liability for the General Interest Charge (**GIC**), which is calculated by reference to that assessed income tax.²

30 3 The general issue in this appeal concerns the proper scope of the presumption that the Crown is not bound by a statute and whether it is displaced. The precise issue is whether the Crown is a 'creditor' of the Wife in relation to her debts within the meaning of s 90AE of the *Family Law Act 1975* (Cth) (the **FLA**). If so, then the Federal Circuit Court is empowered by that section, as the Full Court of the Family Court (the **Full Court**) held, to make an order in proceedings under s 79 of the FLA

¹ Division 250 of schedule 1 of the *Taxation Administration Act 1953* (the **TAA**).

² Part IIA of the **TAA**.

Filed on behalf of the First Respondent

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directing the Crown in right of the Commonwealth³ to substitute the Second Respondent (the **Husband**) for the Wife in relation to those debts.

4 The broad questions framed by the Commissioner in the Appellant's Submissions (AS), at [2] to [4] thereof, arise directly from the notice of appeal, subject to the correct identification of the true scope of the common law presumption of Crown immunity. The Commissioner also raises the issue whether the observations of the plurality of the Full Court that the presumption "*applies only to provisions which impose an obligation or restraint on the Crown*"⁴ are correct.

5 ***The true scope of the presumption.*** The true common law presumption is that the
10 Crown, in right of the Commonwealth and of each of the States, is *prima facie* immune from statutory interference, here by orders directed to it by the Court in respect of all its debts. *Prima facie* the Crown is not a "creditor" that can be bound by orders empowered by sections 79 and 90AE of the FLA. The Commissioner incorrectly seeks to narrow the scope of the presumption by submitting that it applies, at the very least, to tax-related liabilities (of which, it should be noted, the Wife's judgment debt is not one⁵): see AS [31]. The common law immunity applies to the Crown in its various capacities as a creditor of the parties to the marriage⁶ and in relation to all debts owed to it. Moreover, at common law, Commonwealth Crown debts are treated the same as State Crown debts⁷. The Commissioner contends that the
20 observations of the plurality (at [7]-[20] Core Appeal Book (CAB), 37-38), viz that the presumption of Crown immunity might not have been engaged at all because it can be 'reasonably argued' that s 90AE does not impose an obligation or restraint on the Crown, constitute the *ratio* of the Full Court. *Did the Full Court err in its characterisation of the presumption and its scope?*

6 ***Immunity of Crown as a creditor under s 90AE issue.*** The Full Court decided the issue argued by the parties, being whether the *prima facie* application of the presumption was *rebutted*. The presumption yields to the statutory context. It is

³ Even in Part IVC TAA proceedings "*the Commissioner is only nominally a 'party' to the proceedings. The proceedings are really proceedings between Crown and subject*": *George v Federal Commissioner of Taxation* [1952] HCA 21; (1952) 86 CLR 183, 208 (Fullagar J).

⁴ *Tomaras v Tomaras & Ors* (2018) 327 FLR 228 (*Tomaras*), 232 [16] (per Thackray and Strickland JJ); Core Appeal Book (CAB), 37.

⁵ *Chamberlain v Federal Commissioner of Taxation* [1988] HCA 21; (1988) 164 CLR 502.

⁶ "There is but one Crown for the whole Empire": *Minister for Works (W.A.) v Gulson* (1944) 69 CLR. 338, 356-357.

⁷ *Re Richard Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* [1947] HCA 45; (1947) 74 CLR 508.

uncontroversial that the FLA allows orders to be made in proceedings under section 79 of the FLA that affect creditors and that the Crown is a creditor within this section. It is submitted, given the textual links between sections 79 and 90AE and the common purpose of these provisions, that the presumed meaning of creditor is displaced in favour of a meaning that *includes* the Crown. The real question is, *did the Full Court err in holding that the Crown was a creditor within s 90AE FLA, having regard to the presumption of Crown immunity?*

7 ***Exclusion of tax debts issue.*** It is uncontroversial that the Crown, as a ‘creditor of a party to the proceedings’ within the meaning of s 79 of the FLA is conferred a right to
10 intervene in proceedings under s 79 of the FLA in relation to all debts, including tax-related liabilities. The Commissioner does not positively assert, absent the presumption, that the Crown is a creditor within the meaning of s 90AE of the FLA in respect of debts other than tax-related liabilities and provides no submissions that could support that construction. He submits that peculiar force should be given to the scheme of taxation legislation. The issue of construction is whether some or all tax-related liabilities comprise a special category of debts that, although within s 79 of the FLA, are outside s 90AE of the FLA. This issue does not concern Crown immunity. The Commissioner bears the persuasive onus, unaided by the true common law
20 presumption of Crown immunity. If certain tax-related liabilities are a special category outside the meaning of debt, then the real issue is whether the Wife’s judgment debt and/or the GIC are within that special category. *Did the Full Court err in deciding that the Court can make an order directed to the Crown that substitutes the Husband for the Wife as the debtor of the Crown in relation to the judgment debt and the GIC pursuant to s 90AE of the FLA?*

Part III: Certification regarding s 78B Judiciary Act 1903

8 The Wife does not consider that a notice under section 78B of the *Judiciary Act 1903* (Cth) is required. The Wife also notes that the Commissioner served a s 78B notice dated 25 November 2016 in respect of the Case Stated before the Full Court.

