CASE NOTE

GAZZO v THE COMPTROLLER OF STAMPS (VIC); EX PARTE THE ATTORNEY-GENERAL FOR VICTORIA[1]—A CHRISTMAS CAROL

Constitutional law (Cth) — Constitution (Cth) s 51(xxi) marriage power, (xxii) divorce power, (xxxix) incidental power — Whether Commonwealth statutory exemption of maintenance agreements from State taxes valid — Family Law Act 1975 (Cth) s 90 — Stamps Act 1958 (Vic) s 32 — Transfer of Land Act 1958 (Vic) Sch 20.

Family Law — Commonwealth statutory exemption of maintenance agreements from State taxes — Whether valid exercise of marriage power, divorce power, or incidental power under Constitution (Cth) — Constitution (Cth) s 51(xxi), (xxii), (xxxix) — Family Law Act 1975 (Cth) s 90 — Stamp Act 1958 (Vic) s 32 — Transfer of Land Act 1958 (Vic) Sch 20.

On Chrismas Eve last the High Court handed down its decision in *Gazzo* v *The Comptroller of Stamps (Vic).* The majority held that s 90 of the Family Law Act 1975 (Cth)[2] was constitutionally invalid in its attempt to exclude State stamp duty on transfers of property between married persons pursuant to Family Court Orders. The decision has a substantial financial impact on divorcing couples, many of whom are faced with the division of matrimonial property which is already of limited proportions. It may also provide important indications of the constitutional directions in which the various judges are moving, more especially with respect to the marriage and divorce powers.

On 26 May 1977 the Victorian Supreme Court exercising federal jurisdiction under the Act dissolved the marriage of Mr and Mrs Gazzo.[3] The Court also ordered the husband to transfer his interest in their former matrimonial home to the wife as trustee for the children of the marriage. Mr Gazzo duly executed the transfer deed and presented it for registration under the Victorian Torrens title legislation, the Transfer of Land Act 1958 (Vic). However the Stamps Act 1958 (Vic) required a settlor of property to pay an *ad valorem* impost on the deed.[4] Until it was paid, and the document duly stamped, the Registrar of Titles could not register the transfer.[5] The Comptroller of Stamps assessed the duty owing on the Gazzo's deed at $616.[6] Mr Gazzo formally objected on the ground that s 90 of the

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[1] (1981) FLC 91-101; (1981) 38 ALR 25; (1982) 56 ALJR 143; High Court of Australia; Gibbs CJ, Stephen, Mason, Murphy and Aickin JJ.

[2] Hereinafter referred to as "the Act".

[3] The Supreme Courts of the States were invested with federal jurisdiction during a transitional period: s 39 of the Act.

[4] S 70(3) and the Third Schedule of the Stamps Act.

[5] Stamps Act s 37.

[6] The States never fully accepted the constitutional validity of s 90. While different practices grew up in the offices of the State Stamp Duty Commissioners, Court ordered transfers between spouses were generally exempted. The Victorian Commissioner levied the duty in the *Gazzo* case because the ultimate beneficiary of the transfer was not the wife but the children as the beneficiaries of the trust ordered to be set up by the Court.

Act exempted the deed from any State duty. The matter was removed to the High Court on application of the Victorian Attorney General for a decision on the question whether s 90 was a valid law of the Commonwealth.[7]

Section 90 provides that:

> A maintenance agreement, or a deed or other instrument executed by a person for the purposes of such an agreement or for the purposes of, or in accordance with an order under, this Part, is not subject to any duty or charge under any law of a State or Territory or any law of the Commonwealth that applies only to or in relation to a Territory.

The expression "maintenance agreement" is defined in s 4 as:

> . . . an agreement in writing made, whether before or after the commencement of this Act, between the parties to a marriage, being an agreement that makes provision with respect to financial matters, whether or not there are other parties to the agreement and whether or not it also makes provision with respect to other matters, and includes such an agreement that varies an earlier maintenance agreement.

The "financial matters" that may be covered in those agreements are defined in s 4 as follows:

> "financial matters", in relation to the parties to a marriage, means matters with respect to—
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> (a) the maintenance of one of the parties;
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> (b) the property of those parties or of either of them; or
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> (c) the maintenance of children of the marriage.

