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Family Law Value Handbook

eighth edition

Family Law Value Handbook

The Eighth Edition of the Family Law Value Handbook provides a range of material useful to Family Law Practitioners in a variety of situations. The valuation and tax issues that are encountered in the course of a Family Law property matter remain complex.

The Handbook provides both quick reference material and detailed analysis which may be of assistance at varying stages of proceedings.

Delbridge Forensic Accounting provides expert assistance in Family Law and commercial matters, including valuations, investigation reports and assistance with settlement structuring.

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Suzanne Delbridge, Director

March 2019

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Eighth Edition

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1.1 Valuation principles and methodologies

“Fair market value” is defined as the highest price available in an open and unrestricted market between informed, prudent parties acting at arm’s length and under no compulsion to act, expressed in terms of money or money’s worth. Fair market value is assessed by reference to a likely sale transaction but does not reflect the strategic benefits or gains from synergies that might be inherent in an acquisition by any one specific party.

In the Family Court, the hypothetical prudent vendor/purchaser concept has been challenged and widely replaced by the “value to the owner” concept. Unlike a strict fair market value approach, the value to the owner premise endeavours to assign a value to the strategic benefits that might be associated with ownership by a particular party. The approach is clearly set out in a number of reported decisions (refer **Case Table 4.1**), with the Court adopting the position that the value ascribed must be a realistic one, based upon worth to the party himself or herself. The wide application of this principle by valuers has resulted in many businesses being valued at amounts that materially exceed their fair market value, without drawing a distinction between personal and commercial goodwill and/or property versus financial resource. The application of this premise of value should also influence the extent of a minority/liquidity discount where the subject interest is not a controlling one (refer **1.3** below).

The decision of the Full Court in ***Wall & Wall*** (which remains unreported), EA 83 of 1999, contained an important clarification of the application of the “value to the owner” approach widely adopted by the Family Court and examines the distinction between personal and commercial goodwill. It also considers the potential double count between earning capacity and capitalised value (see goodwill section at **1.2** below).

The assessment of value, be it fair market value or value to the owner, is normally performed by applying one or more of the following valuation techniques. The selection of which technique(s) are appropriate to apply in any situation rests with the circumstances of the particular case. It is important to keep in mind that the property which is the subject of the valuation is the equity interest held by the party in the subject entity, not the entity itself. A variance between fair market value and value to the owner may arise because of the valuer's varying assessment of the components that must be determined under each method.

(a) Capitalisation of estimated future maintainable dividends

The capitalisation of estimated future maintainable dividends methodology is generally the most appropriate technique to apply in the valuation of a true minority interest. The holder of a minority interest is not usually in a position to influence the payment of dividends, the investment of retained profits or the strategy or policies governing the activities and operation of the entity. The value of a true minority interest rests with the right to receive dividends or other distributions of funds from the entity.

It is necessary to consider the nature of the minority interest held, particularly in circumstances where the shareholder may play an active role in the business and decision making, and have access to financial and management information not normally available to a minority shareholder. It is also essential to consider the identity of the other shareholders, who may be family, friends or associates, and whether any other shareholder has control. The existence of a shareholder agreement and prior conduct of the shareholder group may also require consideration.

Consequently, the capitalisation of estimated future maintainable dividends method is infrequently applied to the valuation of shares in private companies for the purpose of Family Law proceedings.

(b) Net present value of projected cash flows

The discounted cashflow approach is arguably the superior valuation methodology as it has regard to the future cashflow stream that will flow from a project or investment, and it should allow for fluctuations in future performance to be recognised. The method is normally applied to projects of a finite life or where realisation of an asset in a relatively short timeframe is anticipated.

To be effective for longer term investments, reasonably reliable cashflow projections for at least five, and preferably ten years, are required. Reliable cashflow projections beyond twelve months, if available at all, are not usually prepared by smaller businesses that are often the subject of valuation in Family Law proceedings. The valuation of a going concern business may be no more precise using a discounted cashflow approach as compared to a properly determined capitalised future maintainable earnings approach, and a cashflow method is therefore not to be preferred over an earnings method in most circumstances.

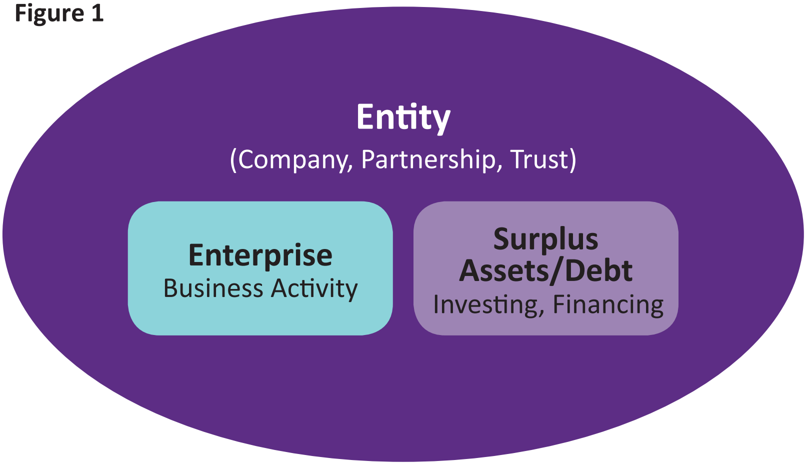
An exception to this is the valuation of a minority parcel of shares that may have some value in the future when the prevailing control scenario changes, due to the death of a controlling shareholder or some other event. The valuation of a minority interest in a profitable company which has not paid a dividend in recent years may be assessed by reference to the value of the eventual return such shares may offer to their owner. This may be determined by reference to future dividends, and/or a future capital gain where no dividend is expected. The minority shareholder in this situation may be faced with a long investment period, considerable uncertainty and the risk that the underlying assets may be dissipated or eroded by investment decisions in the meantime. See ***Georgeson & Georgeson*** (1995) FLC 92-618.

(c) Capitalisation of estimated future maintainable earnings

As the capitalisation of estimated future maintainable earnings method has regard to the profits which will flow from a business continuing to trade, which represents the value to the owners of the business, it is one of the most common methods applied in valuations for Family Law proceedings. The method is appropriate for the valuation of controlling interests in entities conducting viable going concern businesses, with a history of earnings on which a prediction of future profit can be based. It may also be utilised to determine the value of an entity in its entirety, which may then be prorated and possibly discounted to determine the value of a minority interest. Businesses with low profitability or erratic past performance would not ordinarily be valued using this approach. Care is required when selecting relevant years for the purpose of determining maintainable earnings and the earnings multiple to be applied.

An entity which has been trading for some time may have two quite separate components, being the business/enterprise and surplus assets/investments as depicted below:

Figure 1



The future maintainable earnings method requires consideration of the following factors:

- Determination of an appropriate level of future maintainable earnings of the business, having regard to historical and forecast operating results, adjusted for non-recurring or non-business related items of income and expenditure and any other known factors likely to affect the future operating performance of the business;

- Identification of profits or losses arising from any net assets surplus to the operation of the sustainable business, with such profits or losses being eliminated from the business results and the assets, net of any liabilities relating thereto, treated incrementally; and

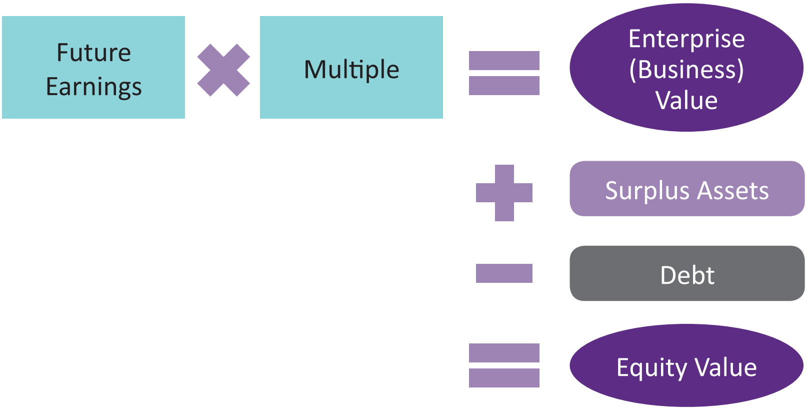
- Selection of an appropriate earnings multiple, having regard to the market rating and multiples of comparable companies or businesses (noting that listed company multiples are irrelevant to the valuation of small to medium sized private companies and truly comparable companies are usually non-existent), the extent and nature of competition in the industry, quality of earnings, future growth opportunities, asset backing and relative investment risk.

The value determined using the capitalisation of estimated future maintainable earnings method will ordinarily be the value of the business, not the entity conducting the business or the interest held by the party therein.

The selection of the appropriate earnings multiple is inextricably linked to the assessment of future maintainable earnings. Care should be taken to avoid the double counting of business risk or upside. For example, the application of a high multiple to an aggressive assessment of future earnings is likely to result in a double count of the upside in the business. Similarly, the application of a low multiple to a conservatively assessed future earnings stream is likely to result in an over statement of risk and therefore an understatement in value.

As noted, the net assets surplus to the business will be treated incrementally, such that the value of the whole entity would be the value of the business (determined using an earnings approach) +/- any net surplus assets. The value of the equity holder's interest in the entity is then determined, either on a pro rata basis of the whole value or after an allowance for minority/negotiability discount.

Figure 2



(d) Net asset backing

The net asset backing approach is often the primary valuation technique used where entities are not currently making profits but may do so in the future, or where the capitalisation of profits (or cash flow) yields a lower value than that of the net assets. The net asset backing approach is useful as a secondary valuation technique where capitalisation of profits (or cash flows) is the primary method used. Comparison of the value determined by capitalisation of profits (or cash flows) with the fair market value of net assets provides useful insight to the value of the intangible assets of the entity.

Consequently, the net asset backing approach may be complementary to the capitalisation of earnings method or may be applied in the case of asset reporting situations such as passive investment portfolios. Care needs to be taken in the application of this approach to ensure that the basis of valuation is consistent, i.e. orderly realisation versus fire sale versus in-situ value.

(e) Rules of thumb

Industry benchmarks will be quoted enthusiastically by business brokers but should be treated with extreme caution as they often provide a very unrealistic view of the real value of a business.

There are some exceptions to this, where the volume of business sales in a particular industry supports the application of a rule of thumb (e.g. real estate agent rent rolls, strata managers, insurance broking/ financial planning practices, accounting practices, general medical practices, mortgage brokers). The best application of a rule of thumb valuation in the context of Family Law proceedings is often to provide a market check of the value determined using a formal valuation approach, however in certain circumstances it may be the primary valuation method.

In the event that a rule of thumb approach is deemed appropriate (see ***Nettler & Nettler*** 2009 FamCAFC 185), it is effectively premised on a realisation basis and as such the effect of any restraint of trade on the parties' ability to continue deriving an income, plus realisation costs including capital gains tax, must be taken into account. It may be inequitable to take into account the value achievable by reference to a notional rule of thumb based sale without due consideration being given to the consequences that such a transaction would attract.

(f) The "ROI" approach

A very public debate between accountants and business brokers played out in **Australian Family Lawyer** many years ago[1], with the debate around the valuation methodology known as the "ROI (Return on Investment)".

There are many reasons why the ROI valuation method is flawed, including the confusion between profit and cashflow inherent in this method and the fact that the ROI method often adds back the owner's remuneration without considering a notional commercial remuneration for the services performed by the owner, therefore also treating the owner's salary package as a profit.

In addition, often only plant, equipment and stock are deducted from the value determined under the ROI approach to ascertain the value of goodwill, with no allowance for the net working capital required by the business (simply trade debtors less trade creditors). The resulting goodwill value is therefore likely to be misstated, and often by a material amount.

Many ROI proponents base their calculations on only the most recent year (adjusted) profit. This may not be appropriate as profit trends and growth are important to consider, and the immediate past performance may not be a reliable indicator of the future. Utilising a number of years to determine future earnings averages out any accounting cut-offs, errors, estimates and accruals, while relying on one year in isolation may increase the risk that the results are affected by one-off factors.

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1 See Harvey Pickup, "ROI and the Seven Deadly Sins", *Australian Family Lawyer*, Vol. 16 No. 2 (Spring 2002), and Wayne Lonergan, "The Numerous Fallacies of ROI", *Australian Family Lawyer*, Vol. 18 No. 1 (Summer 2005).

1.2 Goodwill

Goodwill, per the **International Glossary of Business Valuation Terms**, is *that intangible asset arising as a result of name, reputation, customer loyalty, location, products, and similar factors not separately identified*.

Per Australian Accounting Standard **AASB 3 "Business Combinations"** goodwill is defined as the future economic benefit arising from assets that are not capable of being individually identified and separately recognised. Unidentifiable assets do not include assets of an intangible nature that are capable of being both individually identified and separately recognised, as may be the case with patents, licences, rights and copyrights.

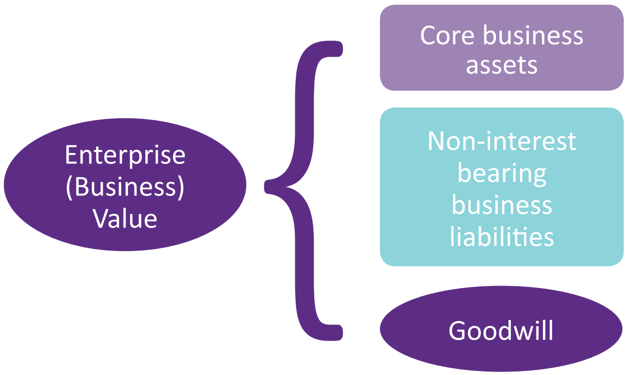
Regardless of whether goodwill was purchased in a previous transaction, was booked on the occasion of a restructure or has been internally generated (and is unbooked), its existence and value must be determined as part of the business valuation process. It is acknowledged that there may be "goodwill" in a business arising from the return of customers, however it only becomes of value when the earnings generated exceed a reasonable rate of return on the assets employed, and after appropriate allowance for the personal exertion effort / expertise of the proprietor. In many small businesses, goodwill reflects the capacity of the business to generate a profit over and above that necessary to remunerate the proprietor for his/her effort in running the business and a return on the capital employed.

The application of a valuation methodology premised on future earnings or cashflows generally implies the existence of some level of goodwill. For example, if the capitalised value of the earnings of an entity is $5million, and there are net tangible assets and identified intangibles totalling $4million, the implied goodwill is $1million. In the event that there are undisclosed or under-valued tangible assets or identified intangible assets, the actual goodwill value may be less than the value implied.

Not all businesses have a measurable level of goodwill, even though they may be profitable, as the value of capitalised earnings may be less than the net tangible assets or identified intangibles employed in the conduct of the business. This outcome is not uncommon where the business requires a heavy investment in its plant and machinery or trading stock, for example if goods are imported from overseas or have a long manufacturing lead time.

