OCTOBER 2017

Streets of your town: Property proprietary claims on divorce in the global village - the Australian perspective

PRESENTED AT THE ANNUAL CONFERENCE OF **THE INTERNATIONAL BAR ASSOCIATION**, SYDNEY 8 - 13 OCTOBER 2017

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About Geoff Wilson

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Geoff co-manages HopgoodGanim's Family Law practice, one of the largest in Australia. He is a Queensland Law Society Accredited Family Law Specialist and has practiced in family law for almost three decades. Geoff is an arbitrator under regulation 67B of the *Family Law Regulations* 1984 and is on the list of arbitrators held by the Australian Institute of Family Law Arbitrators and Mediators. His specialisation includes relationship agreements, representation of third parties and high net wealth clients, trusts and property disputes, dispute resolution (particularly arbitration).

In 2015 and 2017, Geoff was named as the only Pre-eminent Queensland-based practitioner in *Doyle's Guide to Leading Australian Family Lawyers* list, placing him amongst the top seven family lawyers in Australia.

Geoff is a fellow of the International Academy of Family Lawyers and is the current chair of the International Dispute Resolution committee of the IAFL (formerly IAML) and Secretary of the Asia Pacific Chapter, serving on many of its other committees. Geoff was also a past parliamentarian of the IAFL. Geoff authored the Australian chapter of the leading international text, *International Pre-Nuptial and Post Nuptial Agreements* by London based publisher Jordans in 2012.

Geoff was a lecturer at the Queensland University of Technology and regularly presents at international (including London and Singapore) and local industry conferences on topics as diverse as trusts, superannuation, relationship agreements, estate planning and family law, mediation and arbitration. He has prepared over 100 papers on family law topics throughout his career and has been a contributing author to the CCH Loose-leaf Services, Australian Family Law and Practice, Australian De Facto Relationships Law, and Matrimonial Property Guide and to the Queensland Law Handbook.

He is the legal advisor to the Australian website Pre-nuptial Agreements Australia and previously prepared Lexon Insurance's *Family Law Risk Tools - Binding Financial Agreements Risk Procedure Pack*.

"Geoff Wilson is, weight for age, one of the best family lawyers in the country"

– *Doyle's Guide to Family Lawyers*

Awards and accolades

Corporate LiveWire - Global Awards 2017
- Family Lawyer of the Year

Doyle's Guide to the Legal Profession
- In 2017, Geoff was the only Queensland based practitioner named pre-eminent in Doyle's Guide to Leading Australian Family Lawyers list, placing him amongst the top 7 family lawyers in Australia.
  - Leading Australian Family Lawyers - 2015 & 2017 (Pre-eminent)
  - Leading Australian Family Lawyers - 2016 (Leading)
  - Leading Queensland Family Lawyers - 2012 (Market Leader) - 2017

Best Lawyers
- Best Lawyers in Australia - 7th - 10th Editions (Family Law)
- Family Law "Lawyer of the Year" Brisbane - 2018

Lawyers Weekly
- Partner of the Year Awards - Family Law - 2017 (Finalist)

Global Law Experts
- Pre-Nuptial Agreements Law Firm of the Year in Australia - 2015 and 2017
- Pre-Nuptial Agreements Lawyer of the Year in Australia - 2015

Key publications and presentations

- "Trusts In Action", published by Blackstone Press in 1995
  - Chapter: "Trusts in the Family Court"
- Contributing author to Wolters Kluwer CCH loose-leaf service, Australian Family Law and Practice:
  - Chapter:"Corporations Law and Property Applications"
  - Chapter: "Trusts and Property Applications"
- "Trusts and the Family Court", delivered paper to Legal and Accounting Management Seminars Pty Ltd in 1994
- "Unravelling Complex Corporate Structures", delivered paper at the FLPA Family Law Residential in 1995
- "Family Breakdown and Trusts - the Anatomy of a Trust, a Family Lawyer's Perspective" delivered sections of the paper to the QLS in 1999, to LAAMS Seminar in 2000, to Taxation Institute of Australia in 2000, and to LAAMS seminar in 2001.
- "International Pre - Nuptial and Post - Nuptial Agreements", published by Jordans, London in March 2011,
  - Chapter "An Australian Perspective on International Prenuptial Agreements"
- Wide Open Road ... Cross-Border Pre-Nuptial Agreements in Australia" delivered to Family Law / Jordans / IAML International Pre Nuptial Agreements Symposium, London U.K., 8 March 2011
- "It's a wide open road....Cross Border Financial [prenuptial] Agreements" delivered to TEN 7th Annual Family Law Conference 2013, 29 August 2013
- "[B]FA's – the Australian Cutting Edge, Evolution or Revolution", paper (co-authored with Cathi Blanchfield, Sydney) delivered to the FLS 16th National Family Law Conference, Sydney, 8 October 2014
- "Arbitration – the new frontier: Yes it's time...Family Law Arbitration in Australia: Draining the pool for you, delivered to TEN 10th Annual Family Law Conference, 15 July 2016
- Fast cars....Discretionary Trusts: Property of the Parties or a Financial Resource?", delivered to TEN 11th Annual Family Law Conference, 27 July 2017

Round and round up and down
Through the streets of your town
Everyday I make my way
Through the streets of your town

Don't the sun look good today?
But the rain is on its way
Watch the butcher shine his knives
And this town is full of battered wives

Introduction

Foreign investment in real estate and enterprises in Australia

To provide context to the Australian landscape, Australia is a multi-cultural society that enjoys a good living standard. The Australian economy has not been in recession for the past 27 years.

As such Australia presents a good opportunity for foreign investment. The value of real estate continues to rise across many of our capital cities particularly Sydney and Melbourne. There has been a wave of foreign investment in Australian residential, development and commercial property by individuals and their related entities. For those visiting Sydney from abroad for the IBA conference this week if you have the pleasure of spending some time on Sydney harbour the foreign investment in harbourside property will be evident.

The National Australia Bank Residential Property Survey Q2-2017 released on 13 July 2017[1] reported the following concerning foreign investment in residential properties:

- Despite China's crackdown on capital outflows into overseas property markets and a raft of new restrictions and taxes on foreign ownership of Australian properties introduced in the 2017/18 federal budget, the share of overseas buyers in new Australian property markets increased to 11.6% in Q2 2017, from 10.8% in Q1. But their share of total sales in established property markets fell to 5.6% - its lowest level in more than 4 years.
- The overall increase in foreign buying activity in new property markets was driven largely by VIC, where foreign buyers accounted for just over 1 in 5 (20.8%) new property sales in Q2 2017 (13.8% in Q1), according to surveyed Victorian property experts. Foreign buyers were also slightly more active in NSW (12.0% vs. 11.6% in Q1) and WA (6.9% vs. 5.6%).
- In established housing markets, the overall share of foreign buyers rose to 9.0% in VIC (7.4% in Q1), but fell in NSW (5.9% vs. 8.0%) and WA (4.5% vs. 7.0%). In QLD, foreign buyers accounted for just 3.8% of established property sales (6.1% in Q1) - its lowest level since late-2011.
- Property experts noted some changes in the mix of property purchased by foreigners in Q2 2017. Around 51% of all property purchased by foreigners in Q2'17 were apartments (53% in Q1), 35% houses (28% in Q1) and 14% dwellings or land for re-development (17% in Q1).Apartments accounted for a much bigger share of sales in QLD (59%), Sydney (57%) and VIC (51%), but houses accounted for the lion's share in WA (41%).More than 1 in 5 (22%) residential properties purchased by foreigners in WA and 17% in VIC were for re-development, compared to around 1 in 10 in both NSW and QLD.
- Property experts estimate that foreign buyers in Australian residential property markets represented17% of all apartment buyers and 11% of all house buyers in the country in Q2 2017. However, they played a much bigger role in the apartment market in VIC, where they purchased 1 in 4 (25%) properties and WA where they accounted for just over 1 in 4 (22%).Property experts also estimate that foreigners represented just over 1 in 10 (11%) of all house buyers in Australia in Q2 2017. They were most prominent in VIC (14%) and WA (14%) and least prominent in QLD (8%) and NSW (9%).
- Overall, 15% of properties purchased by foreigners were for properties valued at less than $500,000 and 27% valued between $500,000-$1 million.Around 12% invested $1-2 million, 5% between $2-5 million and 3% over $ 5 million. By state, over 1 in 4 (26%) foreign property investments in WA were less than $500,000, compared to just 12% in NSW and QLD and 14% in VIC. Around 1 in 3 foreign residential property investments in QLD, NSW and WA were valued at between $500,000-$1 million, compared to just 23% in VIC.Around 8% of investments in NSW and 6% in VIC were between $2-5 million, while almost 1 in 10 (8%) properties in VIC were above $5 million.

1 https://business.nab.com.au/wp-content/uploads/2017/07/nab-residential-property-survey-q22017.pdf

Statistics provided by the Australian Bureau of Statistics in July 2017 and published by the Australian Government Department of Foreign Affairs and Trade[2], indicate:

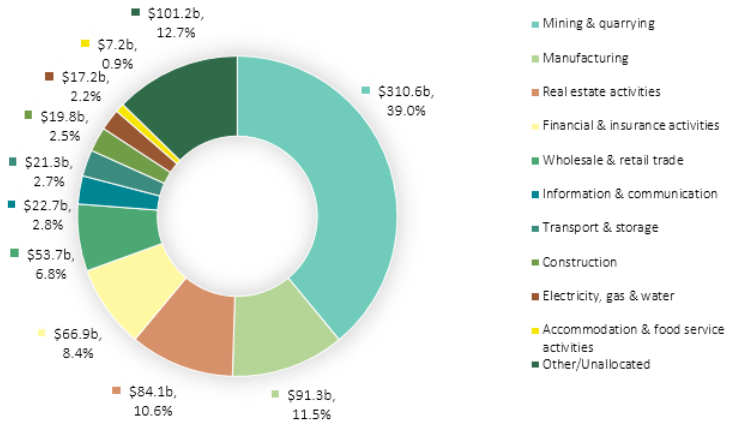
- In 2016 real estate activities ranked third in the range of Australian industries attracting foreign direct investment behind mining and quarrying and manufacturing. Real estate activity contributed $84.1 billion or 10.6% of the overall foreign investment in Australia:

- In order of ranking the top 5 countries investing in Australia in 2016 were United States (27%), United Kingdom (16.1%), Belgium (8.5%), Japan (6.7%) and Hong Kong (3.2%). Switzerland (1.9%) ranked 10th and France (0.9%) ranked 14th.

- In order of ranking in 2016 the leading countries where Australians invested abroad were United States ($617.4b or 28%); United Kingdom ($350.5B or 16%), Japan ($108.3b or 5%), New Zealand ($106.9b or 5%) and China (excluding SAR and Taiwan Province) ($87.9b or 4%).

WHICH AUSTRALIAN INDUSTRIES ATTRACT FOREIGN DIRECT INVESTMENT?

Foreign direct investment in Australia - levels of investment by selected industry (2016)



It is further worth noting that the Australian Federal Government has regulated the purchase of real estate by foreign investors including:

- The need for application to the Foreign Investment Review Board[3]:
  - Foreign persons generally need to apply for foreign investment approval before purchasing residential real estate in Australia;
  - Foreign investment applications are therefore generally considered in light of the overarching principle that the proposed investment should increase Australia's housing stock
  - Different factors apply depending on whether the type of property being acquired will increase the housing stock or whether it is an established dwelling
  - It is important that foreign investors understand and comply with Australia's foreign investment framework as strict criminal and civil penalties may apply for breaches of the law, including disposal orders (such as the reported recent crackdown and divestment of properties purchased by Chinese investors particularly around the Sydney harbour front).
  - From 9 May 2017, foreign persons who purchase residential real estate will be subject to an annual vacancy charge where the property is not rented out or occupied for more than six months per year.
  - Foreign persons must have received foreign investment approval before they acquire an interest in residential real estate.

- 10% foreign withholding tax:
  - On 25 February 2016 the Australian Government enacted legislation that introduced a 10 per cent non-final withholding tax to foreign residents on the disposal of certain direct and indirect interests in Australian real property. The regime is to apply to contracts entered into on or after 1 July 2016.
  - The purpose of the regime is to assist in the collection of foreign residents' capital gains tax (CGT) liabilities.
  - Under the new law, where a foreign resident disposes of certain Australian real property interests, the purchaser will be obliged to pay 10 per cent of the purchase price to the Australian Taxation Office. This amount is payable on or before the day the purchaser becomes the owner of the asset.
  - The new withholding obligations apply to taxable Australian property. This includes, but is not limited to:
  - Real property in Australia (e.g. land and buildings);
  - Lease premiums paid in relation to a lease over Australian real property;
  - Options or rights to acquire Australian real property[4].

Marriage and divorce in Australia

On 30 November 2016 the Australian Bureau of Statistics released its most current data on marriages and divorces in Australia[5]. The highlights of the report include:

- Marriage:
  - The 113,595 marriages registered in 2015 represent a decrease of 7,602 (-6.3%) from the 121,197 marriages registered in Australia in 2014.
  - In 2015, the crude marriage rate was 4.8 marriages per 1,000 estimated resident population, compared with 5.4 marriages per 1,000 estimated resident population in 2005 and 6.1 in 1995
  - In 2015, 92,151 brides (81.1% of all brides) and 89,826 grooms (79.1% of all grooms) had not married previously. This is an increase of 3.0% for grooms and 3.4% for brides over the past decade. Of the 113,595 marriages registered in 2015, 71.9% were between a bride and groom never previously married. A further 16.3% were first marriages for one partner, while 11.7% were

2 http://dfat.gov.au/trade/topics/investment/Pages/which-australian-industries-attract-foreign-investment.aspx
3 http://firb.gov.au/real-estate/; http://firb.gov.au/resources/guidance/gn01/
4 http://hsfnotes.com/pwtd/2016/04/25/australia-introduces-a-new-10-per-cent-withholding-obligation-on-purchasers-of-australian-real-property-from-foreign-residents/
5 http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3310.0Main%20Features112015?opendocument&tabname=Summary&prodno=3310.0&issue=2015&num=&view=

remarriages for both partners. In 2015, 20.9% of grooms and 18.9% of brides had been married before. There were 22,246 grooms (19.6% of all grooms) and 19,818 brides (17.4% of all brides) who had been previously divorced.
- In 2015, 1,627 brides (1.4% of all brides) and 1,531 grooms (1.3% of all grooms) who registered for marriage, were widowed. There has been a steady decline in the proportion of brides and grooms who were previously widowed.
- The proportion of marriages between two Australian born people has been gradually decreasing since 1993. Over the last decade, the proportion of marriages between two people born in Australia has decreased from 61.4% in 2005 to 54.2% (61,565) of all marriages in 2015. Conversely, the proportion of marriages between two people born in the same overseas country has increased over the same period, from 8.7% in 2005 to 13.9% (15,762) in 2015. Marriages of people born in different countries accounted for 31.9% (36,240) of all marriages in 2015 compared with 29.9% in 2005.

- Divorces:
  - In 2015, there were 48,517 divorces granted in Australia, an increase of 2019 (4.3%) from the 46,498 divorces granted in 2014.
  - In 2015, the crude divorce rate in Australia was 2.0 divorces granted per 1,000 estimated resident population, remaining the same as in 2014.
  - The median duration of marriage to divorce increased from 11 years in 1995 to a peak of 12.6 years in 2005. After slowly decreasing since 2005, the median duration of marriage to divorce increased by 0.1 to 12.1 years in 2015.

Observations: Risk and opportunity in the vortex

It should therefore come as no surprise given the level of foreign investment in Australia (and outward from Australia) in real estate, enterprises and other investments and the incidence of marriage and divorce in Australia involving persons born outside Australia (let alone breakdown of cohabitation in Australia involving persons born outside Australia) that the potential for a property settlement dispute across various forums including Australia looms as a real issue for many people (and their related entities) who are somehow connected to Australia.

The modern family (to be) or in transition following a breakdown of the relationship may be a product of cross border connections by virtue of:

- one or both of the parties are Australian citizens or Australian residents but live or work overseas prior to the relationship, or the parties intend to do so during the relationship; or
- one or both of the parties are foreign citizens or foreign residents but live or are employed in Australia prior to the relationship, or intend to do so during the relationship; or
- all or some of the parties' property (immovable and movable) is situated in Australia and overseas; or
- related entities of the parties own property or conduct business in Australia and overseas.

There may be unintended consequences for your client if following the breakdown of their relationship they come within the jurisdiction of the Australian family law system unwittingly or otherwise. In this paper I provide a background to the Australian property settlement framework and then focus upon the legitimate means a person can through forward planning minimise the potential impact and disruption of a relationship breakdown on their investments. For many foreign parties whose domestic family law system differs markedly from the Australian system there are significant risks for the entrepreneur / wealthy party and potential opportunities for the other person if their matter is dealt with by the Family Law Courts in Australia. These need to be understood and managed and steps taken to secure proceedings in Australia where there is a juridical advantage and avoid the jurisdiction where it is disadvantageous.

]The forum test in Australia is easier to satisfy than the general forum non conveniens test abroad. It is not difficult to satisfy the Australian forum test if there is a connection to the Australian jurisdiction and the other threshold tests for jurisdiction are satisfied. Once in it may be difficult to extricate your client from property settlement proceedings in Australia.

The Australian courts have an expansive definition of "property" and extra territorial reach that can include the property of a trust and company.

The Australian courts have very broad powers over third parties including trusts and companies that will be canvassed in this paper.

Importantly your client may be labouring under the misapprehension (due to the domestic family laws they are familiar with where for instance trusts and corporate interests may be effectively quarantined in a property settlement thereby making such vehicles attractive for holding real property, enterprises and other investments) that the situation is the same in Australia. It is not. Where the parties control the entity and / or the source and origin of the capital of the entity is from the parties then there is a real risk that the property of the entity will be attributed with a nuptial character and included as property available for adjustment in a property settlement in Australia.

Of course if there are genuine arms-length third party interests involved in the entity and there is a mix of the source and origin of the capital of the entity then the court's ability to prise open the entity for a property settlement may be limited.

There can be no guarantees to your client that they can effectively quarantine or ring fence their investments in real estate, businesses and the like in a trust and company without it being assailed in a property settlement without effectively divesting their interests and control which may be counter intuitive to their commercial intentions.

Ultimately I will bring you to the conclusion of this paper that the best means of protecting your client's investments in real estate, enterprises and other investments sited both in Australia and elsewhere is to enter a properly prepared financial agreement (such as a prenuptial and post nuptial agreement) that properly complies with the Family Law Act such that the agreement is binding, recognised and enforceable in Australia.

Conflicts in international family law in Australia the verdicts of Lindenmayer L, Warnick J and Kent J

The following statements are clear indications of the trouble foreign parties and their related entities can find themselves in trying to extricate themselves from the Australian Family Law jurisdiction once sucked into its vortex:

- **Lindenmayer**: the Honourable Justice Lindenmayer in Chu[6] explains the compatibility between the Family Court's reach to foreign immovable property and the Mocambique rule, as follows:

  "The mere fact that the court may be required, for the purpose of determining the size of the property pool available for division between the parties, to decide whether one of the parties or some third party is the owner of or has a proprietary interest in a particular piece of land in a foreign country, does not mean that the court is thereby exercising jurisdiction over or in relation to the title to that land. As I have earlier suggested that would be the case only if the court sought to make an order directly in relation to that land or interest therein such as the party found to be the owner of it transfer it or some proprietary interest in it to the other....Thus the question of title to the land would arise only incidentally and not directly in the proceedings and Lord Herschell L.C. in the Mozambique case (supra), at 66, acknowledged "the undoubted jurisdiction of the courts ... incidentally to investigate and determine title to foreign lands" as distinct from trying an action founded on a disputed claim of title to foreign lands."

- **Warnick**: the Honourable Justice Warnick writing extra judicially expanded this view:

  "In an action in personam in an Australian court, there is no compelling logic in refusing to order a party to transfer that parties' interests in foreign land to the other party the transfer to be in accordance with the laws of the overseas country. Indeed, if the Australian court has jurisdiction over the person and the orders relating to the dealing with that person's interests meet the requirements of the overseas property law, it is difficult to see the offence given to foreign laws....A broader and well-recognised proposition, which affects the Australian court exercising jurisdiction over interests in property overseas, is that a court "should not exercise extra-territorial jurisdiction where any order the court might make would be clearly futile."[7]

- **Kent**: the now Honourable Justice Kent also wrote:

  "As authorities in family law make plain (such as Pagliotti v Hartner , Cain v Cain , Pastrikos v Pastrikos , Hannema v Hannema and Gilmore v Gilmore), once a matter within the definition of "matrimonial cause" enlivens the jurisdiction of the Australian Court, it is Australian law which the Court applies, and it may adjust the property rights of the parties in property located overseas, regardless of any rights acquired or vested in the parties under foreign law.[8]*"*

6 Unreported judgment, 30 March 1994, page 52

7 Warnick J., "Conflict of Laws" in Family Law, delivered to QLS / FLPA Family Law Residential

8 Kent J International Elements in Financial Cases in Family Law, (co authored by Paul Doolan) @ para 13

Jurisdictional issues in Australia

Jurisdiction requirements in Australia
In Australia, financial disputes (including property adjustment and spousal maintenance) between parties to marriages and to de facto relationships are governed by a legislative framework:

- Marriages:
  - In all states and territories (except Western Australia) are subject to Part VIII of the *Family Law Act 1975* (Cwth)
  - In Western Australia are subject to *Family Law Act* (WA).

- De facto relationship (including same sex relationships):
  - In all states and territories (except Western Australia) where the relationship breaks down:
  - (1) From 1/3/2009[9], are subject to Part VIIIAB of the *Family Law Act 1975* (Cwth) (or in limited circumstances where the parties separate before this date but opt into the jurisdiction[10]):
  - (2) Prior to 1/3/2009, were subject to the states and territories own legislation (e.g. Part 19 of the *Property Law Act 1974* (Qld))[11];
  - In Western Australia are subject to *Family Law Act* (WA).

The *Family Law Act* confers exclusive jurisdiction on the Family Law Courts (Family Court of Australia and Federal Circuit Court of Australia) in respect of "matrimonial cause" and "de facto financial cause" which include proceedings with respect to the maintenance of one of the parties and property of the parties or either of them[12].

The jurisdictional requirements for instituting proceedings for property adjustment and spousal maintenance in respect of marriages and de facto relationships are that at the relevant date (when the proceeding is instituted) either party to the relationship or other relevant party to the proceedings are:

- an Australian citizen,
- is ordinarily resident in Australia, or
- is present in Australia.

These are additional requirements for de facto relationships.

- Meet the definition of de facto relationship:
- Geographical limitations: to bring a claim a party needs to establish 1 of 3 nexus:
  - ordinarily resident in a referring State during at least 1/3 of the de facto relationship;
  - the party made substantial contributions in a referring State; or
  - the parties were ordinarily resident in a referring State when the relationship broke down.
- Gateway requirements: to bring a claim a party needs to establish:
  - the period or total periods of the de facto relationship was at least 2 years; or
  - there is a child of the de facto relationship; or
  - the party made substantial contributions and failure to make the order / declaration would result in serious injustice; or
  - the relationship is or was registered under a prescribed law of a State or Territory (note no time limitation).

Forum disputes

Australia is not a party to any international agreement or convention governing the exercise of jurisdiction or containing rules for preventing "forum-shopping"[13].

Where there are competing proceedings in Australia and abroad Australia's forum test needs careful attention as it largely differs from the rule in most common law jurisdictions, e.g. the United Kingdom. Australian courts apply the "clearly inappropriate forum" test.

In *Voth*[14], the High Court held where an action has been commenced in an Australian court which has jurisdiction to hear the action, that Court has power to stay the proceedings only where the respondent satisfies the Court that it is so inappropriate a forum for their determination that their continuation in that Court would be ``oppressive'' or ``vexatious'' to him or her or ``an abuse of process''. The question whether the local court is a ``clearly inappropriate forum'' focuses upon the inappropriateness of the local court and not upon the appropriateness or comparative appropriateness of the suggested foreign forum. The Australian test begins from the basis that a plaintiff

9 South Australia from 1/7/2010
10 Section 86A
11 This also applies to parties who separate after 1/3/09 but do not meet the threshold requirements under the Family Law Act
12 Sections 4(1)(c),(caa)(d) & (ea); sections 4(a) & (b)
13 Ian Kennedy AM, "Forum Shopping – an Australian Perspective"
14 Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538 @ 564, 572

who has regularly invoked the jurisdiction of the court has a prima facie right to insist upon its exercise.
The leading application of Voth in a family law financial matter in Australia is the case of *Henry*[15].

> *"What factors are relevant to the determination of a "clearly inappropriate forum" issue. This list, which is not exhaustive, was as follows:*
>
> *1. No question arises unless the courts of the respective countries each have jurisdiction.*
>
> *2. Whether the courts of each country will recognise the other's orders and decrees.*
>
> *3. The order in which proceedings were instituted, the stage reached and the costs incurred.*
>
> *4. The connection of the parties and their marriage with each of the jurisdictions and the issues on which relief may depend in those jurisdictions.*
>
> *5. Which forum may provide more effectively for a complete resolution of the matters involved in the parties' controversy.*
>
> *6. Whether having regard to their resources and understanding of language, the parties are able to participate in the respective proceedings on an equal footing.*
>
> *Their Honours stated that a determination as to a "clearly inappropriate forum" issue will "depend on the general circumstances of the case, taking into account the true nature and full extent of the issues involved"[16].*

If there are significant factors pointing to the conclusion that the chosen forum is appropriate, it is immaterial that there may be many factors suggesting that another forum might also be appropriate or even more appropriate. The factors are not to be weighed to see where the balance lies because that would, in effect, be a Spiliada-like 'more appropriate forum' test[17].

Other reported Australian family law decisions on the clearly inappropriate forum test include:

15 [1996] FLC 92-685

16 From Pagliotti (supra) @ 83,232
17 Professor M. Davies, Professor A. Bell and the Honourable Justice P. Brereton in Nygh's Conflict of Laws in Australia (LexisNexis Butterworths, 8th ed., 2010) at [8.29]

Case	Citation	Competing jurisdictions	Comment
Pagliotti v Hartner	(2009) FLC 93-393	Australia / Italy	Australia not a clearly inappropriate forum. 116. It is in our view clear beyond doubt that the Roman Tribunal did not purport to determine the beneficial ownership of the B property or the proceeds of its sale..... it is difficult to see how this Court could be a "clearly inappropriate forum" in which the dispute relating to the B property could be determined when it is acknowledged that it is the only Court in which that dispute could be determined.
Porto v Porto	[2007] FamCA 454	Australia / Portugal	Australia not a clearly inappropriate forum.
Kemeny v Kemeny	[1998] FamCA 34	Australia / New Jersey	On occasion, Australia may be a clearly inappropriate forum in which to litigate one "cause of action", whilst at the same time being prepared to hear other matrimonial disputes between the same parties.
Henry v Henry	[1996] HCA 571	Australia / Germany / Monaco / Europe / North America / Asia / New York / Switzerland	
Ferrier-Watson BF v McElrath DA	[2000] FamCA 219	Australia / Fiji	
Cashel v Carr (DGC & SLC)	(2005) FLC 93-232 [2005] FamCA 765	Australia / Hong Kong	Australia a clearly inappropriate forum.
Garrett v Cowell	[2007] FamCA 778	Australia / Switzerland	Australia a clearly inappropriate forum.
Vaden v Vaden	[2007] FMCAfam 744	Australia / United Kingdom	See below.
Steen v Black	(2000) FLC 93-005	Australia / New Zealand	No stay granted: Not only could it not be said that Australia was a clearly inappropriate forum but indeed it was clear that Australia was the natural forum for these proceedings.