Section 90 clearly purports to exempt a wide range of financial transactions made between married persons, whether entered into voluntarily or pursuant to a court order, whether during the currency of the marriage or on its breakdown, or whether involving only the married persons and their children or third parties as well.

The Chief Justice and Aickin J expressly narrowed the question for their consideration to the validity of s 90 in its application to court ordered transfers. However their reasoning would seem to deny s 90 any application at all. Stephen J held the section invalid *in toto*. Of the minority, Mason J found it necessary only to uphold its validity in respect of court ordered transfers, and Murphy J upheld it *in toto*. The net result would seem to be that s 90 is totally invalid in its present form.

As the Bench points out,[8] for s 90 to be a valid law of the Commonwealth it must be either a law with respect to (a) Marriage (s 51(xxi)); or (b) Divorce and matrimonial causes (s 51(xxii)); or (c) Matters incidental to the execution of the powers vested by the Constitution in the Federal Judicature (s 51(xxxix)).[9]

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[7] Pursuant to s 40(1) *Judiciary Act* 1903 (Cth).

[8] *Eg* (1981) FLC 91-101, 76,717, (1981) 38 ALR 25, 28 *per* Gibbs CJ.

[9] Para (xxxix) does of course also apply to matters incidental to the execution of a head of legislative power. While the Court recognised the theoretical distinction between s 51(xxxix) in its application to a head of legislative power and the implied incidental area of that power, Their Honours thought that it was of little consequence in this case and treated the issues as one.

The leading majority judgment is that of the Chief Justice. The first question His Honour considers is whether s 90 falls within what might be described as the central area of the marriage power. The crucial question in His Honour's view is whether the particular law ". . . creates, defines or declares rights or duties that arise out of, or have a close connection with, the marriage relationship".[10] His Honour states that this is in each case a question of degree. However, His Honour considers that:

> it is not enough that the [particular] law incidentally touches on marriage, or that Parliament has seized on the fact of marriage as a justification for the enactment of a law which really deals with some other topic.[11]

Thus, His Honour states that a law which, for example, purported to exempt all married persons from State taxes would not be a law with respect to marriage. Such a law would, in His Honour's view, be concerned instead with the relationship between a State and its citizens, and the fact that it applies only to persons who are married would be too remote a connection to bring it within power.

Although His Honour feels that there is some connection between s 90 and either the marriage or divorce powers or both, he considers that this connection is not sufficient to bring it into the central area of either power. The object of the section in His Honour's view:

> is to destroy a liability that would otherwise be owed by a person (albeit a married person) to a State, under a law which does not take as the criterion of the liability anything related to the marriage or the matrimonial cause.[12]

Stephen J, taking a similar view, states that any connection between the marriage and divorce powers and s 90 arises only when the State laws, in the course of applying generally to all documents falling within their reach, encounter, quite randomly, documents which relate to marriage or its dissolution.[13]

Aickin J reached the same conclusion but by alternate reasoning[14] founded on comments made by Gibbs J (as he then was) in *Ascot Investments* v *Harper*.[15] In that case His Honour held that s 114 of the Act empowered the Family Court to make orders affecting the rights of third parties when dealing with the rights and duties of the parties to the marriage. However, His Honour commented in passing that if s 114 allowed the Court to go further and destroy the rights of third parties, then it would be necessary to determine its constitutional validity.[16] Aickin J considers that s 90 raises the constitutional difficulties hinted at by Gibbs J as it purports to destroy the rights of a third party, the Victorian Comptroller of Stamps.

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[10] (1981) FLC 91-101, 76,718-76,719; (1981) 38 ALR 25, 30 quoting from his own judgment in *R* v *Lambert; ex parte Plummer* (1980) FLC 90-904, 75,691; (1980) 32 ALR 505, 512.
[11] (1981) FLC 91-101, 76,719; (1981) 38 ALR 25, 30.
[12] *Ibid.*
[13] (1981) FLC 91-101, 76,722-76,723; (1981) 38 ALR 25, 35.
[14] (1981) FLC 91-101, 76,736; (1981) 38 ALR 25, 54.
[15] (1981) FLC 91-000, 76,051; (1981) 33 ALR 631.
[16] (1981) FLC 91-000, 76,061; (1981) 33 ALR 631, 644.