Goodwill is determined by comparing the capitalised value of the business to the net business assets employed in generating its earnings. Care needs to be exercised to ensure that only net business assets are included in this exercise and not net assets as a whole (see **Figure 3** below). Care also needs to be taken to ensure that goodwill is not mistaken for unrecorded tangible asset value.

Figure 3



While goodwill in its entirety has a definition, there are essentially three types of goodwill that should be distinguished:

- **Enterprise** (Commercial) goodwill;
- **Personal** (Professional) goodwill; and
- **Non-transferrable goodwill** (which essentially relates to **pure personal goodwill** but may have a component of enterprise goodwill due to a contractual nuance or some case specific matter).

The AICPA's **International Glossary of Business Valuation Terms** does not contain a definition for either enterprise goodwill or personal goodwill. **Lonergan**[2] discusses goodwill in the context of personal, location and name goodwill, and suggests that personal goodwill derives from and attaches to the people or a particular person in the business because of their know-how, experience, ability and the personality to attract and retain customers[3.]

The decision in ***Wall & Wall*** (Unreported – EA83 of 1999) highlights the important distinction between personal goodwill and commercial goodwill. Personal goodwill is associated with the skill, experience and relationships of a proprietor that are not easily transferable to another party. Commercial goodwill on the other hand relates to factors such as location, market position, corporate reputation, longevity of the business, etc. For example, a surveying business conducted by a group of appropriately qualified principals and staff is more likely to have commercial goodwill than the business of a surveyor operating as a sole trader, where any goodwill is likely to be personal goodwill.

There is certainly no argument that the superior income earning capacity of a medical specialist, barrister, artist or the like, is personal goodwill that is not transferable. However, we see submissions from practitioners suggesting that the goodwill associated with trades people, solicitors, accountants, real estate agents, financial planners and so on, is inextricably linked with the personal relationships of the proprietor and therefore must be "personal goodwill" for the purpose of a Family Law valuation.

A distinction needs to made between true personally held expertise, such as that held by a medical specialist, tax guru, film maker, versus the relationships held by a good proprietor with his customers.

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2 **Lonergan**, The Valuation of Businesses, Shares and Other Equity 4th Ed, page 765

3 See **Lonergan**, page 346.

Where relationships could be transferred to others over time with a managed transition, it may be more appropriate to treat any goodwill as commercial, and therefore property, rather than personal and therefore a financial resource.

There are a myriad of factors that must be examined in order to dissect goodwill into its personal and commercial components. While the task is an imprecise one, taking an orderly, analytical approach will assist in demonstrating to the Court the approach that has been taken in deconstructing the goodwill.

Dr Shannon Pratt notes simply[4] "*goodwill should be considered enterprise or practice goodwill only if it would continue to exist in the enterprise if the practitioner were not present. Therefore, a good "litmus test" of whether goodwill is practice or personal is the extent to which truly "excess" earnings (over and above adequate return to capital and adequate compensation for work performed) would continue to exist in the absence of the key individual"*.

While this all sounds simple enough, in practice it can be very difficult to assess the effect on the earnings and profitability of the business of the key individuals involved in it.

It is therefore useful to consider the factors that are likely to drive this analysis, and which should form the basis of a series of questions to be put to the business owner. The factors and circumstances surrounding the business, its services, customers and people must be carefully examined as follows[5]:

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4 Dr Shannon Pratt "**Overview of Enterprise and Personal Goodwill**", Shannon Pratt Valuations Inc.

5 The starting point for this list is drawn from "**Separating Personal and Business Goodwill**", Darrell Arne CPA, ASA and James Hamill PhD, CPA – see BVR's Guide to Personal v Professional Goodwill 3-125.

Size of the business – is the business a small owner operated enterprise, dependent on one, two or only a few individuals, including their personal skills and relationships? Or, is it a larger business with many individuals, more than one location, a formalised organisation chart and no particular reliance on any one individual?

Covenant not to compete (CNTC) – would a CNTC be effective in retaining revenue and customers in the event of the sale of the business by the current owner (even if there is no sale contemplated)? Or, are the skills and relationships of the owner such that the value would not be retained by the business in the event of the departure of the current owner?

Services offered (a) – is the provision of personal services an important component of the revenue derived? Or, is the business not solely dependent on the provision of personal services, with products also forming part of the revenue achieved?

Services offered (b) – do the services provided require a high degree of skill or knowledge? Does the person derive revenue at a higher level than other practitioners (e.g. the tax specialist versus the compliance accountant)? Or, could the services be provided by any one of a great number of people?

Capital investment – does the business have a significant investment in capital, either tangible or identified intangible assets? Goodwill may attach to specialised equipment as opposed to a person.

Customer relationships – are relationships principally held by the employee-owner? Or, is there business name recognition, a sales team, sales contracts and company owned intangibles that give rise to revenue?

Product/service knowhow – is the knowledge of the products and services sold by the business held by a key individual? Or, does the enterprise have formalised production methods, patents, copyrights and business systems?

Industry reputation - is the business known for its excellence generally, or does the reputation reside in one or a few key individuals?

Once identified, how do we value the personal goodwill?

To my knowledge, there is no precise methodology applied in Australia, or the US for that matter, in determining the value of personal goodwill or for allocating an overall goodwill value between personal and enterprise components.

It is generally accepted that the allocation may be made using a Top-down approach, a Bottom-up approach or a With and without approach.

An objective and scientific approach to the bifurcation of goodwill, as developed in the US by David Wood, is the use of a "MUM" model, being the adoption of Multiattribute Utility Theory[6]. While the Wood MUM has been accepted in some cases, in others it has not been favourably received. To this end, Thomas Gillmore, CPA/ CVA, CFE[7] suggests that removing the subjectivity associated with assigning an importance weighting to each attribute, and simply stating whether or not the attribute exists, removes the complication of the model being subjective.

1.3 Minority interest discount

In order to determine the value of a minority interest a discount may be applied, with the amount of the discount varying depending on the circumstances prevailing. The discount applied will normally contain two components, which may be considered individually or collectively:

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6 See **"An Allocation Model for Distinguishing Enterprise Goodwill from Personal Goodwill"**, BVR's Guide to Personal v Enterprise Goodwill, 2010 Edition, at 3-53

7 See **"Simplified MUM for Determining Personal Goodwill"**, per BV Resources Business Valuation Update Vol 22, No 2, February 2016.

(a) **Minority (lack of control) discount** – deals with the relationship between the interest being valued and the total enterprise, with the primary factor being the degree of control the minority interest does or does not have over the particular entity; and

(b) **Illiquidity (lack of marketability) discount** – deals with the liquidity of the interest, that is, how quickly and certainly it can be converted into cash at the owner's discretion.

It is not uncommon for combined control and marketability discounts in excess of 50% to be applied in the valuation of closely held equity interests when they are sold to an **unrelated party**. As can be seen from a review of Family Court decisions over a long period (**Case Table 4.2**), the minority discount applied can vary greatly depending on the circumstances of the case.

In the context of a Family Law matter, where more often than not the shares will not be sold, and certainly not to an unrelated person, it will be necessary to consider subjective factors including:

- Who owns the rest of the shares?;
- Is there a shareholders agreement?;
- Does the family get along?;
- Is the minority interest likely to be sold?; and
- Does the method of valuation already reflect the minority nature of the interest?

Per a research paper prepared by Dr Alan S Zipp, CPA/ABV, CBA published by Business Valuation Resources "BVR'S Guide to Fair Value in Shareholder Dissent, Oppression, and Marital Dissolution", 2011 Edition:

> *"The concept of fair value requires that the business be valued as a going concern and not as if it were to be sold or liquidated. The fair value of a minority interest is its pro rata share of the enterprise value as a going concern.*

> *Discounts for a lack of liquidity, whether marketability or minority, conflict with the underlying premise of value as a going concern and penalize the minority by presuming a sale."*

In a "fair value" appraisal, value is measured from the perspective of the current owners, i.e. value to the owner, not a hypothetical purchaser. As explained further by Dr Zipp, the fair value concept is inherently inconsistent with discounting to reflect limited marketability or liquidity. Liquidity is of little consequence in a divorce case where there is no evidence of a contemplated sale of all or part of the business, forced or otherwise.

1.4 Tax and realisation costs

There is long running debate as to whether tax and other realisation costs should be deducted when determining the value of a party's equity interests for the purpose of Family Law proceedings. A summary of reported decisions is included in **Case Table 4.3**;

Following the decision of Nicholas CJ in ***Carruthers & Carruthers*** (1996) FLC 92-707, the widely adopted practice has been to make an allowance for tax and other realisation costs where the asset is likely to be disposed of or the orders of the court will cause a disposal. A valuation undertaken on the basis of the realisable value of net assets should ordinarily include an allowance for tax and realisation costs.

The decision of the full court in ***Rosati & Rosati*** (1998) FamCA 38 affirmed the trial judge's approach of not making a specific allowance for capital gains tax when determining the value of the property pool, rather the possibility of CGT arising, was taken into account as a Section 75(2) factor, at paragraph 6.44:

> *“This is not a case in which we think the evidence was so clear, and the prospects of a sale of the entire business in the short term so likely, that in the absence of an order for its sale it was an error not to make such an allowance. Rather we think that it was within the proper exercise of His Honour's discretion to take the prospect of such a tax being incurred by the husband into account as a relevant Section 75(2) factor, as His Honour said that he did, and as we have no doubt that in fact he did.”*

The judgment in ***Rosati*** (paragraph 6.36) contains a succinct analysis of the reported decisions prior to that case:

> *“It appears to us that although there is a degree of confusion, and possibly conflict, in the reported cases as to the proper approach to be adopted by a court in Family Law proceedings under s 79 of the Act in relation to the effect of potential capital gains tax, which would be payable upon the sale of an asset, the following general principles may be said to emerge from those cases:--*
>
> *(1) Whether the incidence of capital gains tax should be taken into account in valuing a particular asset varies according to the circumstances of the case, including the method of valuation applied to the particular asset, the likelihood or otherwise of that asset being realised in the foreseeable future, the circumstances of its acquisition and the evidence of the parties as to their intentions in relation to that asset;*
>
> *(2) If the Court orders the sale of an asset, or is satisfied that a sale of it is inevitable, or would probably occur in the near future, or if the asset is one which was acquired solely as an investment and with a view to its ultimate sale for profit, then, generally, allowance should be made for any capital gains tax payable upon such a sale in determining the value of that asset for the purpose of the Family Law proceedings;*

> (3) *If none of the circumstances referred to in (2) applies to a particular asset, but the Court is satisfied that there is a significant risk that the asset will have to be sold in the short to mid term, then the Court, whilst not making allowance for the capital gains tax payable on such a sale in determining the value of the asset, may take that risk into account as a relevant s 75(2) factor, the weight to be attributed to that factor varying according to the degree of the risk and the length of the period within which the sale may occur; and*
>
> (4) *There may be special circumstances in a particular case which, despite the absence of any certainty or even likelihood of a sale of an asset in the foreseeable future, make it appropriate to take the incidence of capital gains tax into account in valuing that asset. In such a case, it may be appropriate to take the capital gains tax into account at its full rate, or at some discounted rate, having regard to the degree of risk of a sale occurring and/or the length of time which is likely to elapse before that occurs."*

Two more recent decisions have appropriately taken these principles one step further, with a "contingent order" suggested as an appropriate mechanism to capture realisation tax in circumstances where there was uncertainty surrounding whether the asset would be sold – see ***Lovine & Connor & Anor*** (2012) FamCAFC168 and ***Jarrott & Jarrott*** (2012) FamCAFC29.

Finally, the importance of having sufficient evidence of the ongoing future taxation consequences that may be associated with loan compliance (see paragraph **2.4.5**.) is evident in the matter of ***Rodgers & Rodgers*** (No2) (2016) FamCAFC 104.

1.5 Shareholder loan accounts

Often without due regard for commercial or tax considerations, privately owned entities make loans to their proprietors or are in receipt of funds contributed by them.

The decision to include or exclude these loans when preparing the parties' respective Family Law Financial Statements should not be made without reference to the valuation of the party's ownership interest in the particular entity.

If in determining the value of a party's interest in a business structure the valuer has included loans receivable from or payable to the party, the Family Law Financial Statement should show the corresponding liability or asset. On the other hand, if all related party loans are excluded from the valuation of the equity interest, which is not recommended, there should be no disclosure of the loan balance in the Family Law Financial Statement.

However, great care should be taken when forgiving (or ignoring) loans between the parties and an entity. The forgiveness of the loan may have unfavourable tax implications for either the party or the entity, as detailed in **Section 2.4/2.5** below. Best practice would always see all loans included in the entity valuation, with a corresponding loan asset/liability disclosed in the Family Law Financial Statement of the parties.

1.6 Valuing liabilities

Due attention is ordinarily given to the valuation of assets, be they personal or business, tangible or intangible. The proper valuation of liabilities is often overlooked as it is assumed that their market value equates to their face value or the value at which they might be reported in a set of financial statements. This is not always the case. For example, the fair market value of a loan issued on concessional terms may differ materially from its notional face value.

When valuing a liability, the liability should be measured on the basis of its present value expressed in today's dollars (i.e. a sum of money payable in the future is discounted to convert it into today's dollars).

The discount rate to be applied in determining the value of a liability should be the notional rate at which it would be possible to pay out the indebtedness today. That is, the value of the liability can be calculated as if the indebted party were to pay the creditor a sum of money today (which would be the present value of the liability to pay capital and interest discounted at an appropriate prevailing rate of interest) to discharge the debts as and when they fall due.

In the unreported decision of O'Ryan J in ***O'Connell's Case*** (1996), the real value of a liability with a $600,000 face value was determined to be $265,000, after proper regard was given to the long interest free period over which the loan was repayable.

1.7 The use of hindsight in valuations

The valuation of a business or equity interest is often required at more than one date, due to the relevance of the value at the commencement of cohabitation or at separation, when there are competing arguments as to pre and post separation contributions. In some cases it may be necessary to value the interest held by the parties at three dates – cohabitation, separation and a current date for the purpose of the trial.

With the passage of time, this may be a difficult task, as the necessary financial information may have been destroyed or may be incomplete. It is therefore tempting to rely on more recent and available information for the purpose of ascertaining the value at the earlier date.

However, in assessing the value of an interest, it is essential that the valuer only consider information that was *"known or knowable"* at the valuation date.

The issue is clearly more obvious when the valuation date is long ago, however it can be relevant in the context of a valuation when the production of documents has been slow (for example many months have passed since the date of the latest available financial statements).

It is necessary to distinguish between the information that would have been reasonably available and discernible at the valuation date, as against the subsequent information that has become available as a result of the passage of time.

The relevance of subsequent events, or hindsight, in a valuation has been widely discussed by various well known authors of valuation texts,[8] and by Courts in both Australia[9] and overseas.

