

MEMORANDUM

RE: Agrinova

DATE: 24 June 2024

Stamp Duty on Divorce

1. When a couple splits, they have quite enough stress without paying State and Territory stamp duty on their property adjustment.
2. This was recognised early in the life of the Commonwealth's *Family Law Act 1975 (FLA)*. And this tax relief has had bipartisan support at Federal level.
3. Malcolm Fraser's Attorney-General, Bob Ellicott, persuaded parliament to insert section 90, in 1976.
4. It exempted dealings with property, spousal maintenance, and maintenance agreements, if made under Part VIII of the FLA.
5. But the Commonwealth can only legislate in the fields stated in the Federal Constitution.
6. The three heads of Commonwealth power relied on were:
 - (a) marriage;
 - (b) divorce and matrimonial causes; and
 - (c) the incidental power – that is, matters incidental to the other two powers mentioned.
7. Then came *Gazzo's* case.
8. On the divorce of Mr and Mrs Gazzo, the trial court required the husband to transfer Victorian land to his wife as trustee for their children.
9. In obedience, Mr Gazzo signed a transfer.
10. The Victorian State Revenue assessed it to stamp duty.
11. Mrs Gazzo objected, saying that the transfer was exempt under section 90 of the *Family Law Act*.
12. That objection was disallowed. The Comptroller of Stamps considered section 90 was invalid.

13. Mrs Gazzo's appeal was removed to the High Court of Australia.
14. The High Court found that section 90 was indeed invalid.
15. As a consequence, from date of judgment, 24 December 1981, it was beyond doubt that section 90 provided no exemption from stamp duty on such documents.
16. The Commonwealth did not give up.
17. In 1983, under the Hawke government, Deputy Prime Minister Lionel Bowen presented a Bill to revive section 90.
18. I recall, seven years later as an articled clerk, looking at the language of the new provision, and wondering how it differed from the old. I still wonder.
19. Neither the explanatory memorandum, nor the supplementary EM, to the *Family Law Amendment Bill 1983* outlines why the new provision is different.
20. Experienced practitioners have been cautious about the viability of a claim for exemption under section 90 of the *Family Law Act*, despite the 1983 revival.
21. While there has long been a suspicion that the Gibbs Court read the Constitution a little narrowly in *Gazzo*, decisions of the High Court can be hard to move.
22. Thus, I have urged parties to attempt to avoid or settle any dispute, rather than litigate this point. There was always the prospect of a private client becoming mere bycatch in a larger dispute between the States and the Commonwealth.
23. It is true that individual Members of the High Court of Australia have since doubted the correctness of *Gazzo*.
24. But the point has not been directly litigated, probably because private litigants with even comparatively large stamp duty bills, would find the tax bill overwhelmed by legal costs.
25. But now the New South Wales Civil and Administrative Tribunal has decided that section 90, in its current form, is indistinguishable from that held invalid in *Gazzo*.
26. NCAT found that no stamp duty exemption applied under the new, also invalid, section 90.
27. Senior Member Frost in *Agrinova Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWCATAD 170 (21 June 2024) would not entertain arguments about the whether the present High Court of Australia would overturn *Gazzo*. SM Frost explained why he was bound by the decisions of the High Court of Australia, regardless of the subsequent debate as to *Gazzo*'s correctness:
 65. ... I must follow what the High Court decided in *Gazzo* – that s 90 of the *Family Law Act*, as it then stood, was not a valid law of the Commonwealth.
... Since I do not accept that the current version of s 90 is relevantly different from the earlier version struck down by the High Court, I conclude that the decision in *Gazzo* applies with equal force to the current version of s 90.
28. This leaves us in an awkward position.
29. A Tribunal, whose decision binds no one, has made a conventional finding that it is bound by the High Court of Australia.

30. That is in the face of an updated version of section 90, which the Tribunal finds not to be relevantly different from the version struck down in *Gazzo*. This is in the face of some judicial discussion as to the correctness of *Gazzo*.
31. The immediate effects for those advising in this field nevertheless are plain.
32. No one can hide behind the re-enactment of section 90, or later judicial criticism of *Gazzo*.
33. The profession is on notice that a client relying on section 90 of the *Family Law Act* may at least be caught up in expensive litigation, and on a trip to the High Court in the company of all Attorneys-General.
34. To illustrate the point, the Queensland *Duties Act* only has narrow provisions for exempting matrimonial and *de facto* relationship instruments (Chapter 10 Part 3).
35. The Queensland legislation appears to rely on section 90 to give further width. Section 424, Note 1 says:

Exemptions for duty for particular instruments and maintenance agreements are provided in the Family Law Act 1975 (Cwlth), section 90.
36. Section 424, Notes 2 & 3, also cross-refer to other exemptions in the *Family Law Act* -- sections 90L and 90WA of the *Family Law Act*.
37. Those three notes to section 424 of the *Duties Act (Qd)* must now be in doubt.
38. This recent case, *Agrinova*, is from New South Wales.
39. We will need to examine the width of any exemptions offered in a State or Territory in which they practice, to see what can be achieved in the event that an application for exemption under section 90 of the *Family Law Act* is now rejected by a State or Territory revenue authority.
40. This will take some time to sort out. In the meantime, there is increased risk for all.
41. And there is no obligation on the unsuccessful applicant in *Agrinova* to appeal. The process of appeal in New South Wales would be time consuming and costly.
42. In the meantime, at time of dictating this (Monday, 24 June 2024), the QRO's website in Queensland still referred to exemptions from transfer duty relevantly under the *Family Law Act*.

David W Marks KC

Inns of Court, Brisbane

24 June 2024