

Binding the Crown and Sexually Transmitted Debt

David Smith reports on *Commissioner of Taxation v Tomaras* [2018] HCA 62

The High Court considered whether the presumption that legislation does not bind the Crown applied to Part VIII A of the *Family Law Act* 1975 (Cth). The Court also commented on when it is appropriate to state a question of law, before determining the merits.

Part VIII of the *Family Law Act* is concerned with spousal maintenance and the division of property of parties to a marriage. Part VIII A permits a court to make an order that is directed to, or alters the rights, liabilities or property interests of a third party to the marriage. Specifically, a court may make an order directed to a creditor of one party to a marriage to substitute the other party to the marriage in relation to the debt owed to that creditor (s 90AE). That is, in adjusting the property rights of parties to a marriage, a court can make one party liable for the other party's debts.

In proceedings before the Federal Circuit Court, a question arose whether the Court had power to order that a husband be substituted as the debtor in respect of a taxation liability owed by his wife. The Commissioner contended that he was not bound by Part VIII A of the *Family Law Act* and so could not be the subject of an order substituting one debtor for another. The issue for the High Court in *Commissioner of Taxation v Tomaras* [2018] HCA 62 (Tomaras) was therefore whether Part VIII A of the *Family Law Act* binds the Crown.

The wife sought an order that the husband be liable for an unpaid judgment debt obtained by the Commissioner in 2009. The husband was an undischarged bankrupt. The Commissioner was granted leave to intervene. Rather than decide the case on its merits, the Federal Circuit Judge stated a question of law for the opinion of the Full Court of the Family Court under s 94A of the *Family Law Act*.

It was held in *Bropho v Western Australia* [1990] HCA 24; (1990) 171 CLR 1 at [17] that it is a rule of statutory interpretation that legislation is presumed not to bind the Crown, but an intention to bind the Crown



may be discerned from the provisions of the statute, including its subject matter and its disclosed purpose and policy, construed in context. As Gageler J put it in *Tomaras* at [18]: ‘... *the presumption is displaced simply where an affirmative intention to alter the legal position of the Commonwealth, State or self-governing Territory appears from the text, structure, subject matter or context of the statute.*’

In four judgments, all five judges of the High Court held that Part VIII A binds the Crown. The main reasons given were:

- a. It was common ground that the Crown was a ‘creditor’ under Part VIII of the Act. Part VIII A is expressly ancillary to Part VIII: it allows the Court to make orders under Part VIII that are directed to third parties. It follows that ‘creditor’ should have the same meaning in Part VIII A as it has in Part VIII (Kiefel CJ and Keane J at [5]; Gordon J at [77]; Edelman J at [119]).
- b. There is nothing in the application of Part VIII A to suggest that its practical effect on the Commissioner would be different from its effect on other creditors. All creditors are protected from any adverse effects of an order under Part VIII A. Under s 90AE, an order directed at a third party creditor cannot be made if it is foreseeable that the order would result in the debt not being paid in full or where the order would be unjust or inequitable (Kiefel CJ and Keane J at [7] to [8]; Gordon J at [78]; Edelman J at [126] to [128]).

c. A ‘third party’ is defined in Part VIII A as ‘a person who is not party to the marriage’ (s 90AB). Under s 2C *Acts Interpretation Act* 1901 (Cth), a reference to a ‘person’ includes a reference to a ‘body politic’ absent something to indicate a contrary intention (Gageler J at [21]; Edelman J at [121]).

d. Part VIII A is expressed to have effect despite anything to the contrary in any other law: s 90AC(1)(a) (Gageler J at [22]; Gordon J at [76]; Edelman J at [129]).

Such considerations will be important in future cases considering whether legislation binds the Crown.

Two further matters may be noted briefly. First, Kiefel CJ, Keane and Gordon JJ observed that orders for substitution under Part VIII A will be rare because of the requirements that it not be foreseeable that the order would result in the debt not being paid in full and that it be just and equitable to make the order (Kiefel CJ and Keane J at [10]; Gordon J at [90]). Secondly, Kiefel CJ and Keane J said it was ‘regrettable’ that the matter proceeded as a special case stated because the question would not have arisen had the case been determined on its merits (Kiefel CJ and Keane J at [13]; see also Gordon J at [93] to [96]). By contrast, Gageler J (at [6]) and Edelman J (at [132]) considered that the case stated procedure was appropriate.