Dr Shannon Pratt[10] suggests that broadly speaking there are two categories of subsequent events or information:

(i) Those that affect value; and
(ii) Those that do not affect value, but provide evidence as to the value that existed at the valuation date.

As a generalisation, subsequent events or information within the first category should not be considered unless they are foreseeable, while those in the latter category may be considered. This leads to the consideration of what information was *"known or knowable"* at the valuation date. Dr Pratt opines that information that existed, even though it may not have been officially compiled, meets the criteria of "knowable".

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8 Various texts by Dr Shannon Pratt, see also Reilly and Schweihs, *Handbook of Advanced Business Valuation*, page 305 and Lonergan, *The Valuation of Businesses Shares and Other Equities*, 4th Edition, page 594.

9 See *HTW Valuers (Central QLD) Pty Limited & Astonland Pty Limited* (2004) HCA 54, 217 CLR.

10 Shannon Pratt, *Should subsequent events be considered in the present value of a business*, (BVUpdate, Business Valuation Resources LLC, March 2002) and Reilly and Schweihs, *the Handbook of Advanced Business Valuation*.

For example, even though the latest financial statements did not exist as at 30 June, the relevant financial information existed at that date and was “knowable”, just not compiled yet.

In the context of a usual valuation, this issue will most likely extend to the relevance of business performance immediately subsequent to the valuation date.

For example, performance post balance date may have been affected by the revenue and profit derived from a new contract. In that instance it would be necessary to ascertain if knowledge of the contract existed at the valuation date, and further, whether the effect on profitability was knowable, even if not known, at the valuation date.

Similarly, revenue and profitability may be affected by the loss of a key customer or client contract after the valuation date, and it is only if that information was known or knowable at the valuation date that the valuer should take the reduction into account.

In an unusual case, hindsight may be a very big factor in the valuation outcome.

In the matter of ***Pope & Pope*** (2012) FamCA 204, a cohabitation date valuation was required some 16 years prior to the Family Law proceedings.

Subsequent spectacular success was known, however at the valuation date success was good, but not spectacular. In this instance it was necessary to critically consider the elements of the successful product that were in existence at the valuation date, the timing of various contracts and events subsequent to the valuation date, and whether the elements of success where knowable, if not known, at the valuation date.

In this case there was a wealth of publicly available information that could be utilised, however the exercise would have been exponentially more difficult had that not been the case.

Potential tax consequences of a property settlement

2.0 Potential tax consequences of a property settlement

Transactions entered into to achieve a division of assets between parties as a consequence of marriage or relationship breakdown may cause unexpected tax liabilities to crystallise, either immediately or at a later date.

Compulsory marriage breakdown rollover relief from capital gains tax lulls many into a false sense of security that there will be no tax burden associated with asset transfers.

The principles in ***Rosati & Rosati*** (1998) FamCA 38 may also result in little attention being given to tax liabilities on the expectation that the Court may not take them into account when assessing the pool under s79.

If no, or only minimal, effort is made to quantify the liabilities then there is even less likelihood that the Court will take them into account – see ***Rodgers & Rodgers*** (No2) (2016) FamCAFC 104.

An essential step in the conduct of all property and Family Law proceedings should be a thorough review of the taxation consequences of the orders sought, whether by consent or via application to the Court.

The identification of both current and future tax liabilities is equally as important as the identification and valuation of the property and resources of the parties.

2.1 Capital Gains Tax (CGT)

Capital gains tax is normally payable on the differential between the capital proceeds from disposal (or deemed market value when the transaction is not arm's length) and the "cost base" of an asset. The cost base includes the original purchase price as well as other purchase and disposal costs relating to the asset. Depending on whether the owner of the asset is an individual or an entity, the effective rate of capital gains tax will vary.

The transfer of assets between spouses, from an entity to a spouse, or between entities will constitute "a CGT event". In the absence of any rollover relief, the transfer would ordinarily result in a capital gain being realised by the transferor.

In order to determine the capital gains tax consequences of a property settlement it is necessary to consider whether the asset being transferred is subject to CGT and whether there are any rollover provisions available to reduce or eliminate the CGT.

2.1.1 Is the asset being transferred subject to CGT?

Assets for CGT purposes include tangible assets such as real estate or shares as well as intangible assets such as the goodwill of a business. As a general rule, the following assets are normally **exempt** from CGT:

- Assets acquired prior to 20 September 1985 ("Pre CGT assets");
- Cars and motorcycles;
- Collectables (e.g. artworks or jewellery) costing less than $500 (however where the collectable is an interest in artwork, jewellery, antiques, coins or medallions, rare folios, manuscripts, books, postage stamps or first day covers, the exemption only applies if the market value of the collectable at the time of acquisition was $500 or less);
- Certain personal use assets costing less than $10,000;
- Assets used to produce exempt income; and
- The main residence of the party/parties (see **section 2.2**).

2.1.2 Will there be rollover relief on transfer of assets?

Any capital gain or loss arising to the spouse on the notional disposal by them of their interest in an asset to the other spouse will be disregarded under the **compulsory marriage breakdown rollover relief** (s126-5 ITAA 1997).

The marriage breakdown rollover relief is compulsory where an individual disposes of an asset to his/her spouse as a consequence of:

- A court order under the *Family Law Act 1975* (Cth) or a corresponding foreign law;
- A court order under a State, Territory or foreign law relating to de facto marriage breakdowns;
- A binding financial agreement made under the *Family Law Act 1975* (Cth) or a corresponding foreign law;
- An arbitral award made under the *Family Law Act 1975* (Cth) or a corresponding foreign law; or
- A binding written agreement that is made under a State law, Territory law or foreign law relating to de facto marriage breakdowns and that, because of such law, cannot be overridden by an order of a court (except to avoid an injustice).

The definition of spouse in Subsection 995-1 is as follows:

> *"Spouse of an individual includes:*
>
> *(a) another individual (whether of the same sex or a different sex) with whom the individual is in a relationship that is registered under a State law or Territory law prescribed for the purposes of Section 2E of the Acts Interpretation Act 1901 as a kind of relationship prescribed for the purposes of that Section; and*
>
> *(b) Another individual who, although not legally married to the individual, lives with the individual on a genuine domestic basis in a relationship as a couple"*

The rollover relief also applies where a CGT asset is transferred from a company or trust to an individual, although the relief does not work in reverse.

Where the marriage breakdown rollover relief is applied, any gain or loss to the company or trust is disregarded (s126-15 ITAA 1997).

On receipt of the asset, there will be no CGT implications for the transferee spouse. There **may** be CGT on the eventual disposal of the asset by the transferee spouse. This will depend on the differential at the time of sale between the sale price and the cost base of the asset. As the transferee spouse did not originally pay for the asset, the legislation provides a deemed cost base for the asset, based on whether the asset is a pre-CGT asset (originally purchased prior to 20 September 1985) or a post-CGT asset (originally purchased subsequent to 20 September 1985) as follows:

- For post-CGT assets transferred between the parties, the cost base of the asset will be the asset's cost base to the transferor spouse at the time the transferee spouse acquired the asset; and

- For pre-CGT assets transferred between the parties, the asset retains its pre-CGT status in the hands of the transferee spouse – i.e. there will be no capital gains tax on ultimate disposal of the asset.

Non-deductible holding costs may be able to be added to the cost base when calculating any capital gain in the event of a future sale. Such costs would include for example, interest on borrowings, rates and repairs, where these costs have not already been claimed as a tax deduction.

Example:

Robert owns an investment property purchased in 2012 for $600,000. He transfers this property to his former spouse Michelle as a result of an order of the Family Court. Michelle continues to rent out the property to tenants. She sells the property in 2019 for $800,000. Ignoring any disposal costs, Michelle's capital gain is $200,000, being the difference between the sale price of $800,000 and her deemed cost base of $600,000.

The consequences of rollover relief can become more complicated when the asset being transferred is held within a company or a trust rather than by an individual. The transfer may result in a reduction in the cost base of shares or units in the entity, ultimately leading to higher capital gains tax on the eventual sale. In addition, the transfer from a private company to a party may result in the party being deemed to receive a taxable dividend (see **Section 2.4**).

2.1.3 Other CGT exemptions available

It is also of interest to note that there may be other CGT exemptions available on the sale of a small business or business asset, which may eliminate or reduce the owner's capital gains tax liability. The small business CGT concessions include the small business asset rollover, the small business 50% active asset reduction, the 15 year exemption and the retirement exemption. There are various eligibility criteria that must be met for a taxpayer to achieve these exemptions, however they are worth exploring as in some instances the CGT otherwise payable may be reduced to $Nil. *However, changes to the small business capital gains tax concessions have made their application increasingly complex, and it is strongly recommended that expert tax advice is sought if the concessions need to be considered.*

2.2 Main residence exemption

Generally, the main residence exemption allows a taxpayer to disregard a capital gain or loss that is made from a CGT event happening to a dwelling that is the taxpayer's main residence (e.g. the matrimonial home). The key points of how the exemption operates are summarised below:

For a taxpayer to qualify for a full exemption:

- The taxpayer must be an individual;
- The dwelling must have been the taxpayer's home (generally the disposal relates to a dwelling or an ownership interest in a dwelling);
- The dwelling was the taxpayer's main residence for the entire ownership period; and
- The disposal resulted from one of a number specified CGT events (s118-110).

A partial exemption may be available if:

- The dwelling was the taxpayer's main residence during only part of the period that the taxpayer owned it (s118-185); or
- The taxpayer used the dwelling to produce assessable income (e.g. to derive rental income), the exemption is reduced in certain circumstances (s118-190).

Where a transferor spouse acquires an ownership interest in a dwelling after 19 September 1985 and marriage breakdown rollover is available to the transferor spouse, the main residence exemption rules take into account the way in which **both** the transferor and transferee spouses used the dwelling when determining the transferee spouse’s eligibility for the main residence exemption (s 118-178)[11].

If marriage breakdown rollover relief applies to the transferee spouse, the following applies to the transferee spouse with respect to the interest in the home transferred from the transferor spouse:

- The transferee spouse is taken to have acquired their ownership interest at the time that the transferor spouse acquired their ownership interest;

11 Section 118-178 ITAA 1997 was inserted by *Tax Laws Amendment (2006 Measures No 4) Act 2006* (Cth).

- From the date of acquisition until the time of transfer to the transferee spouse:

  - The transferee spouse is taken to use the dwelling in the same way as the transferor spouse; and

  - The dwelling had been the main residence of the transferee spouse for the same number of days as it was the main residence of the transferor spouse.

It cannot be assumed that the former matrimonial home is free of CGT consequences where it has always been used as a family home.

The CGT implications may be substantial where a new property has been acquired by the spouse no longer residing in the former matrimonial home and:

- The home was owned for a relatively short period of time prior to separation; and/or
- The home is located in a high growth property market; and/or
- There is a long period between separation and property settlement.

Under the current regime, there may be a favourable impact for a spouse who acquires an investment property that was previously a main residence of the other spouse, as the main residence use by the transferor spouse may be taken into account to reduce the capital gain on future disposal by the transferee spouse.

If a dwelling that was a taxpayer's main residence stops being their main residence, the taxpayer may choose to continue to treat it as a main residence. The maximum period that the dwelling can be treated as a main residence is:

- Six years, if the dwelling is used for income-producing purposes while the taxpayer is absent; and

- Indefinitely, if the dwelling is not used for income-producing purposes.

A person cannot use the main residence exemption on more than one property concurrently. If the taxpayer owns more than one dwelling during a particular period, only one dwelling can be the main residence at any one time. An exception to this rule can arise where the taxpayer acquires a new residence while they continue to hold their former residence (because they are in the process of selling their former residence). Both properties will be treated as main residences for either six months or when the former residence is sold (whichever is shorter) (s118-140).

Where the spouse no longer residing in the former matrimonial home acquires a new main residence, their main residence election should be clearly set out as a notation in the orders.

An example of such an election can be obtained from the Delbridge Forensic Accounting website **www.delbridgeforensic.com.au/support documents.**

2.3 Superannuation Splitting – CGT consequences

Where CGT assets are transferred in specie (e.g. off-market share transfers, property transfer) between superannuation funds, there will normally be CGT payable. However, rollover relief is available in a marriage or relationship breakdown if the transfer occurs as a consequence of an award, court order or agreement as listed in section 2.1.2. The rollover relief available is dependent on the date of the CGT event.

Rollover relief is available in a marriage breakdown, which will permit one spouse to transfer their entire in specie interest in a small superannuation fund[12] to another complying superannuation fund[13] without crystallising an immediate CGT taxing point (s126-140). The transferee superannuation fund will be deemed to acquire the CGT assets at the same cost base and at the same time as the original acquisition by the transferor fund.

2.4 Income tax consequences of private company payments and asset transfers (Division 7A)

In some circumstances, the transfer of an asset or payment of cash from a private company (or discretionary trust in some circumstances) to a party will result in the party being deemed to receive a **taxable dividend**. This may be the case regardless of whether there is a Court order to transfer the asset. The relevant area of legislation is Division 7A of the *Income Tax Assessment Act 1936* (Cth) ("Division 7A").

2.4.1 General overview of Division 7A

A deemed dividend may occur when a private company pays an amount to a shareholder or associate, or forgives a shareholder (or associate) loan. A "payment" includes the transfer of property or the granting of guarantees and meeting of guarantee obligations.

An "associate" of a shareholder is broadly defined in Section 318 ITAA 1936 as a relative, partner, trust controlled by the shareholder or company controlled by the shareholder.

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12 Small superannuation fund means a complying superannuation fund (see below) with four or fewer members. Self managed superannuation fund has the same meaning as in the *Superannuation Industry (Supervision) Act 1993* (Cth) and is a small superannuation fund.

13 Complying superannuation fund means a complying superannuation fund within the meaning of Section 45 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

The taxpayer for the purpose of Division 7A is the recipient of the benefit, who may be the former spouse of the shareholder.

While, notionally, the amount of a particular Division 7A dividend arising as a consequence of the payment of cash or transfer of property is the arm's length value of the property, this is proportionately reduced if the total of all Division 7A dividends taken to be paid by the private company for the income year exceeds the "distributable surplus" of the company for that year, as calculated by the formula at Section 109Y ITAA 1936. In other words, the maximum deemed dividend payable in the year of income will be the amount of the distributable surplus and not the arm's length value of the property. Care needs to be taken in properly assessing the quantum of the distributable surplus.

2.4.2 Proposed changes to Division 7A

Changes to improve the operation and administration of Division 7A were included in the Budget Measures for 2016–17[14] which stated that *"the changes draw on a number of recommendations from the Board of Taxation's Post-implementation Review into Division 7A and will apply from 1 July 2018"*. The Board of Tax were critical of the prevailing Division 7A regime labelling it "complex, inflexible and costly to comply with". However, the Treasury Consultation Paper was only released in October 2018, and the changes are now expected to come into force on 1 July 2020. The Treasury Consultation Paper details that the amendments will comprise:

- simplified Division 7A loan rules to make it easier for taxpayers to comply;

- a self-correction mechanism to assist taxpayers to promptly rectify breaches of Division 7A;

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14 Commonwealth of Australia, Budget 2016-17, Budget Measures 2016-17 Budget Paper No 2 at page 42, 3 May 2016.