However, as the Chief Justice points out, every legislative power carries with it "authority to legislate in relation to Acts, matters and things the control of which is found necessary to effectuate its main purpose . . .".[17] Thus, although a particular law may not be within the central area of a power, it may yet be valid as being incidental to that power.

In His Honour's view, the Parliament could, as incidental to the marriage and divorce powers, legislate so as to make the orders of the Family Court effective and to provide against any impairment of their practical efficacy.

The Chief Justice refers to the previous decisions of the Court in *Commonwealth* v *Queensland*[18] and the *Australian Coastal Shipping Commission* v *O'Reilly*[19] as illustrating that the Commonwealth can in the exercise of its incidental powers exclude State taxation where it is necessary to render effective the exercise of a power. In the former, the Court upheld a Commonwealth law exempting interest payments on Treasury bonds from State income tax. In a passage from their joint judgment quoted by Gibbs CJ, Isaacs and Rich JJ state that the imposition of State taxation would derogate from the Commonwealth's ability to secure to itself the full benefit of its revenue powers and could frustrate the financial position of the nation as a whole. In the *O'Reilly* case, the Court upheld the power of the Parliament to exempt Commonwealth corporations set up for Commonwealth purposes from the burden of State taxation.

However, His Honour considers that unlike the situation in these two decisions, the exercise of the Commonwealth's marriage and divorce powers by way of orders of the Family Court is nonetheless effective even though the ordered transfers are subject to State taxation. In His Honour's view, the liability to pay tax does not prevent or impede a person complying with an order, though it may subject him or her to a greater financial burden in executing it. His Honour concedes that the situation would be different if the State tax constituted what he termed a "practical barrier".[20] The example His Honour gives is of a tax equalling or exceeding the value of the property to be transferred.

His Honour refers to the *Second Uniform Tax* case[21] and the *Royal Metals* case[22] in support of his view that a law is not incidental simply because it facilitates the execution of a matter within Commonwealth power. Further, His Honour considers that these two decisions also confirm that it is not always irrelevant to the question whether a law is incidental to a Commonwealth power that its effect would be to invade State power.

Stephen J reached a similar conclusion by reference to the reasoning of Menzies J in *O'Reilly's* case. Menzies J was the only judge to consider the wider issue of whether the Commonwealth could in the exercise of its trade and commerce power exempt traders from State taxation. Stephen J quotes a passage from His Honour's judgment in which he states that a law is not one with respect to trade merely because it gives some financial benefit to

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[17] (1981) FLC 91-101, 76,719; (1981) 38 ALR 25, 30 quoting from *Grannall* v *Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77.
[18] (1920) 29 CLR 1.
[19] (1962) 107 CLR 46.
[20] (1981) FLC 91-101, 76,721; (1981) 38 ALR 25, 33.
[21] *Victoria* v *The Commonwealth* (1957) 99 CLR 575.
[22] *Commonwealth* v *NSW* (1923) 33 CLR 1.

those who engage in trade, such as by exempting them from State taxes.[23] By parity of reasoning, Stephen J concludes that s 90 is not a law incidental to the marriage or divorce powers merely because it increases the amount of property available for disbursement, or gives the party otherwise liable to the tax a financial advantage.

In an obvious reference to other elements in the judgment of Menzies J His Honour states that the situation might well be different if s 90 was directed to the exclusion of State laws which discriminate against a federal power by taking as their criterion of liability some aspect or manifestation of divorce or marriage. The example His Honour gives is of a State tax imposed on marriage certificates.

Aickin J again treads an alternate path to reach the same result. His Honour states that if the Commonwealth empowers the Family Court to order a party to a marriage to transfer property registered under a State Torrens system to the other party, then it and the parties must abide by the requirements of that system, including the payment of stamp duty. In His Honour's view this is the price of taking advantage of the rights and protection afforded by those systems set up by the States.