30 **Part IV: Contested statement in the Appellant’s narrative of relevant facts found or admitted**

9 The facts are as set forth in AS [7]-[14]. However, two aspects of those facts should be noted.

10 *First*, the Wife’s Debt owed to the Crown comprises a judgment debt which is not a
“tax-related liability”. In *Chamberlain v Federal Commissioner of Taxation*⁸, this
Court said:

“ ... the sections of the *Income Tax Assessment Act 1936 (Cth)* [now Divs 250 and 255 in
schedule 1 TAA] giving rise to a liability to pay tax and empowering the Commissioner to sue
for that tax are spent once judgment is entered in favour of the Commissioner.”

11 Parliament also expressly recognises this distinction between a tax-related liability and
a judgment debt in section 260-5 in schedule 1 TAA.

10 12 *Second*, the Wife does not have the right to challenge the correctness of her income
taxation liability (and never had the right to challenge her GIC liability) in
proceedings under Part IVC of the TAA. The time allowed to her for objections under
s 14ZW of the TAA against her income tax assessments has long expired.

~~Part V: Appellant’s statement of applicable legislation~~

13 The Commissioner’s statement of applicable legislation is incomplete. The Court
should also have regard to the following:

Part IIA, and Divisions 250, 255 and 260 in schedule 1, of the TAA

Divison V (repealed) of the *Income Tax Assessment Act 1936 (Cth)*.

20

~~Part VI: Argument in answer to the appellant’s argument~~

Operation of the presumption issue

14 The first and second grounds of appeal, and the AS, contend that the *ratio decidendi*
of the Full Court was that the presumption of Crown immunity *did not* apply at all.
The plurality’s remarks at [14] to [20]⁹ were manifestly *obiter dicta*. The Wife has
already made this point in her submissions in response to the application for special
leave.

30 15 In any event, the alleged error is one that was immaterial to the disposition of the Case
Stated¹⁰. As the plurality made clear, it necessarily reached the same conclusion on
the basis argued by the respondent, that the presumption applied and was rebutted.
That was, at the very least, a separate reason for its decision and therefore ratio, not obiter.

16 Furthermore, the Full Court reached their conclusion regarding the engagement of the

⁸ [1988] HCA 21; (1988) 164 CLR 502, 509 (per Deane, Toohey and Gaudron JJ).

⁹ *Tomaras*, 232-233 (per Thackray and Strickland JJ).

¹⁰ cf *Madras Electric Supply Corporation v Boarland* [1955] AC 667, discussed [22] herein.

presumption only after construing the relevant section and since the presumption itself is only a rule of construction, whether the Full Court held that the presumption was engaged but displaced, or not engaged at all, is a distinction without a difference. There can be no doubt that the Full Court had regard to the presumption as identified in *Bropho v Western Australia* (1990) 171 CLR 1 (*'Bropho'*) in holding that the Crown was a creditor within s 90AE in relation to the Wife's debts.

Immunity of the Crown as a creditor under 90AE issue

Overview

10

17 In determining whether the Crown is susceptible to statutory interference by the Court directing to it to substitute the Husband for the Wife as debtor under s 90AE of the FLA for orders made in section 79 proceedings, the Court is required to consider the following:

- (a) is there a common law presumption that the meaning of 'creditor' under s 90AE excludes the Crown (the **presumed meaning**)?
- (b) if so, what principles govern whether the presumed meaning of creditor is displaced in favour of an alternative meaning (the **true meaning**)?
- (c) upon the proper application of those principles, does the true meaning of 'creditor' include the Crown or not?

20

Presumption of Crown immunity from statute

18 Since *Bropho*, the so-called 'presumption' that general words in a statute do not bind the Crown, her agents or her instrumentalities, can be more accurately described as a 'judge-made rule of construction'.¹¹ Where the rule is engaged, it requires a statute of general application to be construed so that the Crown is *prima facie* excluded from its operation unless parliament has manifested its intention to bind the Crown by *something more* than the use of general words in the provision in question.¹²

30

19 In *Bropho*, this Court held that the strength of the presumption depends on the circumstances, and it yields to 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

¹¹ *Bropho* at 15 (per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *ACCC v Baxter* (2007) 232 CLR 1, 27 [44] (per Gleeson CJ, Gummow, Hayne and Crennan JJ).

¹² *Bropho*, 21-22.

provision arises.¹³ In most cases, the presumption will be little more than a starting point for ascertaining the legislative intention.

20 Therefore, in determining whether the rule of construction is displaced in the present case, it is necessary to embark on the orthodox process of statutory construction by attending to the statutory context.

21 Further, there is more recent authority which confirms that there is no basis for applying a presumption that the Crown is not bound unless the provision in question would operate so as to have some effect upon the ‘*interests or purposes of the Sovereign*’.¹⁴

10 22 The decision in *Madras Electric Supply Corporation v Boarland* [1955] AC 667, referred to by the Full Court¹⁵ and in *Bropho*¹⁶ exemplifies the point. In that case the word “person” was used in two very different provisions. In the first, a person was made liable to tax. Not surprisingly, it was held that “person” did not include the Crown. In the second, a person was made liable to tax on a certain profit if that person sold its business to another “person”. The taxpayer sold its business to the Crown and argued that it had not sold its business to a “person” because person did not include the Crown. Not surprisingly, it was held that “person” did include the Crown as in that second context parliament was not intending to affect the rights of the purchaser in any way.