- safe harbour rules for the use of assets to provide certainty and simplify compliance for taxpayers;

- technical amendments to improve the integrity and operation of Division 7A while providing increased certainty for taxpayers; and

- clarification that unpaid present entitlements (UPEs) come within the scope of Division 7A.

2.4.3 Excluded payments

Certain payments may qualify as excluded payments, i.e. Division 7A does not apply to the payment by the company. Some of the exclusions are:

- Loans made from one private company to another private company (s109K);
- Payment of a genuine debt (s109J); and
- Loans made on commercial terms (s109N).

2.4.4 Payment of genuine debt

The s109J exemption was utilised in the past to assist in the settlement of large property cases, where significant wealth had accumulated in a corporate structure. The exemption was obtained by the company being joined as a party to the Family Law proceedings, and then being ordered to pay an amount to a spouse.

The amount was required to be paid as cash, not an in specie distribution of property. The ATO had previously accepted that a court order made in respect of Family Law proceedings was an obligation of the company. Accordingly, the payment to a spouse on the basis of a court order was not considered a dividend for income tax purposes.

However, on 31 July 2014 the Australian Taxation Office issued taxation ruling, **TR 2014/5**, reversing its position in respect of the taxation effect of orders made in Family Law proceedings that involve payments from companies. There is relief from a Division 7A deemed dividend consequence via the "109J Payment of a Genuine Debt" exemption.

The ruling states that:

"Where a Section 79 property order requires:

- *A private company, or*
- *A party to the matrimonial Family Law proceedings to cause the private company, to pay money or transfer property to a shareholder of the private company, the payment of money or transfer property in compliance with that order is an ordinary dividend to the extent paid out of the private company profits and is assessable income of the shareholder under Section 44 of the ITAA 1936".*

Similarly, a payment of money or transfer of property to an associate of a shareholder in compliance with such an order is a payment for the purposes of s109C(3) of the ITAA 1936.

Specifically, Section 109J does not prevent the payment from being treated as a dividend under subsection 109C(1). The dividend is frankable to the extent permissible under normal franking rules.

It is imperative to seek taxation advice prior to the making of orders involving a company to ensure all tax liabilities of the parties are quantified.

2.4.5 Commercial loans

A loan made on commercial terms is excluded from the application of Division 7A. The minimum loan requirements are contained in s109N of ITAA 1936, which <u>currently</u> include:

- Loan must be made under a **written agreement**;
- Maximum term of 25 years for secured loans and 7 years for unsecured;
- Security must be real property;
- Market value of security must be a least 110% of the loan advanced;
- **Interest must be charged** at the minimum benchmark rate; and
- Minimum loan repayments must be made annually.

Under the changes proposed following the review of Division 7A, a "simplified loan model" will have a maximum term of 10 years with a variable interest rate and payments of both interest and principal in each income year.

Often the payments made by a company for the benefit of the shareholders and their associates are accumulated in a loan account balance owing back to the company ("a debit loan account").

Many parties, and their accountant, assert that a debit loan account is a complying loan pursuant to Division 7A Section 109N, yet they are unable to produce a copy of the written loan agreement and there is no interest income being declared in the company financial statements.

The absence of both must lead to a reasonable suspicion that the debit loan account is not actually a complying commercial loan, and there is a heightened risk of the amount being a deemed dividend in the hands of the shareholder.

Care must be taken in dealing with loan accounts in the property settlement to ensure that a deemed dividend is not inadvertently triggered by forgiving a loan that was otherwise complying. Loan accounts should be either cleared by way of dividends or one of the parties takes responsibility for the liability. In either situation there are tax consequences that must be considered – see ***Rodgers***.

2.4.6 Marriage breakdown concessions (s109RC)

Division 7A provides that deemed dividends arising from "payments" on or after 1 July 2006, in respect of marriage or relationship breakdowns, may be frankable[15] by the private company taken to have paid the deemed dividend (see **s109RC of ITAA 1936**).

The dividend may be franked irrespective of whether it was made to a shareholder or associate of the shareholder (for example, a former spouse). Accordingly, while the transfer of property from a private company to a spouse who is a shareholder or associate will continue to be treated as a dividend, this deemed dividend may be franked by the transferor company. It is important to note that top up tax may be payable by the recipient of the dividend, even where it is franked.

It should be noted that the dividend may only be franked in the same circumstances that CGT rollover relief applies in relation to marriage breakdowns – see paragraph **2.1.2**.

2.5 Goods and Services Tax (GST)

There is no general relief from GST on transactions that are entered into as a consequence of marriage or relationship breakdown.

The views of the ATO regarding the GST consequences of the transfer of assets following marriage or relationship breakdown are set out in GSTR 2003/6, with the ATO making a distinction between "private assets" and "enterprise assets".

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[15] It should be noted that whilst Division 7A allows the deemed dividend to be franked, the franking percentage will be dependent on the benchmark rate and whether the company has any franking credits available (see Part 3-6 of ITAA 1997).

An **enterprise asset** means real property, tangible and intangible personal property that is owned by either or both spouses or a related entity and used or intended to be used in an "enterprise" of the entity that is registered or required to be registered for GST. Examples of enterprise assets include trading stock, plant, office equipment, motor vehicles and real property.

A **private asset** means any property that is not an enterprise asset.

GST is imposed on taxable supplies, being:

- A supply for consideration;
- Made in the course of furtherance of an enterprise;
- Connected with Australia; and
- Made by a registered person or person required to be registered for GST.

The transfer of private assets between spouses who are not registered (or required to be registered) for GST have no GST consequences.

Where an enterprise asset is transferred to a spouse under a matrimonial property distribution, there is a **supply** for GST purposes. However, if the supply is made for no consideration, GST will not be paid on the supply. The GST provisions that may deem market value consideration will generally not be applied in respect of supplies made as a consequence of marriage breakdown.

Where consideration is paid for the supply, further consideration is required as to whether the supply is made in the course of furtherance of an enterprise. This will generally not be the case for asset transfers made on marriage breakdown as the supply is considered to be made for private reasons.

While GST may not be required to be paid in respect of the transfer of an enterprise asset to a spouse, there may be an adjustment to the input tax credit previously claimed on the original acquisition of the enterprise asset, due to the change in use of the asset by the enterprise. The result is that there may be GST "payable" by the transferor spouse.

Example:

Brendan is a sole trader who carries on a retailing business. Brendan and Molly have divorced and as part of the property settlement, a motor vehicle owned by Brendan's business will be transferred to Molly.

The transfer of the car to Molly will be a taxable supply, however as there is no consideration paid by Molly the transaction will not be subject to GST.

However, the car has been used in the business to date and Brendan has previously claimed an input tax credit in respect of the car. When the car is transferred to Molly, it is considered to now be applied for a private or domestic use and no longer has a creditable purpose. An adjustment may be required to reverse the input tax credit previously claimed by Brendan. Section 129-40 of the GST Act contains the method for calculating this adjustment.

2.6 Stamp duty consequences on asset transfer

In all states and territories, the transfer of the matrimonial home from one spouse to the other pursuant to a court order is exempt from stamp duty.

Each of the states and territories have their own requirements in relation to the required form of a transfer or agreement giving effect to the sale or transfer of other property for an exemption to be available.

Furthermore, arrangements are treated differently throughout Australia depending on the identity of the parties to the transfer, and some of the exemptions available on marriage breakdown are currently under review.

Table 2.6 details the current position, however when a transfer is proposed involving an entity other than parties personally, the draft orders should be submitted to the relevant office of state revenue for review as to whether the transaction will be exempt from duty.

Table 2.6 – Summary of Stamp Duty Consequences

Event	NSW	VIC	QLD	SA	WA	TAS	ACT	NT (Note #4)
Transfer of matrimonial home from spouse to spouse	Exempt (s68)	Exempt (s44)	Exempt (s424)	Exempt (s71CB)	Exempt (s97)	Exempt (s56)	Exempt (s232)	Exempt (s91)
Transfer of listed shares from spouse to spouse	Exempt (s68)	Exempt (s44)	Exempt (s424)	Exempt (s71CA)	Maximum $20 (Schedule 2)	Exempt (s56)	Exempt (s232)	Exempt (s91)
Transfer of unlisted shares from spouse to spouse	Exempt (s68)	Exempt (s44)	Exempt (s424)	Exempt (s71CA)	Maximum $20 (Schedule 2)	Exempt (s56)	Exempt (s232)	Exempt (s91)
Transfer of other property (e.g. real property) from spouse to spouse	Exempt (s68)	Exempt (s44)	Exempt (s424)	Exempt (s71CA)	Maximum $20 (Schedule 2)	Exempt (s56)	Exempt (s232)	Exempt (s91)
Transfer of assets from company or trust to spouse	Note #1	Exempt (s44(3))	Exempt (s424) (Note #2)	May be exempt (Note #3)	Dutiable	Exempt (s56)	Exempt (s232)	Exempt (s91)
Transfer of assets from spouse to company or trust	Dutiable	Dutiable	Dutiable	Dutiable	Dutiable	Dutiable	Dutiable	May be dutiable
Relevant Legislation	**Duties Act 1997**	**Duties Act 2000**	**Duties Act 2001**	**Duties Act 1923**	**Duties Act 2008**	**Duties Act 2001**	**Duties Act 1999**	**Stamp Duty Act 1978**

Assumed that all events occur pursuant to a financial agreement or court order

#1: Exempt if the only members of the company are the parties to the marriage as the company is considered to be "matrimonial property" (Revenue Ruling SD 183). If only one party to a marriage is a member of the family company, factors to be considered include the voting strength of that party in relation to the other members and the composition of the board.

#2: Exempt if general exemption under s424 can prevail: *Duty is not imposed on a transaction to the extent that it gives effect to a matrimonial instrument or de facto relationship instrument*.

#3: Exemption provided in relation to transfers from superannuation funds, may be available from company or trust subject to the terms of the orders and discretion of commissioner (see s71CA).

#4: Exemption determined on a case by case basis.

Employee share options

3.0 Employee share schemes

3.1 Employee share schemes

Employee share schemes are again becoming prevalent and a basic understanding of these types of schemes will be necessary when one of the parties holds this type of equity**.** Employee share/option schemes are variously treated as property or a financial resource, in Family Law property proceedings (see ***Hurst & Weber*** 2009 FamCAFC 137 and ***Nielson & Nielson*** 2012 FamCA 70). It is essential that the nature of the options is thoroughly explored and the risks affecting their value adequately canvassed by the valuer.

Employee share schemes take many and varied forms, with most falling into one of the following categories:

(1) **Discounted share purchase plans** – an employee is granted the right to acquire shares at a discount off the current market price of the shares. The acquisition may be funded by salary sacrifice or after tax salary. Often the employee will be required to hold the shares for a specified period before being able to sell them;

(2) **Market price options** – the employee is granted an option to purchase a share in the employer company at a specified price at a future point in time. The exercise price is often the market price of the share at the date of grant of the option. The capacity of the employee to exercise the option is nearly always subject to continued employment to the date of vesting and may be subject to external performance hurdles being met by the employer company. Often the options will vest in tranches over a certain period and expire five to ten years after grant date;

(3) **Zero exercise price options** – as the name implies, the employee is granted options to purchase shares with a zero exercise price. Similar vesting conditions to those detailed above will usually apply; and

(4) **Loan plans** – under these types of schemes the employee is granted the right to acquire securities and is offered concessional funding arrangements by the employer to assist with the acquisition of the shares.

3.2 Explanation of some key terms

Grant date – the day on which the options are awarded by the employer to the employee;

Exercise price – the amount payable by the employee to acquire the underlying security (usually a share) over which the option is granted;

Vesting date – the date on which the employee can exercise the option and acquire the underlying shares;

Expiry date – the date on which the right to exercise the options and acquire the shares ceases;

Escrow period – the minimum period over which the shares acquired under the scheme must be held by the employee prior to being sold;

Performance hurdle – a performance measure that must be achieved by the company (total shareholder return, growth in earnings per share and so on), the failure of which results in the options not vesting to the employee. There is usually more than one date at which the performance hurdle is assessed, often by reference to the company's performance relative to a group of listed companies (ASX 100, FTSE 350 etc);

Vested options – those where the vesting criteria have been met and the employee has the capacity to exercise the option, but has chosen not to as yet;

Unvested options – those where the vesting criteria have not yet been met.

3.3 Basic value concepts – Employee share options

In broad terms, the value of an option is the difference between the amount required to be paid to exercise the option and the price of the underlying share that will be acquired.

An **"in the money"** option is one where the current share price is higher than the option "exercise" price. For example, assuming that the share price of the employer company is currently $25.00 and the exercise price, being the amount that must be paid by the employee to acquire the share, is $15.00, and the option has six months before it expires, this option has an "intrinsic value" of $10.00 (i.e. the value of the share price less the exercise price), and the option is said to be in the money.

The value of the option using an option valuation methodology may, for example, be $12.00. The value of the option at $12.00 is $2.00 more than the intrinsic value. An investor may be willing to pay more than the intrinsic value because they will receive the benefit of any increase in the share price over the period to expiry of the option. The value of this potential benefit is often referred to as the "time value" of the option. If the option had only three months until expiry, the time value of the option would probably be less, as there may be less opportunity for the share price to increase.

An **"out of the money"** option, is one where the current share price is less than the exercise price. Assuming that the share price is $12.00, the exercise price is $15.00 and the option has six months to expire, the option has no intrinsic value as the exercise price is greater than the share price. However, the option may still have a time value as an investor may be willing to pay a price for the opportunity to buy the share for $15.00 in six months' time when the share value could be, say, $20.00.

3.4 Employee share option valuation

There are many methods utilised by financial experts and investors to determine the value of publicly traded options. Some of these are more widely used than others and vary markedly in their complexity. One of the most widely used methods of valuing stock options is the method developed by Black-Scholes, or a derivative of this method. The assumptions of the Black-Scholes method make it appropriate for valuing European style options (only exercisable on the expiry date as opposed to American style options that can be exercised at any time after the vesting date) that do not pay dividends. The valuation method has been adapted for stocks that pay dividends under the Merton modified method.

Other methods include the Binomial, Trinomial and Monte Carlo methods. These methods are more complex, and less transparent, than the Black-Scholes method, and in many instances will be impractical to apply in the context of Family Law proceedings.

The Black-Scholes formula contains the following key components:

- The current market price of the share;
- The exercise price of the option;
- The dividend yield of the underlying stock;
- The risk free rate of return; and
- The volatility of the underlying stock (being the standard deviation of the stock's price movement over a given period).