Mason J commences his dissenting judgment with a general discussion of the nature and extent of the marriage power. While His Honour accepts the Chief Justice's basic formulation he considers that the words "close connection" suggests too strict a nexus, and that the words "substantial connection" more accurately express the necessary relationship between the law and marriage.[24]

The mutual rights and obligations of the parties to a marriage do not in His Honour's view mark the outer limits of the power, but only coincide with what is central to it. His Honour considers that the Commonwealth can legislate to define the rights of a party to the marriage against a third party if to do so is incidental to dealing with the mutual rights and obligations of the parties to the marriage. Further, His Honour feels that there is no absolute rule against the Commonwealth excluding State taxation in the exercise of its incidental powers.

In His Honour's view, the marriage power allows Parliament to define and deal with the rights of the parties to a marriage with respect to property so as to relate those rights to the marriage relationship. His Honour then expresses his difficulty in understanding why, if Parliament can empower the Family Court to order rearrangements of those rights, it cannot also logically free the ordered transfers from State taxation. Such a law has in His Honour's view, not only a sufficient but a close connection with the marriage relationship.

His Honour also considers that s 90 is both central and incidental to the power of the Family Court under the "divorce" power to make orders for a property settlement on, or in connection with, the dissolution of a marriage. As in relation to the marriage power, s 90 makes the transfers clearer and simpler and removes a liability which may decrease the ability of one party to discharge any obligations arising out of the dissolution owed to another party, including children.

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[23] See *Australian Coastal Shipping Commission* v *O'Reilly* (1962) 107 CLR 46, 63.
[24] (1981) FLC 91-101, 76726; (1981) 38 ALR 25, 40.

Murphy J prefaces his dissenting judgment with a discussion of the principle that Commonwealth laws are to be presumed valid until they are proved beyond reasonable doubt not to be.[25] His Honour considers that this presumtpion has been ignored recently, and, particularly in family law cases, has been replaced by a presumption of invalidity. His Honour also tersely remarks that:

> The once-discredited doctrine of reserved powers of the States, is having a triumphant, if unacknowledged, resurgence, at least in the areas of marriage and divorce (see *Plummer's* case) and emerged in this case.[26]

His Honour counters this by reaffirming his adherence to the principle set down in the *Engineers* case[27] that each head of power must be interpreted according to its natural and ordinary meaning without reference to the powers traditionally exercised by the States.

With respect to the meaning of divorce, His Honour points out that the is not only a social, but an economic and property holding unit. Therefore, in His Honour's view a law which deals with the property of the parties to a marriage whether during its currency or on its dissolution, is logically a law with respect to marriage.

With respect to the meaning of divorce, His Honour points out that the dissolution of marriage results in the conversion of such a single economic and property holding unit into two. Therefore, in His Honour's view, a law concerned with the readjustment of property between divorcing couples is a law with respect to divorce. His Honour considers that the wide ambit afforded s 90 by the expansive definition of "maintenance agreements", and the "financial matters" they may cover, is supported by both powers taken together. His Honour further considers that the exemption given by s 90 is at least incidental to either power because it facilitates any rearrangements effected within the ambit of s 90.

Finally, none of Their Honours considered that it was necessary to deal at any length with the question of the operation of s 51(xxxix) in relation to matters incidental to the execution of a power vested in the Federal Judicature. Their Honours felt that para (xxxix) did not give to the Parliament any relevant power in respect of Family Court orders which it did not already have under paras (xxi) and (xxii) or their respective incidental areas. Aickin J did note that a question arises as to whether the power conferred by the Constitution in para (xxxix) can apply to judicial powers not conferred directly by the Constitution but by Parliament in the exercise of one of the heads of power vested in it.[28] However, His Honour found it unnecessary to determine the issue because s 90 was not, in his opinion, incidental to the fulfilment of the powers of the Family Court.

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[25] Murphy J referred, *inter alia*, to a passage from the judgment of Isaacs J in *FC of T* v *Munro* (1926) 38 CLR 153, 180.

[26] (1981) FLC 91-101, 76,330; (1981) 38 ALR 25, 46.

[27] *The Amalgamated Society of Engineers* v *The Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[28] However, Murphy J did expressly uphold the power of the Parliament to protect from State taxation the implementation of valid orders made in the exercise of the judicial power of the Commonwealth, including those made by the Family Court under the Family Law Act, (1981) FLC 91-101, 76,733; (1981) 38 ALR 25, 50.