20 23 Whilst it may be said that an order under s 79 or 90AE *affects* the creditor because the creditor is bound by the order, it may also be said that parliament evinces no intention to affect the creditor “to its prejudice” since the power to make such an order can only be exercised if the Court is satisfied that the creditor will be paid in full.¹⁷ Accordingly, there is something to be said for the plurality’s remarks that the presumption is not engaged, rather than rebutted, and that conclusion would be consistent with the observations in the *Madras case*. However since the Full Court only reached this conclusion after construing s 90AE of the FLA in accordance with orthodox principles of construction it is ultimately a distinction without a difference.

30 *The (true) common law presumption yields to the context*

¹³ Ibid, at 21.

¹⁴ *The Registrar of the Accident Compensation Tribunal v Commissioner of Taxation* (1993) 178 CLR 145, 171-172 (per Mason CJ, Deane, Toohey, Gaudron JJ).

¹⁵ *Tomaras*, [16] (per Thackray and Strickland JJ); CAB, 37.

¹⁶ *Bropho*, 16 (per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

¹⁷ s 90AE(3)(b) of the FLA.

24 The true meaning of ‘creditor’ in section 90AE of the FLA must ultimately be determined by reference to its text, context and the general purpose and policy of the relevant statutory provision, which includes any mischief it seeks to address.¹⁸

25 The ‘canons of construction’ do not have privileged status. In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78], McHugh Gummow, Kirby and Hayne JJ stated:

10 “... the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision, But not always. The context of the words, the consequences of a literal or grammatical meaning, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspondence with the literal or grammatical meaning.”

26 The context must be considered at the outset, not merely in circumstances of ambiguity.¹⁹ Legislative history may form part of the context but it is not an end in itself.²⁰

27 A number of textual and contextual features displace the presumed meaning of creditor in s 90AE, most notably that it is displaced in section 79 of the FLA

28 First, section 90AE of the FLA is contained in Part VIII A of the FLA. In section 90AA of the FLA the objects of Part VIII A are described as follows: ‘to allow the court, in relation to the property of a party to the marriage, to (a) make an order under section 79 or 114... that is directed to, or alters the rights, liabilities or property of a third party’.

29 This object is expressed in Division 2 of Part VIII A which bears the heading “Orders under section 79” and the introductory text of section 90AE which provides:

“Court may make an order under section 79 binding a third party

30 (1) In proceedings under section 79, the court may make any of the following orders...” (emphasis added).

¹⁸ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[70] (per McHugh, Gummow, Kirby and Hayne JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [45]-[46] (per Hayne, Heydon, Crennan and Kiefel JJ).

¹⁹ *CIC Insurance v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (per Brennan CJ, Dawson, Toohey and Gummow JJ); *Baini v R* (2012) 246 CLR 469, 484 [42] (per Gageler J).

²⁰ *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 (Per French CJ, Hayne, Crennan, Bell and Gageler JJ).

30 Accordingly, since section 90AE furthers the objects of s 79 of the FLA by *allowing* certain orders to be made pursuant to that section, it must be construed by reference to the text and purpose of s 79 of the FLA, in which the Crown is within the contemplated class of creditors. The AS fails to attend adequately to the text of s 79.

31 Section 79(10) requires the Court to have regard to the interests of ‘*creditors*’ and to accord natural justice to ‘*creditors*’ and to ‘*any other persons whose interests would be affected by the making of the order*’. There is a further protection for ‘persons affected’ by a section 79 order in that such persons, including a creditor who ‘*may not be able to recover his or her debt because the order has been made*’²¹, may apply to
10 set the order aside or vary it if there has been a ‘miscarriage of justice’.²²

32 It is uncontroversial that Parliament intended that creditors of the parties to the marriage, including the Crown, be conferred intervention rights under the FLA for the purposes of proceedings under section 79. It is well-settled that the Crown is a creditor within the meaning of s 79 FLA. The Commissioner concedes as much at [64] AS. Parliament is therefore conferring upon the Crown the right to become a party to those proceedings in order to protect its rights as a creditor of the parties to the marriage and thereby confers a benefit in that the Crown is able to contend for orders in s 79 proceedings that advance its own interests, rather than those of the parties to the marriage.

20 33 If the Crown, like any other creditor, claims a right to intervene in section 79 proceedings, then plainly “*it must take it on the terms of the Act which it invokes*”.²³ It subjects itself to the orders that the Court is empowered to make.

34 In this regard, it is wholly unremarkable to read the word ‘creditor’ in section 90AE as synonymous with ‘creditor of a party to the proceedings’ under section 79. The creditor intervenes in the s 79 proceedings and, for the purpose of making a section 79 order (one that is just and equitable), the Court is empowered to alter the rights of that creditor if satisfied it will be paid in full. That is, Parliament expressly intended that the Crown, with rights as an intervening creditor, is to be subject to orders that the Family Court may make and direct to it for the purposes of s 79 proceedings,
30 including an order allowed by s 90AE..

35 Since at the time s 90AE was enacted, it was well-settled that a creditor within the

²¹ s 79A(4) of the FLA.