It is essential to note however, that the Black-Scholes method, or the other methods listed above, do not take into account the significant impediments associated with employee stock options, when compared to publicly traded options. These impediments include, but are not limited to, the inability of the employee to sell the options and the continued employment required to vesting date. The valuer of the options must take these impediments into account when arriving at a value for the options.

3.5 Discount for lack of marketability

The discount for lack of marketability deals with the liquidity of the option, that is, how quickly and certainly the asset can be converted into cash at the employee's discretion. Where an asset is unable to be readily converted into cash, or a cash equivalent, it is appropriate to apply a discount for the lack of marketability.

It is not appropriate to apply a discount to the intrinsic value of the vested options. This is because the intrinsic value of a vested option does not suffer from illiquidity, as the option can be exercised immediately and the share sold in order for the holder to convert the intrinsic value of the option to cash.

With respect to the discount for lack of marketability to the **intrinsic value** of the **unvested options**, it is appropriate to apply a discount dependant on the period of time before the options vest.

With respect to the **time value** of an option, it can only be converted into cash when the option can be sold. As the unvested option is unable to be sold or otherwise traded, a discount should be applied to this component of the option value. With respect to vested options, as the employee has the option to hold the options until expiry, it is also appropriate to discount the time value of the vested option.

The valuer of the option should be in a position to determine the appropriate marketability discount to apply to the employee stock options, taking into account the following factors:

- Empirical studies[16] assessing the discount applied to shares which have restricted trading relative to shares in the same company that are able to be publicly traded on a stock exchange;
- The volatility of the underlying shares;

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16 For example, a paper by Francis A Longstaff as published at Appendix D of Shannon P Pratt, *Business Valuation Discounts and Discounts for Lack of Marketability*, Emory Pre-IPO Discount Studies 1980 – 2000.

- Empirical studies[17] assessing the impact of the yield (i.e. dividend or other distribution) on the discount for lack of marketability;
- The dividend yield on the underlying shares; and
- The share rights cannot be traded.

3.6 Risks due to ceasing relevant employment

The risk that the employee may not continue in employment until the vesting date, and the risk that the employee may cease to be an employee prior to the expiration of the normal life of the option, are taken into consideration by some valuers by applying a further discount to the market value determined by the Black-Scholes, Binomial or some other option valuation method.

Such discounts should only be applied where there is sufficient evidence to support the discounts applied, such as statistical evidence of the likelihood that an employee will remain in relevant employment. Further, such evidence needs to be relevant to the party to the marriage that holds the options in order to be an appropriate basis for determining the "value to the party" for Family Law purposes. Where clear evidence as to the likelihood of continued employment is not available, it may be necessary for the valuer to apply an arbitrary discount.

An alternative is the valuation of the options under a number of scenarios assuming varying durations of continued employment, rather than applying a discount for the probability of continued employment. It is appropriate to use significant dates within the life of the options, such as vesting and expiry, as the reference point for the assumption of continued employment. The table on the following page sets out such an approach:

17 FMV Restricted Stock Study.

	Current value assuming continuous employment to:		
Grant Date	**Sep 19**	**Sep 20**	**Sep 21**
Gross value of share options	$152,000	$184,000	$238,000
Gross value of share rights	$62,000	$123,000	$232,000
Gross value of share options and awards	**$214,000**	**$307,000**	**$470,000**
Less: Tax and Medicare @ 47%	($101,000)	($144,000)	($221,000)
Net value of share options and awards	**$113,000**	**$163,000**	**$249,000**

3.7 Risk of performance hurdles not being met

It is important to note that, unlike shares owned by an investor, the future cashflow relating to certain employee share options may be contingent on the employer company achieving specified performance hurdles.

The capacity of the employer company to meet performance-related vesting hurdles is outside of the control of the employee and the future performance of the share in relation to the comparative companies will depend on many items which the entity cannot control, e.g. interest rates and the results of the comparative companies.

The valuation of employee share options, or rights that are subject to external performance hurdles, can be determined by the application of a financial model prepared by an actuary that utilises, for example, the Monte Carlo method of determination. Such a model includes calculations under 100,000's of probability scenarios. It is impractical to apply this type of model in the context of employee share options in Family Law proceedings and it is necessary to take a more simplistic approach to the valuation.

In this instance, it would be appropriate for the valuer to prepare a valuation of the options under various scenarios as to the likelihood of the performance hurdle being achieved, for example 100%, 50% and 0% probability.

3.8 Taxation implications

Special rules apply to the taxation of benefits in the form of discounts on shares and rights acquired under employee share schemes ("ESS"). A detailed explanation of the application of these rules is outside the scope of this handbook, however a general understanding is beneficial to highlight potential issues that may arise for the parties.

The taxing of Employee Share Schemes changed with effect from 1 July 2015, with the changes applying to interests acquired after that date.

Section 83A of the Income Tax Assessment Act (1997) taxes discounts on interests acquired under employee share schemes either upfront (on acquisition of the share or right) or on a deferred basis, with the method depending on the nature of the employee share scheme.

Generally, the discount is included in assessable income in the income year the shares or rights are acquired. The amount of the discount is calculated at the date the shares or rights are acquired and is the difference between the market value of the shares or rights and the consideration, if any, that is paid to acquire them.

For those schemes with a deferred taxing point it is the earlier of:

- When there is no risk of forfeiting the ESS interests and any restrictions on their sale are lifted;
- In the case of rights, when the employee has exercised them and there is no risk of forfeiting the resulting share and no restriction on disposing of that share;
- When the employee ceases the relevant employment; or
- 15 years after the ESS interests were acquired.

Where the discount is taxed under Section 83A, they are exempt from being taxed as a fringe benefit or under the CGT provisions. However, once an employee share scheme interest has been taxed under Section 83A, any subsequent gain or loss is taxed in the same way as other capital assets but possibly also under other regimes.

When considering whether or not to make an allowance for tax and other realisation costs, the Family Court will consider the likelihood of the asset being realised in the foreseeable future, the purpose of the investment, the valuation approach applied and the intentions of the party (see ***Rosati****)*. Considering the principles laid down in the relevant Family Law cases, the tax payable on the vesting of the share rights and awards must be taken into account when determining the value to the party. This is due to the different characteristics of a share option/award in comparison to other assets such as real property or shares in a company.

If an individual has an interest in real property, they are able to enjoy the benefits of holding that property, such as provision of accommodation or rental income, prior to the point in time when the asset may be sold and the cost of any unrealised capital gains tax is crystallised. If an individual holds shares in a company, they will be able to enjoy the benefits of any dividends paid prior to the point in time when the asset may be sold and the cost of any unrealised capital gains tax is crystallised.

In comparison, an employee share scheme often provides no benefit to the holder, as they do not receive any dividends, nor are they able to sell or transfer their rights and shares under the various awards. In order to realise any benefits of the share rights or awards, the awards must vest. Therefore, any tax that is payable on vesting of the awards should be taken into account in assessing the value of the awards granted to the individual.

3.9 Other issues

If you suspect that a party may have been granted some sort of equity based incentive, but you are having difficulty achieving proper disclosure, contact the human resources department of the employer company and simply ask the question. While they are unlikely to give you information about a particular individual, they will almost certainly tell you whether the company has an equity based incentive program. You can then take proper steps to gain information about the particular employee.

The valuer will require a summary of all of the options/share awards granted to the employee. The employer will usually produce a summary that includes the grant date, vesting dates, expiry dates, exercise price, and number and type of equity units. The valuer will also require a copy of the rules of the plan under which each grant has been made.

Cases - Valuation and tax

4.0 Cases – Valuation, taxation, superannuation, experts

4.1 Valuation principles and methodology

Case	Valuation principles/methodology
Mallet & Mallet (1984) 156 CLR 605	– Determination of the most appropriate method of estimating the value of shares in a proprietary company depends on a variety of factors. These include the purpose for which the valuation is required, the nature of the shareholding or the character of the company's business, its capacity to earn profits and the net value of its assets – No fixed rule as to the proper method for the valuation of shares or other property in the Family Court
Hull & Hull (1983) FLC 91-360	– The test laid down in **Spencer & The Commonwealth** (1907) 5 CLR 418, being the hypothetical vendor / purchaser principle, can only be applied where there is a ready and available market and has no application where there is no market
Reynolds & Reynolds (1985) FLC 91-632	– Doubtful whether valuation methods which have been developed for commercial purposes are entirely appropriate for the purposes of Family Law proceedings. The commercial value may not reflect the value to the spouse who ultimately stands to benefit
Sapir & Sapir (No. 2) (1989) FLC 92-047	– The value to be ascribed to shares in a family company must be a realistic one, based upon the worth of the shares to the shareholder

Case	Valuation principles/methodology
Turnbull & Turnbull (1991) FLC 92-258	– Must look at the reality of the situation and value the shares on the basis of their worth to the shareholder
Burke & Burke (1992) FamCA 85	– Redundancy and long service leave entitlements – The contingent right is an accruing potential financial resource of the employee party which is transposed into property where the condition for its payment arises. That is, until an offer of redundancy is made and accepted, no chose-in-action arises and the entitlement is not property of the parties within s 79. – In a case where there is evidence of imminent redundancy, the potential entitlement may be capable of having a value attributed to it. Where, on the other hand, the possibility of redundancy is incapable of a positive finding this accruing potential resource would be likely to have little, if any, realistic relevance to any aspect of proceedings under s 79.
Harrison & Harrison (1996) FLC 92-682	– Must look at the reality of the situation and value the shares on the basis of their worth to the shareholder
O'Connell's Case (1996 unreported)	– Liability with a $600,000 face value was determined to have a value of $265,000, after regard was given to the long interest free period over which the loan was payable

Case	Valuation principles/methodology
Ramsay & Ramsay (1997) FLC 92-742	– Must consider whether there is a market for the shares – If there is a market, evidence of the market value will be relevant even if there is no intention to sell – Unhelpful for valuations to focus on the lack of a market in establishing the value to the shareholder – Probability of a minority shareholder gaining control of the company is a matter for the Court not the valuer – Probability of a shareholder receiving future benefits is a matter for the Court
Wall & Wall *Unreported* (Judgment published on 26 October 2000) EA83 of 1999	– Distinction between personal goodwill and commercial goodwill, with personal goodwill being treated as a factor affecting earning capacity, not property
GWR & VAR (2006) FamCA 894	– Real property should be valued at highest and best use, regardless of the intention of the parties
Stephens & Stephens & Ors (2007) FamCA 680 ***(Kennon & Spry)***	– Instruments and dispositions assigning capital to other parties (in the subject case the distribution of trust capital to separate trusts established for the benefit of the children) may be set aside, bringing the amounts back into the property pool
Myerson & Myerson **UK Court of Appeal** (2009) EWCA Civ 282	– Global Financial Crisis ("GFC") case – the natural process of price fluctuation, however dramatic, did not allow the Husband to appeal the settlement reached prior to the effect of the GFC on the pool of assets

Case	Valuation principles/methodology
Walkden & Walkden **UK Court of Appeal** (2009) EWCA Civ 627	– Wife failed in her attempt to secure a better outcome due to improved fortunes of the Husband as she had de-risked her settlement by taking cash assets, whereas Husband kept the business assets which then improved in value
Greenwood & Greenwood (2009) FamCA 787	– GFC case – reduction in value due to GFC and floods plus inability to secure finance were insufficient grounds for a Section 79A application to set aside consent orders made prior to the GFC
Nettler & Nettler (2009) FamCAFC 185	– Rule of thumb valuation – application of the highest and best use principle. The appropriate method of valuation of a business cannot depend upon the subjective intentions of one of the parties to the Family Law proceedings. It cannot be right in principle that a party wishing to hold onto a business can then insist on the business being valued on its future maintainable earnings in circumstances where the business, or its underlying assets, could be sold immediately for a substantially greater sum (in the subject case the asset was a loan book valued on a multiple of recurring income basis)
Hurst & Weber (2009) FamCA 137	– *Unvested* share options treated as an asset, but financial resource adjustment not property (outcome unaffected). O'Ryan – options should be treated as property

Case	Valuation principles/methodology
Pitt & Pitt (2011) FamCA 172	– Consideration of the relevance of a “non-binding indicative offer” to purchase the subject business, and its relevance to the valuation
Harris & Harris (2011) FamCA 245	– Value of discretionary trust not attributable to the Appointor but to the beneficiaries
Goddard & Patterson (2011) FamCAFC 14	– Goodwill centred on personal goodwill to the Husband – Commercial goodwill was found to be minimal despite the size of the business and the number of employees
Nielson & Nielson (2012) FamCA 70	– Employee share options treated as property not a financial resource, risks appropriately discounted
Pope & Pope (2012) FamCA 204	– Retrospective valuation principles (use of hindsight) – Valuation of royalty income – Whether royalty income is property or financial resource – Property development losses
Ledarn & Ledarn (2013) FamCA 858	– Both parties sought to retain successful business. Wife valued business at greater amount than value agreed by accountants. Court found Wife was not bargaining with the Court, rather the value to her was higher than the agreed value – Wife unsuccessfully sought restraint of trade in her favour injuncting the Husband from competing against her

Case	Valuation principles/methodology
Marlowe-Dawson & Dawson (No 2) (2014) FamCA 599	– Earning capacity and personal right to exercise earning capacity (professional partnership interest) do not constitute property within the meaning of s79 – The Act draws a distinction between 'property' and 'financial resources'. The Court is able to make orders that settle the property of the parties but not their financial resources. Thus, in making orders that settle property, the Court is required to have regard to each party's financial resources but can only settle the property of the parties **which is in existence**.