Case	Citation	Competing jurisdictions	Comment
Hastings v Hastings	(1990) FLC 92-176	Australia / New Zealand	The Family Court of Australia had jurisdiction to entertain the wife's applications (Family Law Act, sec. 4(1), definition of ``matrimonial cause'' para. (ca); 39(4), (4A); 44(1); 63B(1), (2)). However, the parties' agreement, an agreement of which New Zealand law was the proper law of the contract, required that in determining the wife's property proceedings the Australian court should apply New Zealand law, pursuant to sec. 42(2) of the Family Law Act. Bearing in mind the substantive law to be applied as agreed by the parties to their contract and the clear availability of the New Zealand Court to determine the matter promptly, it was clearly inappropriate that the property proceedings between the parties be determined by the Family Court of Australia. These proceedings should be stayed.
Navarra v Jurado	[2010] FamCAFC 210	Australia / Costa Rica	Australia a clearly inappropriate forum. "6.Whilst it has been the subject of some criticism, the Voth test emerged unscathed following an attack recently mounted in the High Court: Puttick v Tenon Ltd [2008] HCA 54; (2008) 238 CLR 265".. 190. the question of whether an Australian court is a clearly inappropriate forum requires attention to be directed to the inappropriateness of the Australian court and not to the appropriateness or comparative appropriateness of the available foreign forum. The test is essentially an analysis that looks inward to the local forum and it must be established that there would be injustice or prejudice to the respondent in the circumstance where the local proceedings were continued
Soderberg & Soderberg	[2016] FamCA71		Australia is a clearly inappropriate forum.

Stays

A party may seek a stay of the Australian proceedings to continue proceedings overseas. A summary of some of the relevant reported decisions in Australia follows:

Case	Citation	Competing jurisdictions	Comment
Taffa & Taffa (Summary dismissal)	[2012] FamCA 181	Australia / Lebanon	172.In conclusion, I am satisfied in the particular circumstances of this case that Australia is a clearly inappropriate forum for the wife's proposed litigation. 173.I would therefore stay the proceedings, which order, in the circumstances of this case, is probably more aptly described as a permanent stay which is akin to a dismissal of her application for property orders and lump sum spouse maintenance.
Paglioti v Hartner	(2009) FLC 93-393	Australia / Italy	Stay not granted.
Vaden v Vaden	[2007] FCMAfam 744	Australia / United Kingdom	Court held: 69.It also seems to me that a court in the United Kingdom will provide a forum which will allow for the complete resolution of the parties' controversy. I reach this conclusion because of Mrs P's restriction on the title of the Property E property; Mr Vaden's wish to challenge it; the controversy about the value of the property; and the parties' close connection to the United Kingdom. 70.Accordingly, I have reached the conclusion that the property aspect of these proceedings should be stayed pending the outcome of the children's issues in this court in the early part of next year. Once this aspect of the proceedings has been determined, it will be clear whether the wife and children will be returning to the United Kingdom. As was noted in Henry, it is sometimes appropriate to grant a temporary stay of local proceedings to allow for factual issues to be determined.
Cashel v Carr	(2005) FLC 93-232	Australia / Hong Kong	Stay not granted.
Ibbsen & Harrison Ibssen	[2012] FMCAfam 1037	Australia / United States	Australia a clearly inappropriate forum. Stay not granted in respect of application by the father pursuant to r.36 of the Family Law Regulations to discharge an overseas maintenance order.
Chen & Tan	[2012] FamCA 225	Australia / Taiwan	Stay not granted: 228..... There are significant reasons, such as the avoidance of duplicate litigation, for the dispute to be heard in Taiwan. However, there are similarly significant reasons, such as the legitimate juridical advantage to the Wife in litigating in Australia and the connecting factors with Australia, for the current proceedings to be litigated here, and many of the factors do not weigh strongly either way. 229.... The ties between this case and Australia are real and valid, and there is not such an absence of connection as to render this Court a "clearly inappropriate" forum in which to litigate this dispute.

Case	Citation	Competing jurisdictions	Comment
Vandenberg	[2013] FamCA 134	Australia / Papua New Guinea	The proceedings should be stayed as this Australian court is clearly inappropriate for these property.
Jasmit & Jasmit	[2014] FCCA 972	Australia / India	The fact that [divorce] proceedings are pending in a court of a foreign jurisdiction does not of itself create an immediate bar to jurisdiction in Australia, but again is a relevant factor. 46.Considering the matter as a whole and the unusual circumstances of this case, it appears to me that Australia is not a clearly inappropriate forum in which to allow the divorce application to proceed. Stay of proceedings declined.
Gavde	[2014] FCCA 2661	Australia / India	Australian court is a clearly inappropriate forum and stay granted until further order of the Court.
O & P	[2014] EWHC 2225 (fam) UK	Australia / England	
Nevill & Nevill	[2016] FamCAFC 41	Australia / New Zealand	Application for stay under the trans-Tasman Proceedings Act: held the appropriate forum test was the "more appropriate forum" not the "clearly inappropriate forum" test.

Anti-suit injunctions (lis alibi pendens)

The corollary to the stay – where one party seeks to restrain the other party from commencing or continuing overseas proceedings is often invoked and ordered by Australian courts in forum disputes.

The High Court of Australia held in *CSR Ltd v Cigna Insurance Australia Ltd*[18] that a court may restrain a person from commencing or continuing foreign proceedings if they interfere, or have a tendency to interfere with proceedings presently entertained by the court. Further the Court held that only after determining that it is not a clearly inappropriate forum should an Australian Court consider whether to grant an anti suit injunction or to require the applicant to seek a stay of the foreign proceedings.

The Full Court of the Family Court of Australia in *Monticelli v McTiernan* (see below) held the general principles applicable in Australia to applications for injunctions to restrain a person from foreign proceedings may be summarised as follows:

- the basis of the exercise of the jurisdiction lies in the principle of equity preventing unconscionable behaviour, and general concepts of justice, and the exercise of the jurisdiction should not be limited to specific categories of cases;
- the Court's power to restrain parties from commencing or continuing proceedings in a foreign jurisdiction should be exercised cautiously, having regard to international comity and the fact that such restraining orders interfere indirectly with the operation of the foreign court;
- the Court should have regard to the principles in Voth which apply to decisions as to the exercise of jurisdiction by Australian courts, and thus in general should not restrain a party from pursuing proceedings in a foreign court where that foreign court cannot be characterised as a clearly inappropriate forum;
- relevant factors include whether granting the injunction will deprive the respondent (the party against whom the injunction is sought) of a significant advantage or otherwise cause the respondent hardship; and whether refusing it will deprive the applicant (the party seeking the injunction) of a significant advantage or otherwise cause the applicant hardship; and
- the court should consider whether there is anything in the relevant legislation indicating that a particular approach or emphasis is appropriate.

18 (1997) 189 CLR 345

A summary of some of the relevant reported decisions in Australia follows:

Case	Citation	Competing jurisdictions	Comment
Dobson & Van Londen	(2005) FLC 93-225	Australia / Netherlands	
Lederer v Hunt	(2007) FLC 93-311 [2007] FamCA 55	Within Australia in respect of proceedings in different Courts in Australia	
Skinner v Alfonso Skinner	[2010] FamCA 329	Australia / Spain / Argentina	Stay ordered in respect of Australian proceedings and no anti-suit injunction in respect of Spanish proceedings.
Ashforth v Ashforth	[2010] FamCA 37	Australia / United Kingdom	Australian Court is not "a clearly inappropriate forum": Stay of Australian proceedings not granted and anti suit injunction of London proceedings granted.
Morton v Morton	[2008] FamCA 854	Australia / United Kingdom	In all the circumstances I consider that the Family Court of Australia is a clearly inappropriate forum for this matter to proceed in and I will therefore grant the order sought by the wife staying the proceedings instituted in this court by the husband. 41.In the circumstance where I have found that this court is a clearly inappropriate forum, it is not necessary for me to consider further the husband's application for the grant of an injunction to restrain the wife from proceeding in England.
Sankil	(2007) FLC 93-3 [2008] FamCAFC 205	Australia / India	Temporary stay orders made: (2) That the order made by the Honourable Justice Steele on 26 August 2005 be amended to provide that the appellant husband's applications filed on 11 March 2005 in the Family Court of Australia be stayed pending the determination in India of the question as to whether the courts of that country have jurisdiction to determine divorce and other matrimonial proceedings between the appellant husband and the respondent wife. (3) That there be liberty to the appellant husband to apply to re-list his applications in the Family Court of Australia in the event that the courts of India determine that there is no jurisdiction to entertain divorce and/or other matrimonial proceedings between the appellant husband and the respondent wife.
Monticelli & McTiernan	(1995) FLC 92-617	Australia / California	Re parenting proceedings. Anti suit injunction granted in respect of the Californian proceedings.
Whung & Whung & Ors	[2010] FamCA 137	Australia / Taiwan	Australian Court is not "a clearly inappropriate forum": Stay of Australian proceedings not granted and anti suit injunction of proceedings in Taiwan Republic of China granted.
Singh	[2010] FMCAfam 949	Australia / India	
White & Temple	[2014] FamCA 396	Australia / New York	Anti suit injunction granted in global terms: That the wife be restrained by injunction from continuing the proceedings associated with child support or spousal maintenance in any court other than the Family Court of Australia.

Case	Citation	Competing jurisdictions	Comment
Lan & Hao	(2017) FLC 93-795 [2017] FamCAFC 175	Australia / China	No grant of anti suit injunction restraining the husband from pursuing proceedings in China.
Kent & Kent	[2017] FamCAFC 157	Australia / Papua New Guinea	Australian Court is not "a clearly inappropriate forum": Stay of Australian proceedings not granted and Anti suit injunction granted in the following terms: "The husband is restrained and an injunction hereby issues restraining him from continuing proceedings in Papua New Guinea in so far as those proceedings seek to restrain the wife from pursuing her application for settlement of property in the Family Court of Australia".

Abuse of process and Res judicata

The extended principles of res judicata were explained by the High Court of Australia in the *Anshun*[19] case as follows:

> *"Accordingly, inconsistency between judgments against the same defendant is avoided by the merger in the judgment first recovered of the right to the remedy thereby given and of all other rights which arise on the same facts."*

The principles of estoppel, as described in *Anshun*, have been applied in the Family Court[20].

The substance of the *Anshun* estoppel is that a party is required to bring all of that party's claims in the one proceeding if they can reasonably do so, failing to do so would constitute an abuse of process, which would be restrained.

In *Steen v Black* (supra) the court found it is not an abuse of the processes of the Family Court where a party to an agreement contracting out of the provisions of the *Matrimonial Property Act* (NZ) subsequently brings an application pursuant to section 79 of the *Family Law Act* in the following circumstances:

- the parties live in Australia;
- the property the subject of the agreement is in Australia;
- the parties were only in New Zealand for a limited period;
- at the time of entering into the NZ agreement one or both parties were intending to return to New Zealand; and
- there may be juridical advantage under Australian law to one of the parties.

The Australian courts have power to grant injunctions where property is offshore (e.g. to surrender all passports to the Family Court of Australia and be restrained from leaving the Commonwealth of Australia). See *Restein*[21] and *Brown*[22].

When proceedings have been determined by a foreign court:

- Where a cause of action has already been determined in a foreign jurisdiction then the Australian courts will readily have regard to the principles of res judicata (cause of issue estoppel) and issue estoppel when dealing with a subsequent application for substantially the same relief before it.
- For instance refer to *Caddy v Miller*[23], *Kemeny*[24], *Pagliotti & Hartner* (where the court found there was no estoppel or res judicata).
- The *Foreign Judgments Act 1991* (Cwth) enforces overseas judgments that meet the criteria under the Act and are registered in Australian courts.[25]

19 Port of Melbourne Authority &Anshun Pty Ltd (1981) 147 CLR 589 (Anshun's Case)
20 see for example: Symonds & Raphael [1998] FamCA 165; Williams & Wylie-Williams [2005] FamCA 1043 and Dmitrieff & Shaw and Ors [2008] FamCA 881
21 No MLF 2665 of 2002, unreported judgment of Guest J, delivered 4/7/2003
22 (2007) FLC 93-316
23 (1996) FLC 92-806
24 (1998) FLC 92-806
25 For a good overview see Gilmore (1993) FLC 92-353 @ 79,732 – 79,739

Property settlement under Australian law

Introduction

Before embarking upon a review of the Australian courts ability (and agility) to deal with entities (both foreign and domestic) within its property settlement powers and the means to best protect your clients and their related entities, it is important to consider the property settlement regime in Australia as it may directly impact your client should they fall within the jurisdiction of the Australian Family Law Courts.

The Court will not make an order for property settlement unless it is satisfied that in all the circumstances, it is just and equitable to make the order.[26] The Court exercises a wide discretionary power under section 79 [Marriages] and 90SM [De facto relationships] of the *Family Law Act* to make such property settlement order as the Court considers appropriate, altering the interests of the parties to a marriage in the property of the parties or either of them.

Whilst that discretion is very broad, it is not unlimited and is conditioned by the requirement that it is "just and equitable to make the Order (Section 79(2)) and that the Court take into account the matters specified in Section 79(4) and the principles embodied in Sections 43 and 81[27], so far as they are applicable"[28]

26 Section 79(2) of the Family Law Act
27 The finality principle: the court has a duty to make orders which will, as far as practicable, provide a clean break in the financial relationship between the parties and avoid further proceedings
28 Norbis v Norbis (1986) FLC 91-721 per Mason and Deane JJ at p75,167

(No) Property Regime

There is no system of community of property under Australian law. Parties do not have a right to an interest in marital property or the division of marital property.

> *"All the more is that so when it is recognised that s 79 of the Act must be applied keeping in mind that "[c]ommunity of ownership arising from marriage has no place in the common law". Questions between husband and wife about the ownership of property that may be then, or may have been in the past, enjoyed in common are to be "decided according to the same scheme of legal titles and equitable principles as govern the rights of any two persons who are not spouses". The question presented by s 79 is whether those rights and interests should be altered."*[29]

In Australia, financial disputes (including property adjustment and spousal maintenance) between parties to marriages and to de facto relationships are governed by a legislative framework, namely Parts VIII and VIIIAB of the *Family Law Act 1975* (Commonwealth of Australia) ("*Family Law Act*").

In *Chen & Tan*, the Honourable Justice Kent also observed:

> *3.There is no concept of "matrimonial property" in the Family Law Act 1975 (Cth) ("the Act") but this descriptor is sometimes used by practitioners, wrongly, to refer to any property owned by either party or by them jointly, and it is reasonable to infer that it is to that property which the application is intended to be directed.*

29 Stanford [2012] HCA 52, judgement of the High Court of Australia delivered on 15 November 2012

Jurisdiction

The *Family Law Act* confers exclusive jurisdiction on the Family Law Courts (Family Court of Australia and Federal Circuit Court of Australia) in respect of "matrimonial cause" and "de facto financial cause" which include proceedings with respect to the maintenance of one of the parties[30] and property of the parties or either of them.

The jurisdictional requirements for instituting proceedings for property adjustment and spousal maintenance in respect of marriages[31] and de facto relationships[32] are that at the relevant date (when the proceeding is instituted) either party to the relationship or other relevant party to the proceedings are:

- an Australian citizen,
- is ordinarily resident in Australia, or
- is present in Australia.

30 Sections 4(1)(c),(caa)(d) & (ea); sections 4(a) & (b)
31 Section 39(4)
32 Section 39A

Parties have until 12 months after their divorce (2 years for a de facto relationship) to have either:

- Reached agreement in respect of property settlement and spousal maintenance and then documented and taken out the agreement in one of the 2 recognised forms (consent order or financial agreement); or
- Commenced proceedings in the Federal Circuit Court of Australia or the Family Court of Australia for property settlement and spousal maintenance.

Proceedings under the *Family Law Act* for property settlement are in personam.

A relevant connection may be established between the foreign property and the proceedings or the foreign party and property sited in Australia such as real estate, businesses, and investments:

- Due to ownership or control of the property by one of the parties or their related entity; or
- Due to a foreign party dealing with the property and the parties, which have the effect of defeating an existing or anticipated order of the court and consequently draws the transaction and the foreign party into the proceedings:

"The Family Law Act 1975 (Cth) s79 on the other hand, draws no distinction between matrimonial and other property. All the property rights of the parties whensoever and howsoever acquired are liable to adjustment between the parties on the basis of contribution and need……The law to be applied in each country is the law of the forum…In Australia there is no statutory provision but it has been held that s79 can be invoked to adjust the property rights which parties have acquired under foreign matrimonial law."[33]

"Property", "financial resources" and the reach of the Australian courts

The concept of "property" has a very wide definition and context under Australian law.

The *Family Law Act* defines "property' as:

"property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion"[34]

The leading decision on the definition of "property" is *Duff and Duff* (1977) FLC ¶90-217 which has been regularly cited including by the High Court in *Kennon v Spry* (see paragraph 54 of the judgment of French CJ):

'The word 'property', appearing in the section, construed by reference to its ancestry in matrimonial causes statutes, has been given a wide meaning….The word has also been comprehensively defined in statutes both State and Imperial relating to married women's property. We do not propose to instance those definitions here, but in Jones v Skinner Langdale MR said: 'Property is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have.' This is a definition which commends itself to us as being descriptive of the nature of the concept of 'property' to which it is intended that the Family Law Act 1975 should relate and over which the Family Court of Australia should have jurisdiction to intervene when disputes arise in relation to the property of spouses as between themselves or when the court is asked to exercise the powers conferred upon it under Pt VIII or its injunctive powers under s 114 so far as they are expressed to relate to a property of the party to a marriage.'

In *Kennon v Spry*, French CJ stated that the definition of 'property' is to be read as part of the collocation "property of the parties to the marriage."At paragraph 64 his honour stated:

64.The word "property" in s 79 is to be read as part of the collocation "property of the parties to the marriage". It is to be read widely and conformably with the purposes of the Family Law Act.

At paragraph 89 of their joint judgment, Gummow and Hayne JJ stated that the definition of property under section 4 of the *Family Law Act* ought to be read in such a way that advances, rather than constrains the purposes of the legislation.

"Property" was also defined by the Full Court (Fogarty, Lindenmayer and McGovern JJ) in *Best* (1993) FLC 92-418 @ 80280 as follows:

Section 79 of the Family Law Act provides that in proceedings ``with respect to the property of the parties to a marriage or either of them'' the Court may make orders altering the interests of the parties in the property or make orders by way of settlement or transfer of property. Section 75(2), incorporated into the s. 79 exercise through s. 79(4)(e), lists a number of matters which the Court shall take into account in exercising the s. 79 power, including ``the financial resources of each of the parties''.

Ordinarily, where a particular interest is ``property of the parties or either of them'' it may be the subject of a direct order under s. 79. On the other hand, if it is not property but a ``financial resource'', a direct order may not be made in relation to it but it may be taken into account in deciding what orders to make in respect of any property of the parties. The above statement is subject to the qualification that the concept of what is ``property'' is very wide but there may be property in relation to which it is either impracticable or inappropriate to make a direct order. This case may be an example of that. See, for example, the discussion in Evans and Public Trustee for the State of Western Australia as Legal Personal Representative of Evans (1991) FLC ¶92-223, esp. at p. 78,547 where the Court said: —

``The question of what is `property' within s. 79 takes on almost a religious significance in proceedings under that section.''

33 Hon. Dr Peter Nygh, "Voth in the Family Court: Forum Conveniens in Property and Custody Litigation", (1993) 7 AJFL 261 @ pp262-

34 Section 4(1)

The difference can lead to narrow and artificial distinctions and inconsistent results. This is brought about by several factors. Wide as the meaning of ``property'' is, many valuable rights fall outside it. So long as s. 79 is confined to ``property'' these problems will continue. This issue is exacerbated by the trend to employ, for collateral reasons, other means, such as trusts, to own or control property or other valuable interests.

A significant issue at the trial and on this appeal related to the appropriate characterization in this context of the husband's interest in the partnership of MSJ. The wife argued that this interest was property within s. 79. The husband argued that it was not property and should be treated as a financial resource under s. 75(2). The trial Judge held that the interest was not property and it should be regarded as a ``continuing and permanent financial resource of a substantial kind'' under s. 75(2). The wife challenges that conclusion.

Financial resource has been defined in:

- *Kelly (No 2)* (1981) FLC 91-108 where the Full Court held:

  "[t]here are circumstances in which property of a third party can be taken into account as a financial resource of the party to a marriage and the extent to which the party can control the property in question is relevant to this question."

- *Holland* (2017) FLC 93-798; and

- *Hall and Hall* [2016] HCA 23 at [54] to [55]:

  "The reference to "financial resources" in the context of s 75(2)(b) has long been correctly interpreted by the Family Court to refer to "a source of financial support which a party can reasonably expect will be available to him or her to supply a financial need or deficiency" The requirement that the financial resource be that "of" a party no doubt implies that the source of financial support be one on which the party is capable of drawing. It must involve something more than an expectation of benevolence on the part of another. But it goes too far to suggest that the party must control the source of financial support. Thus, it has long correctly been recognised that a nominated beneficiary of a discretionary trust who has no control over the trustee but who has a reasonable expectation that the trustee's discretion will be exercised in his or her favour, has a financial resource to the extent of that expectation (citing In the marriage of Kelly and Kelly (No 2) (1981) FLC 91-108 at 76,803).

  Whether a potential source of financial support amounts to a financial resource of a party turns in most cases on a factual inquiry as to whether or not support from that source could reasonably be expected to be forthcoming were the party to call on it."

Importantly, you ought to appreciate the following interests may be treated as property under Australian law:

- Interests in a trust, particularly where the spouse is held to have control of the trust and its property. The High Court in its leading decision on trusts, *Kennon and Spry*[35] confirmed the long standing approach of our Family Law Courts to trusts and in the circumstances of that case found:

  "The husband's legal title to the Trust assets and his power to apply trust assets to the wife coupled with the wife's equitable rights, were property rights capable of providing a basis for the orders made by the primary judge

  Where property is held under such a trust by a party to a marriage and the property has been acquired by or through the efforts of that party or his or her spouse, whether before or during the marriage, it does not, in my opinion, necessarily lose its character as 'property of the parties to the marriage' because the party has declared a trust of which he or she is trustee and can, under the terms of that trust, give the property away to other family or extended family members at his or her discretion."

  Note however the High Court of Australia did qualify its findings in dealing with treatment of genuine arms-length interests as follows:

  "69. The preceding conclusion does not involve some general extension of s 79 which would require that it be hedged about with protective discretions of uncertain application to prevent its intrusion into trust arrangements affecting assets foreign or extraneous to those acquired by the parties to the marriage in their own right. So if the husband were trustee of a charitable trust or executor of the will of a friend or client the mere legal title to the assets of such trusts, because of their origins and character, could not be regarded as part of the husband's property as a party to the marriage within the meaning of the Family Law Act. Importantly, in such a trust there could be no power of appointment to his wife and no corresponding equitable right enjoyed by her. The question of a trust involving a combination of purposes and family and extraneous assets does not arise"

  In respect of the court's power to make orders directed to the assets of the trust in a subsequent decision of the Full Court in the Spry case it held:

  "An order may be made that enables a party to the marriage who is in control of the trust to satisfy his or her personal liability to the other party to the marriage who is an object of the trust from the assets of the trust"

- The Australian courts have extensive powers over third parties and the ability to make orders directed to third parties to aid in property settlement. I will refer to the courts' powers under Part VIIIAA of the *Family Law Act* later in this paper.

- The Australian courts may treat superannuation entitlements as property of the parties[36] or another species of asset[37].

- The Court may notionally add back to the pool a premature distribution of a proportion of the matrimonial assets[38]. The court's powers in this regard have been circumscribed by the High Court decision in Stanford.

- The court may claw back property to the pool by setting aside dispositions with effect or intent of defeating a claim: s106B of the *Family Law Act*.

35 [2008] 251 ALR 257

36 Section 90MC

37 Coughlan (2005) FLC ¶93-220; see also Hickey and Hickey and Attorney General (Cwth) [2003] FamCA 395

38 Omacini and Omacini (2005) FLC ¶93-218; Townsend and Townsend (1995) FLC ¶92-569

- The Family Law Courts have extraterritorial jurisdiction such that "*the jurisdiction of the Family Court may be exercised in relation to persons or things outside Australia and the Territories*"[39].

- Once the court is seized of jurisdiction in a property matter in Australia the court has the power to deal with property situated within Australia and overseas. [40][See below] Australian law is the applicable law, even though some property is located overseas.[41] The court's has power to order a party to deal with the overseas property in the matter of a personal obligation: the actions are *in personam*[42].

- The parties have a duty to the Court and to each party to give full and frank disclosure of all information relevant to the case (about their financial affairs) in a timely manner.[43] The notion of full and frank disclosure by parties is fundamental to financial proceedings before the Family Court. It becomes critical when dealing with complex corporate structures. This fundamental obligation has been re-enforced by a long line of authorities including *Oriolo and Oriolo* (1985) FLC ¶91-653; *Breise and Breise* (1986) FLC ¶91-713; *Monte and Monte* (1986) FLC ¶91-757; *Giunti and Giunti* (1986) FLC ¶91-759; *Mezzacappa and Mezzacappa* (1987) FLC ¶91-853; *Black and Kellner* (1992) FLC ¶92-287; *Weir and Weir* (1993) FLC ¶92-338; *Efthimiadis and Efthimiadis* (1993) FLC ¶92-361; *Suiker and Suiker* (1993) FLC ¶92-436; *Morrison and Morrison* (1995) FLC ¶92-573 and *Foda v Foda* (1997) FLC ¶92-753. There is power to make orders beyond the pool in cases of non –disclosure[44].

The court will identify and account for all of the property in existence at the time of the hearing (see *Jones* (1990) FLC 92-142; Shaw (1989) FLC 92-010; *Farmer –v- Bramley* (2000) FLC 93-060).