²² s 79A(1)(a) of the FLA

²³ *Commonwealth v New South Wales* (1918) 25 CLR 325, 340 (per Isaacs and Rich JJ); *Commonwealth v New South Wales* (1923) 33 CLR 1, 28 (Knox CJ and Starke J).

meaning of s 79 of the FLA included the Crown, the parliamentary draftsman must have been taken to know of this accepted meaning. As the Full Court correctly observed, the accepted meaning of “creditor” in s 79 and the express textual linkage between those sections is strong support for assigning the same meaning to ‘creditor’ in both sections. The creditor intervenes in the s 79 proceedings and, for the purpose of making a section 79 order that is just and equitable, the Court is empowered to alter the rights of that creditor under s 90AE if satisfied it will be paid in full.

36 The Commissioner submits that sections 79 and 79A are very different from s 90AE. But the Commissioner necessarily accepts that the Crown is entitled to intervene in s
10 79 proceedings and to argue against orders being made which would prejudice its prospects of recovery as a creditor of one of the parties to the marriage (as it has done in the past) and the Crown has standing to apply to set aside or vary an order arising from a miscarriage of justice. There is no question that a just and equitable order made under section 79 (or section 79A) may be to the Crown’s advantage or, in its perception, to its disadvantage but it is, whatever the outcome, binding upon it.²⁴

37 The position is the same where the Crown does not expressly intervene as a creditor but is brought into the s 79 proceedings by one of the parties or is otherwise notified in accordance with the requirement to give it procedural fairness. The meaning of creditor cannot change by reason of how that creditor comes to be a party to
20 proceedings under section 79 of the FLA.

38 It is in this context that one must consider the impact that the statute is intended to have on the creditor’s rights. Sections 79(10) and 90AE of the FLA confirm that parliament did not intend to affect creditor’s rights adversely.

39 By section 90AE(3) of the FLA, the Court may only make an order under sections 90AE(1) or (2) if it is ‘*reasonably necessary, or reasonably appropriate and adapted to effect a division of the property between the parties to the marriage*’²⁵ and it is ‘*just and equitable to make the order*’.²⁶ Insofar as the orders concerns ‘a debt’ of a party to the marriage, the order may only be made if ‘*it is not reasonably foreseeable at the time that the order is made that to make the order would result in the debt not being
30 paid in full*’²⁷ and provided the third party has been ‘*accorded procedural fairness in*

²⁴ *Commissioner of Taxation v Worsnop* (2009) Fam LR 552 (where the Court declined to make an order for payment of the husband’s tax debt out the net proceeds of sale of the matrimonial home).

²⁵ s 90AE(3)(a) of the FLA.

²⁶ s 90AE(3)(b) of the FLA.

²⁷ s 90AE(3)(b) of the FLA.

respect of the making of the order'.²⁸

40 Accordingly, nothing in the text of s 90AE distinguishes it from s 79 in a way that
would require 'creditor' to bear a different meaning in s 90AE. Both provisions
recognise that orders made may affect the interests of third party creditors and both
confer rights of intervention upon those third parties to allow them to safeguard their
interests. It is a sound rule of construction to give the same meaning to the same words
appearing in different parts of a statute unless there is reason to do otherwise.²⁹ There
is no reason to depart from the default rule of construction whereby the word creditor
has a uniform meaning in the scheme which comprises both sections, particularly
10 given the express textual linkages between section 79 and section 90AE.³⁰

The presumption yields to the purpose of the FLA

41 A necessary corollary of the Crown being a creditor within s 90AE is that substitution
orders can be made in respect of the debts owed to it by a party to the marriage. There
is nothing in the scheme of the FLA that even hints that Parliament intended that a
debt within s 90AE did not mean all Crown debts.

42 The Commissioner accepts that the Crown debts payable to him are the very debts that
give him, on behalf of the Crown as a creditor, the right to intervene under s 79 of the
20 FLA. For the foregoing textual and contextual reasons, they are the very debts that
can be substituted by the Court under s 90AE. The purpose of section 79 proceedings
reinforces this conclusion.

43 Pursuant to section 79(2) of the FLA, the Court may only make an order if it is
satisfied that, in all the circumstances, it is 'just and equitable' to do so, in accordance
with principles set forth in *Stanford v Stanford* (2012) 247 CLR 108, 120. This is the
overriding purpose of Part VIII of the FLA and, consequently, it is the overriding
purpose of Part VIII A of the FLA.

44 The Court has a broad discretion in making an order under section 79 of the FLA.³¹ In
exercising that discretion in a principled manner, the Court must first ascertain the
30 assets and liabilities of the parties and then, having regard to the parties' existing

²⁸ s 90AE(3)(c) of the FLA.

²⁹ *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611, 618 (per Mason J).

³⁰ *Murphy v Farmer* (1988) 165 CLR 19, 24 (per Brennan and Toohey JJ) and 27 (per Deane, Dawson and Gaudron JJ).

³¹ See *Stanford v Stanford* (2012) 247 CLR 108, [36]-[37].

interests, determine whether it is ‘just and equitable’ to adjust the property interests of the parties. In fairness, no liability should be arbitrarily excluded from this inquiry.