4.2 Minority interest discount

Case	Minority discount
Hull & Hull (1983) FLC 91-360	– Parents had effective control – Hypothetical willing yet prudent buyer concept was rejected but concluded it would be artificial to value the shares at $Nil – Held to be a financial resource as not realisable in foreseeable future
Sapir & Sapir (No. 2) (1989) FLC 92-047	– Effective control by parents (even though wife held 48% interest) – Present value of the proportional net asset value of the shareholding, discounted at an appropriate compounded annual rate over the lifetime of controlling family member – 50% discount on net asset value

Case	Minority discount
Turnbull & Turnbull (1991) FLC 92-258	– Ultimate intention for ownership to effectively remain with husband – Applied a modest discount rate of 5%
Moylan & Moylan (unreported decision delivered 12/11/92)	– 10% equity interest in company controlled by parents – 20% discount on net asset value to reflect the "reality of the situation"
Georgeson & Georgeson (1995) FLC 92-618	– Company controlled by parents – Value was discounted at a compounded annual rate of 5% over the lifetime of the controlling family member (22 years) – 66% discount on net asset value
Ramsay & Ramsay (1997) FLC 92-742	– 22.73% interest in company – No real prospect of gaining control of the company in the future – Valued on capitalisation of future maintainable dividends approach
Eaton & Eaton (2013) FamCAFC106	– 35% discount on net asset value – Husband one of nine shareholders, in a company controlled by three permanent directors and run for the benefit of three families and their descendants – Inappropriate for the wife to be required to take any of the shares, they were the husband's in a company that he ran and as such logical as well as just and equitable that he retain the shares

4.3 Tax and realisation costs

Case	Tax and realisation costs
Sorenson & Sorenson (unreported decision delivered 11/12/91)	– Deduct total realisation costs of parcels of real estate which the Husband had to sell to meet the Wife's award
Rothwell & Rothwell (1994) FLC 92-511	– Deduct notional capital gains tax as it would be unfair to leave the Husband with a CGT liability
Bland & Bland (1995) 19 FAM LR 325	– May only deduct CGT if immediate sale contemplated
Carruthers & Carruthers (1996) FLC 92-707	– An allowance should be made where evidence that the disposition will involve a sale or transfer of property that attracts tax consequences – Should not be made where it is not clear when, if ever, a sale or transfer of property will be made
Rosati & Rosati (1998) FamCA 38	– The prospect of capital gains tax being incurred by the husband was taken into account as a Section 75(2) factor, rather than as a deduction from the property pool, following consideration of the principles from earlier decisions
JEL & DDF (2001) FLC 93-075	– Husband unsuccessfully appealed realisation costs should have been taken into account
J & J (2006) FamCA 951	– CGT calculations considered to be inadmissible as evidence due to complexity of calculations required and capacity of Husband to be able to adjust timing of income

Case	Tax and realisation costs
IABH & HRBH (2010) FamCA 110	– Analysis and application of *Rosati* principles regarding future capital gains tax liabilities – Discounting of future capital gains tax liabilities on a present value basis considered in a s75(2) adjustment and s79(4)(d)-(g) matters
Jarrott & Jarrott (2012) FamCAFC 29	– Contingent order for CGT appropriate where there was uncertainty as to the realisation of an asset. "All or nothing" approach of either including or excluding CGT, or taking it into account as a 75(2) factor, had the potential to visit an injustice on one of the parties
Lovine & Connor & Anor (2012) FamCAFC 168	– Contingent order for tax on a proportional basis
Commissioner of Taxation & Darling & Anor (2014) FamCAFC 59	– ATO released from implied obligation not to make use of documents obtained via the Family Law matter
Rodgers & Rodgers (No 2) (2016) FamCAFC 104	– Allowance for future income tax liabilities associated with ongoing compliance with Division 7A – Highlights the need for proper evidence about the options for funding loan obligations and the income tax payable

4.4 Superannuation

Case	Superannuation (see supersplitting.com.au)
For a comprehensive analysis of relevant superannuation cases, see supersplitting.com.au	
Conti & Conti (2010) FMCAfam 344	– A foreign superannuation fund is not an *"eligible superannuation plan"* – Foreign superannuation plan treated as a financial resource
Campbell & Superannuation Complaints Tribunal (2016) FCA 808	– **Invalidity** pension from military superannuation scheme (MSBS) is **not** a defined benefit interest for the purpose of Part VIIIB – Must therefore be valued as an accumulation interest under r63 of FLSR, not the method applied to a defined benefit interest under r64 or 64A

4.5 Experts

Case	Experts
Picton & Picton (2009) FamCA 867	– Where questions asked of the expert under Rule 15.65 of the Family Law Rules 2004 required an unreasonable amount of work and went beyond the purpose of clarifying the expert's opinion

Tables -
Rates and dates

5.0 Tables – Rates and dates

5.1 Income tax rates

(a) **Resident Individual** income tax rates for the years ended 30 June 2019 and 2020:

Taxable income	Tax on taxable income	Marginal % on excess
18,200	Nil	19%
37,000	3,572	32.5%
90,000	20,797	37%
180,000	54,097	45%

(b) **Non-resident individual** income tax rates for the years ended 30 June 2019 and 2020:

Taxable income	Tax on taxable income	Marginal % on excess
Nil – 90,000	Nil	32.5%
90,001 – 180,000	29,250	37%
>180,000	62,550	45%

(c) **Medicare levy**
Resident individuals are liable to pay a **Medicare levy** based on the amount of their taxable income. The Medicare Levy rate for the two years ended 30 June 2020 is **2%** of taxable income. Medicare levy is not payable for residents with a taxable income of less than $22,398 ($35,418 for seniors and pensioners entitled to the seniors and pensioners tax offset). Medicare Levy thresholds are indexed annually in the last quarter of the financial year.

(d) **Company tax**
The rate of tax payable by a company is now determined by reference to its classification as a **"base rate entity"** or otherwise.

The corporate tax rate is **30%** for all companies that are not base rate entities.

A base rate entity is a company that meets both of the following:

- An aggregated turnover less than the aggregated turnover threshold; and
- 80% or less of their assessable income is base rate entity passive income (which replaces the requirement to be carrying on a business).

Base rate entity passive income includes:

- Corporate distributions and franking credits;
- Royalties and rent;
- Interest income (generally, some exceptions apply);
- Gains on qualifying securities;
- A net capital gain;
- Assessable income of a partner in a partnership or the beneficiary of a trust that is traceable to an amount that is otherwise base rate entity passive income.

A summary of the aggregated turnover thresholds, per the ATO website, for the five years to 30 June 2022, is as follows:

Year	Turnover threshold	Base rate entities under the threshold	Other corporate tax entities
2017 – 2018	\$25 million	27.5%	30%
2018 – 2019	\$50 million	27.5%	30%
2019 – 2020	\$50 million	27.5%	30%
2020 – 2021	\$50 million	26.0%	30%
2021 – 2022	\$50 million	25.0%	30%

The change in tax rates adds complication when determining the extent of fully franked dividends that can be paid, as the dividend can only be franked to the extent of the tax paid in the prior year, which may be at varying rates as entities move into the lower tax bracket. (Broadly, a fully franked dividend equates to tax paid x (1-tax rate)/tax rate)

(e) Division 7A loans

The benchmark rate of interest that must be charged on complying Division 7A loans (s109N loans) is released each year in a tax determination. **TD 2018/14** sets the rate for the 2019 tax year at **5.2%**. The rate for 2018, per TD 2017/17 was 5.3%.

(f) Superannuation

The rate of tax applicable to a **complying superannuation fund** in relation to their income for the year ended 30 June 2019 and beyond is 15% assessed on income, including realised capital gains and taxable contributions.

(g) The **superannuation guarantee** rate is currently 9.5%, and the rate will remain the same until July 2021 when it increases to 10%, and will progressively increase to 12% by July 2025.

(h) The **preservation age**, being the age at which a member can access their superannuation unless earlier meeting a condition of release, applicable to a person depends on the date of birth of the person as set out in the table below:

Date of birth	Preservation age
Before 1 July 1960	55
1 July 1960 – 30 June 1961	56
1 July 1961 – 30 June 1962	57
1 July 1962 – 30 June 1963	58
1 July 1963 – 30 June 1964	59
After 30 June 1964	60

5.2 CPI index factors
Consumer Price Index (CPI) (Australian Taxation Office)

Year	Quarterly CPI number			
	March	**June**	**Sept**	**Dec**
1987	45.3	46.0	46.8	47.6
1988	48.4	49.3	50.2	51.2
1989	51.7	53.0	54.2	55.2
1990	56.2	57.1	57.5	59.0
1991	58.9	59.0	59.3	59.9
1992	59.9	59.7	59.8	60.1
1993	60.3	60.8	61.1	61.2
1994	61.5	61.9	62.3	62.8
1995	63.8	64.7	65.5	66.0
1996	66.2	66.7	66.9	67.0
1997	67.1	66.9	66.6	66.8
1998	67.0	67.4	67.5	67.8
1999	67.8	68.1	68.7	69.1
2000	69.7	70.2	72.9	73.1
2001	73.9	74.5	74.7	75.4
2002	76.1	76.6	77.1	77.6
2003	78.6	78.6	79.1	79.5
2004	80.2	80.6	80.9	81.5
2005	82.1	82.6	83.4	83.8
2006	84.5	85.9	86.7	86.6
2007	86.6	87.7	88.3	89.1
2008	90.3	91.6	92.7	92.4
2009	92.5	92.9	93.8	94.3
2010	95.2	95.8	96.5	96.9
2011	98.3	99.2	99.8	99.8
2012	99.9	100.4	101.8	102.0
2013	102.4	102.8	104.0	104.8
2014	105.4	105.9	106.4	106.6
2015	106.8	107.5	108.0	108.4
2016	108.2	108.6	109.4	110.0
2017	110.5	110.7	111.4	112.1
2018	112.6	113.0	113.5	114.1
2019	114.1			

5.3 Life expectancy

(a) Life expectancy tables prepared by the Australian Government Actuary – 2015 to 2017.

Number of years of average life expectancy at exact age shown.

Age	Male	Female	Age	Male	Female	Age	Male	Female
0	80.5	84.6	34	47.5	51.3	68	17.3	19.8
1	79.8	83.9	35	46.6	50.3	69	16.5	18.9
2	78.8	82.9	36	45.6	49.4	70	15.7	18.1
3	77.8	81.9	37	44.7	48.4	71	15.0	17.3
4	76.8	80.9	38	43.7	47.4	72	14.2	16.4
5	75.8	79.9	39	42.8	46.4	73	13.5	15.6
6	74.8	78.9	40	41.8	45.5	74	12.8	14.8
7	73.8	77.9	41	40.9	44.5	75	12.1	14.1
8	72.8	76.9	42	40.0	43.5	76	11.4	13.3
9	71.8	76.0	43	39.0	42.6	77	10.8	12.6
10	70.8	75.0	44	38.1	41.6	78	10.1	11.8
11	69.8	74.0	45	37.2	40.7	79	9.5	11.1
12	68.9	73.0	46	36.2	39.7	80	8.9	10.4
13	67.9	72.0	47	35.3	38.8	81	8.3	9.7
14	66.9	71.0	48	34.4	37.8	82	7.8	9.1
15	65.9	70.0	49	33.5	36.9	83	7.2	8.5
16	64.9	69.0	50	32.6	36.0	84	6.7	7.9
17	63.9	68.0	51	31.7	35.0	85	6.3	7.3
18	62.9	67.0	52	30.8	34.1	86	5.8	6.8
19	62.0	66.0	53	29.9	33.2	87	5.4	6.2
20	61.0	65.1	54	29.0	32.2	88	5.0	5.8
21	60.0	64.1	55	28.1	31.3	89	4.6	5.3
22	59.1	63.1	56	27.2	30.4	90	4.3	4.9
23	58.1	62.1	57	26.4	29.5	91	4.0	4.5
24	57.1	61.1	58	25.5	28.6	92	3.7	4.1
25	56.2	60.1	59	24.7	27.7	93	3.5	3.8
26	55.2	59.1	60	23.8	26.8	94	3.3	3.6
27	54.3	58.2	61	23.0	25.9	95	3.1	3.3
28	53.3	57.2	62	22.1	25.0	96	2.9	3.1
29	52.3	56.2	63	21.3	24.1	97	2.7	2.8
30	51.4	55.2	64	20.5	23.2	98	2.5	2.7
31	50.4	54.2	65	19.7	22.3	99	2.3	2.5
32	49.4	53.3	66	18.9	21.5	100	2.1	2.3
33	48.5	52.3	67	18.1	20.6			

(b) Life expectancy (improving mortality) tables prepared by Cumpston Sarjeant Consulting Actuaries – 2019.

Number of years of average life expectancy at exact age shown.

Age	Male	Female	Age	Male	Female	Age	Male	Female
0	82.81	85.86	34	49.39	52.36	68	18.13	20.21
1	82.07	85.12	35	48.41	51.37	69	17.31	19.34
2	81.09	84.13	36	47.44	50.39	70	16.50	18.48
3	80.10	83.14	37	46.47	49.40	71	15.71	17.63
4	79.10	82.14	38	45.50	48.42	72	14.92	16.79
5	78.10	81.15	39	44.53	47.44	73	14.15	15.97
6	77.11	80.15	40	43.57	46.47	74	13.40	15.15
7	76.10	79.16	41	42.60	45.49	75	12.66	14.35
8	75.10	78.16	42	41.64	44.51	76	11.94	13.57
9	74.10	77.16	43	40.69	43.54	77	11.24	12.80
10	73.10	76.16	44	39.73	42.57	78	10.56	12.05
11	72.09	75.16	45	38.78	41.60	79	9.90	11.32
12	71.09	74.16	46	37.83	40.63	80	9.26	10.60
13	70.08	73.17	47	36.88	39.67	81	8.65	9.91
14	69.08	72.17	48	35.93	38.71	82	8.06	9.24
15	68.08	71.18	49	35.00	37.75	83	7.51	8.60
16	67.08	70.18	50	34.06	36.79	84	6.98	7.99
17	66.08	69.19	51	33.13	35.84	85	6.48	7.40
18	65.09	68.20	52	32.20	34.89	86	6.01	6.85
19	64.11	67.20	53	31.28	33.94	87	5.58	6.33
20	63.12	66.21	54	30.36	33.00	88	5.17	5.84
21	62.14	65.22	55	29.45	32.06	89	4.79	5.38
22	61.15	64.23	56	28.55	31.12	90	4.45	4.96
23	60.17	63.24	57	27.65	30.19	91	4.13	4.57
24	59.19	62.25	58	26.75	29.26	92	3.84	4.22
25	58.21	61.26	59	25.86	28.34	93	3.58	3.90
26	57.23	60.26	60	24.98	27.41	94	3.35	3.62
27	56.25	59.27	61	24.10	26.50	95	3.15	3.38
28	55.26	58.28	62	23.23	25.58	96	2.97	3.17
29	54.28	57.29	63	22.36	24.67	97	2.82	3.01
30	53.30	56.30	64	21.50	23.77	98	2.69	2.89
31	52.32	55.31	65	20.65	22.87	99	2.57	2.83
32	51.34	54.33	66	19.80	21.97	100	2.47	2.81
33	50.36	53.34	67	18.96	21.09			

5.4 De facto provisions in *Family Law Act 1975* (Cth)

Table of Key Mirror Sections		
Topic	**Marriage**	**De facto Relationship**
Cause	Matrimonial Cause	De facto Financial Cause
Binding Financial Agreements exclude the jurisdiction	s 71A	s 90SA(1)
Spousal maintenance	s 74	s 90SE
Matters to take into account in maintenance Family Law proceedings	s 75(2)	s 90SF(3)
Urgent maintenance	s 77	s 90SG
Declarations of interests in property	s 78	s 90SL
Alteration of property interests	s 79	s 90SM
Just & Equitable	s 79(2)	s 90SM(3)
Matters to take into account	s 79(4)	s 90SM(4)
Varying and setting aside orders altering property	s 79A	s 90SN
General powers	s 80	s 90SS(1)
Duty to end financial relationships	s 8l	s 90ST
Modification of maintenance orders	s 83	s 90SI
Stamp duty	s 90	s 90WA
Binding Financial Agreements (BFAs)	Pt VIIIA	Div 4 Pt VIIIAB
BFAs before marriage/cohabitation	s 90B	s 90UB
BFAs during marriage/cohabitation	s 90C	s 9000
BFAs after divorce/breakdown	s 90D	s 90UD
Formal requirements of BFAs	s 90G(1)	s 90UJ(1)
Setting aside BFAs	s 90K	s 90UM
Validity, enforceability and effect of BFAs	s 90KA	s 90UN
Orders and injunctions binding third parties	Pt VIIIAA	Div 3 Pt VIIIAB