The long standing general principle adopted by the Court that there is no dichotomy between business assets and other non-business assets when arriving at a property settlement will apply in these circumstances. See *Napthali*, where the court held:

> *"It was not permissible for the trial Judge to draw the distinction which she did between matrimonial and business assets. In the case of a wife whose role is primarily that of homemaker and parent, her contribution under sec. 79(4) (a), (b) and (c) is not to be taken as being confined to the former matrimonial home but extends to the whole of the parties' assets including the business. (Miller and Miller (1984) FLC ¶91-542; Pastrikos and Pastrikos (1980) FLC ¶90-897; Albany and Albany (1980) FLC ¶90-905 and Lee Steere and Lee Steere (1985) FLC ¶91-626 followed.)"*

Global reach

The *Mocambique rule*[45] has application in Australia[46] inter alia, the court cannot in the absence of express statutory authorisation exercise jurisdiction in respect of title to or possession of property situated abroad.[47] Dicey and Morris refer to the general principle, where a legal action concerns immovable property, then the court of the country where the land is situated has exclusive jurisdiction[48]. David Truex notes section 31(2) of the Family Law Act is consistent with this principle by virtue of the words "persons or things" do not relate to real property.[49] In *Pagliotti* the Full Court of the Family Court found:

> *"It would be surprising if an Australian court determining title to domestic real estate would do so according to the laws of another country, particularly in circumstances where that country has expressly disavowed any entitlement to seek to determine that issue... The Mocambiquie Rule case is "based on the sensible principle that only the court of the place where the land is situated can effectively enforce an order as to title and/or possession" (Nygh, PE Conflict of Laws in Australia, 7th ed., Butterworths, Sydney, 2002 at [7.31]). The Mocambiquie Rule case was approved by the High Court of Australia in Potter v Broken Hill Pty Co Ltd (1906) 3 CLR 479."*

Further in Gilmore[50]*:*

> *"In that sense, and speaking generally the lexsitus governs the application of the matrimonial property regime to immovables (see Nygh at pages 384-5), whilst movables may be governed by the law of the matrimonial domicile at the time of the marriage (Nygh at pages 380-282, 386). In addition, s42(2) of the Family Law Act provides:*
>
> *"Where it would be in accordance with the common law rules of private international law to apply the laws of any country or place (including a State or Territory), the court shall, subject to the provisions of the Marriage Act 1961, apply the laws of that country or place."*
>
> *37. Nevertheless, these considerations, which need not be elaborated upon here, are of little, if any, ultimate relevance in matrimonial property proceedings as the court of the forum will apply its own law to the determination of that dispute: see Nygh at page 383; Hannema (l98l) 7 Fam LR 542. Relevantly here, the wife invokes the jurisdiction of the Family Court of Australia under s79 of the Family Law Act and if the Court hears the proceeding its warrant is s79 and it will apply the considerations contained in that provision and, save as is referred to hereafter, will include within that exercise all the property of the parties."*

Also in *Pagliotti*:

> *"179.Although not the subject of a specific proposed ground of appeal, learned Senior Counsel for the husband submitted that his client's section 78 application with respect to the B property would be determined according to Italian law as if it were an Italian asset held by the parties in Italy. Given our conclusion that the Court's powers*

39 Section 31(2)
40 Pastrikos (1980) FLC 90-897; Gould & Gould; Swire Investments (1993) FLC 92-434
41 Cain (1986) 11FamLR 540
42 In the marriage of Perry (1978) 3 FamLN 77
43 Rule 13.01 and Chapter 13 of the Family Law Rules; Weir & Weir (1993) FLC ¶92-338, 79,593
44 see Weir (1993) FLC 92-338; Milankov (2002) FLC 93-095; Oriolo and Oriolo (1985) FLC 91-653; Kannis and Kannis, supra; Gould and Gould [2007] FamCA 609; (2007) FLC 93-333; Chang and Su [2002] FamCA 156; (2002) FLC 93-117 Hodges [2010] FamCA 220
45 British South Africa co v Companhia de Mocambique [1893] AC 602
46 See Fogarty J in Gilmore[1993] FLC 92-353; Pagliotti&Hartner [2009] FamCAFC 18 @ p45
47 See also Nygh, PE, Conflict of Laws in Australia, 6th ed, Butterworths, Sydney, 1995
48 Dicey and Morris, Conflicts of Laws, 13th ed., 2000 at pp 938-948
49 Truex, D., "International Matrimonial Property Litigation: some tips for the family lawyer", paper delivered to the 9th Australian National Family Law conference, Sydney, 4/7/2000
50 Supra at paragraphs 36-37

with respect to the B property are not limited to section 78 of the Act, and encompass section 79 of the Act, it is probably unnecessary to deal with this contention.

180.We record however that nothing to which we have been referred provides support for Senior Counsel's proposition. It would be surprising if an Australian court determining title to domestic real estate would do so according to the laws of a another country, particularly in circumstances where that country has expressly disavowed any entitlement to seek to determine that issue.

181.Learned Senior Counsel for the husband's proposition is inconsistent with the decision in British South Africa Co v Companhia de Mocambique [1893] AC 602 ("Mocambiquie Rule case") which is regarded as setting down the modern rule denying jurisdiction in respect of title to, or possession of, land situated within a foreign jurisdiction. The Mocambiquie Rule case is "based on the sensible principle that only the court of the place where the land is situated can effectively enforce an order as to title and/or possession" (Nygh, P. E., Conflict of Laws in Australia, 7th ed., Butterworths, Sydney, 2002 at [7.31]). The Mocambiquie Rule case was approved by the High Court of Australia in Potter v Broken Hill Pty Co Ltd [1906] HCA 88; (1906) 3 CLR 479. Whether mindful of that decision or not, the determination of the Roman Tribunal is consistent with the "Rule" and its rationale."

I reiterate however, proceedings under the *Family Law Act* for property settlement are in personam. Once the court is seized of jurisdiction in a property matter in Australia the court has the power to deal with property situated within Australia and overseas. As the Honourable Justice Kent in Chen & Tan found:

"17.However, a Court exercising jurisdiction under the Act in family law exercises jurisdiction in personam and not in rem. There is therefore no offence to the Mozambique Rule for the exercise of jurisdiction with respect to foreign land. Thus, because proceedings for the adjustment of property rights pursuant to s 79 of the Act are in personam, an Order for one party to transfer title to real property situated overseas is not an exercise of jurisdiction in respect of title to, or possession of, foreign land, but an Order in personam against that party. Likewise, Orders for enforcement, including in relation to property located overseas, are made in personam.

18.This may be qualified to the extent that, having regard to the principle that a party ought not be ordered to do something illegal in the place it is to be done, when exercising jurisdiction in personam, Courts ought be alive to avoiding the making of an Order in relation to any assets located in a foreign country that might operate in direct conflict with the laws of that country."

Setting aside transactions involving foreign entities

In *Narelle Gould*; *Wah Dak Services Limited and Cheung Wah Bank Limited Appellants and Vanda Russell Gould and Swire Investments Limited Respondents Appeals* [1993] FamCA 126, in proceedings between the parties under section 79 of the *Family Law Act* the wife instituted claims under then anti avoidance provisions of section 85 (now section 106B) of that Act against the husband and three companies; Swire Investments Limited (" Swire "), Wah Dak Services Limited ("Wah Dak") and Cheung Wah Bank Limited ("Cheung Wah"), all of which are incorporated overseas and none of which were registered in or carry on business in Australia. Each filed an answer objecting to the jurisdiction of the Court.

For the purpose of this paper it is worth noting the intersection of the various jurisdictions of the various third party entities:

The specific entities which are relevant to these transactions can be briefly identified as follows (in referring to any particular corporations I assume them to be incorporated in Australia unless I state to the contrary):

- *Swire (formerly Perigee) is a company incorporated in the United Kingdom and is alleged by the wife to be controlled by Wah Dak (paras.4 and 18 of the wife's application).*
- *Wah Dak is a company incorporated in Hong Kong and is alleged by the wife to be controlled by the husband through the Beer Trust (formerly the Gould Trust) incorporated in the Turk and Caicos Islands (paras.6,7 and 8).*
- *Cheung Wah is a company incorporated in Western Samoa. The wife alleges (para.45 of her application) that "due to the privacy laws of Western Samoa the shareholders (of Cheung Wah) are unknown" but alleges (para.46) that Cheung Wah is "an entity caused to be established by (the husband)".*
- *Southsea (Investments) Pty Limited is the registered proprietor of the former matrimonial home at Seaforth. The company is a bare trustee of the Gould Family Trust of which trust the husband is the appointor, and the husband, wife and the children are the beneficiaries as to corpus and income.*
- *Melbourne Corporation of Australia Pty Limited and Philadelphia Investments Pty Limited are alleged to be controlled by the husband through various entities (para.39).*
- *Darlington McArthur Pty Limited and Yale Investments Pty Limited are alleged by the wife to be controlled by the husband (para.25).*
- *Southsea (Aust) Limited is a company registered in Jersey and is alleged to be controlled by the husband (para.51)."*

The wife alleged in her pleadings that after the institution of the proceedings and prior to the date fixed for the trial various transactions involving the husband, the third parties and others were made to defeat, and were likely to defeat anticipated orders in the proceedings. It was further, or in the alternative, alleged by the wife that some or all of the transactions were a "sham" and that certain entities are the "alter ego" of and/or are "owned and controlled" by the husband. In this respect the Honourable Justice Fogarty held: "*I do not consider that the jurisdiction of the Court to make orders under s.85 is dependent upon a finding that the third party is an alter ego of a party to the marriage...*"

Specifically the transactions identified in the judgement were:

Overall, the allegations of the wife in relation to transactions involving the above entities are as follows:

- *During October and November 1992 the husband caused or purported to be paid to Swire amounts totalling approximately $7.6m. by Yale and Darlington (para.28);*
- *In November 1992 Southsea (Investments) mortgaged the matrimonial home to Cheung Wah (paras.43 and 47) to the extent that it is now asserted that there is no, or little, equity in this substantial property;*
- *In November 1992 the husband caused the shares in Melbourne and Philadelphia to be transferred to Wah Dak and the title to the suites which those companies held in BMA House, Sydney, to be substantially encumbered by floating charges to Cheung Wah (paras.29 to 40);*
- *In October/November 1992 the husband caused the shares in a company known as CVC Investment Managers Limited held by Southsea (Investments),Melbourne and Philadelphia to be transferred to Southsea (Aust) (paras.48 to 52).*

The third parties unsuccessfully challenged the constitutionality of section 85 of the *Family Law Act*.

The third parties relied on the *Foreign Corporations (Application of Laws) Act 1989*, and in particular section 7, any question relating to the rights and liabilities of members of a foreign corporation and its shareholders or of the existence, nature and extent of any interest in a foreign corporation may only be determined by the law of the place of incorporation of that foreign corporation and not by Australian law. At first instance the Honourable Justice Moore held (and ultimately the Full Court agreed):

"the Act constitutes 'choice of law' legislation and has nothing to do with the question of jurisdiction either of this Court to make an order under s.85 of the Family Law Act or any other Court in which the stipulated issues may arise"

In respect of the Family Law Courts' overseas jurisdiction the Full Court held:

"169. I now turn to the separate but interrelated issues of the jurisdiction of the Family Court over persons or entities outside Australia and its Territories, and whether in this case the three third parties have been properly served with the wife's application...

172. However, in s.31(2) of the Family Law Act there is an express grant of extra-territorial jurisdiction to the Family Court in relation to the jurisdiction which is conferred on the Court by s.31(1) (and which includes jurisdiction in matrimonial causes). The grant of extra-territorial jurisdiction by s.31(2) is in the following terms:

"Subject to such restrictions and conditions (if any) as are contained in the regulations, or the Rules of Court, the jurisdiction of the Family Court may be exercised in relation to persons or things outside Australia and the Territories."

173. Thus it would seem that Parliament has chosen to provide the Family Court with an extra-territorial jurisdiction both as regards "persons" and "things" in broad, general language and not just by means of a grant of jurisdiction to order service out of the jurisdiction."

Power of the courts: Section 79

A parties' entitlement to an adjustment of the property of the other spouse only arises by operation of the *Family Law Act*. The Court will not make an order for property settlement unless it is satisfied that in all the circumstances, it is just and equitable to make the order. The relevant provision of the *Family Law Act* is section 79 which provides power to a Court to make orders altering the interests of parties to a marriage in property.

In Australia the judges exercise of power in respect of a property settlement is discretionary (as highlighted above) as to whether it is just and equitable to make an order and in the context of the order it makes. The exercise of discretion is described by the courts as:

"a discretion which is extraordinarily wide and which parameters mark out the boundaries within which reasonable minds might differ as to the result without appealable error"

The Court will not make an order for property settlement unless it is satisfied that in all the circumstances, it is just and equitable to make the order.[51] The Court exercises a wide discretionary power under section 79 of the *Family Law Act* to make such property settlement order as the Court considers appropriate, altering the interests of the parties to a marriage in the property of the parties or either of them. Whilst that discretion is very broad, it is not unlimited and is conditioned by the requirement that it is "just and equitable to make the Order (Section 79(2)) and that the Court take into account the matters specified in Section 79(4) and the principles embodied in Sections 43 and 81[52], so far as they are applicable".

Court's approach to property settlement

The High Court of Australia has recently reframed the court's approach to determining a property settlement[53]. Essentially the court must embark upon two fundamental inquiries which are not to be conflated:

- The section 79(2) inquiry: whether it is just and equitable to make a property settlement order:
  - First it is necessary to identify according to ordinary common law and equitable principles, the existing legal and equitable interests of the parties in the property.
  - Secondly determine whether in all the circumstances, it is just and equitable to make an order:
    - In most instances where parties separate and that brings to an end their common usage of property, the court will determine it is just and equitable to make a property

51 Section 79(2) of the Family Law Act
52 The finality principle: the court has a duty to make orders which will, as far as practicable, provide a clean break in the financial relationship between the parties and avoid further proceedings
53 Stanford [2012] HCA 52

settlement order and then proceed to assess and determine the parties' entitlements:

"In many cases where an application is made for a property settlement order, the just and equitable requirement is readily satisfied by observing that, as the result of a choice made by one or both of the parties, the husband and wife are no longer living in a marital relationship. It will be just and equitable to make a property settlement order in such a case because there is not and will not thereafter be the common use of property by the husband and wife. (Stanford)"

- However there are circumstances where a court will decline to make an order, including:
- Where the parties have entered a financial agreement that is binding under Part VIIIA of the Family Law Act;
- Where the parties have a written or unwritten agreement (not necessarily a binding agreement) and have given effect to that agreement:

"In the present matter, however, over a long period of time after the end of their marriage, the parties did give express consideration to what should become of their property. In such circumstances we consider the husband must do more than point to the end of the relationship in order to persuade us that there is some principled basis upon which we should interfere with an existing state of affairs created by the consent, or at the very least, acquiescence of the parties.[54]"

- The parties have kept their property separate and not intermingled their property:

"their relationship had been conducted on the basis that neither would have any interest in the property of the other."

- "41. Adherence to these fundamental propositions in exercising the power in s 79 gives due recognition to "the need to preserve and protect the "institution of marriage" identified in s 43(1)(a) as a principle to be applied by courts in exercising jurisdiction under the Act. **If the parties have made a financial agreement about the property of one or both of the parties that is binding under Pt VIIIA of the Act, then, subject to that Part, a court cannot[29] make a property settlement order under s 79. But if the parties to a marriage have expressly considered, but not put in writing in a way that complies with Pt VIIIA, how their property interests should be arranged between them during the continuance of their marriage, the application of these principles accommodates that fact. And if the parties to a marriage have not expressly considered whether or to what extent there is or should be some different arrangement of their property interests in their individual or commonly held assets while the marriage continues, the application of these principles again accommodates that fact.** These principles do so by recognising the force of the stated and unstated assumptions between the parties to a marriage that the arrangement of property interests, whatever they are, is sufficient for the purposes of that husband and wife during the continuance of their marriage. The fundamental propositions that have been identified require that a court have a principled reason for interfering with the existing legal and equitable interests of the parties to the marriage and whatever may have been their stated or unstated assumptions and agreements about property interests during the continuance of the marriage." (Stanford)
- The court was also at pains to say that it was not attempting to chart the "metes and bounds" of what is just and equitable and each case will be judged on its own circumstances.

- The section 79(4) inquiry: relevant factors inquiry:
  - If the court determines that an order should be made then the court may make such order as it considers appropriate.
  - The nature and extent of the relevant factors inquiry the court embarks upon is as follows:
    - the Court should identify and assess the contributions of the parties within the meaning of sections 79(4)(a), (b) and (c) and determine the contribution based entitlements of the parties usually expressed as a percentage of the net value of the property of the parties.
    - the Court should identify and assess the relevant matters referred to in sections 79(4)(d), (e), (f) and (g), (`the other factors') including, because of section 79(4)(e), the matters referred to in section 75(2) so far as they are relevant and determine the adjustment (if any) that should be made to the contribution based entitlements of the parties establish.

The Australian courts have regularly found that the determination of a property settlement is not an exercise in social engineering:

"The objective of the section (S.79) is not to equalise the financial strengths of the parties. It is to empower the Court ... to effect re re-distribution of the property of the parties if it be just and equitable to do so ...[55]"

It is not a mathematical or accounting exercise:

"[T]he Court is not required under s 20 to undertake a reductionist process analogous to the taking of partnership accounts (notoriously one of the most time-consuming and expensive of litigious exercises) by examining every alleged 'contribution' of the kinds described in the section with a view to putting a monetary value on it in order to reach an accounting balance one way or the other, which is to be then eliminated by the requisite financial adjustment. Rather the Court is required to make a holistic value judgment in the exercise of a discretionary power of a very general kind"[56]

54 Bevan [2014] FamCAFC 19

55 Mallet (1984) FLC 91-507 @ 79,127 Wilson J
56 Davey –v- Lee(1990) DFC 95-084

The Full Court in *Wallis and Manning* [2017] FamCAFC 14 adopted the following order of considerations that best summarises the Australian courts approach to property settlement:

- The parties' interests in property;
- The nature of property interests within this marital relationship
- Section 79(2): is it just and equitable to make any order?
- Nature, form and characteristics of the parties' relationship and contributions
- Assessment and quantification of contributions
- Conclusion as to assessment and quantification of contributions
- Assessment and quantification of sections 79(4)(d) to (g) [including section 75(2) factors]
- Conclusion as to assessment and quantification of sections 79(4)(d) to (g)
- Orders for settlement of property

The Property Pool: disclosure and valuations

The Court assesses and determines the pool of assets, liabilities and financial resources of each party and related entities for consideration in property settlement.

The Court will take into account all of the property in existence at the time of the hearing as valued at that time.

Property acquired after separation but before the court determines a property settlement is not quarantined and can be taken into account.

Generally the following property is not excluded from the property available to the court in making a property settlement and may be taken in to account in the property pool:

- Premarital property in existence at the time of separation and the hearing;
- Gifts;
- Inheritances;
- Personal injury damages;
- Trust property where the spouse is a beneficiary, trustee and / or appointor of the trust;
- Superannuation / pensions.

The process of putting together the parties' "balance sheet" of all of the property, liabilities and financial resources of the parties and their related entities involves undertaking disclosure and obtaining valuations where the parties dispute the value of line items in the balance sheet.

A pillar of property settlement (indeed all financial disputes and agreements) is the obligation on the parties to provide full and frank disclosure of all information relevant to the case (about their financial affairs) in a timely manner[57].

There is power to make orders beyond the pool in cases of non –disclosure[58].

In respect of valuations:

- Having identified the property to be distributed between the parties, each item in the pool is to be valued, generally at the time of the hearing, whether by ascribing an agreed value or obtaining a valuation from an expert.
- Generally where there is controversy over the value of property, a court appointed single expert is engaged under the rules of the Court[59]. The Court is the ultimate arbiter on the question of value having regard for the expert evidence.[60]
- The value of property the court generally accepts is the fair market value of the property which is defined as the price that a willing but not anxious buyer, acting at arm's length, with adequate information, would be prepared to pay to a willing but not anxious seller of the shares or assets in question: *Spencer v The Commonwealth of Australia*[61]. There is a body of case law in Australia concerning the court's approach to valuation issues. For instance an area that generates a lot of work in disputes involving corporations is the approach to valuing minority shareholdings[62].
- The Court ascertains the value of the property of the parties to a marriage by deducting from the value of their assets the value of their total liabilities. In the case of encumbered assets, the value thereof is ascertained by deducting the amount of the secured liability from the gross value of the asset... Where the assets are not encumbered and moneys are owned by the parties or one of them to unsecured creditors, the Court ascertains the value of their property by deducting from the value of their assets the value of their total liabilities, including the unsecured liabilities. [63]It may discount the liability. In certain instances the Court may bring to account the realisation costs of transacting the property (including agents' commissions and taxation liabilities). [64]
- For a good article on the valuation of real estate in family law matters refer to Eades, John "Salo Salo Salo Valuation of Land in Family Court Matters" presented to the 1996 National Family Law Conference. Also refer to the following decisions:
  - *Smith* (1991) FLC 92-261, where the court held that volatility in the market and the valuation was hazardous or uncertain and competing claims for retention of the real estate should result in the property being listed for sale with each party having the right to bid and acquire the property);
  - *Lenehan* (1987) FLC 91-814 where there were conflicting valuations.

Assessment of contributions

There are generally 2 approaches taken to the assessment of contributions[65]:

- In short term relationships (up to say 7 years duration), the asset by asset or piecemeal approach is commonly adopted;
- In mid to longer term relationships the global approach is the preferred methodology.

The court will assess the following contributions:

- Direct and indirect, financial and non financial contributions to the acquisition, conservation and improvement of the property;
- Contributions to the welfare of the family.

57 Rule 13.01 and Chapter 13 of the Family Law Rules; Weir & Weir (1993) FLC ¶92-338, 79,593
58 see Weir (1993) FLC 92-338; Milankov (2002) FLC 93-095; Oriolo and Oriolo (1985) FLC 91-653; Kannis and Kannis, supra; Gould and Gould [2007] FamCA 609; (2007) FLC 93-333; Chang and Su [2002] FamCA 156; (2002) FLC 93-117 Hodges [2010] FamCA 220
59 See Part 15.5 of the Family Law Rules 2004
60 See discussion in Elder[2010] FamCA 50, para 91; Phillips and Phillips [2002] FamCA 350
61 (1907) 5 CLR 418
62 For a good summary of the law see Manx & Jenner [2009] FamCA 1264
63 Biltoft and Biltoft (1995) FLC ¶92-614
64 Rosati v Rosati (1998) FLC ¶92-804
65 Norbis (1986) FLC 91-712

The process of assessing contributions involves:

> *"...considering the transposition from evaluation of actual contributions to determination of a monetary sum (or impliedly a sum represented by a percentage of assets)."*

The difficulty confronting the Family Court is the task of weighing and assessing contributions of different natures. Central to the contributions exercise is the balancing of domestic contributions of a homemaker and parent against financial contributions made by the other spouse. The High Court of Australia in *Mallett* found:

> *"The Act requires that the contribution of a wife as a homemaker and parent be seen as an indirect contribution to the acquisition, conservation or improvement of the property of the parties regardless of where legal ownership resides. The contribution must be assessed, not in a merely token way, but in terms of its true worth to the building up of the assets. However, equality will be the measure, other things being equal, only if the quality of the respective contributions of husband and wife, each judged by reference to their own sphere, are equal. The quality of the contributions made by a wife as homemaker or parent may vary enormously from the inadequate to the adequate to the exceptionally good. She may be an admirable housewife in every way or she may fulfil little more than the minimum requirement. Similarly, the contribution of the breadwinner may vary enormously and deserves to be evaluated in comparison with that of the other party. It follows that it cannot be said of every case where the parties reside together that equal value must be attributed to the contribution of each. That will be appropriate only to the extent that the respective contribution of the parties are each made to an equivalent degree. What the Act requires is that in considering an Order that is just and equitable the Court shall 'take into account' any contribution made by a party in the capacity of homemaker and parent. It is a wide discretion which requires the Court to assess the value of that contribution in terms of what is just and equitable in all the circumstances of a particular case. There can be no fixed rule of general application"*[66].

It is accepted by the Court that in mid to longer range relationships, all other contributions being equal, and each party has worked equally hard in their respective spheres (whether as breadwinner, homemaker and/or caregiver) that contribution will start on a platform of 50%/50%. For instance the following statement of the High Court holds true today:

> *How should the contribution of a woman who fulfils primarily the role of homemaker and parent be assessed? The decision of the High Court in Mallet v. Mallet (supra), is authority for the proposition that the Court should not start off with any presumption or rule that equality of division is necessarily a just and equitable result. But their Honours did not decide that the contribution of a wife as homemaker and parent was necessarily inferior to that of the husband/breadwinner. Indeed, all of their Honours agreed that the contribution of the wife was to be assessed in a substantial and not merely token way: at FLC p. 79,111; A.L.R. p. 196 per Gibbs C.J.; at FLC pp. 79,118, 79,119; A.L.R. pp. 207, 208 per Mason J.; at FLC p. 79,126; A.L.R. p. 218 per Wilson J.; at FLC p. 79,129; A.L.R. p. 222 by necessary inference per Deane J.; and at FLC p. 79,131; A.L.R. p. 226 per Dawson J. Several of their Honours went further and accepted the proposition that the contribution of each spouse within their respective roles was equal, i.e. the contribution of a good homemaker and parent is in principle equal to that of a good breadwinner, although the use of special skills in one's profession or business may have to be given greater weight than the essentially indirect contribution of the homemaker to that business. Thus Wilson J. states at FLC p. 79,126; A.L.R. p. 218: ''However, equality will be the measure, other things being equal, only if the quality of the respective contributions of husband and wife, each judged by reference to their own sphere, are equal'' (our italics). See also the similar remarks of Mason J. at FLC p. 79,120; A.L.R. p. 209. It is therefore possible to arrive at the conclusion that in a marriage there has been an equality of contribution by each of the parties within his or her own sphere: that of the wife as a good homemaker and parent and that of the husband as a breadwinner. The ''partnership concept'' of marriage derives support not only from Deane J., at FLC p. 79,128; A.L.R. p. 221, who dissented, but also to a certain extent from Mason J. at FLC p. 79,120; A.L.R. p. 209 and Dawson J. at FLC p. 79,132; A.L.R. p. 227, albeit limited to non-business assets. In the case of a farm, as we have remarked earlier, the idea of a partnership between the farmer and his wife applies all the more strongly, especially where as often is the case, the parties actually operate the farm in the form of a partnership between them, although it might be argued that the partnership is a ''paper one'' entered into for taxation purposes only (if that argument is open at all: see the remarks of Goldstein J. in Elias and Elias (1977) FLC ¶90-267 at pp. 76,423-76,424; (1977) 29 F.L.R. at pp. 400, 401). But it cannot be denied that the splitting of income tax is of direct and immediate financial benefit to the husband and to that extent a direct financial contribution on the part of the wife*

There are two aspects to the process:

- Firstly, the "value" given to a role of itself;
- Secondly, the assessment of the quality with which a particular role was performed.

Within the concept of "value of a role" is the idea of "the reach" of that role, particularly where a variety of assets has been acquired.[67] The High Court has previously referred to the role that value judgments play in the exercise:

> *"assessments under s79 "call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion..."*[68]

The scales of equality will be tilted by categories of case where differential contributions made by or on behalf of the parties are afforded appropriate weighting. The assessment of contribution will not be equal in circumstances where:

66 Wilson J in Mallet v Mallet , supra, at p79,126

67 SL and ELH [2005] FamCA 132
68 Norbis v Norbis at 75,165

- One party has made a greater initial contribution than the other;[69]
- One party has received a significant inheritance[70].
- One party has received a significant gift[71];
- Third parties have made contributions on behalf of one party[72];
- One party has through negligence, wanton recklessness and/or criminal activity caused financial loss to the parties[73];
- Onerous family responsibilities (such as the care of special needs children or as a result of domestic violence)[74];
- Where there has been significant domestic violence resulting in a party making contributions beyond "normal"[75]; or
- One party has created significant wealth for the family as a result of special skills or entrepreneurial ability (however the Australian courts have recently, heavily qualified what was known as the doctrine of "special contribution" which I refer to below when discussing high wealth cases).