45 Section 90AD of the FLA defines ‘a debt of a party to the marriage’ as ‘property’ for the purpose of the definition of a matrimonial cause in the FLA. It follows that the Court’s jurisdiction extends not only to the division of assets but also to the division of all liabilities of the marriage. This is particularly significant where the liabilities of the parties to the marriage exceed their assets. Part VIII AA was enacted to allow orders to bind creditors and other third parties so that the relief granted under s 79 would be effective to sever the financial links between the parties to the marriage in
10 circumstances where the third party has been afforded procedural fairness and the court is satisfied, insofar as it can be, that the third party will not be worse off. This approach coheres with the Court discharging its duty to end financial relations under s 81 of the FLA.

46 The text of section 90AE must be read in light of the overriding purpose of dividing the property of the parties to the marriage. In terms, s 90AE(1)(b) empowers to the Court, relevantly, in making a section 79 order to ‘*make an order directed to a creditor of one of the parties to the marriage to substitute the other party, or both parties, to the marriage for the party in relation to the debt owed to the creditor*’.

47 The discretion is constrained in that an order may only be made if the Court takes
20 account of the matters set forth in subsection 90AE(4) of the FLA. Relevantly, these matters include: ‘*the taxation effect (if any) of the order*’ on ‘*the parties to the marriage*’³² or ‘*the third party*’;³³ insofar as 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*’³⁴; and any other matters raised by the third parties³⁵ or which the court considers relevant³⁶.

48 Section 90AE is therefore fundamental in furthering parliament’s purpose of ensuring the Court can justly and equitably order a final division of all assets and all liabilities of the marriage, having regard to the corollary ‘rights, liabilities and property interests of third parties’.

30 49 That is, s 90AE is not a power to make orders independently of the power under s 79,

³² s 90AE(4)(a) of the FLA.

³³ s 90AE(4)(b) of the FLA.

³⁴ s 90AE(4)(e) of the FLA.

³⁵ s 90AE(4)(g) of the FLA.

³⁶ s 90AE(4)(h) of the FLA.

but is a power that facilitates the making of the single order under s 79 that finally determines the division of all assets and all liabilities of the marriage.

50 It is noteworthy that the making of an order under s 79 alone which transfers assets between the parties to a marriage may well offer less protection to the creditor than a substitution order made under s 90AE. The transfer of the *assets* of the marriage may occur without the Court being satisfied that the creditor will be able to successfully enforce the debt. By contrast, the s 90AE power can only be exercised for the purposes of s 79 where the Court is satisfied that the creditor will be paid in full. Although the Crown's chose in action against one party may cease to be enforceable, 10 that chose in action remains enforceable against another party in circumstances where, as far as the Court can determine, it is of no lesser value.

51 Thus, having taken all the rights, liabilities and property interests into account for the purpose of arriving at a property settlement, it would be arbitrary and unjust to exclude the alteration of some of debts from the scope of the Court's orders. In some cases, Crown debts will be significant compared with other assets and liabilities of the parties. It is not inconceivable that Crown liabilities might be the principal liability of the parties to the marriage. To construe ss 90AE(1)-(2) of the FLA in a way that excludes the power to make orders with respect to Crown debts (and the Crown's security for them) would, in a number of cases, prevent the Court from making an order that would be 'just and equitable' and, in some cases, may prevent the Court from making any order at all. That would arbitrarily constrain the principled discretion conferred and is inconsistent with the dominant purpose of the FLA.³⁷

20
52 Moreover, when one considers the consequences of the interpretation urged by the Commissioner it can be seen that it frustrates the making of an order in circumstances where it would yield the most just and beneficial outcome for all concerned. Consider the following 'hypothetical' example: *the Husband runs a business but, due to his inter-personal dominance over the Wife, organises the business and family affairs such that tax liabilities lawfully fall on the Wife. At the time the marriage dissolves, there are few assets to speak of but there is a large tax-related debt owed by the Wife to the Commissioner. This is the only substantial unsecured debt of the marriage. The Wife has little or no income-earning capacity whereas the husband has substantial income-earning capacity (but no assets). The Court determines that it*

³⁷ *Hunt v Hunt & Anor* (2006) 36 Fam LR 64, 81.

would be just and equitable, in dealing with the liabilities of the marriage and in severing financial ties, to substitute the Husband for the Wife as the tax debtor. After hearing from the Commissioner, the Court concludes that there is no evidence that the Commissioner would ever be worse off as a result of the order and it is more likely than not that the Commissioner's prospects of recovering the tax debt would be greater if the Husband were liable. Throughout the marriage, the husband had the effective benefit of the income upon which tax was paid and is thereby not prejudiced by being called upon to meet the tax liability on behalf of the Wife. And the Court is also persuaded that the Wife, who received little effective benefit from the income upon which tax was paid during the course of the marriage, is only likely to be further oppressed by leaving her the subject of a substantial tax liability.

10

53 This highlights the implausibility of the Commissioner's construction in that the Commissioner contends that even where the order sought would be 'just and equitable' as between the parties to the marriage and even where the interests of recovery of the Crown debt would be improved by the making of the order, the Commissioner submits that the Court should be completely without power to deal with a Crown debt the same way it would unquestionably be entitled to deal with any other debt. This undermines the very mischief of s 90AE of the FLA.