5.5 Public holidays 2019 to 2022

National Public Holidays

National Public Holidays (*plus important dates*)	2019	2020	2021	2022
New Year's Day holiday	1 Jan	1 Jan	1 Jan	3 Jan
Australia Day holiday	28 Jan	27 Jan	26 Jan	26 Jan
Good Friday	19 Apr	10 Apr	2 Apr	15 Apr
Easter Monday	22 Apr	13 Apr	5 Apr	18 Apr
Anzac Day	25 Apr	25 Apr	25 Apr	25 Apr
Mother's Day	12 May	10 May	9 May	8 May
Father's Day	1 Sep	6 Sep	5 Sep	4 Sep
Christmas Day	25 Dec	25 Dec	25 Dec	25 Dec
Boxing Day holiday	26 Dec	28 Dec	27 Dec	26 Dec

Public Holidays – NSW

Holiday	2019	2020	2021	2022
Queen's Birthday	10 Jun	8 Jun	14 Jun	13 Jun
Bank Holiday	5 Aug	3 Aug	2 Aug	1 Aug
Labour Day	7 Oct	5 Oct	4 Oct	3 Oct

Public Holidays – WA

Holiday	2019	2020	2021	2022
Labour Day	4 Mar	2 Mar	1 Mar	7 Mar
Western Australia Day	3 Jun	1 Jun	7 Jun	6 Jun
Queen's Birthday	30 Sep	28 Sep	27 Sep	26 Sep

Public Holidays – VIC

Holiday	2019	2020	2021	2022
Labour Day	11 Mar	9 Mar	8 Mar	4 Mar
Melbourne Cup Day (*Melbourne Metro only*)	5 Nov	3 Nov	2 Nov	1 Nov

Public Holidays – ACT

Holiday	2019	2020	2021	2022
Canberra Day	11 Mar	9 Mar	8 Mar	14 Mar
Reconciliation Day	27 May	1 Jun	31 May	30 May
Labour Day	7 Oct	5 Oct	4 Oct	3 Oct

Public Holidays – QLD

Holiday	2019	2020	2021	2022
Labour Day	6 May	4 May	3 May	2 May
Royal Queensland Show *(Brisbane area only)*	14 Aug	12 Aug	11 Aug	17 Aug
Queen's Birthday	7 Oct	5 Oct	4 Oct	3 Oct

Public Holidays – SA

Holiday	2019	2020	2021	2022
Adelaide Cup	11 Mar	9 Mar	8 Mar	14 Mar
Queen's Birthday	10 Jun	8 Jun	14 Jun	13 Jun
Labour Day	7 Oct	5 Oct	4 Oct	3 Oct

Public Holidays – TAS

Holiday	2019	2020	2021	2022
Eight Hours Day	11 Mar	9 Mar	8 Mar	14 Mar
Easter Tuesday	23 Apr	14 Apr	6 Apr	19 Apr
Queen's Birthday	10 Jun	8 Jun	14 Jun	13 Jun

Public Holidays – NT

Holiday	2019	2020	2021	2022
May Day	6 May	4 May	3 May	2 May
Queen's Birthday	10 Jun	8 Jun	14 Jun	13 Jun
Picnic Day	5 Aug	3 Aug	2 Aug	1 Aug

- **Note these dates are subject to change. They have been obtained from publicly available sources at the date of publication.**

5.6 School holidays 2019 to 2022 (State schools)

School Holidays – 2019

Holiday	New South Wales	Victoria
Autumn Winter Spring Summer	15 Apr – 26 Apr 8 Jul – 19 Jul 30 Sep – 11 Oct 23 Dec – 24 Jan	8 Apr – 22 Apr 1 Jul – 12 Jul 23 Sep – 4 Oct 23 Dec – 28 Jan
	South Australia	**Tasmania**
Autumn Winter Spring Summer	15 Apr – 26 Apr 8 Jul – 19 Jul 30 Sep – 11 Oct 16 Dec – 27 Jan	15 Apr – 26 Apr 8 Jul – 19 Jul 30 Sep – 11 Oct 20 Dec – 4 Feb
	Queensland	**Western Australia**
Autumn Winter Spring Summer	8 Apr – 22 Apr 1 Jul – 12 Jul 23 Sep – 7 Oct 16 Dec – 27 Jan	15 Apr – 26 Apr 8 Jul – 19 Jul 30 Sep – 11 Oct 20 Dec – 31 Jan
	Australian Capital Territory	**Northern Territory**
Autumn Winter Spring Summer	15 Apr – 26 Apr 8 Jul – 19 Jul 30 Sep – 11 Oct 20 Dec – 31 Jan	15 Apr – 19 Apr 1 Jul – 19 Jul 30 Sep – 11 Oct 16 Dec – 27 Jan

- **Note these dates are subject to change. They have been obtained from publicly available sources at the date of publication.**

School Holidays – 2020

Holiday	New South Wales	Victoria
Autumn Winter Spring Summer	13 Apr – 24 Apr 6 Jul – 17 Jul 28 Sep – 9 Oct 21 Dec – 26 Jan	30 Mar – 13 Apr 29 Jun – 10 Jul 21 Sep – 2 Oct 21 Dec – 27 Jan
	South Australia	**Tasmania**
Autumn Winter Spring Summer	10 Apr – 24 Apr 6 Jul – 17 Jul 28 Sep – 9 Oct 14 Dec – 26 Jan	10 Apr – 27 Apr 6 Jul – 17 Jul 28 Sep – 9 Oct 18 Dec – 2 Feb
	Queensland	**Western Australia**
Autumn Winter Spring Summer	6 Apr – 17 Apr 29 Jun – 10 Jul 21 Sep – 5 Oct 14 Dec – 26 Jan	10 Apr – 27 Apr 6 Jul – 17 Jul 28 Sep – 9 Oct 18 Dec – 29 Jan
	Australian Capital Territory	**Northern Territory**
Autumn Winter Spring Summer	10 Apr – 24 Apr 6 Jul – 17 Jul 28 Sep – 9 Oct 21 Dec – 29 Jan	10 Apr – 17 Apr 29 Jun – 17 Jul 28 Sep – 9 Oct 21 Dec – 29 Jan

- **Note these dates are subject to change. They have been obtained from publicly available sources at the date of publication.**

School Holidays – 2021

Holiday	New South Wales	Victoria
Autumn	5 Apr – 16 Apr	2 Apr – 16 Apr
Winter	28 Jun – 9 Jul	28 Jun – 9 Jul
Spring	20 Sep – 1 Oct	20 Sep – 1 Oct
Summer	20 Dec – 27 Jan	20 Dec – 28 Jan
	South Australia	**Tasmania**
Autumn	12 Apr – 26 Apr	*Not available*
Winter	5 Jul – 16 Jul	
Spring	27 Sep – 8 Oct	
Summer	13 Dec – 28 Jan	
	Queensland	**Western Australia**
Autumn	2 Apr – 16 Apr	2 Apr – 16 Apr
Winter	28 Jun – 9 Jul	5 Jul – 16 Jul
Spring	20 Sep – 4 Oct	27 Sep – 8 Oct
Summer	13 Dec – 21 Jan	17 Dec – 28 Jan
	Australian Capital Territory	**Northern Territory**
Autumn	2 Apr – 16 Apr	19 Apr – 23 Apr
Winter	28 Jun – 9 Jul	5 Jul – 23 Jul
Spring	20 Sep – 4 Oct	4 Oct – 15 Oct
Summer	20 Dec – 28 Jan	20 Dec – 28 Jan

- **Note these dates are subject to change. They have been obtained from publicly available sources at the date of publication.**

School Holidays – 2022

Holiday	New South Wales	Victoria
Autumn Winter Spring Summer	11 Apr – 22 Apr 4 Jul – 15 Jul 26 Sep – 7 Oct 21 Dec – 26 Jan	11 Apr – 25 Apr 27 Jun – 8 Jul 19 Sep – 30 Sep 21 Dec – 27 Jan
	South Australia	**Tasmania**
Autumn Winter Spring Summer	15 Apr – 29 Apr 11 Jul – 22 Jul 3 Oct – 14 Oct 19 Dec – 27 Jan	*Not available*
	Queensland	**Western Australia**
Autumn Winter Spring Summer	4 Apr – 18 Apr 27 Jun – 8 Jul 19 Sep – 3 Oct 12 Dec – 20 Jan	11 Apr – 25 Apr 4 Jul – 15 Jul 26 Sep – 7 Oct 16 Dec – 31 Jan
	Australian Capital Territory	**Northern Territory**
Autumn Winter Spring Summer	11 Apr – 25 Apr 4 Jul – 15 Jul 26 Sep – 7 Oct 19 Dec – 30 Jan	19 Apr – 22 Apr 4 Jul – 22 Jul 3 Oct – 14 Oct 19 Dec – 27 Jan

- **Note these dates are subject to change. They have been obtained from publicly available sources at the date of publication.**

Information required for a valuation

6.0 Information required for a valuation

6.1 Individuals (parties to the Family Law proceedings)

Names of individuals – Information requirements	
1)	Documents relating to the matter including **Family Law Financial Statements,** relevant affidavit extracts, and any other documents that may be of assistance with the valuations
2)	Personal income tax returns, including all supporting schedules and any amended returns, and income tax assessments for the past three financial years

6.2 Self Managed Superannuation Funds (SMSF)

Self Managed Superannuation Funds – Information requirements	
1)	Financial statements and income tax returns for the most recent financial year, including copy of compliance certificate
2)	Details of the assets held by the fund including: – Name of entity in which the fund holds shares/units; – Number of shares/units held; – Purchase price and date of assets; and – Independent valuation of real property (if any)
3)	Member statements detailing superannuation benefits payable to each member at balance date

6.3 Employee equity plans

Employee equity plan – Information requirements	
1)	Copies of all equity certificates detailing nature of the security, date issued, vesting periods, exercise price, expiry date and number of equity units issued

Employee equity plan – Information requirements	
2)	Copy of the rules governing the option scheme/plan which sets out the conditions which must be met in order to be able to exercise the option and any actions of the employee which would cause any rights under the option scheme/plan to cease
3)	If it is not identifiable from either of 1 or 2 above, the class of share that can be purchased with the option and the stock exchange on which the share is listed
4)	Details of any advice or information provided with respect to the taxation liability of the employee on receiving and/or exercising the options

6.4 Entities/businesses in which the parties have an interest (company, trust, partnership, sole trader)

Entity/business – Information requirements	
1)	Copies of the Constitution or Memorandum and Articles of Association, Trust Deeds, Partnership agreements, shareholder agreements
2)	Copies of minutes pertaining to rights of members if Constitution is silent as to rights
3)	Group structure, if any, including identification of all related parties, and an outline of the relationships and transactions between each entity in the Group, including a copy of any written agreements
4)	Agreements for the provision of services, rental accommodation etc, between group entities or a related party
5)	Detailed narrative regarding the business conducted by each entity, including but not limited to the following, if not available from the business website: – Date of establishment; – Nature of business activity, including any area of recognised specialisation or niche;

Entity/business – Information requirements	
	– Nature of the customer base, including any specific industry group on which the business relies; – Market share and position; – Major competitors; – Details of any important contracts or agreements between the entity and its customers or suppliers, including supply contracts, lease or hire purchase arrangements – Barriers to market entry; – Management's assessment of current industry conditions and anticipated future prospects; – Organisation chart/Management structure including key employees, their qualifications, roles and responsibilities and any variation over the past three financial years; – Details of past transactions in the equity/interest in the entity including the date, number of shares/units, consideration paid and reason for transactions; – For large businesses, any current or proposed plans to restructure, trade sale, or offer an initial public offering; – Capital and funding requirements and planned future capital expenditure; – Business address utilised in the past three financial years, and confirmation as to whether rent is paid on a commercial arms-length basis
6)	Financial statements and income tax returns for the past three financial years
7)	Budgets/forecasts for the current financial year and years forward, including assumptions on which the budgets are based (if available)
8)	Business Activity Statements from latest financial year end to the present
9)	Copy of Australian Taxation Office Integrated Client Account and Income Tax Account covering the period from the beginning of the latest financial year to date

Entity/business – Information requirements	
10)	Copies of Fringe Benefits Tax (FBT) returns and working papers for the past three FBT years
11)	Details of salary packages paid to all related parties for the past three financial years (including cash salary, superannuation and all fringe benefits e.g. private use of motor vehicle)
12)	Detailed information as to the duties undertaken by each party (including hours worked per week, responsibilities, tasks, etc) and variation in duties over the past three financial years
13)	Instructions as to whether an expert remuneration opinion will be provided in respect of the notional salary that should be allowed commensurate with the duties performed by the parties and related parties, or whether it is appropriate to utilise published salary surveys
14)	Bank statement for main trading account at the latest year end and a copy of bank reconciliation
15)	Information to support the valuation of any stock on hand at the latest financial year end
16)	Listing of all work completed or services provided pre year end that were billed after year end (work in progress at balance date) at the latest financial year end
17)	Confirmation that there have not been any material movements in the balances of stock and work in progress between the beginning and end of each of the last three years. Should this not be the case, provide details of the closing balances of stock and work in progress for the three years prior to the current year
18)	Detailed listing (preferably depreciation schedules associated with financial year accounting) of property, plant and equipment as at the latest financial year end. Also include any recent valuations of entity assets – particularly freehold land and buildings (if any)
19)	Details of any improvements to a property held, occurring subsequent to the financial year end but prior to the property valuation date
20)	Detail of any patents, licences, contracts and protection of intellectual property

Entity/business – Information requirements	
21)	Details of the transaction(s) from which any goodwill assets at the latest balance date arose, including copies of any documents (including contracts, agreements and any calculations) in respect of these transaction(s)
22)	Listing of all trade debtors and trade creditors outstanding at the latest balance date
23)	Details of any material contingent liabilities of the entity at the present time which are not noted in the accounts as at the latest financial year end – include guarantees and any litigation affecting the entity
24)	Details of the terms and conditions of any loans owed to or by the entity as at the latest financial year end, for both unsecured loans and secured loans. Include confirmation, where appropriate, that loans owed to the entity are compliant with the provisions of Division 7A of the Income Tax Assessment Act
25)	Schedule of accrued leave entitlements by employee (both hours / $) as at the latest financial year end, including both annual leave and long service leave
26)	Listing of all hire purchase / lease liabilities as at the latest financial year end, including principal and unexpired interest, and the asset to which they relate
27)	Explanation/schedule of large increases and variances in individual line items of financial statements, including budgets
28)	Schedule of abnormal/extraordinary items included in the financial statements

Glossary of terms

7.0 Glossary of valuation terms

Accounting Standards are a set of principles or standards issued by the accounting professional bodies and the Australian Accounting Standards Board to assist the definition and treatment of financial reporting.