In *Petruski & Balewa* [2013] FamCAFC 15, the Full Court said (at [49]):

> *"The task of assessing contributions under s 79 of the Act is an holistic one; what is required is to evaluate the extent of the contributions of all types made by each of the parties in the context of their particular relationship (Dickons & Dickons [2012] FamCAFC 154). As was also said by the Full Court in Lovine & Connor & Anor [2012] FamCAFC 168 at [40] and [41] such an evaluation "inevitably involves value judgments and matters of impression", and accordingly it cannot be treated as a "mathematical exercise"....*

The Full Court in *Bolger & Headon* (2014) FLC 93-575 discussed the flawed approach of attempting to attribute percentage figures to identified or discreet components of contribution. Other recent decisions have also focused on adopting a holistic approach to the assessment of the parties' contributions (see *Eufrosin & Eufrosin* [2014] FamCAFC 191 and *Singerson & Jones* [2015] FamCAFC 238. Recently the Full Court in *Wallis and Manning* [2017] FamCAFC 14 described the process of assessing contributions and cited Dickons as follows:

> *"19. By those central submissions the parties approached the assessment of contributions by suggesting that "an adjustment" should be made to a result reached otherwise by reference to a miscellany of other contributions. Her Honour adopted a similar approach. Such an approach is by no means uncommon to both the presentation of cases and the structure of judgments. It is convenient in this case, as it is more broadly, so as to describe a contribution or contributions of a particular type said to have particular importance and to distinguish it or them from other contributions.*
>
> *20. Yet, that approach must also ensure that the "myriad of other contributions" and the duration over which, and circumstances in which, the miscellany of other s 79(4) contributions were made is not accorded a subsidiary role. The essential s 79(4) task is for "trial Judges [to] weigh and assess the contributions of all kinds and from all sources made by each of the parties throughout the period of their cohabitation....*
>
> *23.What the Full Court said in Dickons v Dickons [15] should be reiterated here:*
>
> *21.... the requirements of the section are met by approaching the assessment of contributions holistically and by analysing the nature, form, characteristics and origin of the property currently comprising that to which s 79 applies, and, in turn, analysing the nature, form and extent of the contributions (of all types) contemplated by s 79). That task is also undertaken by reference to the nature and form of the particular marriage partnership manifested by the particular circumstances of this particular marriage. Is it, for example, a relationship, as Deane J put it in Mallett [sic] at 640–1 "where the parties have adopted the attitude that their marriage constituted a practical union of both lives and property" or is it, for example, a union where parties lived very separate domestic and financial lives?*
>
> *...*
>
> *24.There can be little doubt that the classification of contributions by reference to terms such as "initial contributions", "contributions during the relationship", and "post-separation contributions", can be helpful as a convenient means of giving coherent expression to the evidence in a s 79 case and to giving coherence to the nature, form and extent of the parties' respective contributions. However, the task of assessing contributions is holistic and but part of a yet further holistic determination of what orders, if any, represent justice and equity in the particular circumstances of this particular relationship. So much is clear from the terms of s 79 itself and, in particular, s 79(2). The essential task is to assess the nature, form and extent of the contributions of all types made by each of the parties within the context of an analysis of their particular relationship.*
>
> *...*
>
> *26.The necessarily imprecise "wide discretion" inherent in what is required by the section is made no more precise or coherent by attributing percentage figures to arbitrary time frames or categorisations of contributions within the relationship. Indeed, we consider that doing so is contrary to the holistic analysis required by the section and, in the usual course of events, should be avoided."*

Further the Full Court in *Holland & Holland* [2017] FamCAFC 166 in dealing with an inheritance received 3½ years after separation found:

> *"we consider it important to state that there is no doubt that her Honour erred in referring to the husband's vested interest in Property W as a "financial resource". It was, with respect, not a financial resource; it was property of the husband. It is property to which the parties are, or a party is, presently*

69 Pierce (1999) FLC ¶92-844; Cabbell [2009] FamCAFC 205; Williams [2007] FamCA 313
70 Bonnici (1992) FLC ¶92-272; Mistle [2010] FamCa 29; Burke (1993) FLC 92-356
71 Gosper and Gosper (1987) FLC ¶91-818, Kessey and Kessey (1994) FLC 92-495 and Pellegrino (1997) FLC 92-789
72 Aleksovski (1996) FLC 92-705)
73 Kowaliw (1981) FLC 91-092; Browne v Green (1999) FLC 92-873; Omacini (2005) FLC 93-218
74 Kennon (1997) FLC 92-757
75 Kennon; Doherty (1996) FLC 92-652

entitled – see the definition of "property" in s 4 of the Act and the recent discussion in Calvin....

28.In answering the fundamental s 79(2) question, a court may (but not must) take into account the matters referred to in s 79(4) – that is, the nature, type and extent of all contributions of all types made by the parties to the interests in property of the parties or either of them.[18] The relevant inquiry may have reference to the nature, form and characteristics of particular interests in property, including the manner of their acquisition, conservation and improvement and the nature, form and characteristics of the contributions of all types (if any) made by the parties during the currency of their relationship"

29.In Zaruba & Zaruba [19] the Full Court said:

In the vast majority of cases, it will be appropriate to address the s 79(2) question by ascertaining the legal and equitable interests in property without making distinctions between individual assets. That is because [referring to Stanford] the "express and implicit assumptions that underpinned the existing property arrangements" can be seen to apply (to the extent and degree to which they do apply) to all of the property of the parties or either of them, including property in which the legal interests vary.

However, the position is likely to be different in circumstances where, as here, the characteristics of the property and the circumstances of its acquisition, improvement and the like can be seen to differ significantly and where, as here, the parties' relationship had taken on quite different characteristics during the period to which the s 79 inquiry is directed."

31.Thus, the nature of a particular interest or interests in property and when and how it was acquired, utilised, improved or preserved may be very relevant to each or all of three central questions: should a s 79 order be made at all;[21] whether contributions should be assessed "globally" or "asset by asset"[22] or by reference to two or more "pools";[23] and, what is the nature and extent of each party's contributions. However, there is no basis for excluding from consideration any property in which the parties have an existing legal or equitable interest.

33.The consideration of the three central questions earlier referred to call in each case for the exercise of discretion by a trial judge. That discretion is exercised not by reference to whether property might conveniently be described as "an inheritance " or "after-acquired" but, rather, by reference to the nature, form and characteristics of the property in question and the nature, form and extent of the parties' contributions of all types across the entirety of their relationship.

44.The other party cannot be regarded as contributing significantly to an inheritance received very late in the relationship and certainly not after it has terminated, except in very unusual circumstances

In the past as practitioners with guidance from reported court decisions we could predict with a reasonable degree of confidence the likely range of entitlements of the parties. As the Full Court held in *Hoffman* [2014] FamCAFC 92 at [42] to [44]:

"The words of Gibbs CJ in Mallet quoted earlier continue to resonate: there is little doubt that this Court, and indeed judges at first instance, have, from time to time, sought to identify "unifying principles" or "guidelines" designed to address the mischief, and remedy the problems, to which Gibbs CJ and, later, the Justices in Norbis refer. Contentions have been made periodically that "legitimate guidelines" exist in respect of a number of purported "categories of case". Examples might be seen to include global/asset-by-asset approach; initial contributions; gifts and inheritances; waste; and conduct making contributions significantly more arduous... The essential inquiry, however, is not one of categorisation or labelling; rather the task is to assess, relevantly, whether the authorities reveal a principle enunciated with clarity and clear indicia as to a class or category of case in which the clear principle can be applied universally so as to guide the exercise of the discretion in the sense earlier outlined."

Recent decisions have moved away from long standing guidelines of the court. Frankly such an approach makes it difficult as a practitioner to assess and predict the likely outcome of a court proceeding and adds to the uncertainty for our clients.

However in *Wallis and Manning* the court returned to the assistance to be gained from guidelines in earlier decisions:

"64.In our view, each of the High Court and the Full Court of this court has postulated a role both for guidelines in the "generality of cases or a particular class of cases"[55] and a role for comparable cases for determining what is just and appropriate in a particular case. Much more recently, in the discretionary context earlier described, the judgment of the plurality in Barbaro again provides, in our respectful view, powerful guidance in respect of the use of comparable cases for the exercise of the s 79 discretion."

The Full Court of the Family Court of Australia in *Brodie*[76] described the process as follows:

"We appreciate that application of the principles referred to above, as recognised by Mason J in Mallet, is not always an easy task. It is not one, in a marriage stretching over a decade, which can be carried out as a purely mathematical exercise, but requires careful evaluation of each party's disparate contributions in the individual circumstances of the case before the trial Judge. Other decided cases involving similar facts give guidance to approach and promote consistency in decision making particularly in relationships of many year's duration. The discretion involved in the evaluative exercise under s 79 properly exercised will lead to an order which is just and equitable in all the circumstances."

76 [2009] FamCAFC 6

Particularly pertinent in big money cases are the following statements from the court about determining property settlement entitlements expressed in terms of a percentage:

"The parties differed about whether the determination on the agreed pool should be by way of lump sum or by percentage. Both argued that the issue was discretionary and there was reference to what was described as the "usual approach". Ultimately they submitted, what was important was the reference to the relevant legislative factors..... It must be noted that that approach is not a statutory requirement. In this case, one percentage point amounts to $4.34 million. The use of percentages obscures what the Court is really asked to do which is to evaluate and give a dollar figure to what is an award or acknowledgement for the things done (rather than things achieved) by the contribution. Trying to apportion contribution on a percentage basis still requires the Court to look at the underlying value.[77]"

and:

"Nothing in s 79 requires a trial judge (or for that matter the parties) to allocate a percentage entitlement of the property to each party in applying the criteria and requirements of s 79. (And because of s 79(4)(e) s 75(2)). The articulation of such percentages is a practical tool whereby the parties and ultimately the trial judge indicate the weight and evaluation given to any contribution (or contributions in combination) or to any factor under s 75(2) (or all factors in combination). While the allocation of percentages is a sensible and valuable tool, (particularly to promote consistency and predictability) it cannot be an objective in its self. Section 79 imposes no obligation on a Court to divide property or interests in property in accordance with some determined percentage.

That having been said the evaluation and comparison of contributions (and also factors pursuant to s 75(2)) is necessarily a difficult task because contributions of one sort, in one "sphere" of contribution, may be significantly different in kind from contributions in another.

Murphy J (at first instance) in Smith & Fields [2012] FamCA 510 analysed some of these difficulties with particular clarity by reference to the relevant authorities [1] and I respectfully agree with and adopt his analysis. [2] His Honour concludes that part of his judgment with a quotation from Coleman J in Steinbrenner & Steinbrenner [2008] FamCAFC 193 at [234] which I reproduce:

Given the evaluation of contribution based entitlements inevitably moves from qualitative evaluation of contributions to a quantitative reflection of such evaluation, there will inevitably be a "leap" from words to figures. That is the nature of the exercise of discretion, whether it be in the assessment of contributions in the matrimonial cause, assessment of damages in a personal injuries case, or determination of compensation in a land resumption case...[78]"

Sections 79(4)(d) to (g): Section 75(2) Adjustment factors

Having assessed the contributions of the parties, the court will determine the need to adjust its assessment having regards for:

- the effect of any proposed order upon the earning capacity of either party to the marriage;
- the matters referred to in subsection 75(2) so far as they are relevant;
- any other order made under this Act affecting a party to the relationship or a child of the relationship;
- any child support under the *Child Support (Assessment) Act 1989* that a party has provided, is to provide, or might be liable to provide in the future, for a child; and
- the factors set out in section 75(2) of the *Family Law Act*.

The court may make a needs based adjustment. The approach taken is reflected in the following.

In *Clauson*[79], the Full Court held:

"There is a tendency by the Court to assess sec 75(2) factors in percentage terms without considering the real impact, and legitimacy in the view that the Court has tended to operate in this area within artificially delineated boundaries. That is, it appears to be almost inevitable that the sec 75(2) factors will be assessed in the range between 10% and 20%. A number of cases will justify an assessment outside those parameters and in any event it is the real impact in money terms which is ultimately the critical issue."

In *Waters v Jurek*[80] the Full Court held:

"Disparity in income and income earning capacities is a common basis for making an adjustment under s. 79, quite independently of its maintenance implications. The rationale for that usually lies in the circumstance that the difference in income earning capacities is significant and/or has arisen either directly or indirectly as a consequence of the marriage and the roles which the parties played during the marriage".

On earning capacity see *DJM v LJM* (1998) FLC 92-816 and S v S (2006) FLC 98-030 where the Court held:

"In DJM v JLM (1998) FLC 92-816 the Full Court of the Family Court discussed issues relevant to determining income and earning capacity in great detail. Whilst it is ultimately a question of fact in each case, it is appropriate to identify relevant considerations in determining this question of fact. In this regard, relevant considerations will generally fall within the following categories:
(i) the ability to generate income
(ii) the opportunity to generate income; and
(iii) whether the parent's pursuits are appropriate in the circumstance"

77 Carmel Fevia and Fevia (no 3) [2012] FamCA 631 at [44] and [46]

78 Kane [2013] FamCAFC 205 at [3] to [5]

79 (1995) FLC 92-595

80 (1995) FLC 92-635

Assessment: the "leap" from words to figures

In *Cotters & Eggers-Cotters* [2015] FamCA 879 the Honourable Justice Cronin said the following of the process:

> *"Section 81 of the Act imposes on the Court a duty, as far as practicable, to make orders that will finalise the financial relationships of the parties. That provision (in other words, the clean break principle) is not part of the justice and equity determination required by s 79; its usefulness is questionable other than to encourage the cessation of proceedings so that each party knows what they have to enable them to start life anew.*
>
> *Attempting to achieve an outcome by reference to percentages of a "pool" of assets (as the parties have here) can ignore the real changes going on in the parties' life and the Court needs to guard against too formulaic approach.*
>
> *Section 79 and therefore s 75(2) highlights the Court's very wide discretion which exacerbates the complications involved in coming up with a solution (see Norbis and Norbis [1986] HCA 17; (1996) 161 CLR 513 at 520 per Mason and Deane JJ).*
>
> *These "complications" in the pursuit of a just and equity outcome were also described by Coleman J in Steinbrenner and Steinbrenner [2008] FamCAFC 193 at 234 as part of the exercise of a discretion under which the assessment moves from a qualitative approach to a quantitative reflection of such an evaluation. Apart from the focus of the parties on disparity of income, no specific approach to work out the answer was suggested; in other words, much depends upon intuitive synthesis (or described as instinctive synthesis in R v Barbaro [2014] HCA 2). Perhaps it might be helpful to look at comparable cases for some yardstick in the future."*

The Full Court in cases including *Steinbrenner; Myrtle* [2014] FamCAFC 31; and *Field and Smith* has described the process of arriving at a settlement as follows:

> *"60. His Honour has translated those findings into a percentage entitlement for each party, and it is here that the broad discretion reposed in the trial judge is most evident. The exercise entails a leap from words to figures, and the extent of the leap must be seen to be justified by "the discussion which precedes it" (Steinbrenner & Steinbrenner [2008] FamCAFC 193 at [234])....."*
> *"58. .... As Coleman J in Steinbrenner explains, the assessment of contributions entails a process of making quantitative findings and translating those findings into figures. It is the "leap" from words to figures which is recognised as sometimes being difficult to explain, but of course it must always be based on the findings that precede it. (Myrtle)"*

UHNW cases and summary

There is a current controversy in Australia regarding the court's approach to high wealth matters. I provide a summary of some reported decisions of Australian courts concerning high wealth cases at **Schedule 1** to this paper.

There has been much agitation of recent times in Australia about the category of "special contribution" arising from the quantum of the property pool.

Whilst previously there was an argument for a differential in the contribution assessment in favour of the party who creates significant wealth (these cases were commonly referred to as the "special contribution" or special skills" cases: the leading authority for "special contributions" until recent times and the high water mark was the case of Lynch & Fitzpatrick where after a long marriage the wife received 27.5% of the wealth attributable to the husband's business acumen in the mining industry), the recent decisions of the Australian courts indicate a party is required to establish more than mere creation of wealth during a relationship to warrant a significant adjustment in their favour.

The Court's approach to "big money" cases per se (the wealth being accumulated during the marriage and post separation and all other contributions being equal or of no significance) is now best reflected in decisions such as:

- *Hoffman* [2014] FamCAFC 92 (50% / 50% outcome)
- *Kane & Kane* [2013] FamCAFC 205 (trial judgment of 2/3 husband // 1/3 wife set aside and remitted for retrial);
- *Fields & Smith* [2015] FamCAFC 57 (50% /50% outcome).

These cases rejected the argument that there was a particular type of contribution that related to "special skills" or "special talents", with the result that such a finding "is productive of a particular finding or range of findings in respect of contribution". In *Hoffman* the Full Court stated:

> *"In each case, we consider that the point being made is that there is no principle or guideline (or indeed anything else emerging from s 79), that renders the direct contribution of income or capital more important – or "special" – when compared against indirect contributions and, in particular, contributions to the home or the welfare of the family..."*

In *Fields & Smith*, the Full Court found:

> *"If it is necessary to make the point again, and to highlight it for the purpose of this appeal, we add our endorsement to what has been made clear in the authorities referred and to the Full Court's comments in [52] of Hoffman, that the words of s 79 do not provide endorsement for any category of contribution related to any class of property (for example, high wealth) being, by virtue of that category or class, more valuable or important that another. In each case the contributions made by the parties must be evaluated in the context of the facts particular to that case.*
>
> *As we have already said at [42] and [43] the notion, if there ever was one, that for some reason the wealth of parties itself, particularly in relation to business interests, should axiomatically mean that the party involved in the business is entitled to more, and according to senior counsel for the husband in this case, significantly more, has been put to rest.*
>
> *These parties made significant contributions in differing but intersecting spheres. In our view, there is no basis for differentiating between them. In Mallet the High Court said that equality was not the starting point, that*

much can be readily accepted. That is not to prevent equality from being the conclusion once contributions and other relevant factors have been evaluated. Here the parties had organised their financial affairs in a manner which strongly pointed to a joint endeavour, at least during the continuance of the marriage and up until their separation. All their financial dealings were consistent with that position.

That is not to say, however, that in different cases, differences in contributions might not be relevant."

There may be other factors in the matrix of facts of any particular case that combined with significant wealth of the parties justifies a differential assessment of entitlement. For instance in many of the high wealth cases where ultimately it was held that the property pool ought to be equally divided the wealth was essentially created during the relationship, that is the parties came to the relationship with similar initial contributions and the wealth of the parties was accumulated during the marriage from their own efforts and from no external sources.

However the wealth may have been introduced by one party at the commencement of the relationship or inherited or a result of contributions they solely made to the property (e.g. see the UK decision of Lambert and the reference to highly skilled and highly paid footballers). The Full Court in *Fevia*[81] indicated:

"Whilst the preferred approach may be one of using percentages, it does not follow that in every case, it will lead to a just and equitable outcome. The focus must really be upon the value to be received. That does not mean that proportionality is irrelevant. It may be that in many if not most cases, proportionality in its various forms is a way of stepping back and deciding that the outcome is just and equitable"

Assistance as to the approach taken by the court where a substantial initial contribution is made in a high wealth case can be gained from:

- *Kennon* [1997] FamCA 27, the Full Court held in a high wealth case where the property pool at trial largely reflected the initial contribution of the husband (i.e. $8.7 million):

  "Dealing firstly with the s 75(2) factors, there are a number of general matters which attract immediate attention. On the one side, there are the circumstances that this was a relatively short marriage, with no children, and the wife is able to continue employment of the type which she had previous to cohabitation (We will discuss later the question whether there has been a diminution in income earning capacity). On the other hand, there are huge differences between the parties' incomes, assets, future income-earning capacities and superannuation benefits. His Honour pointed out on a number of occasions that these differences existed at the time the parties commenced to live together and that if their paths had not crossed and if they had not lived together for five years it is likely that that difference would have remained the same. However, we are not persuaded that that is the beginning and end of the issue. Whilst we acknowledge that s 79 is not a source of social engineering or as a means of evening up of the financial positions of the parties to a marriage, (see, for example, Clauson and Clauson (1995) FLC ¶92-595; Waters and Jurek, supra, and Lyon and Bradshaw (Full Court, 16 May, 1997, not yet reported)), nevertheless the fact is that these parties were married for a not insignificant period, each made contributions which we have discussed, and their obligations to each other do not cease on separation. Their marriage carried with it advantages and obligations and, so far as the settlement of their property on separation or divorce is concerned, those obligations are to be determined in accordance with the detailed provisions of s 79..... The contributions of the wife under s.79(4)(a) were virtually non-existent and under s.79(4)(b) were very limited. But her contributions under s.79(4)(c) were significant. She carried out her responsibilities as wife and homemaker for five years in the ways which were required of her given the particular circumstances of these parties. We reject any view which suggests that those contributions are diminished because of the lavish lifestyle of the parties or by any comparison between her position prior to cohabitation... There are some compelling factors under s.75(2). The most obvious is the disparity in the financial positions of the parties and their future financial prospects, although there are obvious limits to the relevance and impact of that circumstance in isolation. We consider that the wife's income earning capacity at trial and for the future has deteriorated from what it was at the time cohabitation commenced and that this is, to a significant degree, attributable to the marriage and mutual decisions made by the parties during the marriage.... On the other hand, there are some striking factors which mark out clear boundaries for s.75(2) - in particular, the duration of the marriage and the circumstance that there are no children, and that the wife is working full time.... The overall figure of $700,000, together with the retention of property which the wife currently has, represents a small percentage of the husband's assets. Some may see it as a modest award but the limiting factors need to be recognised, namely, the origin of the property, the length of the marriage, the circumstance that the wife does not have the responsibility for children, that she is employed full-time and the dimension of her original claim, namely, $800,000."

- *Carmel – Fevia & Fevia (No. 3)* [2012] FamCA 63, where the Family Court made a property settlement award of $22.8 million to the wife from a property pool of $435 million after a 6 year relationship productive of 2 children and held:

  "The parties differed about whether the determination on the agreed pool should be by way of lump sum or by percentage. Both argued that the issue was discretionary and there was reference to what was described as the "usual approach". Ultimately they submitted, what was important was the reference to the relevant legislative factors... I see no reason to do other than endeavour to evaluate the wife's contributions in dollar terms. The significance of the husband's wealth is that the lifestyle enjoyed by both husband and wife creates certain expectations... It is important to stress that the very fact that the wife could carry out the tasks she did, requires an acknowledgement

81 [2010] FamCA 502

that those satisfied one of the criteria in s 79(4) as a contribution. Whether that was made in a huge pool or in a small pool of assets, the contribution was just the same. The size of the pool cannot affect the fact that it was made. The importance of the contribution and its reach is what is being evaluated in circumstances of significant wealth... It is important to recognize that the facts of this case take it out of the ordinary. Those facts are the large wealth and the modest duration of the relationship... It was common ground that when the relationship between the parties began, the husband was a very wealthy man and it was not seriously put that the wife had contributed in a direct way to the acquisition, conservation or improvement of the property of either of them. This case was really about the entitlement of the wife arising out of her role in the marriage but that is not to ignore a very substantial financial contribution as well as a physical contribution by the husband..... Reflecting the overwhelming contribution of the husband to that increase but acknowledging the significance of the wife's homemaker and parent role, I would assess the wife's contribution to the increase of about $66 million at about 15 per cent. That is almost $10 million and taking into account what the wife already has retained which I shall determine she should also keep, I assess her contribution at $10 million over and above what she has kept. That reflects the fact that the husband introduced the wealth, has nurtured it and fulfilled his role in the factors required of him for the assessment process in s 79..... Having taken into account all of the other matters in s 75(2) and my reference specifically to those matters under the hearing of s 75(2)(o), it is appropriate that I exercise the discretion and make a further adjustment in favour of the wife. That adjustment is guided by the mathematical calculations some of which I have accepted, the ongoing role as a parent in a wealthy environment and her past contribution towards the husband's children. I assess that adjustment at a further $10 million."

Judge's exercise of discretion

The power to adjust the parties' respective interests in property is a wide discretionary power:

> *"The Court will not make an order for property settlement unless it is satisfied that in all the circumstances, it is just and equitable to make the order. The Court exercises a wide discretionary power under section 79 of the Family Law Act to make such property settlement order as the Court considers appropriate, altering the interests of the parties to a marriage in the property of the parties or either of them. Whilst that discretion is very broad, it is not unlimited and is conditioned by the requirement that it is "just and equitable to make the Order (section 79(2)) and that the Court take into account the matters specified in section 79(4) and the principles embodied in sections 43 and 81, so far as they are applicable"*

In *G&G* the Court explained the difficulty associated with the exercise of its discretion in the following terms:

> *"73 (Words) will often (perhaps always) fall frustratingly short of an incontestable explanation for any particular exercise of discretion – or, for that matter, for a finding by an appellate court that a particular exercise was wrong. All the relevant factors can be described, with modifiers in abundance, but still the analysis will beg the question, "Yes, but why that figure and not another?" or "Why was that the range rather than some other parameters?".*
>
> *74 The deficiency is unavoidable. When there are a number of "right" results available, the explanation for the choice of one over others can never be incontestable. Nor can the reasons for saying that a result is outside a range be beyond challenge. The very nature of a discretionary exercise that ascribes mathematical consequences to a batch of actions and events amenable only to descriptive evaluation, means that it is impossible to place beyond argument the explanation for all the steps to the ultimate selection of result.*
>
> *81 (In) respect of virtually every exercise of discretion, by definition, it will not be possible to deliver a judgment which excludes reasoned argument that another result was available."*

Orders

The Family Law Courts powers to make orders include:

- General power to make orders (including injunctive relief under section 114): section 80 [Marriage] / 90SS [De facto relationships]:
  - Interim or partial orders: Strahan (interim property orders)[82]
  - Finality principle: sections 81 [Marriage] / 90ST [De facto relationships] provide:

    "... the Court shall, as far as practicable, make such Orders as will finally determine the financial relationships between the parties to the marriage [de facto relationship] and avoid further proceedings between them."

  - Power to adjourn proceedings: sections 79(5) [Marriage] / 90SM(5) [De facto relationships] & see *Grace*[83] and *Blue and Blue and Ors*[84].
  - Challenge to orders: Power to set aside or vary orders: section 79A [Marriage] / 90SN [De facto relationship].
  - Foreign orders for property settlement: See Foreign Judgments Act 1991 and de Santis v Russo [2001] QCA 457.

If it is to the financial advantage of the parties to adopt a tax effective approach to a settlement then the court will endorse such structuring[85].

82 [2009] FamCAFC 166
83 (1998) FLC 92-792
84 [2008] FamCA 787
85 Campbell v Kuskey (1998) FLC ¶92-795

Piercing the corporate veil

Introduction

In March 1988, Tom Kirk (then partner of my firm, today a leading silk) delivered a paper titled "Revenue Aspects of Estate Planning (The Matrimonial Perspective)" which he presented to the 28th Legal Symposium[86]. Tom made the following observations which are related to this paper:

- *"**How to structure your client's business to best protect him from the consequences of divorce.** The structures or avenues to be considered or discussed with your client may include either alone or in combination:*
  - *Offshore entities*
  - *Pre-nuptial agreements*
  - *Superannuation funds*
  - *Trusts / companies / partnerships.*

  To understand the benefits associated with each in the matrimonial perspective it is necessary to examine briefly the Family Court's power to deal with them and the financial consequences of the use of that power."

- *"**Offshore entities.** The real advantage in having foreign assets (controlled via a foreign corporation or trust) is that the Family Court has very limited power to exercise any jurisdiction over these assets and in a practical sense the other spouse will often have great difficulty in obtaining sufficient documents to enable the assets to be valued.*

  However, if such assets can be valued, then their domicile will not reduce the quantum of any property settlement or maintenance order but enforcement of such an order ...is going to be exceptionally difficult if not economically impractical.

  In practice, it is only where assets having an Australian domicile are insufficient to meet an order, that there is any advantage in having an overseas entity...Consequently, in my opinion overseas structures have a very limited role in legitimate planning to protect a client from the consequences of divorce."