In summation, the majority consider that the connection between s 90 and the marriage and divorce powers is too remote to bring the law within the central or incidental areas of either power. On the other hand, the minority consider that this very connection is sufficient to bring the law within the incidental, if not the central, area of both powers.

In its eighty years the High Court has in respect of the Constitution developed a body of law which rivals in its complexity and subtlety that developed by the Courts of Chancery over centuries. It has been possible at times for different benches and judges to reach divergent results although adhering to the same authorities and canons of constitutional law. This divergence is often explicable by reference to the unspoken and differing attitudes held towards the federal-State balance. *Gazzo's* case seems such an occasion.

The question whether a law falls into the central area of power is more one of common experience and intuition than of law. The answer will often vary at different times and between different judges, particularly on the "outer fringes" of a subject matter. The only real rules in this area are those used in ordinary statutory interpretation,[29] such as the golden or literal rule. In this case, three judges considered that s 90 did not fall into the central area of either the divorce or marriage powers, whereas two seemed to think that it did, or could. Perhaps one can only reiterate Stephen J's comment that s 90 would at least to some extent seem logically to fall within the Commonwealth's comprehensive powers to deal with the property of married persons.

However, there is one comment made by the Chief Justice in relation to the "central area" issue which may give rise to criticism. As will be recalled, His Honour, in rejecting the view that s 90 fell into the central area of the power, states that its object is to destroy a liability owed to a State by its citizens under a State law.[30] But as Murphy J points out, the *Engineers* case sets down that reference cannot be made to the powers traditionally exercised by the States when interpreting a Commonwealth power. Further, later cases have developed the complementary concept that, when determining whether a law is within a head of power, it is sufficient that it has an operation within the subject matter of that power, and any legislative object it has, whether itself within power or not, is irrelevant at that stage.[31] His Honour's comment hardly sits well with either principle.

By reason of the very nature of the concept of "incidental", the issue of whether a law is to be regarded as incidental to a power is circumscribed by more canons of constitutional theory. The general rule is that a law must be a reasonable and appropriate means of achieving an end or object within power. As the Chief Justice rightly points out, because the incidental area includes an area otherwise within State power, the effect of the federal law

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[29] *The Amalgamated Society of Engineers* v *The Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[30] (1981) FLC 91-101, 76,719; (1981) 38 ALR 25, 30.

[31] In *R* v *Barger* (1908) 6 CLR 41 the Court held a law invalid which was limited in its operation to heads of Commonwealth power, because its legislative object gave it a character beyond any Commonwealth power. While not expressly overruled, the decision is clearly at odds with the approach adopted by the court in later cases such as *Herald & Weekly Times Ltd* v *Commonwealth* (1966) 115 CLR 418 and *Murphyores Pty Ltd* v *Commonwealth* (1976) 136 CLR 1.

on State power is relevant to the question of what is incidental to a federal power.[32] However, it is not the invasion of State power which is itself of general relevance. Instead, the nature and effect of the State laws excluded by the federal law are relevant in a limited and special sense.

First, the exclusion of the State law must be directed towards the achievement of an object within federal power. The nature of the State law and its effect on the exercise of federal power can point to the object of the federal law excluding it. Thus in the *Second Uniform Tax* case referred to by the Chief Justice, a law giving priority to federal taxation over State taxation was held not to be incidental to the object of power, the securing of the federal revenue.[33] The Court considered that the State taxation did not impede the collection of the federal revenue and that the true object of the law was to render the States' taxation power null and void. It cannot be seriously disputed that in enacting s 90 Parliament was seeking only to further an object in either or both the marriage and the divorce powers, that being the readjustment of the property rights of the parties to a marriage on its dissolution.