Accrual Accounting is an accounting basis that brings items into the accounts as they are earned or incurred (not as money is received or paid) so as to include them in the accounts for the financial periods they relate to.

Adjusted Book Value is the value that results after one or more asset or liability amounts are added, deleted, or changed from their respective financial statement amounts.

APES 215 is a standard set by the Accounting Professional and Ethical Standards Board for accountants requiring the provision of quality and ethical Forensic Accounting services. Includes standards in respect to the content of an expert witness report and providing expert witness services. A copy of APES 215 can be obtained from www.apesb.org.au.

APES 225 is a standard set by the Accounting Professional and Ethical Standards Board for accountants requiring the provision of quality and ethical valuation services. Includes standards in respect to professional competence and due care and the content of a valuation report. A copy of APES 225 can be obtained from www.apesb.org.au.

Asset (Asset-Based) Approach is a general way of determining a value indication of a business, business ownership interest, or security using one or more methods based on the value of the assets net of liabilities.

BAS is an abbreviation for the Business Activity Statement that an organisation sends to the Australian Tax Office showing GST information.

Base rate entity is a company that has both an aggregated turnover of less than the aggregated turnover threshold and 80% or less of their assessable income is base rate entity passive income – refer to page 62 for more detail.

Beta is a measure of systematic risk of a stock; the tendency of a stock's price to correlate with changes in a specific index.

Blockage Discount is an amount or percentage deducted from the current market price of a publicly traded stock to reflect the decrease in the per share value of a block of stock that is of a size that could not be sold in a reasonable period of time given normal trading volume.

Business Enterprise is a commercial, industrial, service, or investment entity (or a combination thereof) pursuing an economic activity.

Business Risk is the degree of uncertainty of realising expected future returns of the business resulting from factors other than financial leverage. See **Financial Risk.**

Business Valuation is the act or process of determining the value of a business enterprise or ownership interest therein.

Capital Asset Pricing Model (CAPM) is a model in which the cost of capital for any security or portfolio of securities equals a risk free rate plus a premium that is proportionate to the systematic risk of the security or portfolio.

Capitalisation is a conversion of a single period of economic benefits into value.

Capitalisation Factor is any multiple or divisor used to convert anticipated benefits into value.

Capitalisation of Earnings Method is a method within the income approach whereby economic benefits for a representative single period are converted to value through division by a capitalisation rate.

Capital Structure is the composition of the invested capital of a business enterprise, the mix of debt and equity financing.

Cash Accounting is an accounting basis that brings items into the accounts when they are physically received or spent.

Cash Flow is cash that is generated over a period of time by an asset, group of assets, or business enterprise. It may be used in a general sense to encompass various levels of specifically defined cash flows. When the term is used, it should be supplemented by a qualifier (for example, “discretionary” or “operating”) and a definition of exactly what it means in the given valuation context.

Control is the power to direct the management and policies of a business enterprise.

Control Premium is an amount (expressed in either dollar or percentage form) by which the pro rata value of a controlling interest exceeds the pro rata value of a non controlling interest in a business enterprise, that reflects the power of control.

Cost Approach is a general way of determining a value indication of an individual asset by quantifying the amount of money required to replace the future service capability of that asset.

Cost of Capital is the expected rate of return (discount rate) that the market requires in order to attract funds to a particular investment.

Current Asset is an item which, in the normal course of business, is expected to be turned into cash within twelve months.

Depreciation is an accounting process used to reduce the book value of an asset over its defined useful, or effective life.

Discount for Lack of Control is an amount or percentage deducted from the pro rata share of value of one hundred percent (100%) of an equity interest in a business to reflect the absence of some or all the powers of control.

Discount for Lack of Marketability is an amount or percentage deducted from the value of an ownership interest to reflect the relative absence of marketability.

Discount Rate is a rate of return used to convert a future monetary sum into present value.

Discounted Cash Flow Method is a method within the income approach whereby the present value of future expected net cash flows is calculated using a discount rate.

Discounted Future Earnings Method is a method within the income approach whereby the present value of future expected economic benefits is calculated using a discount rate.

EBIT – Earnings Before Interest and Tax is a measure of future earnings often applied in the valuation of a business.

EBITDA – Earnings Before Interest, Tax, Depreciation and Amortisation is a measure of future earnings often applied in the valuation of a business.

Economic Benefits are inflows such as revenues, net income, net cash flows, etc.

Economic Life is the period of time over which property may generate economic benefits.

Earnings Multiple is the inverse of the capitalisation rate applied to a future earnings stream, taking into account the risks associated with the particular business and industry.

Equity is the owner's interest in property after deduction of all liabilities.

Equity Net Cash Flows are those cash flows available to pay out to equity holders (in the form of dividends) after funding operations of the business enterprise, making necessary capital investments, and increasing or decreasing debt financing.

Equity Risk Premium is a rate of return added to a risk-free rate to reflect the additional risk of equity instruments over risk free instruments (a component of the cost of equity capital or equity discount rate).

Excess Earnings is that amount of anticipated economic benefits that exceeds an appropriate rate of return on the value of a selected asset base (often net tangible assets) used to generate those anticipated economic benefits.

Excess Earnings Method is a specific way of determining a value indication of a business, business ownership interest, or security determined as the sum of a) the value of the assets derived by capitalising excess earnings and b) the value of the selected asset base. Also frequently used to value intangible assets. See **Excess Earnings.**

Fair Market Value is the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts. (Note: The term "price" can also be replaced with the term "highest price").

Fairness Opinion is an opinion as to whether or not the consideration in a transaction is fair from a financial point of view.

Fair value – The "fair value" standard of valuation requires the valuer to consider the following:

- (a) The purpose of the valuation;
- (b) The prevailing ownership conditions;
- (c) The identity of the likely purchaser and whether the acquisition of the subject interest will give them control;
- (d) The fact that the transaction is not taking place in the open market; and
- (e) That both the buyer and seller have been brought together by the operation of a legally binding agreement in a way which potentially excludes other buyers and sellers.

Financial Risk is the degree of uncertainty of realising expected future returns of the business resulting from financial leverage. See **Business Risk.**

Fixed Asset is an asset which, in the normal course of business, is not expected to be converted into cash in the next twelve months. Also referred to as a non current asset.

Fixed Costs are costs that do not increase as the volume/activity of a business increases – e.g. Rent of business premises.

Forced Liquidation Value is the liquidation value, at which the asset or assets are sold as quickly as possible, such as at an auction.

Going Concern Value is the value of a business enterprise that is expected to continue to operate into the future. The intangible elements of Going Concern Value result from factors such as having a trained work force, an operational plant, and the necessary licenses, systems, and procedures in place.

Goodwill is the intangible asset arising as a result of name, reputation, customer loyalty, location, products, and similar factors not separately identified.

Income (Income-Based) Approach is a general way of determining a value indication of a business, business ownership interest, security, or intangible asset using one or more methods that convert anticipated economic benefits into a present single amount.

Insolvency is when an organisation cannot pay its debts as and when they fall due.

Intangible Assets are non-physical assets such as franchises, trademarks, patents, copyrights, goodwill, equities, mineral rights, securities and contracts (as distinguished from physical assets) that grant rights and privileges, and have value for the owner.

Internal Rate of Return is a discount rate at which the present value of the future cash flows of the investment equals the cost of the investment.

Intrinsic Value is the value that an investor considers, on the basis of an evaluation or available facts, to be the "true" or "real" value that will become the market value when other investors reach the same conclusion. When the term applies to options, it is the difference between the exercise price or strike price of an option and the market value of the underlying security.

Invested Capital is the sum of equity and debt in a business enterprise. Debt is typically a) all interest bearing debt or b) long-term interest-bearing debt. When the term is used, it should be supplemented by a specific definition in the given valuation context.

Invested Capital Net Cash Flows are those cash flows available to pay out to equity holders (in the form of dividends) and debt investors (in the form of principal and interest) after funding operations of the business enterprise and making necessary capital investments.

Investment Risk is the degree of uncertainty as to the realisation of expected returns.

Key Person Discount is an amount or percentage deducted from the value of an ownership interest to reflect the reduction in value resulting from the actual or potential loss of a key person in a business enterprise.

Levered Beta is the beta reflecting a capital structure that includes debt.

Limited Appraisal is the act or process of determining the value of a business, business ownership interest, security, or intangible asset with limitations in analyses, procedures, or scope.

Liquidity is the ability of an asset to be easily converted into cash with minimum delay and little or no loss of capital.

Liquidity Discount – the illiquidity (lack of marketability) discount deals with the liquidity of the interest, that is, how quickly and certainly it can be converted into cash at the owner's discretion.

Limited Appraisal is the act or process of determining the value of a business, business ownership interest, security, or intangible asset with limitations in analyses, procedures, or scope.

Majority Interest is an ownership interest greater than fifty percent (50%) of the voting interest in a business enterprise.

Market (Market-Based) Approach is a general way of determining a value indication of a business, business ownership interest, security, or intangible asset by using one or more methods that compare the subject to similar businesses, business ownership interests, securities, or intangible assets that have been sold.

Market Capitalisation of Equity is the share price of a publicly traded stock multiplied by the number of shares outstanding.

Market Capitalisation of Invested Capital is the market capitalisation of equity plus the market value of the debt component of invested capital.

Market Multiple is the market value of a company's stock or invested capital divided by a company measure (such as economic benefits, number of customers).

Marketability is the ability to quickly convert property to cash at minimal cost.

Merger and Acquisition Method is a method within the market approach whereby pricing multiples are derived from transactions of significant interests in companies engaged in the same or similar lines of business.

Mid-Year Discounting is a convention used in the Discounted Future Earnings Method that reflects economic benefits being generated at midyear, approximating the effect of economic benefits being generated evenly throughout the year.

Minority Discount is a discount for lack of control applicable to a minority interest.

Minority Interest is an ownership interest less than fifty percent (50%) of the voting interest in a business enterprise.

Multiple is the inverse of the capitalisation rate.

Net Book Value is, with respect to a business enterprise, the difference between total assets (net of accumulated depreciation, depletion, and amortisation) and total liabilities as they appear on the balance sheet (synonymous with Shareholder's Equity). With respect to a specific asset, the capitalised cost less accumulated amortisation or depreciation as it appears on the books of account of the business enterprise.

Net Present Value is the value, as at a specified date, of future cash inflows less all cash outflows (including the cost of investment) calculated using an appropriate discount rate.

Net Profit is the profit remaining after expenses, interest and accounting treatments, such as depreciation, have been taken into account.

Net Tangible Asset Value is the value of the business enterprise's tangible assets (excluding excess assets and non-operating assets) minus the value of its liabilities.

Non-Current Assets are items that are not expected to be converted into cash within twelve months.

Normalised Earnings are economic benefits adjusted for nonrecurring, noneconomic, or other unusual items to eliminate anomalies and/or facilitate comparisons.

Normalised Financial Statements are financial statements adjusted for surplus assets and liabilities and/or for nonrecurring, noneconomic, or other unusual items to eliminate anomalies and/or facilitate comparisons.

Operating Profit is the profit arising from the organisation’s ordinary operations.

Orderly Liquidation Value is the liquidation value at which the asset or assets are sold over a reasonable period of time to maximise proceeds received.

Premise of Value is an assumption regarding the most likely set of transactional circumstances that may be applicable to the subject valuation; e.g. going concern, liquidation.

Present Value is the value, as at a specified date, of future economic benefits and/or proceeds from sale, calculated using an appropriate discount rate.

Portfolio Discount is an amount or percentage deducted from the value of a business enterprise to reflect the fact that it owns dissimilar operations or assets that do not fit well together.

Price/Earnings Multiple is the price of a share of stock divided by its earnings per share.

Rate of Return is an amount of income (loss) and/or change in value realised or anticipated on an investment, expressed as a percentage of that investment.

Report Date is the date conclusions are transmitted to the client.

Replacement Cost New is the current cost of a similar new property having the nearest equivalent utility to the property being valued.

Required Rate of Return is the minimum rate of return acceptable by investors before they will commit money to an investment at a given level of risk.

Residual Value is the value as at the end of the discrete projection period in a discounted future earnings model.

Return on Equity is the amount, expressed as a percentage, earned on a company's common equity for a given period.

Return on Investment see **Return on Invested Capital** and **Return on Equity**.

Return on Invested Capital is the amount, expressed as a percentage, earned on a company's total capital for a given period.

Risk-Free Rate is the rate of return available in the market on an investment free of default risk.

Risk Premium is a rate of return added to a risk-free rate to reflect risk.

Rule of Thumb is a mathematical formula developed from the relationship between price and certain variables based on experience, observation, hearsay, or a combination of these; usually industry specific.

Special Interest Purchasers are acquirers who believe they can enjoy post-acquisition economies of scale, synergies, or strategic advantages by combining the acquired business interest with their own.

Standard of Value is the identification of the type of value being used in a specific engagement; e.g. fair market value, fair value, investment value.

Surplus Assets are assets not necessary for the ongoing operations of the business enterprise.

Systematic Risk is the risk that is common to all risky securities and cannot be eliminated through diversification. The measure of systematic risk in stocks is the beta coefficient.

Tangible Assets are physical assets (such as cash, accounts receivable, inventory, property, plant and equipment, etc.).

Terminal Value see **Residual Value**.

Unlevered Beta is the beta reflecting a capital structure without debt.

Unsystematic Risk is the risk specific to an individual security that can be avoided through diversification.

Valuation is the act or process of determining the value of a business, business ownership interest, security, or intangible asset.

Valuation Approach is a general way of determining a value indication of a business, business ownership interest, security, or intangible asset using one or more valuation methods.

Valuation Date is the specific point in time as of which the valuer's opinion of value applies (also referred to as "Effective Date" or "Appraisal Date").

Valuation Method within approaches is a specific way to determine value.

Valuation Procedure is the act, manner, and technique of performing the steps of an appraisal method.

Value to the Owner is the value to a particular investor based on individual investment requirements and expectations.

Variable Costs are the costs that increase as the volume/activity of an organisation increases – e.g. fuel costs for a motor vehicle.

Weighted Average Cost of Capital (WACC) is the cost of capital (discount rate) determined by the weighted average, at market value, of the cost of all financing sources in the business enterprise's capital structure.

Working Capital is the funds available for the day to day operations of the business:

Current assets – current liabilities = working capital

Written Down Value is the balance remaining after a claim for depreciation is made on an asset. i.e. Cost – depreciation = written down value

Disclaimer and Restrictions

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