20

54 Accordingly, the Wife would suffer an arbitrary injustice and the Husband would escape financial accountability simply because of the identity of the creditor. It is difficult to conceive of a construction that could be more antithetical to the objects of the FLA.

55 *A fortiori*, the logical consequence of the Commissioner's submission is that even in circumstances where the order sought by the Wife is merely that the Husband be made jointly and severally liable for the debt (i.e. where the Commissioner is axiomatically better off as a consequence of the order), the Family Court is still powerless to make such an order where it would otherwise be just and equitable to do so.

30

56 Consider another typical example: *the Husband owns the family home. Husband has a first mortgage debt liability to the Bank. Husband owes two debts to the Crown, one being a finalised taxation debt. Crown has second mortgage over family home to secure the Crown debts, payable in instalments. The Court considers it prima facie desirable to make an order under s 79 of the FLA that the family home be transferred to the wife as she is the primary carer for the children.*

57 It is here that s 90AE facilitates the making of just and equitable orders under s 79 that

might be denied if the power under s 90AE were not available. In order to give effect to the Court's conclusion that the wife and children should have a stable roof over their heads, having regard to the interests of the parties to the marriage and also to the rights of creditors to be paid their debts following the making of orders, s 90AE would allow the Court to make additional orders substituting the wife for the husband as the debtor of the Bank and of the Crown and to avoid the family home being sold to repay those liabilities immediately. The primary objective can thereby be achieved while the security interests of the Bank and the Crown are still protected.

10 58 There is no reason in principle or logic under this regime to differentiate between the Bank and the Crown in this scenario.

59 Rather, a construction that excludes only the Crown as a creditor, and only the liabilities to it, defeats the purpose of s 90AE of the FLA, being to facilitate the just and equitable division of the property of the marriage in s 79 proceedings.

60 Such a construction artificially constrains the Court in its duty to achieve that purpose by treating one third party as special and to be excluded. The Court must work around, by hypothesis, the immutable rights, liabilities and property interests of the Crown to reach a contorted solution (if any solution at all), instead of actively taking those matters into account and adjusting those rights, liabilities and property interests taking full account of Crown's position and providing it procedural fairness.

20 61 It is submitted that the absurdity of the consequences of adhering to the common law presumption, and its potential to interfere with the fundamental objectives of the FLA, provides strong contextual support for the plain and ordinary meanings of 'creditor' and 'debt' within s 90AE, such that the debts within s 90AE include those debts taken into account in section 79 proceedings, which include those which are owed by the parties to the marriage to the Crown as their creditor.

Exclusion of tax debts issue

30 62 A limited presumption to the effect that the Commissioner of Taxation, as opposed to Crown agents generally, is immune from statutory interference for Commonwealth taxation debts is unknown to law.

63 Furthermore, and to the same effect, the presumption that the Crown is not bound by a statute of general application cannot be displaced in a piecemeal manner. Either the presumption is displaced for the Crown in right of the Commonwealth and in right of the States as a creditor or not at all. The Crown is either a creditor susceptible to

orders under the FLA in respect of all Crown debts (if the presumption is displaced) or it is not a creditor at all for the purposes of those orders.

64 The onus is therefore on the Commissioner to demonstrate a positive intention on the part of parliament that the Crown be wholly within section 79 as a creditor but partially excluded from the operation of s 90AE of the FLA (insofar as it is a creditor for Commonwealth tax-related liabilities only).

65 The Commissioner faces several insuperable obstacles in this regard.

66 *First*, the submissions made above as to consistency in the meaning of ‘creditor’ given the relevant rule of construction and the express textual linkages between s 79 and 10 90AE apply with equal or greater force in answer to the submission that the Crown is partially excluded.

67 *Second*, the potential for such a construction to frustrate the purpose of the FLA is equally problematic if tax-related liabilities cannot be dealt with under sections 79 and 90AE. If the conclusion urged by the Commissioner is correct, then the Family Court is left attempting to make a just and equitable property division under s 79 FLA, constrained by treating Federal (and State) taxation debts as immutable, as islands that must be worked around whilst the assets and all other debts, including other Crown debts, can be transferred.

68 *Third*, the Full Court correctly had regard to section 90ACA of the FLA, which 20 purports to expressly exclude superannuation annuities, even though not all such annuities are provided by the Crown. This demonstrates that the legislature turned its mind to appropriate exclusions from Part VIII A A and it would be odd if it did not expressly exclude tax-related liabilities from the class of ‘property’ that can be dealt with under that Part if those debts were intended to be excluded.

69 *Fourth*, the Commissioner’s submission that Crown debts that are payable to him are specially excluded is predicated upon implications derived from the Commonwealth taxation legislation. These arguments apply in the same way to the State taxation legislation.

70 However, Parliament has expressly provided by section 90AC of the FLA that the 30 implications of these various Federal and State revenue statutes, and indeed the policies reflected in any other legislation, are not to affect the plain meaning of s 90AE. It is therefore submitted that, contrary to the Commissioner’s submission, the Court is required to ignore any implications that might otherwise be derived from these other statutes.

71 *Fifth*, even if it were necessary for the Court to have regard to the taxation policies
outside the FLA, nothing in the structure of the taxation regime compels a special
exception for amounts that the same legislation expressly makes Crown debts. The
Commissioner on behalf of the Commonwealth intervenes in section 79 proceedings
regularly as a creditor in relation to taxation debts owed by a party to the marriage
without any suggestion that the efficacy of the taxation regime is undermined. There
is no reason why it should be any different with s 90AE.