- *"**Trusts / companies / partnerships.** Whatever structure is used, there must be consideration given to how that structure would operate after the breakdown of a marriage in expectation that this event will engender animosity, distrust and lack of co-operation. One should always ensure through the appointment of permanent governing directors, managing partners or by some other means that your client is able to continue operating a business structure after a marriage breakdown...."*

- *"**Corporations.** The assets of a company are more difficult to attack than those of a partnership and this is particularly so where there are third party directors and shareholders. The involvement of the children of the marriage and other persons as shareholders place severe limitations on the court.....in such structures there are distinct advantages in appointing permanent governing directors, issuing shares to third parties or children with special dividend and voting rights and having a third party appointed as a director...."*

- ***Trusts.** In my experience the creation of a discretionary trust is the most flexible structure available to limit the financial consequences of a divorce upon a business. However, considerable care and a preparedness by your client to take risks are prerequisites.... Consequently if a trust structure is to be effective in the light of these decisions the following minimum criteria must be met:*
  - *The appointer should be a third party...but not someone who could be considered the alter ego of the husband [client]*
  - *The trustee if it be a company should not be controlled by the husband and preferably the directors should be relatives or trusted professionals;*
  - *The husband if he performs a managerial role in the business of the trust must not assume or be seen to assume full control of trust assets or receive a financial benefit therefrom other than a commercially realistic salary.*
  - *Whilst the husband can be a named beneficiary and also a paid employee he should ensure that there are other third party beneficiaries who are from time to time in receipt of income or capital distributions;*
  - *Whilst the wife should also be a named beneficiary she should be included as "the current wife of" so that on divorce she ceased to be a beneficiary.*
  - *The wife should not be named as a default beneficiary" in relation to capital or income."*

86 Queensland Law Society Journal, February 1989, page 3

Since that article the law has developed giving courts greater power to deal with third party entities and the courts have adopted a more sophisticated approach, however many of the practical suggestions made do hold true.

In particular the following powers are available to the court to deal with third party interests:

- ***Ascot Investments***

  - The starting point in any discussion about third parties in property settlements in Australia is in 1981 when the High Court recognised there are limitations on making orders affecting third parties:

  "in some circumstances the Family Court has power to make an order or injunction which is directed to a third party or which will indirectly affect the position of a third party. They do not establish that any such order may be made if its effect will be to deprive a third party of an existing right or to impose on a third party a duty which the party would not otherwise be liable to perform. The general words of sec. 80 and 114 must be understood in the context of the Act, which confers jurisdiction on the Family Court in matrimonial causes and associated matters, and in that context it would be unreasonable to impute to the Parliament an intention to give power to the Family Court to extinguish the rights, and enlarge the obligations, of third parties, in the absence of clear and unambiguous words... There is nothing in the words of the sections that suggests that the Family Court is intended to have the power to defeat or prejudice the rights, or nullify the powers, of third parties, or to require them to perform duties which they were not previously liable to perform. It is one thing to order a party to a marriage to do whatever is within his power to comply with an order of the court, even if what he does may have some effect on the position of third parties, but it is quite another to order third parties to do what they are not legally bound to do. If the sections had been intended to prejudice the interests of third parties in this way, it would have been necessary to consider their constitutional validity"[87]

  - The exception to this rule is when the trust is the alter ego or mere puppet of a party, or a sham as follows:

  ``The position is,..., different if the alleged rights, powers or privileges of the third party are only a sham and have been brought into being, in appearance rather than reality, as a device to assist one party to evade his or her obligations under the Act. Sham transactions may always be disregarded. Similarly, if a company is completely controlled by one party to a marriage, so that in reality an order against the company is an order against the party, the fact that in form the order appears to affect the rights of the company may not necessarily invalidate it....[88]

  Except in the case of shams, and companies that are mere puppets of a party to the marriage, the Family Court must take the property of a party to the marriage as it finds it. The Family Court cannot ignore the interests of third parties in the property, nor the existence of conditions or covenants that limit the rights of the party who owns it"

- **Anti avoidance provisions**

  - The next consideration are the anti avoidance provisions of the **Family Law Act** (previously section 85 now section 106B). The courts have the power to set aside or restrain transactions which are intended or have the effect of defeating wholly or partially a claim in property settlement. For instance:

    - *In Narelle Gould; Wah Dak Services Limited and Cheung Wah Bank Limited Appellants and Vanda Russell Gould and Swire Investments Limited Respondents Appeals [1993] FamCA 126, the Full Court made the following observations about the anti avoidance provisions under section 106B as it applies to third parties:*

52. As would be expected having regard especially to the terms of s.85(3), the Family Court has been conservative in its application of s.85 in cases involving a genuine third party: see, for example, Abdullah (1981) FLC 91-003; Holley (1982) FLC 91-257; Aldred v Westpac Banking Corp. (1986) FLC 91-753; A.N.Z. Banking Corporation v Harper (1988) FLC 91-938; Commonwealth Bank of Australia v Staatz (1988) FLC 91-842 and D and D (1984) FLC 91-593. In Heath and Westpac Banking Corporation (1983) FLC 91-362 at 78,430, Nygh J said:-

> *"Needless to say, the Court should be most reluctant to interfere with the rights of a bona fide purchaser ..."*

53. Nevertheless, orders have been made affecting the interests of bona fide third parties under s.85, under s.120 of the Matrimonial Causes Act, and under State legislation before that.

54. The examination of the history of this legislative provision in Australia, the United Kingdom and New Zealand, which appears hereafter, leads to the following conclusions. The power of courts exercising divorce and matrimonial causes jurisdiction to make orders of the type in question here either through the equivalent of s.85 or by use of their injunctive powers is of long standing. Secondly, the power to do so has expanded in more recent times, parallelling the increasing availability of trusts and corporate structures which accentuate the problems to which s.85 is in part directed. Thirdly, where the balance is to be drawn between the interests of the parties to the marriage and the interests of third parties has varied from time to time within that legislative history; however, that appears to me to be a policy choice rather than a question of power.....

87 Ascot Investments Pty Ltd v Harper (1981) FLC 91-000

88 Ascot Investments Pty Ltd v Harper (1981) FLC 91-000

80. Thus, the scope or application of a power may expand to meet changing times and circumstances. This is particularly relevant in relation to s.85 because of the increased application of the property settlement powers in modern times and the increased availability of third parties, including overseas entities, through which property may be dispersed. The power to set aside transactions which avoid orders or anticipated orders in matrimonial property proceedings has existed in Commonwealth legislation since 1959 and has been acted upon in a number of reported and unreported cases, including cases where rights of bona fide third parties have been affected."

- **Part VIIA Third party powers**

  - On 17 December 2004 Part VIIIAA was introduced to the *Family Law Act* arming judges with significant powers to deal with third parties.
  - The Family Law Courts have very wide powers to make orders and injunctions against third parties under section 114 and Part VIIIAA of the *Family Law Act*[89] Part VIIIAB also extends to the operation of Part VIIIAA to de facto relationships. The prevailing view is that Part VIIIAA is not an avenue to increase the property pool for division. It is a mechanism to divide the property pool that already exists.
  - Some of the relevant provisions of Part VIIIAA are as follows:

    *"**Section 90AA** Object of this Part: The object of this Part is to allow the court, in relation to the property of a party to a marriage, to:*
    - *make an order under section 79 or 114; or*
    - *grant an injunction under section 114;*

    that is directed to, or alters the rights, liabilities or property interests of a third party.

    ***Section 90AC** This Part overrides other laws, trust deeds etc: This Part has effect despite anything to the contrary in any of the following (whether made before or after the commencement of this Part):.... (b) anything in a trust deed or other instrument.*

    ***Section 90AE** Court may make an order under section 79 binding a third party....*

    (2) In proceedings under section 79, the court may make any other order that:(a) directs a third party to do a thing in relation to the property of a party to the marriage; or (b) alters the rights, liabilities or property interests of a third party in relation to the marriage.

    (3) The court may only make an order under subsection (1) or (2) if:(a) the making of the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage; and .... (c) the third party has been accorded procedural fairness in relation to the making of the order; and(d) the court is satisfied that, in all the circumstances, it is just and equitable to make the order; and(e) the court is satisfied that the order takes into account the matters mentioned in subsection

    (4) [taxation and social security effect and administrative costs and the economic, legal or other capacity of the third party to comply with the order]. Example: The legal capacity of the third party to comply with the order could be affected by the terms of a trust deed. However, after taking the third party's legal capacity into account, the court may make the order despite the terms of the trust deed. If the court does so, the order will have effect despite those terms (see section 90AC).(g) if, as a result of the third party being accorded procedural fairness in relation to the making of the order, the third party raises any other matters—those matters;(h) any other matter that the court considers relevant.

    ***Section 90AF** Court may make an order or injunction under section 114 binding a third party....*

  - In aid of property settlement and injunction proceedings the court has power to bind third parties to make the following orders:
    - Direct a third party to do a thing in relation to the property of the marriage, or alter the rights, liabilities or property interests of a third party in relation to the marriage[90]
    - Restrain a person from repossession of property of a party to the marriage; or grant an injunction restraining a person from commencing legal proceedings against a party to the marriage[91];
    - Directing a third party to do a thing in relation to the property of the marriage; or (which) alters the rights, liabilities or property interests of a third party in relation to the marriage[92]
  - There are constraints on the court's exercise of this power against third parties. In *Hunt v Hunt & Lederer and Ors*[93], the Honourable Justice O'Ryan held:

    "When s 90AE(2) is read in conjunction with s 90AE(3), s 79 and Part VIIIAA generally, it is clear that what is contemplated is not some arbitrary invasion of the rights of a third party, but an alteration of those rights where they are sufficiently connected to the division of the property between parties to the marriage." (at para 112)

- **Specific legislation**

  - There is specific relief, rights and obligations found in legislation outside the *Family Law Act* that may be invoked in the Family Law Courts in aid of the courts property settlement jurisdiction such as the *Corporations Act* (dealt with below), section 226 of the *Property Law Act* (Qld), the *Bankruptcy Act*, the various Superannuation laws and regulations.
  - There are also specific provisions in the *Family Law Act* such as section 85A relating to nuptial settlements

89 Hunt v Hunt & Lederer and Ors; Manichaeus [2010] FamCA 397; B Pty Ltd & Ors & K & Anor (2008) FLC 93-380; Simmons [2008] FamCA 1088; Leader & Martin – Leader [2009] FamCA 979

90 Section 90AE(2)
91 Section 90AF(1)
92 Section 90AF(2)
93 (2007) FLC ¶93-311

- **Evidence**

- Procuring evidence from a foreign jurisdiction can be difficult and costly. Have regard to the following when looking to take evidence overseas:

  - Section 174 of the *Evidence Act 1995* (Cth): evidence of the law of a foreign country may be adduced through the production of a publication containing the relevant law which appears to the Court to be a reliable source of information.

  - The Convention on Taking of Evidence Abroad in Civil or Commercial Matters of 1970 ("Hague Evidence Convention):
    - Article 2: Each contracting State is to designate a Central Authority to receive letters of request (Letters rogatory) coming from a judicial authority of other contracting State and transmit them to an authority competent to execute them.
    - Article 3: sets out the detail required in the letter of request;
    - Article 11: the person concerned who is named may refuse to give evidence insofar as he or she has a privilege or duty to refuse to under the law of the State of execution or under the law of the State of origin if that privilege or duty is specified in the letter of request.
    - Article 12: sets out the limits to refusal of the execution of the letter of request.
    - Application is made to court attaching the draft letter of request, which if approved is transmitted to the Central Authority (Commonwealth attorney General's department) to bring proceedings in the court in the contracting State for the evidence to be taken.
    - For example of Australian decision on letters rogatory refer to Narkis & Narkis (No 3) [2016] FamCA 1048

  - *Foreign Evidence Act 1994* (Cth):
    - The relevant provision is section 7 regarding orders for taking evidence abroad.
    - For the purposes of the legislation, the Family Court is a "Superior Court" before which an application can be made for an order relating to a person outside Australia under section 7 (1):
    - For examination of the person on oath or affirmation at any place outside Australia before a judge of the court, an officer of the court or such other person as the court may appoint; or
    - For issue of a commission for examination of the person on oath or affirmation at any place outside Australia; or
    - For issue of a letter of request to the judicial authorities of a foreign country to take the evidence of the person or cause it to be taken.
    - Under section 7(2), the matters the court has regard to in deciding whether it is in the interests of justice to make an order are:
    - (a) whether the person is willing or able to come to Australia to give evidence in the proceeding;
    - (b) whether the person will be able to give evidence material to any issue to be tried in the proceeding;
    - (c) whether, having regard to the interests of the parties to the proceeding, justice will be better served by granting or refusing the order."

  - For a case on point see *ASIC v Rich* [2004] NSWSC 467.

Trusts

For a more detailed and technical summary of discretionary trusts under Australian law I refer you to the following papers I have previously prepared and delivered that I make available at the following links:

- **Wilson, Geoff**, paper and presentation: "*Fast cars….Discretionary Trusts: Property of the Parties or a Financial Resource?*", delivered to TEN 11th Annual Family Law Conference, 27 July 2017, go to link: **http://www.hopgoodganim.com.au/icms_docs/273972_Fast_cars_Discretionary_Trusts_Property_of_the_parties_or_a_financial_resource.pdf**

Fundamental to any matter in family law proceedings for property settlement relief involving discretionary trusts is the assessment of the interests, roles, powers, entitlements and obligations of the spouse parties and the characterisation of such interests, roles, powers, entitlements and obligations which informs the property settlement outcome. The identification of whether a client's interest (or their spouse's interest) in trust property is 'property', a 'financial resource' or a 'mere expectancy' can be critical to a client's case and can have wide ranging implications.

The body of family law cases about discretionary trusts tends to suggest that the powers and roles with obvious control such as appointor and trustee present little difficulty for the court and parties in pigeon holing the trust. The real challenge occurs when a spouse party's interest is as a potential object / beneficiary of the family trust. Much of the case law is directed to the treatment of the trust in the financial proceedings vis-a-viz` their standing.

The starting point in determining whether trust assets can be 'property' of the parties or a 'financial resource' of the parties was set out in *Goodwin & Goodwin*:

The nature of the parties' interests in the trust property is a question of fact to be determined by the Court (refer to the unreported decision of *Reynolds v Reynolds* cited in *Goodwin & Goodwin Alpe* (1991) FLC 92-192 where the Court found:

> *"…we emphasise that the question whether the property of the trust is, in reality, the property of the parties or one of them, or a financial resource of the parties or one of them, is a matter dependent upon the facts and circumstances of each particular case including the terms of the relevant trust deed.".*

- At paragraph 79 of Reynolds (supra), the Full Court found:

  > *"… In the particular circumstances of this case, the value of the husband's interest had to be assessed realistically. Having regard to the terms of the trust deed and the husband's powers over the trust property arising from the trust deed and also in the light of His Honour's orders, it is our view that in the circumstances the value of the husband's interest under the trust is equivalent to the full value of the trust property."*

- It is fundamental to any financial proceeding before the Family Court involving trusts, that a report ought to be obtained from a specialist accountant regarding the value of the trust and addressing issues concerning the control of the trust (mindful of the Full Court's comments in *Goodwin & Goodwin - Alpe* (1991) FLC 92-192 i.e. " We can see no reason why expert evidence must be called in cases of this nature since the trial judge is perfectly able to interpret trust deeds and to assess their legal effect. Similarly he or she is more than capable of making findings of fact as to the actual administration of the trust" and the comments of Warnick J. in *Wilson and Ramsay*).

Part VIIIAA: In *AC and Ors & VC and Anor* (2013) FLC 93-540; [2013] FamCAFC 60, at paragraph 69, the Full Court refers to the submission of the Attorney General which was directed to the constitutionality of the trial judge's orders under Part VIIIAA as follows:

"69.In a way that is particularly relevant to the present case, the Attorney-General's position was put at paragraph 28 of his submissions:28.The Attorney-General does not, for the purposes of this appeal, suggest the width of the discretion conferred on the Court in exercise of these powers ought to be detracted from by the identification of particular examples. Each case will depend on its facts. However, there is no reason in principle why, in an appropriate case, the Family Court could not make orders under Part VIIIAA altering the rights, liabilities or property interests of beneficiaries under a discretionary trust. This could include, where reasonably necessary or reasonably appropriate and adapted to effect a division of property between the parties to the marriage, orders, for example:
- directing a trustee to pay out the relevant notional entitlement of a party to the marriage in the trust as if the trust had vested, and removing the relevant spouse or spouses as future beneficiary or beneficiaries; or
- vesting and winding up the trust."

The Full Court agreed with the interpretation of the Court's power under Part VIIIAA and that the Court's power could be applied to affect the entitlements of beneficiaries and the structure of trusts even where there is no finding of control. Whilst the facts of the case did not permit, the Court found in certain instances it could vest a trust earlier than provided under the deed. At paragraph 85 of the judgement the Full Court held:

85.Whatever may be the outer limits of the powers in Part VIIIAA, we are satisfied the Part can be used to require a trustee (including a third party trustee) to bring forward the vesting date of a trust find for what can be termed, the "ancillary" purposes of valuing an irrevocable entitlement to ultimately share in the trust fund, and of distributing that share to the party entitled, and that these powers can be exercised even at the expense of third party interests, provided that the requirements in ss 90AE(3) and (4) and ss 90AF(3) and (4) are met, and the order, if made under s 79, is "just and equitable", or if made under s 114, is "proper".

Other decisions worthy reviewing about Part VIIIAA particularly on the question of joinder of trustees to property settlement proceedings:

- *B Pty Ltd and Ors & K and Anor* (2008) FamCAFC 113
- *Simmons & Simmons* [2008] FamCA 1088:
  - Bryant CJ: According to Professor Parkinson, ['Family Trusts and Third Parties under the Family Law Act 1975' (2012) 26 Aust J Fam L 5] the decision of Justice Watt in Simmons & Simmons demonstrates the need for careful evaluation of the source of the trust funds, as identified by Chief Justice French in Kennon & Spry.
- *Cule & Cule and Ors* [2010] FamCA 292

Some practical examples of orders that may be sought involving trusts and Part VIIIAA include:

- Under section 79, an order requiring a trustee to distribute either trust capital or income in a particular manner - for example, the distribution of capital or income to a party of the marriage in a fixed amount or to someone who is not a beneficiary. This could be ordered to occur in circumstances where the instrument either does not or may not permit such distributions. Such transactions also alter the property interests of third parties in so far as, for example, the distribution of either trust capital or income is made to a party to a marriage, for example, not in accordance with fixed entitlements to either income or capital assets of a trust.
- Under section 79, orders which:
  - fix a vesting date;
  - convert a discretionary trust into a fixed trust;
  - require the trustee to exercise its discretion in a particular manner;
  - add a beneficiary; or
  - require a distribution to a spouse who, upon divorce, ceased to be a beneficiary,

  and such orders could be made in circumstances where the transactions all of which may not be permitted pursuant to the relevant instruments.

- Under section 114, injunctions restraining appointors and/or trustees pending further order (interim orders) or pending compliance with final orders;

Kennon v Spry: Whilst the High Court judgment in *Kennon and Spry* is a significant authority in respect of the Family Law Courts treatment of discretionary trusts in property settlement it essentially gave effect to a considerable body of law of the Family Court. In the leading judgement of the Chief Justice, French CJ held:

62. In my opinion the argument advanced on behalf of Mrs Spry should be accepted save that it is the Trust assets coupled with the trustee's power, prior to the 1998 Instrument, to appoint them to her and her equitable right to due consideration, that should be regarded as the relevant property....

70. ***The characterisation of the assets of the Trust, coupled with Dr Spry 's power to appoint them to his wife and her equitable right to due consideration, as property of the parties to the marriage is supported by particular factors.*** *It is supported by his legal title to the assets, the origins of their greater part as property acquired during the marriage, the absence of any equitable interest in them in any other party, the absence of any obligation on his part to apply all or any of the assets to any beneficiary and the contingent character of the interests of those who*

might be entitled to take upon a default distribution at the distribution date....

*81. **The assets of the Trust, coupled with Dr Spry's power to appoint them to his wife and her right to due consideration, were, until the 1998 Instrument, the property of the parties to the marriage for the purposes of s 79**. The fact that Dr Spry removed himself as a beneficiary by the 1983 Deed does not affect that conclusion. Because the 1998 Instrument effectively disposed of Mrs Spry's equitable right to be considered in the application of the Trust fund, and having regard to the trial judge's conclusions about the purpose of the instrument, the order setting it aside was an appropriate exercise of the Family Court's power under s 106B. Mrs Spry's equitable right could then be considered as part of the property of the parties to the marriage. The setting aside of the 18 January 2002 Dispositions was also appropriate. The ancillary order that Dr Spry pay his wife the sum of $2,182,302 was appropriate for the reasons stated by Gummow and Hayne JJ in their joint judgment.*

Gummow and Hayne JJ held:

126. Reference was made earlier in these reasons to the comprehensive sense in which the term "property" is defined in s 4(1) of the Act75. And it will also be recalled that the "property" which may be the subject of orders under s 79(1) of the Act is "the property of the parties to the marriage or either of them" (emphasis added). The right of the wife with respect to the due administration of the Trust was included in her property for the purposes of the Act. The submissions by Mr Gleeson to this effect should be accepted. The submissions to the contrary by Mr Myers should not be accepted. And in considering what is the property of the parties to the marriage (as distinct from what might be identified as the property of the husband) it is important to recognise not only that the right of the wife was accompanied at least by the fiduciary duty of the husband to consider whether and in what way the power should be exercised, but also that, during the marriage, the power could have been exercised by appointing the whole of the Trust assets to the wife. Observing that the husband could not have conferred the same benefit on himself as he could on his wife denies only that he had property in the assets of the Trust, it does not deny that part of the property of the parties to the marriage, within the meaning of the Act, was his power to appoint the whole of the property to his wife and her right to a due administration of the Trust.

Note however the High Court did qualify its findings in dealing with treatment of genuine arms length interests as follows:

*69. The preceding conclusion does not involve some general extension of s 79 which would require that it be hedged about with protective discretions of uncertain application to prevent its intrusion into trust arrangements affecting assets foreign or extraneous to those acquired by the parties to the marriage in their own right. **So if the husband were trustee of a charitable trust or executor of the will of a friend or client the mere legal title to the assets of such trusts, because of their origins and character, could not be regarded as part of the husband's property as a party to the marriage within the meaning of the Family Law Act**. Importantly, in such a trust there could be no power of appointment to his wife and no corresponding equitable right enjoyed by her. **The question of a trust involving a combination of purposes and family and extraneous assets does not arise***

This passage is an important consideration when contemplating structuring a discretionary trust sufficiently to keep it from the reach of the Family Law Courts.

Bryant CJ addresses the criticisms of Kennon and Spry concerning its perceived incongruence with traditional principles of equity and trusts, as follows:

"To what extent then can criticisms levelled at the majority decisions as being antithetical to the basic precepts of trust law, and predicated on assumptions that trustees will act in breach of their fiduciary duties in distributing the trust assets, be justified? In my view there are some important points that can be made in response to characterizations of the majority decisions as outlandish and legally heretical. Here I agree with Tim North SC that although the decision arguably represents an extension of the law, it is not one that in my view poses a serious threat to the basic precepts of general equitable doctrine.....

In my view, and without wishing to sound overly defensive about my own jurisdiction, I think some of the criticism of the majority judgments in Spry is misconceived. And I would add previous aspersions cast on the manner in which the Family Court has dealt with discretionary trusts are without foundation if you look carefully at the jurisprudence.....

First, and most importantly, and a fact ignored by the critics is that in making orders under section 79 the Court is applying the statute. Thus it is the Family Law Act that governs the exercise of discretion and the decision making power, not the general law..... it needs to be remembered that the majority in Kennon & Spry were at pains to emphasise that the question which fell to the High Court for determination was what constituted property for the purpose of section 79 of the Act, not what constitutes property in general law.....

Secondly, a consideration of the seminal cases will demonstrate that the orders made do not offend any trusts law orthodoxy. None of the principles from the cases determined by the Family Court (and I would add the High Court) should be of any concern to trust lawyers, unless and until orders actually interfere or seek to interfere with the asserted inviobility of the exercise of discretion or, inappropriately, affect the interests of third parties in property[I pause to add here that you should carefully consider the judgement of Warnick J in BS and KS [2003] FLC 93-157 where his Honour addresses the difference between making a section 79 order dealing with trusts and enforcing the order against the trust assets and see my comments below in respect of the Nicholls case]. ....The interesting part about the excitement of the trust lawyers who are critical of the decisions of the Family Court is that they focus on the outcome, rather than the facts as found....Second, Spry is self-evidently a case decided on its own facts, which were, in the opinion of the Chief Justice, 'unusual'.....

Third, and allied with the above, is that it needs to be remembered that the question of third party trustees and beneficiaries, and of trust assets obtained from sources other than those acquired by the parties to a marriage, were not in issue in Spry and in that respect the decision too is of narrow compass.....

Fourth, Spry is not the only case in which a beneficiary of a discretionary trust has been found to have effective control of the trustee and thus a proprietary interest in the trust assets."

Indicia: The following are some of the indicia that may lead a court to find that the property of a trust is the property of the parties:

- Control rests with a party;
- Bundle of rights;
- Source and origin (of corpus) is from the parties;
- Patterns of distributions to a party;
- Underlying treatment: It is important clearly to have a clear understanding of the trust deed, associated documents such as umbrella agreements and also the history of the parties' relationship to and use of the assets and income of the trust. This may give rise to raising a claim under Part VIIIAA for instance to vest the trust early as suggested in *AC and ors & VC and anor* (2013) FLC 93-540; [2013] FamCAFC 60
- the party's past exercise of powers and involvement in variations or amendments to the trustee;
- the benefits derived from the trust by the party such as drawings, loans, salaries, payment of expenses, use of motor vehicle;
- how the trust assets were acquired, i.e. were they derived from joint efforts of the parties;
- capacity to borrow on trust funds;
- contributions by the parties to marriage to trust property;
- one party's ability to transfer to themselves, or the other spouse, trust assets;
- whether a party has responsibility for the day-to-day administration of the trust including the banking of money, payment of accounts, etc.
- Is the interest irrevocable or vested (e.g. see *Pittman* [2010] FamCAFC 30)

The foundation to establishing one's claim in any litigation is the evidence. A case will rise and fall on the evidence presented in support of the claim and how persuasive the evidence is.

Critical to determining the character of an interest in a discretionary trust will be the evidence in support of the party's case and how the evidence is procured and presented to the court.

In the search for evidence do not make assumptions: read the documents carefully because the solution to your client's challenge may be found within the document (such as in *Pittman and AC and Ors v VC and Anor*).

A good starting point where a trust entity exists requires an examination of the following preliminary documents It will pay to give careful attention to the trust deed and extrinsic documentation.

I refer you to section 11 of my paper "Fast cars....Discretionary Trusts: Property of the Parties or a Financial Resource?" for a detailed examination of evidentiary issues.