Secondly, the effect of the State law on the federal power is relevant to whether the federal law excluding it is a necessary and reasonable means of achieving an object or end in power. It is on this issue that the majority and minority completely diverge. The majority appear to require the State law to render the federal law ineffective before a federal law excluding it is incidental to the relevant federal power. As will be recalled, the Chief Justice asserts that a law is not incidental to a power merely because it facilitates the execution of that power.[34] The minority on the other hand held s 90 to be incidental because it did facilitate the execution of the Court orders.[35] With all due respect, if one is truly focusing on the federal law and power, then the minority's approach correctly embodies the traditional concept of the incidental power.[36] It is perhaps true that laws which are merely conducive to the exercise of federal power may not be within the incidental area. As Mason J points out, the very concept of the incidental power draws a bottom line by requiring the particular law to be "reasonable", "appropriate", and "necessary".[37]

However, even if the approach of the Chief Justice is accepted, one wonders why the practical barrier does not arise before the tax equals or exceeds the value of the property to be transferred. Many of those who work in the family law jurisdiction assert that the present 1 to 2 per cent tax constitutes something of a barrier in itself. It is because of the differences of opinion that can arise on this issue that the High Court has from its earliest days eschewed passing judgment on the reasonableness or otherwise of taxes.[38]

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[32] (1981) FLC 91-101, 76,722; (1981) 38 ALR 25, 34.
[33] (1957) 99 CLR 575.
[34] (1981) FLC 91-101 ,76,722; (1981) 38 ALR 25, 34.
[35] (1981) FLC 91-101, 76,727; (1981) 38 ALR 25, 42 *per* Mason J; (1981) FLC 91-101; 76,733; (1981) 38 ALR 25, 50 *per* Murphy J.
[36] As expressed in such decisions as *Grannall* v *Marrickville Margarine Pty Ltd* (1955) 93 CLR 55. See also G Rumble, "S 51(xxxix) of the Constitution and the Federal Distribution of Powers" (1982) 13 FL Rev 182.
[37] (1981) FLC 91-101, 76,726; (1981) 38 ALR 25, 40.
[38] *Australian Coastal Shipping Commission* v *O'Reilly* (1962) 107 CLR 46.

Some comment should also be made on Stephen J's reference to the reasoning of Menzies J in *O'Reilly's* case. With all due respect, Stephen J appears to have taken certain comments made by His Honour out of context. Menzies J stated that the only immunities from State law which could be granted to a trader by the Commonwealth are those so closely connected with trade the subject of Commonwealth power as to fall within the power to make laws with respect to that trade.[39] It is then that His Honour comments that a law exempting a trader from State taxation generally would not be a law with respect to trade though it provides a financial benefit to a trader. However, His Honour did uphold the particular law in so far as it exempted a trader from State stamp duty on receipts issued in the course of trade the subject of Commonwealth power because it was so closely connected with that trade. It is implicit from His Honour's judgment that one measure of the sufficiency of the connection is whether the State law excluded takes as the criterion of its liability some matter within the particular power. As will be recalled, Stephen J thought that State stamp duty Acts did not take as their criterion anything to do with marriage or divorce.[40] However, with all due respect, they do. The transfer of property between spouses which attracts the liability to pay the State duty is a matter central to either the marriage or divorce powers or both. The fact that the State laws also apply more generally to transactions not the subject of Commonwealth power did not concern Menzies J in *O'Reilly's* case.[41]

By way of final comment it is interesting to note that only Mason and Murphy JJ really maintain the distinction between the marriage and divorce powers that was so carefully stressed in earlier decisions involving the Family Law Act.[42]

In conclusion, the decision in *Gazzo's* case is from all points of view most unnecessary and unfortunate. Ironically, the State governments have now moved to exempt transfers between spouses made pursuant to Family Court orders[43] and, to differing extents, pursuant to agreements reached under s 86 and s 87 of the Act. One may have to accept the differing ambit of exemptions for transfers made pursuant to s 86 and s 87 agreements as a regrettable and not unexpected consequence of our federal system. Nonetheless, it remains unsatisfactory that in a jurisdiction which encourages the resolution of disputes out of Court, many agreements made between married people should be subject to state duty.

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[39] *Ibid* 62-69.
[40] (1981) FLC 91-101, 76,723; (1981) 38 ALR 25, 36.
[41] The State stamp duty Acts applied generally to all receipts given in the course of trade, whether interstate or intrastate.
[42] *Russell* v *Russell* (1976) 134 CLR 495.
[43] *Eg* Stamp Duties (Amendment) Act 1982 (NSW).
* BA (AS); LLB (ANU).