72 The limited features of contestability under the exclusive Part IVC regime that the
Commissioner identifies in his submissions do not apply to many of the tax-related
10 liabilities listed in the tables in Division 250 in schedule 1 of the TAA, such as the
GIC, which the Commissioner seeks to exempt from the operation of s 90AE orders.
Part IVC of the TAA provides no justification for treating such tax-related liabilities
as a special case. These same contestability features arise in respect of state tax debts,
which are subject to exclusive regimes cognate with Part IVC. This consideration
applies *a fortiori* to judgment debts. As this Court observed in *Chamberlain's* case:
“A statutory obligation to refund tax as a consequence of a successful appeal or
reference by the taxpayer has nothing to do with the existence and character of the
cause of action involved.”³⁸

73 Most importantly, as exemplified by the present facts, Part IVC procedures are
20 completely irrelevant once they are spent and the tax liability determined finally
because “[when] the Court finally declares the mutual rights of the Crown and the
taxpayer ... the general principles of law apply to make the contest final and the rights
unchallengeable.”³⁹

74 The Commissioner’s submission that the Crown will be prejudiced in the recovery of
taxation debts by a s 90AE substitution order is unfounded and, in any event, he has
standing to raise any prejudice before the Court in the exercise of its power. Any
special powers that the Commissioner has under taxation legislation to collect Crown
debts are unaffected. The most important of those powers is the garnishee power in
section 260-5 in schedule 1 of the TAA. It allows the Commissioner to target third
30 parties who owe money to a debtor, being a person who owes a tax-related liability or
a judgment debts payable to the Commissioner. A substitution order fits precisely into

³⁸ *Chamberlain v Federal Commissioner of Taxation* [1988] HCA 21; (1988) 164 CLR 502, 511 (Deane, Toohey and Gaudron JJ).

³⁹ *W & A McArthur Ltd v Federal Commissioner of Taxation* (1930) 45 CLR 1, 10 (per Isaacs CJ).

that power, such that the garnishee power becomes exercisable against the third parties who owe money to the Husband, rather than the Wife, as the debtor. Moreover, the word “taxpayer” in these collection provisions encompasses a debtor who is substituted by the Crown, being the person who for the time being owes the tax-related liability to the Crown. The assumption underlying the Commissioner’s submission, that the word “taxpayer” is not capable of encompassing two persons – the person who originally derived the income and the person who has been substituted as the debtor in compliance with a s 90AE order, depending on the appropriate context – is contrary to authority: cf *Trust Company of Australia v Commissioner of State Revenue* (2003) 77 ALJR 1019; [2003] HCA 23. Furthermore, the Crown has the additional protections under the FLA that the Court cannot make an order unless it is satisfied that the Commissioner is likely to be paid in full.

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75 *Sixth*, insofar as the Commissioner suggests that allowing such orders to be made would be inconsistent with the principles of justice because substituted debtors would be deprived of dispute rights that the original taxpayer would have possessed, the Commissioner’s contentions lack force and have no application to the vast majority of Commonwealth and State taxation debts that are mundane uncontested liabilities of the parties to the marriage within s 79 proceedings.

20

76 A dispute over a debt between the Crown (or any other creditor) and a party to the marriage is obviously never enough to exclude a debt from s 90AE of the FLA. It will often be problematic for a substituted debtor to dispute a debt, *a fortiori* where one objective of a s 79 order is to finalise the relationship between the parties. The fact of, or the potential for, any ongoing or potential dispute with any creditor is a matter that the Court would take into account in the *exercise* of its s 90AE power.

30

77 Moreover, the fact that the debt is one of those which is liable to be contested in Part IVC proceedings, or any other proceedings if the Commissioner chooses not to tender a notice of assessment and rely on s 177 ITAA36 as conclusive evidence in those other proceedings (see *FW Bloemen v Federal Commissioner of Taxation* (1981) 147 CLR 360), is irrelevant to the Commissioner’s duty to recover it from the party to the marriage: sections 14ZZM and 14ZZR TAA; *Commissioner of Taxation v Broadbeach Properties Pty Ltd.* (2008) 237 CLR 473. It is a matter that does not prevent him claiming the right to intervene on behalf of the Commonwealth as a creditor in proceedings under section 79 of the FLA. He seeks protection for the full amount of the liability (not to preserve the identity of the debtor) and the Court is empowered to

provide that protection, including by altering the identity of the debtor by a substitution order.

78 Indeed, if it were true that a taxpayer's rights to object were destroyed by a s 90AE substitution order, that would be a matter for the relevant party to the marriage to raise in opposing the order and could be a matter only for the benefit of the Crown.

79 It is to be recalled that a section 79 order, including sub-orders under s 90AE, is a discretionary power that is only to be exercised after the Court has been apprised of all the relevant circumstances. The Full Court was correct to observe (at [43] and [79]) that the availability or non-availability of contestability procedures will be a factor to be taken into account in the *exercise* of the s 90AE power of substitution, just as
10 uncertainties as to the quantification of other liabilities would be taken into account by the Court.