The *Family Law Act*, the *Family Law Rules 2004* (as amended) and the Federal Circuit Court Rules 2001 firmly entrench the requirement for full and frank disclosure for parties in financial cases

For instance under the Family Law Rules:

In particular, Rule 13.07 states that the duty of disclosure applies to each document that:

(a) is or has been in the possession, or under the control, of the party disclosing the document; and
(b) is relevant to an issue in the case

Rule 13.04(1)(f) (and see Rule 24.03 of the Federal Circuit Court Rules 2001) sets out that each party to a financial case must make full and frank disclosure of the party's financial circumstances, including:

(f) any trust:
(i) of which the party is the appointor or trustee;
(ii) of which the party, the party's child, spouse or de facto spouse is an eligible beneficiary as to capital or income;
(iii) of which a corporation is an eligible beneficiary as to capital or income if the party, or the party's child, spouse or de facto spouse is a shareholder or director of the corporation;
(iv) over which the party has any direct or indirect power or control;
(v) of which the party has the direct or indirect power to remove or appoint a trustee;
(vi) of which the party has the power (whether subject to the concurrence of another person or not) to amend the terms;
(vii) of which the party has the power to disapprove a proposed amendment of the terms or the appointment or removal of a trustee; or
(viii) over which a corporation has a power mentioned in any of subparagraphs (iv) to (vii), if the party, the party's child, spouse or de facto spouse is a director or shareholder of the corporation;

If a third party is joined in the proceedings pursuant to Pt VIIIAA, its obligations of disclosure are limited by r 13.02(2) of the Family Law Rules 2004 providing:

"This division does not apply to a party to a property case who is not a party to the marriage to which the application relates, except to the extent that the party's financial circumstances are relevant to the issues in dispute."

Section 85A: The Court has power to make orders directly in relation to property in Ante-Nuptial or Post-Nuptial settlements made in relation to the marriage pursuant to section 85A of the *Family Law Act* to effectively undo the trust. To invoke the power, the transaction must meet 3 requirements: it must be a settlement; the settlement must have been made in relation to the marriage and the settlement must have a nuptial character. It is beyond the scope of this paper to delve into section 85A. Prior to the minority judgment of the Honourable Justice Kiefel in *Kennon v Spry*, there was little use or utility in seeking relief under section 85A due to the limiting requirements of the legislation. (For reported cases refer to *Greval v Estate of the late Greval*, *Sandalwood Lodge Pty Limited (Intervenor)* (1990) FLC 92-132; *Public Trustee (SA) v Keays* (1985) FLC 91-65; *Knight v Knight (1987)* FLC 91-854; *Spellson v Spellson* (1989) FLC 92-046). The earlier law is reviewed in the paper by Grahame Richardson. The decision of the Honourable Kiefel in *Kennon v Spry* has arguably enlivened the sleeping remedy

as highlighted in the articles by Tim North SC and Justice Brereton. The Honourable Justice Brereton wrote:

> *"Had I been asked before the judgment of the High Court whether this was a nuptial settlement, I would have said not: the Trust was constituted long before the marriage and not by reference to the marriage; it could not be an "ante-nuptial settlement" within the scope of s.85A; it was not made "in relation to" the relevant marriage, and rather had the appearance more of a settlement for the benefit of the family of the husband's father (by reference to whom the beneficiaries were defined)*
>
> *Not all of the Justices found it necessary to address the s 85A issue: French CJ observed that it was 'not necessary in the light of the preceding conclusions to consider whether s 85A has any application', and Gummow and Hayne JJ agreed with French CJ in that respect.*
>
> *Heydon J took the view that s 85A could not be engaged....*
>
> *Kiefel J, whose judgment has described by Justin Gleeson SC, as 'perhaps the most intriguing and far-reaching of the judgments ... in this matter' upheld the wife's contention that s85A(1) provided the power and the means by which the trial judge's finding and intention could be carried into effect.'....*
>
> *The critical feature in Kiefel J's reasoning, the fundamental conflict with that of Heydon J, and the point which has caused me to change my mind, is whether each disposition of property to the trust after marriage can be regarded as a "settlement". I respectfully agree with Kiefel J that it can. A settlement is a disposition of property on certain terms. There can be further settlements on a trustee, on the same trusts, after the initial settlement. Each disposition of property to the trustee is a settlement of property on the trustee on the terms of the trust. The question is not whether there was a nuptial element when the trust was first declared, but whether there was such an element at the time of each disposition. By the time of the marriage, in my view there plainly was....*
>
> *In my view, s 85A would have authorised orders varying the interests of the husband and wife in certain but not the whole of the trust assets. In the event, no orders altering interest in any trust assets were made."*

Section 78 declaration: The Court determines make a declaration pursuant to section 78 of the *Family Law Act* that the spouse be declared the equitable owner of certain property of the trust (refer Moran (1995) FLC 92-559).

Section 106B: The Court has power to set aside transactions pursuant to section 106B of the *Family Law Act* (refer to Turnbull and Davidson). As an adjunct to any property settlement application involving a discretionary trust it may be strategic and essential to apply to set aside certain transactions which have placed the nexus of control and other indicia out of the reach of the party seeking a slice of the trust and beyond the court. Indeed the success of Kennon v Spry was a result of the wife successfully setting aside earlier transactions to restore the powers and interests of the parties.

Other powers: When dealing with trusts, the Family Court has the following powers:

- To appoint new trustees (section 80 of the *Family Law Act* and also refer to the decisions of *Davidson (No.2)* (1994) FLC 92-469 and the unreported decision of *Alcaine*, Judgment of the Full Court, the Family Court of Australia delivered 26 March 1997 in proceedings EA 72 of 1996);
- To direct the trustee and provide other injunctive relief pursuant to section 114 of the *Family Law Act* (refer to Tiley (1980) FLC 90-898 and the unreported decision of *Little* (1978);
- To adjourn property settlement proceedings pursuant to section 79(5) (refer to *Grace v Grace* (1998) FLC 90-792; Blue);
- The Family Court may determine matters arising under the *Trusts Act* or other equitable relief to the extent that it is necessary to apply the provisions of the *Family Law Act*, for instance to determine what interests a spouse or third party has in property;
- The accrued jurisdiction of the Family Court to deal with those matters referred to in (g) above (refer to *C and C and C: Accrued Jurisdiction* [2001] FamCA 459).

Ascot Investments as a fall back: If the factual matrix does not permit the court to make findings that the property of a discretionary trust is property of the parties due to the a mix of source of origin of the trust property and lack of apparent control in the parties and Part VIIIAA cannot be invoked then a party may need to fall back to the limitations in Ascot Investments and attempt to prove:

- that a third party/trust is the alter-ego of a party to the proceedings
- that a third party/trust is a sham brought into being in appearance rather than reality as a device to assist one party to evade his or her obligations under the *Family Law Act* (refer *Harris & Harris* (1991) FLC 92-254 at page 78, 706).
- that a third party/trust is the puppet of a party to the marriage so in reality an order against the trust is an order against the party (refer *Gould & Gould*; *Swire Investments Pty Ltd* (1993) FLC 92-434 at pages 80, 432 – 80, 433) i.e. complete control
- the third party/trustee is in effect an accomplice of a party to the marriage whose actions are designed to assist one spouse and disadvantage the other (refer *Ascot Investments v Harper* at page 76, 062 and *Howard & Howard; Howard Developments Pty Ltd (Intervenor)* (1982) FLC 91-279 at page 77, 595)

Hague Convention on Trusts: It is beyond this paper but you should not overlook the Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition **https://www.hcch.net/en/instruments/conventions/full-text/?cid=59** to which Australia is a contracted State. Australia has enacted legislation *Trusts (Hague Convention) Act* 1991 to give effect to the Convention.

Companies

Introduction: whereas the nature of a party's interest in a discretionary trust can be nebulous, the interest of a shareholder in a company is more tangible and easier to value. The shareholder does not own the assets of a company as the company is a separate legal entity.

However, many of the principles referable to discretionary trusts will have the same application to companies in property settlement proceedings before the court subject to the factual matrix of the matter before the court. For instance, my discussions about the following grounds for claim vis-a-viz trusts also arise in respect of party's interests in companies:

- the Ascot Investments principle regarding shams and alter egos;
- Section 106B in respect of setting aside transactions; and
- Part VIIIAA in respect of the courts powers over third parties. For instance:
  - Restraining orders made in *E Pty Ltd & Ors & Kleacrchos* [2016] FamCA 258

Corporations Law: under section 1337C(1) of the *Corporations Act*, the Family Court is conferred jurisdiction with respect to civil matters arising under the Corporations legislation. This extension of jurisdiction enables parties to institute claims under the Corporations Act as an adjunct to property settlement proceedings, for instance:

- To procure access for members and directors to company records in addition to the ability to inspect documents through disclosure and subpoena;
- To appoint managers and receivers, provisional liquidators and liquidators as occurred in *Weir* (unreported judgement of the Honourable Justice Bulley) and *Gallieni & Gallieni & ors* [2012] FamCAFC 205; *Megalos & Katsaros & Ors* [2015] FamCA 109
- To obtain registration of shares and rectification of share registers which was an issue in Ascot Investments;
- To bring a derivative action, for instance *Viola and Ors & Latham and Ors* [2015] FamCA 826
- Breach of directors duties
- To bring oppression proceedings to increase the available property for distribution in property settlement. For instance see *Gallieni & Gallieni & ors* [2012] FamCAFC 205. In *Lint & Lint* [2010] FamCA 121 a thorough review of relevant documents and other extrinsic documentation led to an oppression action based on declarations of dividends that were ultra vires not in accordance with the constitution

"151.Following the breakdown of the settlement between husband and wife, the solicitors for the wife pressed on with their own investigation of the husband's shareholding. They renewed attempts to obtain documents from the third parties. This objective was not easily achieved, and involved an application to court. When documentation was received, in late March 2008, Mr Declan Kelly SC was briefed to advise, which he did on 22 May 2008. The same day, correspondence was sent to the husband's solicitor inviting him to commence proceedings against the third parties pursuant to s 232 of the Corporations Act 2001. Subsequently, a copy of Mr Kelly's opinion was given to the husband's solicitors, to assist in deliberations."

"89.On the first day of hearing, the claims (which, as will be explained later, were made by both the wife and the husband) against the third parties, were settled. The third parties have paid the husband $3,143,370.00, (held in trust) and $20,000.00 to the wife in respect of costs of her claims."

Disclosure: The Family Law Rules and Federal Circuit Court Rules also prescribe the minimum documents parties are expected to disclose where a party is a shareholder and / or director of a corporation see for instance rule 13.04 of the Family Law Rules.

Valuations: often a vexed issue for parties involved in entities particularly companies is the valuation of their interests in the corporations for the purpose of property settlement. Typically forensic accountants are engaged as a single expert in proceedings to value and provide a report to the court. The valuation will depend on the nature of the parties interests in the shares and the rights attached to the shares. The Family Law Courts do adopt a pragmatic approach to valuation of shares and have regularly held that the judge and not the accountant is the final arbiter on any dispute concerning value[94].

94 Georgeson [1995] FamCA 62

Where the shares are held solely by the parties and own the entity as such (or the court finds that the company is the alter ego of a party) then the valuation exercise is relatively straight forward and subject to the accountant's methodology.

The Family Law Courts are prepared to adopt valuations based on the "value to owner" principle (*the value to be ascribed to shares must be realistic and based on the value to the shareholder*) as distinct from the usual commercial basis of valuation (such as maintainable earnings or net asset backing). See for instance the cases of *Wall* (unreported) EA 83 of 1999; *Harrison* (1996) FLC 92-682; *Ramsay* (1997) FLC 92-742 and *Turnbull* (1991) FLC 92-258.

Difficulties and value judgements arise in the imprecise science of valuation when a shareholder has a minority interest in the company. For a good discussion on the relevant case law and principles refer to the decision of the Honourable Justice Burr in *Manx and Jenner* [2009] FamCA 1264 (refer to my paper "Minority Interests".

Ultimately if there are genuine third party interests involved in the Corporation the parties interests in their shares may represent a combination of the share value for the number of shares held and any loan account balance.

Again as with trusts it is imperative to read all related documents of the company including its constitution, minutes of meeting and shareholder agreements to ascertain any factors that could lead to claims that the face value of the shareholder interest does not reflect the reality and management and operation of the Corporation. For instance it may be possible to claim that the corporation is conducted say as an equitable partnership of interests with different shares to the actual shareholdings of the members.

The ability to successfully ring fence the assets of a company will depend on the distance that can be established between the party and the assets. See for instance *Anison & Anison & Anor* [2015] FamCA 973

Further you ought to appreciate that transactions pursuant to a property settlement order may or may not give rise to taxation liabilities and stamp duty. Whilst there are certain concessions

for transactions pursuant to orders and financial agreements, it is imperative that accounting advice be obtained for instance in respect of potential capital gains tax (that may or may not be subject to rollover relief) and deemed dividends under Division 7A of the *Income Tax Assessment Act* (see also TR 2014/5) particularly in respect of the transfer of assets of a company or dealing with loan accounts.

Susan Pearson[95] makes the following observations about the impact of the *Family Law Act* on corporate structures:

> *"Under the Family Law Act, corporate and trust structures cannot always be quarantined from being included as part of the parties' asset pool. As discussed earlier, the Court has the power to compel changes to a company structure, including the transfer of shares and the resignation and appointment of company officers. Additionally, the Court has the power to cause trusts to vest early and distribute the assets of the trust to the beneficiaries.*
>
> *The far-reaching powers of the Family Court are of little comfort to clients who have significant financial assets in a corporate or trust structure. The best way to prevent assets from coming within the grasp of the Family Court is first and foremost, entering into a binding financial agreement that quarantines specific assets from Family Court proceedings. Additionally, trust structures can be used to protect assets. Companies can have a role to play in this type of asset protection..."*

95 Pearson, Susan, "Corporations Law Powers in Family Law Matters", TEN Annual Family Law Conference, Versace Gold Coast, 2017

Proactive measures

Financial Agreements including prenuptial and post nuptial agreements

For a more detailed and technical summary of financial agreements under Australian law and cross border agreements I refer you to the following papers I have previously prepared and delivered that I make available at the following links:

- **Wilson, Geoff**, paper "It's a wide open road....Cross Border Financial [prenuptial] Agreements" to TEN 7th Annual Family Law Conference 2013, 29 August 2013, go to link: **http://www.hopgoodganim.com.au/icms_docs/178675_Cross_Border_BFAs_Its_a_wide_open_roadCross_Border_Financial_prenuptial_Agreements.pdf**

- **Wilson, Geoff**, paper (co-authored with Cathi Blanchfield, Sydney) "[B]FA's - the Australian Cutting Edge, Evolution or Revolution", delivered to the FLS 16th National Family Law Conference, Sydney, 8 October 2014, go to link: **http://www.hopgoodganim.com.au/icms_docs/273975_Binding_Financial_Agreements_The_Australian_cutting_edge_evolution_or_revolution.pdf**

The Family Law Courts of Australia are now recognising the autonomy of an individual to enter a contract (financial agreement) which the court will no longer interfere. It further enables parties to enter their own agreement without invasion of privacy and potential damage to their reputation without the scrutiny of the court and risk of publicity. This is particularly important for high net wealth individuals, celebrities and other persons with profile. That said these agreements have a broader utility for anybody keen to avoid court proceedings should for whatever reason their relationship end.

In circumstances where real property, businesses and other enterprises and investments are or are intended to be housed in entities such as trusts and companies controlled by the parties to the relationship or sourced from the capital and efforts of those parties and whether there are no other legitimate / bona fide arms length third party interests or not, then I consider if your client is venturing into the Australian jurisdiction or finds they are somehow connected to our jurisdiction, that a financial agreement is an imperative to afford the best possible protection from an unintended property settlement in our jurisdiction should their relationship subsequently break down.

Parties to de facto relationships (including same sex relationships) can enter financial agreements under Part VIIIAB of the *Family Law Act* which for all intents and purposes are identical to their marital counterparts under Part VIIIA of the *Family Law Act*. For the purpose of this paper I confine my discussion to marital financial agreements acknowledging the comments apart from different sections under the Act apply equally to those de facto relationships.

Section 71A of the *Family Law Act* relevantly provides what the effect of a binding financial agreement is under Australian law, namely:

> *"71A(1) This Part does not apply to:*
> *(a) financial matters to which a financial agreement that is binding on the parties to the agreement applies; or*
> *(b) financial resources to which a financial agreement that is binding on the parties to the agreement applies."*

The reference to "this Part" is Part VIII of the *Family Law Act* which gives the courts powers to make property adjustment orders under section 79 and spousal maintenance orders under section 74.

The Family Court has made the following observations about financial agreements:

> *"What is required is that the regime prescribed by the Act ... is followed, and if that is done the agreement is binding upon the parties and ousted entirely the jurisdiction of the court in respect of matters dealt with in the Binding Financial Agreement. Accordingly, it does away for all time with the intervention of any form of judicial intervention so far as the affairs of the parties as dealt with in that agreement are concerned."* [96]

> *"29. A binding financial agreement which is valid under the relevant provisions of Part VIIIA has the effect of ousting the jurisdiction of the court in respect to certain matters covered by the agreement. Section 71A specifically states that Part VIII of the Act which, inter alia, empowers the court to alter property interests, does not apply to financial matters or financial resources to which a binding financial agreement applies...*

96 Ju and Ju (2006) FamCA442 at paragraph 12

41. The Act permits parties to make an agreement which provides an amicable resolution to their financial matters in the event of separation. In providing a regime for parties to do so the Act removes the jurisdiction of the court to determine the division of those matters covered by the agreement as the court would otherwise be called upon to do so in the event of a disagreement. Care must be taken in interpreting any provision of the Act that has the effect of ousting the jurisdiction of the court. The amendments to the legislation that introduced a regime whereby parties could agree to the ouster of the court's power to make property adjustment orders reversed a long held principle that such agreements were contrary to public policy……[97]

A binding financial agreement under Australian law will prevent a court from making orders with respect to:

- the property dealt with under the agreement; and
- the spousal maintenance dealt with under the agreement.

A financial agreement that is binding, prevents a court from making a property settlement order and/or a spousal maintenance order to the extent those matters are covered by the agreement:

"It is not to the point that the financial agreement purports to oust the jurisdiction of the Court but rather that the compliance with the requirements of the Act gives rise to the ouster of the jurisdiction"[98]

After 17 years since the introduction of financial agreements under Australian law, we are finally getting clarity from our courts about its approach to financial agreements. The first 10 – 12 years were marred with many reported decisions of the court finding agreements entered were not binding or setting aside the agreements due to non compliance with the legislative requirements which I will turn to shortly. The *Family Law Act* was amended to address the concerns raised to give effect to the intent of our Commonwealth Government to enable parties to enter a private agreement that will avoid intervention by the court. The legislation is currently under further review with amendments in the Bill currently before the Commonwealth Parliament designed to bolster the agreements and ensure parties are held to those agreements.

It is clear from the following judgments that provided:

- the financial agreement is binding,
- the parties have made a fully informed decision to enter the agreement,
- each party is legally represented and
- there are no grounds to vitiate the agreement,

then it does not matter if the agreement is fair or a bad bargain, the parties will be held to their agreement. The approach the court is taking to financial agreements can be summarised by the following statements:

"63. First, s 90G's requirements must be seen against a crucial consideration. The legislature has decided that the essence of the regime created by Part VIIIA of the Act is that parties who are independently advised and receive appropriate advice should, in the absence of fraud, unconscionability or other vitiating factors, be perfectly free to bind themselves to an entirely unjust and inequitable agreement (in s 79 terms) that governs their future rights and operates as a bar to future property (and/or maintenance) proceedings. In short, if the relevant pre-requisites are met, and there is an absence of vitiating factors, the parties are perfectly free to make a "bad bargain[99]*"*

"18. Put another way, it seems to me that the structure of the section, and the place of Part VIIIA within the Act, demands that the nature and extent of noncompliance with s 90G(1)'s requirements must be given importance just as importance must be given to the plain legislative intent that parties should, absent vitiating factors known to equity and the common law, be held to their bargain…….

By way of (stark) contrast, the regime contemplated by Part VIIIA sees parties having the freedom to enter binding agreements without reference to what might be "just and equitable" within the meaning of s 79 of the Act. That is, binding agreements might be informed by the parties idiosyncratic notions or perceptions of what is, or is not, just and equitable or otherwise appropriate for them. Vitiating elements aside, the parties are perfectly free to make "a bad bargain" (in s 79 terms). Importantly, any such agreement can be "binding" within the meaning of s 90UJ and, by reason of so being, can exclude Part VIII of the Act without reference to a court and without reference to what a court might consider is a "just and equitable" settlement within the meaning of s 79"[100]

[309] "… [It] is suggested that "[a] lthough the Act now undoubtedly allows parties to enter into bad or grossly unfair bargains it is perfectly consistent for the legislation to permit consideration of the fairness of the bargain (judged to the date of execution) in cases where the safeguards in s 90G(1) have not been met".

"[310] Again with the greatest of respect to his Honour we fail to see how that can be. The point of the legislation is to allow the parties to decide what bargain they will strike, and provided the agreement complies with the requirement of s 90G(1) they are bound by what they agree upon. Significantly, in reaching agreement, there is no requirement that they meet any of the considerations contained in s 79 of the Act, and they can literally make the worst bargain possible, but still be bound by it. Thus, again, rhetorically, how can the fairness of the bargain be an enquiry that the court can make when it is seized of a matter under s 90G(1A)? Furthermore, it is not the case that to fail to consider the fairness or injustice of the bargain does not mean that the "discretion is exercised in a vacuum"[101]

"Further, if the agreement is not susceptible to being set aside, the question arises as to whether the court should resist its enforcement because it would operate unconscionably against one party. If the agreement is valid and binding, it should operate according to its terms. Simply because one of the parties made a bad bargain does not mean that it would be unconscionable for the other party to enforce the agreement. The doctrine of unconscionability looks to the conscience of the party whose rights

97 Black and Black [2008] FamCAFC 7, see also Smart [2008] FMCAfam 341
98 Ruane (d para 30
99 Hoult (No. 1) [2011] FamCA 1023
100 Hoult (No. 2)FamCA 367
101 Hoult and Hoult [2013] FamCAFC 109

are sought to be affected. Should the wife, because of something she has said or done, be prevented from enforcing the financial agreement according to its terms? Nothing could be pointed to by counsel for the husband that would invoke equity's assistance. In reality, the husband (and the wife) made the agreement, and entered into transactions because of the husband's belief that he was still a bankrupt. Enquiry by the husband would have corrected his erroneous belief. He failed to make any such enquiry."[102]

"It is quite clear that a person may choose to enter into an agreement where he or she may very well be much worse off than if he or she were left to rely on their rights under s 79 of the Act. Thus, there is a requirement for specific legal advice to be given. That is the safeguard the legislature imposes when it permits the parties to deal with their property by agreement and without possible interference from a court"[103]

"166 I have found that both parties received the requisite legal advice prior to signing the agreement and that the advice received was independent. Absent any other vitiating factor, I conclude that the agreement is binding within the meaning of the Act."[104]

"[163] I am not satisfied from the evidence that the husband entered into the financial agreement unwillingly. There was no evidence that the husband was disadvantaged in the negotiations leading to the signing of the financial agreement. The financial agreement was made after negotiations over a period of three months from January 2012, following on from earlier negotiations regarding a property settlement in April 2011. The husband and the husband's solicitor were involved in the drafting of the financial agreement.

[164] The husband was enthusiastic about signing the financial agreement and reviewed the financial agreement with his solicitor. He wanted the financial agreement. The pressure to sign the financial agreement came from him." [105]

Compare the above to the statements made by the Supreme Court (UK) in *Radmacher*[106] and note the synergies. *Radmacher* has been referred to in several Australian cases on financial agreements including *Paul & Paul*[107], *Wheldon and Asher* and *Thorne and Kennedy*).

At first blush the financial agreement does not need to be fair to be a binding agreement. Indeed the agreement does not (and ordinarily would not) reflect the approach taken to property settlement under Australian law (accounting for contributions made by the parties and adjustments for disparity in future position including provision for primary carers of children and disparity in earning capacity). The agreement does not need to be just and equitable. It would be counter intuitive to enter an agreement that mirrors the parties' entitlements at law. Ultimately one party will be disadvantaged by entering the agreement. The Family Court has made comments such as the following:

> *"The point of the legislation is to allow the parties to decide what bargain they will strike, and provided the agreement complies with the requirement of s 90G(1) they are bound by what they agree upon. Significantly, in reaching agreement, there is no requirement that they meet any of the considerations contained in s 79 of the Act, and they can literally make the worst bargain possible, but still be bound by it. Thus, again, rhetorically, how can the fairness of the bargain be an enquiry that the court can make when it is seized of a matter under s 90G(1A)? Furthermore, it is not the case that to fail to consider the fairness or injustice of the bargain does not mean that the "discretion is exercised in a vacuum*
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> *By way of (stark) contrast, the regime contemplated by Part VIIIA sees parties having the freedom to enter binding agreements without reference to what might be "just and equitable" within the meaning of s 79 of the Act. That is, binding agreements might be informed by the parties idiosyncratic notions or perceptions of what is, or is not, just and equitable or otherwise appropriate for them. Vitiating elements aside, the parties are perfectly free to make "a bad bargain" (in s 79 terms). Importantly, any such agreement can be "binding" within the meaning of s 90G and, by reason of so being, can exclude Part VIII of the Act without reference to a court and without reference to what a court might consider is a "just and equitable" settlement within the meaning of s 79"*

However some of the remedies available to challenge and set aside an agreement do import elements of fairness (particularly unconscionable conduct and undue influence). Accordingly if there is a financial disparity between the parties then I recommend making an additional reasonable provision under the agreement to redress the potential inequity and mitigate any potential challenge to the agreement.

The fundamental issues to address in ensuring the financial agreement is binding are the following:

> *"The point of the legislation is to allow the parties to decide what bargain they will strike, and provided the agreement complies with the requirement of s 90G(1) they are bound by what they agree upon. Significantly, in reaching agreement, there is no requirement that they meet any of the considerations contained in s 79 of the Act, and they can literally make the worst bargain possible, but still be bound by it. Thus, again, rhetorically, how can the fairness of the bargain be an enquiry that the court can make when it is seized of a matter under s 90G(1A)? Furthermore, it is not the case that to fail to consider the fairness or injustice of the bargain does not mean that the "discretion is exercised in a vacuum*
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102 Kostres [2009] FamCAFC 222
103 Abrum and Abrum [2013] FamCA 897
104 Weldon and Asher [2014] FCWA 11; (2014) FLC 93-579
105 Hay and Hay [2014[FCCA 775
106 Radmacher (formerlyGranatino) v Granatino [2010] UKSC 42
107 [2011] FamCA 672

might consider is a "just and equitable" settlement within the meaning of s 79"

However some of the remedies available to challenge and set aside an agreement do import elements of fairness (particularly unconscionable conduct and undue influence). Accordingly if there is a financial disparity between the parties then I recommend making an additional reasonable provision under the agreement to redress the potential inequity and mitigate any potential challenge to the agreement.

The fundamental issues to address in ensuring the financial agreement is binding are the following:

- Is it an agreement?
  - Fundamentally, the agreement must meet the requirements of a contract at law. If essential elements of a contract are missing then the document you enter will not be an agreement at all:

    "By reference to the principles of contract (or equity), there may, in fact, be no agreement between the parties. That there must be an agreement before there can be a financial agreement is made clear by the definition of "financial agreement" in s4 of the Act. The ordinary and natural meaning of "agreement" is, in my view, an agreement which is otherwise effective and enforceable at law."[108]

  - It is imperative the agreement is drafted with certainty otherwise it may be held void:

    "A court's power to adjust property under s 79 is exercised using well defined guidelines to ensure the resulting order is just and equitable, and any order made may be subject of the safeguard of appellate review. That is not the case with property dealt with under a financial agreement. Thus care in establishing the mutual intention of the parties, and drafting the terms of the financial agreement with precision assume the utmost importance."[109]

- Is it a financial agreement?
  - Section 90B (financial agreement before marriage) [section 90C financial agreement during marriage and section 90D financial agreement after divorce] provides that an agreement is a financial agreement if
    - it is in writing;
    - it is made by the parties before marriage [or during marriage or after divorce];
    - it is made with respect to:
      (i) how, in the event of a breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties are to be dealt with at the time of the agreement or at a later time but before a divorce;
      (ii) the maintenance of either of the spouse parties;
      (iii) incidental or ancillary matters to property and spousal maintenance, and other matters;
    - no other financial agreement is in force between the parties with respect to any of those matters;
    - it is expressed to be made under Section 90B [section 90C or section 90D} of the *Family Law Act*;
    - it can be made with one or more other people who are not the spouse parties to the agreement ("third parties"); and
    - it may terminate a previous financial agreement provided all parties to the previous agreement are parties to the new agreement.

- Is it binding?
  - A financial agreement is binding if it complies with:
    - section 90B [section 90C or section 90D] of the *Family Law Act*;
    - section 90G of the *Family Law Act*; and
    - section 90DA of the *Family Law Act*.
  - Section 90G sets out the requirements when financial agreements are binding namely, if, and only if
    - the agreement is signed by all parties (i.e. the spouse parties and third parties (if any));
    - before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about:
      (i) the effect of the agreement on the rights of that party; and
      (ii) about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement;

      "The receipt of independent legal advice by each party and the formalisation of its receipt by each of the parties is the cornerstone of the protection for the contracting parties. Section 90G has the receipt of that advice and its formalisation as its centrepiece" Fevia

    - either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (B) was provided to that party (whether or not the statement is annexed to the agreement);
    - a copy of the statement referred to in paragraph (C) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party;
    - the agreement has not been terminated and has not been set aside by a court.
  - In respect of the reliance that a party can place on the Statement of legal advice, the Full Court of the Family Court in its decision in Hoult held:

"276. The certificate given by the solicitor, when read with recital "N" to the agreement, should have been treated by the trial judge at least as prima facie evidence of compliance with the requirement in s 90G(1) to provide legal advice.

277. The authorities are quite clear as to how such a certificate should be treated, and they are amply set out in Justice Thackray's reasons.

278. In our view, the solicitor's evidence, and in particular her assertion that she did give the requisite advice to the wife, gain positive support including as to what advice was actually given from the presence of the certificate and the recitals in the agreement, and in not so finding his Honour erred.

279. It also must not be forgotten that, as Justice Thackray has correctly pointed out in paragraph 100 above, it was only necessary for the trial judge to be satisfied that the advice referred to in s 90G(1)(b) had been given, and the certificate can be a sufficient

108 Fevia & Carmel-Fevia [2009] FamCA 816 at para 121
109 Kostres & Kostres [2009] FamCAFC 222 at para 164

evidentiary foundation for that finding; it was unnecessary for the trial judge to ascertain the "content of the legal advice", and that was the error his Honour made."

- Where there is non compliance and one or more of paragraphs (1) (b), (c) and (d) of section 90G has not been satisfied in relation to the agreement, the court may make an order declaring that the agreement is binding on the parties to the agreement if the court is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made).
- Please note the legal advice must be provided by Australian legal practitioner.
- Section 90DA of the *Family Law Act* provides that the financial agreement is of no force or effect until a separation declaration is made. This requirement is unnecessary if one or both of the spouse parties die. The Financial Agreement will be of full force and effect from the time of death(s).

- If it is binding then what effect does it have in relation to claims for property settlement and spousal maintenance?

- If it is binding then can it be set aside?

  - Whilst the agreement is binding and enforceable (and to the extent that the agreement deals with property settlement and spousal maintenance, the court cannot make an order in relation to same), the court does have a supervisory function over the financial agreements and has power to set aside the agreement in circumstances referred to below.
  - The only means by which a party can seek orders for property settlement and / or spousal maintenance despite the terms of the financial agreement, is if:

    - the parties terminate the financial agreement by either:
      (i) A binding termination agreement under section 90J of the *Family Law Act*; or
      (ii) Enter a subsequent financial agreement under sections 90C(4) or 90D(4) of the *Family Law Act*; or
      (iii) By conduct or acquiescence;
    - The court finds the agreement is not binding. But in any event, the Court may still take the agreement into account in any property settlement application and can go so far as to decline to make a property settlement order (as was the case in Bevan[110]). Alternatively the court may still give effect to the terms of the agreement in the property settlement application particularly if the terms of the agreement coincide with an order which is just and equitable (see Woodland and Todd[111]).
    - The court finds there is no agreement:

      "By reference to the principles of contract (or equity), there may, in fact, be no agreement between the parties. That there must be an agreement before there can be a financial agreement is made clear by the definition of "financial agreement" in s4 of the Act. The ordinary and natural meaning of "agreement" is, in my view, an agreement which is otherwise effective and enforceable at law."

      - The claim is against property which is not dealt with under the financial agreement i.e. the agreement does not deal with all of the available property of the parties.
      - The court's jurisdiction in relation to spousal maintenance has not been ousted i.e. a party is entitled to an income tested pension, benefit or allowance at the time the maintenance provisions under the agreement come into effect.
      - The court can make orders in the face of an agreement if, by reference to the Act (s90B) there is no "financial agreement"

    - Section 90K of the *Family Law Act* sets out the limited grounds upon which a binding financial agreement can be set aside. One eye ought to be kept on the potential claims that can unravel an agreement in the future and to make provision under the agreement and draft the agreement in such a way to avoid or at the very least minimise the potential claims in the future. The grounds are:

      - The agreement was obtained by fraud (including non-disclosure of a material matter);
      - An agreement may be set aside where a party entered the agreement for the purposes of defrauding another person or defeating the interests of that other party in property settlement or with reckless disregard for the interests of the other person.
      - An agreement may be set aside when a party to the agreement entered into the agreement for the purpose of defrauding or defeating a creditor of the party or with reckless disregard of the interests of a creditor of the party.
      - An agreement may be set aside if the agreement is void, voidable or unenforceable (having regard to the remedies under contract law and equity, for instance, the court may find that there has been misrepresentation, mistake, acts of duress, undue influence or acts of unconscionable conduct which would lead to the agreement being set aside)[112].
      - An agreement may be set aside in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out.
      - An agreement may be set aside if since the making of the agreement, a material change in circumstance has occurred, (being circumstances relating to the care, welfare and development of the child of the relationship), and as a result of the change, the child or, if the applicant has care and responsibility for the child, a party to the agreement will suffer hardship if the court does not set the agreement aside. This ground of claim is likely to be amended in the future if the Bill before Parliament progresses
      - An agreement may be set aside where it is found in respect of the making of the agreement, a party engaged in unconscionable conduct.
      - A payment flag is operating under Part VIIIB on a Superannuation Interest covered by the agreement.
      - The agreement covers at least one superannuation interest that is an unsplittable interest for the purpose of Part VIIIB.

110 [2014] FamCAFC 19
111 [2005] FamCA 161

112 For instance refer to Saintclaire [2015] FamCAFC 245 for duress and unconscionable conduct. Also awaiting High Court decision in Thorne and Kennedy

- Under section 90KA of the *Family Law Act* the Family Court has the power to set aside an agreement on the basis of ordinary principles of contract law and equity quite apart from any consideration of the grounds set out in section 90K of the *Family Law Act*.

I set out in **Schedule 2** to this paper a flowchart of the process I undertake in preparing a financial agreement under Australian law.

At the time of writing this paper, family lawyers around Australia are awaiting the judgement of the High Court of Australia in the matter of *Thorne and Kennedy* which will be the first opportunity the High Court has to consider and rule on financial agreements. The appeal from the Full Court of the Family Court of Australia decision[113] was heard before the seven judges of the High Court on 8 August 2017 (refer to the transcript of the proceedings at [2017] HCATrans 148.

The Full Court allowed the appeal from the trial judge who set aside the agreement. The Full Court found the agreement was binding.

The factual matrix raises classic issues of an inter-country marriage, the proximity of signing the agreement to the wedding, duress, undue influence and unconscionable conduct.

A summary of the relevant facts of *Thorne & Kennedy* are as follows[114]:

- The husband and wife met in early to mid-2006 on a dating site. The wife was aged 36 years and the husband was aged 67 years at the time. The wife's profile read as follows (at [32]):
  - I am single female with no children. I don't smoke or drink. I am of Greek Orthodox religion and speak a little Greek and English. I wish to marry and have a good life.
- The wife was born in Country A and lived in Country B at the time the parties met. She had acquired her English language skills informally. The wife had no children and no assets of substance.
- The husband was an Australian property developer from City E with assets of at least $18 million. The husband had three adult children from a previous marriage.
- The husband visited the wife in Country B on two occasions, and the two of them spent a couple of months travelling around Europe together. Whilst travelling, they made arrangements for an appropriate visa for the wife to come to Australia. It is clear that the visa which was organised was going to be valid for nine months, and the parties formed the joint intention that they would marry during that time, and a visa of a different nature would then be obtained.
- The parties arrived in Australia in February 2007 and began living in the husband's penthouse in City E.
- On 8 August 2007 the husband and wife attended on the husband's solicitor, Mr Jones, for the purpose of drafting a financial agreement prior to the wedding. Mr Jones spoke only with the husband on this occasion. The same occurred on 14 August 2007. The trial judge found that during these conferences, the husband's solicitor was adamant that the husband maintained his view that the marriage would only go ahead if the wife signed the agreement.
- On or around 16 September 2007 (and most likely on 19 September 2007), the husband told the wife that they were going to see solicitors about the signing of some documents. The trial judge found that the wife had known for some time that there would be documents to sign before the wedding.
- The trial judge found that at this time, the wife knew that the only option was to sign the document or there would not be a wedding.
- On 20 September 2007 the wife met with Ms Harrison, her solicitor, for advice regarding the financial agreement. This was the first time the wife was advised on the contents of the agreement, and had information about the husband's financial position.
- On 21 September 2007 the solicitors for each of the husband and wife communicated. It was on this date that the wife's solicitor first raised the suggestion of duress.
- Ms Harrison provided her written advice to the wife on 21 September 2007 and explained this advice to the wife in person on 24 September 2007. The trial judge was satisfied that all advice given by Ms Harrison was consistent with the written advice in her letter of 21 September 2007. Her Honour set this letter out in full (at [52]). In effect, the wife was advised that the agreement was "no good" and should not be signed.
- Despite Ms Harrison's advice, on 26 September 2007 the husband and wife each signed a document headed "Financial Agreement (Pre-Nuptial Agreement s. 90B *Family Law Act 1975*)" ("the first agreement"). This agreement contained a provision that within 30 days of signing, another agreement would be entered into pursuant to section 90C of the Act in similar terms.
- The parties were married in late September 2007.
- On 26 October 2007 the husband again visited Mr Jones seeking advice on the drafting of the second agreement. The draft of the second agreement was provided to Ms Harrison on 30 October 2007.
- On 5 November 2007 Ms Harrison advised the wife on the contents of the second agreement, again providing advice to the effect that the "agreement was terrible and that she shouldn't sign it".
- The second agreement was signed by both the husband and wife on 20 November 2007, and was headed "Financial Agreement (Agreement S.90C *Family Law Act 1975*)" ("the second agreement").
- The husband signed a separation declaration in June 2011.
- The wife left the home in August 2011.
- The wife filed her Initiating Application on 27 April 2012 seeking declarations that the agreements be declared non-binding, or alternatively, set aside, or declared void. The wife also sought an adjustment of property in the order of $1,100,000, along with lump sum spousal maintenance of $104,000.

113 Kennedy & Thorne [2016] FamCAFC 189 (26 September 2016)
114 From Sheridan Emerson's paper "Setting Aside a Financial Agreement: When the Gloves are Off" delivered to TEN Annual Family Law Conference, Versace, Gold Coast, July 2017

- The husband died in May 2014 and the trial was part heard at that stage. The executors and trustees of his estate (two of his three adult children by an earlier marriage) were subsequently substituted as parties in his stead.

  "It is anticipated the High Court will give authoritative guidance on the grounds on which financial agreements may be set aside, and whether there should be a particular "gloss" on the principles of law and equity that are applicable per section 90KAQ given the particular context of the matrimonial relationship."[115]

Commentary around cross border agreements:

I refer you to my paper "*It's a wide open road….Cross Border Financial [prenuptial] Agreements*". Careful attention is needed to ensure that any cross border agreement involving multiple jurisdictions and Australia is binding, recognised and enforceable under Australian law. To circumvent the prospect of a Family Law Court in Australia making unintended orders for property settlement or spousal maintenance where the marital relationship has cross border connections between Australia and other foreign jurisdictions, it is imperative for parties intending to marry, to enter a prenuptial agreement which complies with Part VIIIA of the *Family Law Act* or is declared to be binding by the courts.

In the absence of a binding Financial Agreement under Australian law, the parties risk being subjected to spousal maintenance orders and having all of their property both in Australia and overseas subjected to orders for alteration of property interests by the Family Law Courts of Australia.

I provide a flowchart in schedule 3 of potential outcomes involving forum disputes in Australia vis-a-viz prenuptial agreements.

The obvious but first step in engagement is to be in a position to identify the financial agreement you are about to prepare for your client has potential cross border ramifications. It is essential you take the time to tease out the instructions from your client that may lead to this revelation and then explore whether there is a need to engage with expert family lawyers in the other related jurisdiction(s) or not, leading to the preparation of an agreement tailored to meeting the requirements of all intersecting jurisdictions. In some cases the cross border issues will jump out at you, such as in the case of the opening scenario.

Apart from having expertise in preparing and advising on a financial agreement under Australian law, it is in my view critical that you have an understanding of the law and operation of prenuptial agreements in all other jurisdictions. That can only be achieved by engaging the lawyer in the other jurisdiction(s) to provide the advice you will need to then be in a position to advice your client of the very matters you are required to provide advice about, inter alia –

- about the effect of the agreement on the rights of that party and
- about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement.

It is my view that you cannot properly discharge your obligations to your client to provide such advice until you understand how the laws as to property settlement, spousal maintenance and prenuptial agreements operate under the laws of the foreign jurisdiction, so as to be in a position to provide a point of comparison for the client as to potential outcomes in each jurisdiction and which jurisdiction is the appropriate primary jurisdiction for the agreement, and thereby ensure the client can make an informed decision about whether they should enter the agreement. In particular, as a minimum you would need to know the following information about the foreign jurisdiction:

- Have an understanding of its different property regimes and the property regime that is applicable (separate, community, discretionary system…);
- Have an understanding of the country's treatment of private international law:
  - choice of law,
  - forum,
  - recognition and enforcement of the agreement;

- Have an understanding of the law applicable to property settlement and spousal maintenance in the intersecting jurisdictions and the potential outcomes for each party;
- Have an understanding about the Country's approach to estate issues and wills and the ability to waive and disclaim potential entitlements (In jurisdictions outside New South Wales parties cannot contract out of rights under Succession Act, however a prenuptial agreement/financial agreement may be relevant to assessing adequacy of provision (see *Hills v Chalk & Ors* [2008] QCA 159, *Vigolo v Bostin* 221 CLR 568, *Barns v Barns* (2003) 214 CLR 169).
- Have an understanding of the following practical issues that may be applicable to entering the agreement in the other jurisdiction:
  - The need for, and availability of interpreters and translators;
  - Legal Costs, retainers required by lawyers engaged in the other jurisdictions, and potential need to take out or arrange top up insurance;
  - The time involved in preparing and executing the agreement;
  - The requirements for executing the agreement, e.g. whether the agreement needs to be notarized;
  - The logistics of holding conferences with your client (and the preference to eyeball the client even if it means using technology to achieve this such as skype or teleconferences);

- Have an understanding of the foreign jurisdictions requirements for:
  - Independent legal advice
  - Disclosure; and
  - Fairness tests

- Whether the agreement ought to be documented by parallel / mirror agreements in all jurisdictions or have one(omnibus) agreement
- Have an understanding of the Dispute resolution options and requirements in the jurisdiction(s).

Cross border agreements are among the most difficult, time consuming and expensive agreements to draft. When the parties have a connection (e.g. through residence (past, current or intended), property or employment) a prudent lawyer will work with lawyers in each of the jurisdictions to ensure the agreement (or parallel agreements) is recognized and operates in those countries and will give effect to the parties agreement.

Extra care is required when preparing an agreement where there are cross border

115 Sheridan Emerson, supra

issues. You must engage with lawyers in the other jurisdictions to ensure the agreement will be recognized, binding and enforceable in those jurisdictions in the event the agreement is tested in those jurisdictions at a later time.

Above all ensure the cross border agreement complies with the above statutory requirements of the *Family Law Act*. Failure to do so will be fatal.

The reported decision of the Honourable Justice Murphy of the Family Court of Australia at Brisbane in the matter of *Weinhopf & Weinhopf*[116] brings into sharp focus in proceedings instituted in Australian courts, the place of a prenuptial agreement executed outside Australia and the importance of the prenuptial agreement complying with Australian law where there are cross border issues.

In this particular case, the parties commenced cohabitation in 1972. They lived and worked in Europe. The parties executed a prenuptial agreement in Germany in 1976 prior to the marriage that year. At that time there was no statutory recognition of prenuptial agreements in Australia. It is not surprising to find therefore the German prenuptial agreement does not contemplate and provide for the parties ultimate residence in Australia nor does it comply with Part VIIIA of the *Family Law Act*. Eventually the parties moved to Australia to live. The husband worked overseas during the marriage.

A series of inter vivos gifts of real estate situated in Belgium, shares, bonds and cash investments were made by the wife's parents. The judge found: "it seems clear that the wife's parents made the transfers of property and gifts of cash in reliance upon that pre-nuptial agreement..."

The parties separated in June 2007. At the time of the trial the total wealth of the parties was $10M (AUD) comprising property in Australia and funds in Singapore amounting to $2.4M and European property worth $7.6M.

Despite the existence of the prenuptial agreement, the court entertained an application by the husband for a property settlement (under section 79 of the *Family Law Act*).

In relation to the German prenuptial agreement, the judge held:

> *"45. I accept the argument on behalf of the husband that the prenuptial agreement does not preclude the husband from pursuing his application for orders pursuant to s79, nor does it relieve the Court of its obligation to decide this matter in accordance with the provisions laid down in the Act. (See D & D Full Court, unreported, 30 April 1992, per Strauss, Lindenmayer and McCall JJ and the earlier decisions there cited)."*

Refer also to the following decisions concerning cross border agreements under Australian law:

- *Beidenhope and Cantanor*[117] the Honourable Justice Forrest dealt with a prenuptial agreement under Dutch law executed in the Netherlands in the context of determining an application to stay proceedings for property settlement instituted. At trial before the Honourable Justice Kent[118] it was held:

  "As already found, the pre-nuptial agreement is not binding in this jurisdiction and little weight is attached to it."

- *Paul & Paul* where the Honourable Justice O'Reilly heard an application for a case stated to the effect: "On the assumption that the Pre-nuptial Agreement entered into between the parties on 2 March 1994 in [City C], [Country B], was binding on the parties according to the law of [Country B] and having regard to the provisions of Part VIIIA of the *Family Law Act 1975* (Cth) would the Family Court of Australia regard the parties as being bound by the terms of the Pre-nuptial Agreement entered into between them on 2 March 1994?". In declining to order a case stated to the Full Court, the judge held:

  "70.This is a case thus in which in my view decisions about the proper application of the disputed foreign pre-nuptial agreement should be made by the trial judge at first instance on the particular facts of the case when they are explored at a trial."

- *Renard & Geach*[119] Judge Small dealt with what purported to be 2 prenuptial agreements, one entered in Australia and the other in Bali. The Australian agreement was declared not to be binding for deficiencies in respect of the legal advice. In relation to the agreement entered in Bali, Judge Small found:

  - The parties were married at [omitted] on [date omitted] 2008 ("the Australian marriage"). Mr Renard, who is now 49 years old, is an Australian citizen and Ms Geach, who is 42, is an Indonesian citizen with permanent resident status in Australia.
  - The parties signed the Agreement on [omitted] 2008, the day before they flew out to Bali to prepare for their Bali wedding.
  - The issue of the validity of the document which all parties agree was signed at the home of the wife's parents in Bali on the morning of [date omitted] 2008 ("the Bali document"), was not specifically agitated at trial.

  "For the sake of clarity, I find that as there were no lawyers admitted in an Australian jurisdiction present when the Bali document was signed, that document is not enforceable as a Financial Agreement made under s.90G(1) of the Act.

  In the matter of Ruane & Bachmann-Ruane [2009] FamCA 1101, Cronin J held that only advice from a lawyer qualified to practise in Australia is capable of satisfying s.90G(1). If the wife seeks to enforce the provisions of the Bali document, she will need to do so in Indonesia."

One of the significant compliance requirements to be observed when preparing a cross border agreement involving the Australian jurisdiction is ensuring the requisite advice and statements are provided from Australian legal practitioners as referred to in cases such as *Ruane* and *Renard*.

I consider it is best practice where possible to prepare one agreement covering all relevant jurisdictions rather than attempting parallel or mirror agreements.

116 [2009] FamCA 1084, judgment delivered on 17/11/09

117 [2011] FamCA 669

118 Catanor v Beidenhope [2013] FamCA 243

119 [2013] FCCA 617

Australia is not a party to any convention on the recognition and enforcement of international prenuptial agreements. The fact remains, as with the recognition and enforcement of foreign prenuptial agreements, there is a lacuna in the *Family Law Act* for recognition and enforcement of foreign property orders. Parties are left to pursue whatever relief, if any, is available through Australian civil courts under the *Foreign Judgments Act*. Section 20 of the *Trans Tasman Proceedings Act* (Cwth) 2010 (there is reciprocating legislation in New Zealand - *Trans Tasman Proceedings Act 2010* of New Zealand) provides for exclusive choice of court agreements between Australia and New Zealand.

S90KA of the *Family Law Act* provides the court will determine issues of validity, enforcement and effectiveness according to the principles of law and equity applicable to contracts and has the same powers and can grant the same remedies as the High Court of Australia.
The High Court of Australia has held in respect of choice of law provisions in contracts:

> *"In cases which have some "foreign" element and concern the law of contract, or concerns questions of status, it has long been accepted that the courts should identify and apply the law which governs the issue or issues that fall for decision. Thus, in cases concerning contracts, the courts seek to identify the proper law of the contract and in cases concerning questions of status, they seek to identify the relevant governing law. The process of choice of law has, therefore, been well understood and accepted in these areas."*[120] *and*

> *"As Brennan J observed in Oceanic Sun Line Special Shipping Company Inc v Fay:" A submission to the exclusive jurisdiction of the tribunals of a particular country is an indicium of the parties' intention that the law of that country is to be the proper law of their contract".....It is a relatively common feature of international contracts that disputes are submitted to the exclusive jurisdiction of the courts of a particular country, not infrequently the courts of England. It would be a serious and far-reaching interference with the freedom of the parties to such contracts to prevent them from making provision to that effect....Indeed, the law has always been solicitous that when parties do contract to submit their disputes to the exclusive jurisdiction of the courts of another country they should be held to their bargain...."*[121]

David Hodson stresses the importance of choice of law clauses:

> *"Always include a forum clause if any chance of international element in the future. If a real issue already, consider advice from the other countries in which family will have their base. A combined multi national pre marriage agreement which holds water in various countries. May be influential on forum especially if Brussels I; (S v S (Divorce: staying Proceedings)..."*[122]

In her leading text, "International and Comparative Mediation Legal Perspectives" published by Wolters Kluwer Law International 2009, Nadja Alexander makes the following observations about choice of law and forum in the context of international mediation agreements which is apt for prenuptial agreements:

> *"Private international law primarily deals with issues of jurisdiction, choice of law and forum and the recognition and enforcement of foreign judgments. Mortensen explains these factors as follows. Jurisdictional issues deal with the question of whether the local court (forum) has the power to hear and decide the matter or whether the case has sufficient connection with another state to warrant the local court restraining or limiting its own power. Forum clauses indicate the parties' choice of court or jurisdiction in relation to disputes arising out of a contract. Choice of law refers to the law to be applied by the court which has jurisdiction. Choice of law clauses are vehicles for parties to choose the law they wish to apply to identified disputes. They are also referred to as proper law clauses. Issues relating to recognition and enforcement of foreign judgments occur where judgment has been rendered in another state and recognition or enforcement is sought in the local court. Subject to international agreements to the contrary, domestic courts are not required to recognise or enforce judgments of foreign courts. When parties select a specific legal system for dispute resolution, they risk a judgment from that national court being unenforceable in other territories, for example in the country where the other party resides or their business is located ... Contract can be used to manage and reduce the risks associated with disputes that cross national borders. These risks include:*

- *Excessive costs and delay associated with determining jurisdictional issues before the substantive matters can be heard;*
- *The unpredictability of law and forum and its impact on the subject matter of the dispute;*
- *Lack of clarity about preferred language and potential multilingual confusion; and*
- *The impact of unexpected economic changes and currency fluctuations.*

The dispute resolution clause is an ideal vehicle to manage private international law issues in relation to mediation. Most professionally drafted international dispute resolution clauses include a choice of law subclause and a forum selection subclause. Choices of forum and law encourage the export of legal and other services beyond borders and offer opportunities for increased access to justice where parties are able to negotiate their own dispute resolution terms. Drawing on freedom of contract principles, courts increasingly give effect to correctly drafted dispute resolution clauses.

Within a forum selection clause parties can designate a court in a particular jurisdiction or a specific dispute resolution process such as arbitration or mediation. Where parties select a forum by no law, it is no more than an indication that the law of the selected forum is to apply. Forums may be selected for reasons – such as interpersonal networks and familiarity with own courts – that have little to do with the nature and content of their laws.... The ability to select the applicable law in international transactions allows well resourced parties to choose a law tailored to their specific needs. It also permits

120 John Pfeiffer Pty Ltd v Rogerson [2000] HCA 36; (2000) 203 CLR 503

121 Akai Pty Ltd v People's Insurance Co Ltd [1996] HCA 39; (1996) 188 CLR 418

122 "Pre Marriage Agreemeents" by David Hodson; www.davidhodson.cm/assets/documents/pre_marriage_agree.pdf

powerful international actors to pursue standardisation through the same choice of law clause in all contracts. In a survey of 175 businesses across Europe, two thirds considered the ability to make a choice of law from different legal systems to be an advantage.

Other factors that are said to influence the choice of law in favour of a particular jurisdiction include the quality of the judiciary, the expertise of the courts in particular types of international disputes, the absence of corruption, the presence of witnesses in the selected jurisdiction and the efficiency and cost effectiveness of litigation.

In order to enhance the effectiveness of mediation, it is important for parties drafting dispute resolution clauses to select a jurisdiction with developed and suitable mediation laws that support not only the mediation process but also the outcomes of mediation. However, when signing a contract containing a mediation clause, parties are usually not thinking about disputes which may arise in the future, they may not even be sure in which jurisdiction a future mediation might take place. Accordingly the mediation friendliness of jurisdictions is seldom a primary factor weighing on the minds of parties when entering into their contractual arrangements."

In his paper, "*Jurisdictional & Other Considerations Under Australian Law in Family Law Matters*" Ian Kennedy AM, provides a very good summary of the matters to consider when there is a potential choice of jurisdiction. He poses the fundamental question for the practitioner inter alia: Which jurisdiction will provide the client with the best result?