80 *Seventh*, all the Commissioner's arguments are directed at making a tax-related liability a special case due to his apparent concern that the Wife and all other taxpayers might not be able to contest that liability under Part IVC of the TAA.

81 There is no special case on the facts of these proceedings because the Wife's Debt is finalised and stands in precisely the same position as other Crown debts.

82 The Commissioner's special taxation argument deals with a hypothetical situation of a taxpayer who is within that limited period of time where he or she has a legal right to object (and an intention to object) but nevertheless seeks to be substituted for the other
20 party to the marriage. The facts in the Case Stated confirm the Wife has no right to contest her debt as the taxpayer under Part IVC of the TAA and accordingly these considerations do not arise.

83 Outside that limited period of time or where the contest has concluded, the relationship between the Commissioner and the taxpayer is merely one of undisputed creditor-debtor.

84 In *W & A McArthur Ltd v Federal Commissioner of Taxation* (1930) 45 CLR 1 ('**McArthur**') at 10, Isaacs CJ observed:

30 *There must be an assessment for each year in respect of every business to which the Act applies, be it right or wrong. If right, it must be enforced; if wrong, it must be corrected or declared wrong. Its existence cannot be administratively annihilated, but it may be altered from time to time until the Court finally declares the mutual rights of the Crown and the taxpayer. When that is done, the general principles of law apply to make the contest final and the rights unchallengeable. (emphasis supplied)*

85 In *Deputy Commissioner of Taxation v Brown* (1958) 100 CLR 32 (**‘Brown’**), the High Court was divided as to whether the Commonwealth could, as a creditor of a deceased estate, follow funds distributed by the Executors among beneficiaries. Those Executors had existing rights to object under Division 5 *Income Tax Assessment Act* 1936 (Cth) (the predecessor to Part IVC TAA) against the Estate’s income tax assessments but no duty to, or interest in, doing so. The minority (Taylor J and Kitto J) held that the Commonwealth had rights no different from other creditors to which the general law of debts was applicable.

86 The majority differed, seeing it as critical that the tax liability was contestable by the
10 Executors as taxpayers but could not be contested by the beneficiaries, who were not the taxpayers and given no objection rights under Division 5 *Income Tax Assessment Act* 1936. They saw the tax debt and the live right to contest it as being linked to the same taxpayer and it being unacceptable that the Commonwealth could claim the debt from a person who could not contest it as taxpayer where the taxpayer itself chose not to do so.

87 For the reasons given by this Court in *McArthur* and *Brown*, a *finalised* taxation liability is a debt to be dealt with as such by the general law. That is the position in these proceedings. The Wife’s Debt is no different from any other Crown debt.

88 But the legal answer is ultimately the same as for other Crown debts, including
20 finalised taxation debts, for the following reasons.

89 For the reasons given by the majority in *Brown*, an assessed income tax liability that remains open to be contested by the taxpayer in Part IVC proceedings may stand in a special position in respect of the persons from whom the Commissioner may recover that tax. Parliament nevertheless chose to deem the tax liability to be a pecuniary liability due to the Commonwealth and recoverable by the Commissioner in a Supreme Court – see section 250-1 in schedule 1 TAA.

90 So it is a debt and the Commonwealth is a creditor. As such the taxpayer is a debtor
and can be substituted. The substituted party does not stand as a third party in relation to the debt and the Crown, but the new debtor of the Crown. In any event, the Full
30 Court has observed that this hypothetical concern poses no difficulty in practice and as Aldridge J observed at *Tomaras* [79]:

“a more complete answer is that it is most unlikely that any orders would be made under s 90AE if there were genuine issues of substance that would justify an objection or an appeal which was being or was likely to be pursued.”

91 *Eighth*, the fact that a taxation liability is susceptible to increase by way of an
amended notice of assessment procedure has no implication in support of the
Commissioner's construction. Once again, the Crown's rights to an additional amount
of tax from the taxpayer party are unaffected and the substituted judgment debtor is
simply not involved. The parties to the marriage take the assets and liabilities of their
respective spouses as they find them. The substituted debtor need not be subrogated
to the rights of the original debtor. Those rights remain unaffected. The task of the
Court is to fashion a just and equitable order taking account of the assets and liabilities
of the marriage as they stand as at the date of the order, taking account of reasonably
foreseeable contingencies.

10
92 Therefore, implications gathered from the Federal and State taxation legislation cannot
be taken into consideration by reason of s 90AC of the FLA and, in any event, provide
no positive support for inferring the exclusion of tax-related liabilities that are
contestable under Part IVC of the TAA and cognate provisions from the meaning of
"debt" in s 90AE of the FLA.

Conclusion

93 It is respectfully submitted that, for the above reasons, the Full Court of the Family
Court of Australia correctly answered the question stated for its opinion and the appeal
should be dismissed.

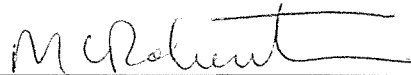
Part VII: Notice of Contention or cross-appeal

94 The Wife does not consider that a notice of contention is necessary and has not filed a
cross-appeal.

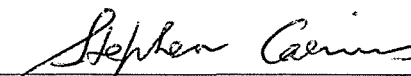
Part VIII: Time Estimate

95 The Wife estimates that 2 hours is required for presentation of her oral argument.

Dated: 18 June 2018



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