Whilst an international prenuptial agreement is prepared with the co-operation of the parties and the collaboration of their lawyers in the intersecting jurisdictions, it still important to have one eye on the potential that the agreement will not ultimately hold and there becomes a forum argument when a party attempts to invoke the more advantageous laws of one country over another. Further in my view when providing the requisite advice to the client under Part VIIIA of the *Family Law Act* about the advantages and disadvantages of the agreement it is important to provide a comparative analysis of the intersecting jurisdictions and incorporate advice about which jurisdiction / forum produces the best outcome for your client vis-a-viz` the agreement and also absent an agreement (or if the agreement is set aside).

I endorse the following approach of Ian Kennedy AM:

"The Australian courts would not apply foreign law to issues to do with prenuptial agreements or marriage contracts.....Under Australian law there is no reason why an agreement cannot include clauses in relation to choice of law and choice of jurisdiction."[123]

"Similarly, an agreement complying fully with the formal requirements of the Australian legislation could have the effect of excluding Australia as a potential jurisdiction due to it extinguishing the jurisdiction of the Australian Courts to make orders in relation to the subject matter of a binding financial agreement."[124]

Anecdotally, I recently worked with family lawyers from Mainland China preparing a cross border prenuptial agreement involving a wealthy billionaire conducting his international business, real estate interests and investments through a myriad of companies and trusts based in many jurisdictions including Australia, BVI, PRC, USA, Hong Kong and Singapore. My client and his fiancée intended to live in their homes in Sydney from time to time, acquire further property in Australia and conduct his business in Australia. The agreement was prepared on the basis that PRC was the choice of law and jurisdiction for the agreement and as such the Australian laws and courts were effectively excluded. The agreement fully complied with the requirements of the *Family Law Act* in all respects and my Brisbane colleague and I provided the requisite advice to our respective clients and provided Statements of legal advice in accordance with the *Family Law Act*. This was attended in conjunction with our Chinese colleagues at the time of execution of the prenuptial agreement in accordance with the laws of PRC.

I provide by way of example only typical choice of law and dispute resolution clauses I adopt in my agreements:

1.1 Governing Law and Jurisdiction

(a) <xxAxx> and <xxBxx> mutually covenant, agree, elect and declare that:

(1) Choice of Law:

(A) This Deed is governed by and construed in accordance with the laws of the Commonwealth of Australia (including but not limited to determining the validity, interpretation, enforcement and application of this Deed);

(B) The proper law of this Deed, the Relationship and its breakdown is the law of the Commonwealth of Australia;

(C) Australian law is the applicable law in the application of Article 3 of the Hague Convention (on the Law Applicable to Matrimonial Property Regimes) dated 14 March 1978;

(D) <xxAxx> and <xxBxx> mutually covenant without derogation from subclause 3.4(a) that notwithstanding the residence, citizenship and domicile of <xxAxx> and <xxBxx> and the situation of the Property, the laws of the Commonwealth of Australia will continue to apply to:

(i) this Deed;

(ii) the Property;

(iii) the Financial Matters of <xxAxx> and <xxBxx>;

(iv) the Relationship; and

(v) the interpretation, implementation and enforcement of the provisions of this Deed.

(2) Choice of Forum / Jurisdiction

(A) Subject to clause 11.4 the Family Law Courts are the appropriate forum for the determination of any dispute or disagreement between <xxAxx> and <xxBxx> arising out of this Deed or out of the Relationship.

(B) Each party irrevocably:

(i) submits to the non-exclusive jurisdiction of the Family Law Courts and the courts competent to determine appeals from those courts, with respect to any proceedings which may be brought at any time relating to

123 Ian Kennedy AM, :International issues for prenuptial agreements and marriage contracts – making them work under Australian law", paper delivered to Capetown IAML conference 4-7/9/2008

124 Kennedy AM, I., supra p5

this Deed; and

(ii) waives any objection it may now or in the future have that any proceedings have been brought in an inconvenient forum, if that venue falls within clause 3.4(a)(2)(A).

(3) The parties agree further that:

(A) If either of them should commence proceedings in respect of any matter arising out of their Relationship or its breakdown in the courts of any country other than Australia and the courts of Australia including the Family Law Courts at that time have jurisdiction to deal with such matter, they irrevocably consent to:

(i) a stay or moratorium in respect of those proceedings for a period of not less than 12 months from the date of commencement of those proceedings during which time proceedings in respect of that matter may be commenced in Australia; and

(ii) the dismissal of the original proceedings upon the acceptance by the Australian court including the Family Law Courts of jurisdiction over the subsequent proceedings.

(B) If the original proceedings issued in a court in a country other than Australia continue and / or are subsequently revived, the parties must both request that court to apply the law of the Commonwealth of Australia in its determination of the issues and, in any event, to:

(i) have regard to the effect of the law of the Commonwealth of Australia; and

(ii) give full force and effect to all of the terms of this Deed.

(b) <xxAxx> and <xxBxx> mutually covenant that neither party will Acquire an interest in the Property or Property rights of the other solely by reason of the law of any jurisdiction in which they may reside together (now or in the future) or be married to each other, notwithstanding any contrary provision of the law of such other jurisdiction.

1.2 Dispute resolutions

(a) <xxAxx> and <xxBxx> mutually covenant that:

(1) save where there is a specific procedure for resolving disputes between the parties provided in this Deed, all and any future difference, disagreement or dispute arising out of or under this Deed or the breach, termination, validity or subject matter thereof will be referred in the first instance to mediation;

(2) the mediator will be agreed between them within one calendar month of the difference, disagreement or dispute arising and failing agreement, then a mediator will be appointed by the Chairperson for the time being of the Australian Institute of Family Law Arbitrators and Mediators;

(3) the mediation will take place at a venue in Australia agreed upon by <xxAxx> and <xxBxx> and failing agreement as nominated by the mediator;

(4) if the dispute is not settled within 28 days (or such other period as agreed to in writing between <xxAxx> and <xxBxx>) after conclusion of the mediation then the dispute will be submitted to arbitration and determined by one approved arbitrator under the Family Law Act (Cwth) appointed pursuant to the Arbitration rules and the arbitration will be conducted in accordance with the Arbitration rules;

(5) further and without ousting the Family Law Court's jurisdiction in respect of such matters, if either party:

(A) challenges the validity of this Deed; or

(B) challenges that this Deed is a financial agreement; or

(C) challenges that this Deed is binding; or

(D) seeks to set aside this Deed under section 90K of the *Family Law Act*; or

(E) seeks relief under section 90KA of the *Family Law Act*;

then the parties will consent to arbitrate such matters under section 10L(2)(b) of the *Family Law Act*;

(6) the arbitrator will be agreed between the parties within 6 weeks of the conclusion of the mediation and failing agreement, then an arbitrator will be appointed by the Chairperson for the time being of the Australian Institute of Family Law Arbitrators and Mediators;

(7) the number of arbitrators will be one;

(8) the place of arbitration will be Brisbane, Australia;

(9) the language to be used in the arbitral proceedings will be English;

(10) any costs and fees of the mediator and arbitrator will be paid equally by the parties; and

(11) the parties will be solely responsible for their own legal costs of and incidental to the mediation and arbitration (subject to any award for costs made by the arbitrator).

(b) <xxAxx> and <xxBxx>mutually covenant that at the joint election of the parties, they may endeavour to resolve any future difference, disagreement or dispute arising out of or under this Deed through the collaborative practice process.

(c) <xxAxx> and <xxBxx> mutually covenant that the provisions of clause 11.4 of this Deed are mandatory and are a bar to either party commencing litigation without having complied with the provisions of clause 11.4 of this Deed.

In *Neville's Bus Service Pty Ltd v Pitcher Partners Consulting Pty Ltd* [2016] FCA 859, the Honourable Justice Gleeson dealt with the relevance of an exclusive jurisdiction clause and distilled the following principles concerning the parties' contractual stipulation of a venue for resolution of their disputes:

- "It is a relevant factor that the parties' agreement refers to a choice of governing law even though there may not be any relevant difference between the law of the competing location.
- The existence of a non-exclusive jurisdiction clause is not determinative of an application for transfer and does not preclude the exercise of the Court's discretion pursuant to section 48 if the preponderance of factors favours the exercise of discretion in that way.
- A court can and should require parties to abide by their choice of forum unless there is some good reason why that should not be done."

Arbitration of financial matters

Whilst beyond the scope of this paper, I highlight the availability of arbitration of financial matters in Australia under the *Family Law Act*. As referred to above, it is worth considering arbitration as a means of dispute resolution where parties to an agreement (or in the absence of an agreement) are I dispute within the Australian jurisdiction.

For a more detailed and technical summary of arbitration under Australian law I refer you to the following paper I have previously prepared and delivered that I make available at the following links:

- **Wilson, Geoff**, paper and presentation: "Arbitration – the new frontier: Yes it's time...Family Law Arbitration in Australia: Draining the pool for you, delivered to TEN 10th Annual Family Law Conference, 15 July 2016 (this paper has subsequently been delivered and referred to at 2017 FLS Family Law Intensives in Brisbane and Sydney and AIFLAM Arbitration seminar Sydney 4 April 2017: go to link: **http://www.hopgoodganim.com.au/icms_docs/273973_Arbitration_-_the_new_frontier.pdf**

Conclusion

When Marcus Dearle asks the Question "what is the trick?", the answer from the Australian perspective is to prepare a financial agreement that complies with the *Family Law Act*.

Schedule 1

UHNW summary

SUMMARY OF REPORTED DECISIONS OF THE FAMILY LAW COURTS OF AUSTRALIA [AND U.K. DECISIONS] REGARDING PROPERTY SETTLEMENTS AND SPOUSAL MAINTENANCE INVOLVING HIGH WEALTH INDIVIDUALS

Duration	Case	Length of relationship	Size of pool	Initial contribution of wealth creator	Existence of children	Amount to non entrepreneur / wealth creator	
						$	%
Mid to long term							
40-50 years							
	Family Court of Australia						
	Davidson (1991)	45 years	$2.593 [2.7-2.8] million	? - appears wealth created during rel'n	√ - 4 (adult)	$1.481 million [wife]	53 - 55%
	Kannis (2003)	42 years	$33 million	Insignificant	5 children during marriage – adult		50%
	Bulleen [2010] FamCA 187	47 years	$151,037,015	Wife – land; husband interest in family companies	√ 4 children	46.7% to W	Due H's greater initial contributions and inheritance
	Elgin & Elgin [2014] FamCA 10	49 years	$44,319,922	Insubstantial	√ 3 adult children	$22,159,961 to wife	50% / 50%
30-40 years							
	Family Court of Australia						
	C –v- C (1998)	38 years	$6.3M		√ - 4 adult children		50%
	L & L [unreported, 8/3/05]- Warnick J. SL & EHL (2005) FamCA 132	35 years	$12.38M	Modest	√ - 4		52% to wife
	RWW (2006)	33 yrs	$1.896M				H: 37.5%
	Weinhopf [2009] FamCA 1084	37 years	$10M ($7.6M overseas and $2.4M in Australia	insubstantial			H received 18 %; W: 82% Nb gifts from W's parents of $280K and overseas property worth $7.6M
	Kane & Kane [2013] FamCAFC 205	30 years	$4,205,983		√ 4 adult children		Trial judge: 63.55% to H; 36.45% to W – held to be excessive for H

Duration	Case	Length of relationship	Size of pool	Initial contribution of wealth creator	Existence of children	Amount to non entrepreneur / wealth creator	
							(particularly on finding of special contribution for share trading) , appeal allowed and remitted for rehearing
	Hoffman & Hoffman [2014] FamCAFC 92	36 years	$10,000,000	Each had a home – "difference in values of these properties is no longer relevant	√ 4 adult children	$5m to husband and to the wife	50% to H / W Note Court denounces the concept of "special contribution"
	Jurlina and Jurlina [2014] FamCA 284	39 years	$4,291,244		√ 3 adult children (1 child with Downs syndrome)		58% to wife (51 5 contributions for post separation -+2%; s75(2) +7%)
	Federal Circuit Court of Australia						
	Chaplin & Chaplin [2014] FCCA 72	30 years	$4,202,949	insubstantial	√ 7 children (1 under 18 yrs)	$1,786,253	42.5% to W Contributions of gifts from H's father: 15 of 19 properties representing 55% of the value of the pool
	United Kingdom						
	Cowan [2001]EWCA Civ 679 UK	35 years	£11.5M				38%
	White [2001] 1 AC 596 [House of Lords]	33 years	£4.6M		√ - 3		50%
	G & G [2/7/2002]UK	32 years	£8.5M				50%
	Sorrell (2005) EWHC 1717 UK	32 years	£75M		√ 3	£29,345,150	H: 60% W: 40% the H established one of the world's largest Advertising agencies: *the evidence does establish that the husband has achieved in his business career what few others*

Duration	Case	Length of relationship	Size of pool	Initial contribution of wealth creator	Existence of children	Amount to non entrepreneur / wealth creator	
							have done and he is regarded within his field and the wider business community as one of the most exceptional and most talented businessmen
	Charman (2006) EWHC 1879 (appeal was dismissed)	30 yrs	£131,322,950	nil	√ - 2 children	£48M	W: 36.5%
20-30 years							
	Family Court of Australia						
	Whiteley (1992)	25 years	$11.32 million	? - Husband successful artist with internat'nal reputation after commence	√- 1	$3.68 million [wife]	32.5%
	Ferraro (1993)	27 years	$12 million	nil	√ - 3	$4.5 million [wife]	37.5%
	McLay (1996)	21 years	$8.8 million	nil	√ - 1	$3.53 million [wife]	40%
	Stay (1997)	27 years	$4.2 million	Nil - wealth created largely post sep'n	√ - 5	Pool was subject to adjustment - $1.89 million [wife]	45%
	Dickson (1999)	26 years	$6.6 million	$255K- wealth created during from inheritance	√ - 3	$1.97 million [wife]	30%
	Johnson (No.1) (2000)	22 years	$25M (Aust - $10M; offshore $15M)		X		W – 40%
	Noetel (2005)	21 years	$10,643,419	H: $138K + inheritance from mother	√ 1		53% H 47% W s75(2): 7% W

Duration	Case	Length of relationship	Size of pool	Initial contribution of wealth creator	Existence of children	Amount to non entrepreneur / wealth creator	
	Blake (2007)	22 yrs	$2.433M		√ - 4 children		W: 45%
	Ashton (2006)	21yrs	$28M	H>W	√ - 2 children		35% to W
	Gelb (2007) FamCA 514	23 yrs	$833M		√ - 2 children	W received an interim property settlement of $10M	W claims $500M property settlement; H responds - $30M
	Stephens (2007) FamCA 680	23 yrs	$9,527,356		√ - 4 children	$4,712,709	48% to wife
	Ball [2009] FamCA 3	25years	$8,995,782		√ - 2 children adult		50%
	Pittman [2010] FamCAFC 30; (2010) FLC ¶93-430	20 years	$71,388,079	H > W including interest in trust	√ 1 child	At trial wife received $6,910,463 (80% of assets excluding husband's interest in trust: overall 9.6%	Matter remitted for rehearing
	Read & Chang [2010] FamCA 320	23 years	>$14.5M (ex wife's interest in a family trust worth >$600M)		√ 2 children	Property settlement yet to be determined	
	Pitt [2011] FamCA 172	25 years	$16,760,914		√ 3 adult children	55% to W	Contributions 52.5% to H; s75(2) 7.5% to W
	Sweeney & Farrar [2012] FamCA 510 (Smith & Field); [2015] FamCAFC 57	29 years	$32,320,726 - $39,816,258	Insubstantial	√ 3 adult children	50% to wife	Trial 40% to wife Appeal successful: 50% to wife See Murphy J judgment about no concept of special contributions (see also Kane & Kane [2013] and

Duration	Case	Length of relationship	Size of pool	Initial contribution of wealth creator	Existence of children	Amount to non entrepreneur / wealth creator	
							Hoffman [2014]
	AC & ors v VC and anor [2013] FamCAFC 60	26 years	$5,224,755		√ 3 adult children		38% to wife
	Pfenning & Snow [2016] FamCA 29	21 years	$17,446,936	W: $1,535,000 H: $346,000	√ 2		55% to H; 45% to W: *In my judgment in the holistic assessment of contributions of all relevant kinds of these parties over an approximate 21 year marriage producing two children; and notwithstanding the many and varied counterbalancing or countervailing factors in favour of the wife to which reference has been made; the characteristics referrable to the husband's contributions in respect of the business, in terms of also contribution to the acquisition of property, has a distinguishing character resulting, overall, in a weighting in the husband's favour; albeit not to the extent contended for by the husband.* See *Bolger & Headon* (2014) FLC 93-575
	Federal Circuit Court of Australia						
	Cabbell (2008) FMCAfam 1103	25 years	$9,591,206	H > W: Had legal practice in well known national firm	√ 3		50% to wife

Duration	Case	Length of relationship	Size of pool	Initial contribution of wealth creator	Existence of children	Amount to non entrepreneur / wealth creator	
	Peabody & Peabody [2013] FCCA 1980	26 years	$8,040,904	H > W	√ 3 adult children	$3.216M to wife	H > post separation contributions 40% to wife
	United Kingdom						
	H-J [2002] 1 FLR 415 UK	25 years	£2.7M				50%
	Lambert [2002] 1 FLR 139 UK Court of Appeal	23 years	£20.2M		√ - 2		50% - see para 46: focus on the generating force behind the fortune rather than in the mere product itself
10-20 yrs							
	Family Court of Australia						
	Ramsay (1997)	10 years	$1.5 million	Husband had interest in coys & trusts - $?	√- 2	$530,000 [wife]	35%
	Webster (1998)	15 years	$16.4 million	Nil - although wife had interest in trusts which were source of subseq wealth thru inheritance	√ - 3	$6.6 million [husband]	40%
	Farmer –v- Bramley (2000)	12 years	$5M (lotto winnings post separation	Insignificant	√ - 1		W – 15%
	Lynch & Fitzpatrick (2001)	18 years	$37 million	? – appears created during rel'n	√ - 3	$10 million [wife]	27.5%
	Coventry (2004)	14 years	$28M	Husband significant interest in grazing properties from his father / trusts	1 child		15%
	H & H [2005] FamCA 42	17 years	$10.6M	Modest initial contribution – H: $165K	√ - 3		Pool doubled post separation by H's stock investments. Trial – 70% H, 30% W

Duration	Case	Length of relationship	Size of pool	Initial contribution of wealth creator	Existence of children	Amount to non entrepreneur / wealth creator	
							Full Crt sent to retrial – obiter White –v- White suggesting 50%
	Z & Z (2005)	19 years	$3.175M		√ 2 [adult]		30% to Wife [contribution to separation -50/50; Contribution post separation – significant delay: Husband 80%. S75(2) – Wife + 10%]
	Hill (2005)	16 years	$10.6M	H: $65K H – stock broker & investor] issue of Wife's conduct in business after separation	√ 3		Trial judge: 70% H; 30% W On appeal remitted for retrial W sought 50% Full Court intimated no special contribution for increase in shares post separation due market forces
	Cromwell (2006) FamCA 1454	13 years	$13M (husband 3rd or 4th generation owner – farm inherited in course of marriage)	nk	√ -2 (surviving child 5y.o)		W: 22.5% Farming case
	Reichstein (2006)	11 yrs	$1.832M		√ - 2 children		W: 30%
	Saville [2007] FamCA 349	14 years	$2.4M		√ - 2 children		W: 57%
	Amble (2007) FamCA 1247	>19yrs	$28M	?	√ - 1 child	$9,830,247	35% to W (30% contribution; 5% - 75(2))
	Lint [2010] FamCA 121	19 years	$9,602,540	H>W	√ 2 children	$4,321,143	45% to W Contributions to H: 62.5%; s75(2) to W: 7.5%

Duration	Case	Length of relationship	Size of pool	Initial contribution of wealth creator	Existence of children	Amount to non entrepreneur / wealth creator	
	Strahan [2010] FamCA 423; [2009] FamCAFC 166	>11 years	>$105M (wife) $77.5M (husband)		√ 1 child		Property settlement yet to be determined: to date interim property orders have been made in favour of the wife totalling: $10.475M to May 2010
	Lovine & Connor and anor [2012] FamCAFC 168	10 years	$13,583,962	$3.3 million from husband + inheritance of $1.392million	√ 2 children		At trial held 60% to H & 40% to w (including a 15% s75(2) adjustment). Full Court upheld appeal on s75(2) adjustment and remitted for rehearing
	Sebastian and Sebastian no 5 [2013] FamCA 191	18 years	$14,897,927		√ 2 children		33.3% to wife
	Marlowe-Dawson & Dawson [2014] FamCA	12 years	$6,617,451		√ 3 children (1 under 18 yrs)	$4.632M to wife	70% to wife (50% contribution + 20% s75(2))
	Federal Circuit Court of Australia						
	W & W (2007) FMCAfam 459	10 yrs	$5,381,732		√ - 2 children		39% to wife
	United Kingdom						
	NA –v- MA [2006] EWHC 2900	12.5 years	£40,000,000	All assets inherited by H from wealthy father	√ - 2 children	£4.5M	W: 11.25% : a case of extravagant lifestyle
	Cooper-Hohn v Hohn [2014] EWHC 4122	~18 years	£1.4 billion	Neither had any assets of substance	√ 4 children	$530M	W: 36%
	Supreme Court (Qld De Facto cases)						
	RFB –v- UEB (2005) DFC 95-322	19 yrs	$2,341,578	W:>H	Nil		37.14% to H
7 – 10 yrs (and where insufficient							

Duration	Case	Length of relationship	Size of pool	Initial contribution of wealth creator	Existence of children	Amount to non entrepreneur / wealth creator	
information about duration)							
	Family Court of Australia						
	Phillips (1998)						
	Sheehan and Bopp [2005]	9 years	$1,534,251		X	$575,344	37.5% to W
	Gibbons (2007)	8 yrs	$1.688M				W: 52.5%
	Santic						$125M to Wife: source Courier Mail: 30/3/08
	Lowrence [2008] FamCA 1019		$17M				W: 50%
	United Kingdom						
	H-v-H [2002] FLR 1021 UK		£6M				50%
	Supreme Court (Qld De Facto cases)						
	CL –v- JMG (2007) QSC	8 yrs	$3,808,396	H: $2,226,656	Nil	$1,137,741	30% to W
Short term							
0-7 yrs							
	Family Court of Australia						
	Goodwin & Goodwin Alpe (1991)	4 years	$3.138 million	?	nil	$300,000 [wife] refer judgment – needs basis not % pg	10%

Duration	Case	Length of relationship	Size of pool	Initial contribution of wealth creator	Existence of children	Amount to non entrepreneur / wealth creator	
						78,275	
	Kennon (1997)	5 years	$8.7 million (wife's property an additional $54,000	Approx $8.7 million with income $1M p.a.	✕	$700,000 (and wife's additional property of $54,000-00)	8.6% to W
	Malpass & Mayson (2000)	2.5 years	$2,590,894-00		√- 2		21% to W
	Figgins (2002)	5 years	$22.5 million (nb inheritance)	nil	√- 1	$2.5 million [wife]	11% [nb obiter dictum – UK decisions – *White, Cowan & Lambert*]
	Pedersen (2002)	5.5 – 6.5 years	$10.689M	~$10M: wife - >$200K Husband: >$9.8M	✕	<$1.282M nb the Full Court remitted this matter for rehearing as it considered the trial judge's award was excessive	<12%
	AM & MM [2005] FamCA 443	7.5 years	$2.25M	$640K Husband	2		32.5%
	GBT & BJT [2005] Fam CA 683 (26/7/05)	6 years	$3,167,340	$400K Husband + $26K inherit + $1.4M income -v- WY = $143K	✕		10% to W
	CCD & AGMD (2006)	4 yrs	$3.460M	H: $2.5M; W: 197K	**Nil**		W: 8.36% nb para 52 – differences between U.K. & Australian property settlements (Warnick J.)
	Madden (2006)	6 yrs	$2.657 M (exc W inheritance of $1.325M)	H: $1.372M; W: 325K	**Nil**		W: 27.5% (+inheritance of $1.325M)

Duration	Case	Length of relationship	Size of pool	Initial contribution of wealth creator	Existence of children	Amount to non entrepreneur / wealth creator	
	Cook and Langford [2008] FamCAFC 84	5.5 years	$66,574,187	W: $14.8M (property settlement) & $45M control of rural & commercial companies from father	**nil**	H: $2M	H: 3%
	Carmel-Fevia & Fevia (No. 3) [2012] FamCA 631	6½ years	$435million	$364million from husband	√ 2 children		5.38% to wife ($23.4M) See Cronin J's judgment re % vs value (see also Full Court in Kane & Kane [2103] FamCAFC 205 which held: "nothing in s79 requires a trial judge (or for that matter the parties) to allocate a percentage entitlement of the property to each party in applying the criteria and requirements of s79."
	Lippman [2010] FamCAFC 127	7 years	$11,000,000	$1.6m – w $1.1m - h	√ 3 children	55% to wife (trial judge order)	Appeal was adjourned
	United Kingdom						
	Miller [2005] EWCA Civ 984	2.75 years	£30M - £35M	£20M – Husband	**X**		15% or 7% [Wife 36.5% of acquest [asset by asset] or 15% global: Nb arguably £2.7M of award is lump sum sp. Mt.]
	McCartney (2008) EWHC 401 (fam)	3 years 10 months	£394.8M	£347.5M (husband)	**1-4yrs**	Wife received £24.3M	6.15%
	Supreme Court (Qld De Facto cases)						
	AMA –v- KCD & Ors (2007) QSC 304	18months – 3yrs	$52M	H: $5.5M	**1**	$3.5M - 4m shares + motor vehicle	W:~ $4m

Please exercise caution in relying on the above table as a comparative analysis. In *Smith v Field* an abridged version of my table was placed before the Court. Murphy J stated in relation to the table:

"Quantification of Contributions - Comparison with other Cases

> 84. The assessment of contributions is an exercise performed not only within the specific legislative context earlier referred to, but also within the context of what is now nearly 40 years of decided cases. The "general counsel of experience" of which Deane J spoke in *Mallett* derives, as his Honour said (at 640), not in isolation but "... from decisions in previous cases involving questions of fact". His Honour continued (at 641): "[i]t is plainly important that, conformably with the ideal of justice in the individual case, there be general consistency from one case to another of underlying notions of what is just and appropriate in particular circumstances."
>
> 85. Mr Kirk SC submits that this Court cannot ignore earlier decisions where the facts can be said to be similar, although his submissions, correctly, recognise that the section requires individual justice, that no two marriages are identical and that, as a result, decisions in earlier cases need to be treated with some circumspection in so far as the results within them might guide the discretion in this, different, case.
>
> 86. It is not, then, suggested that any particular decision (including decisions of the Full Court) is binding as to result, but it is contended that there is a consistency in the range of results which cannot be ignored. Specifically, Mr Kirk SC grounds this argument by reference to a comparison of this case with a tabulation of decisions of the Full Court in what his table's heading calls "comparable big money cases" (whatever that expression might mean or be intended to connote).
>
> 88. In my view, it is appropriate, as counsel suggests, to take account of earlier decisions so as to inform generally the parameters of the discretion. However, care must be exercised; orders in any given case are about effecting individual justice by reference to individual circumstances and it is imperative that reference to those decisions should not be used as a fetter on the wide discretion inherent in the section.
>
> 89. Reference to counsel's table shows a range of entitlements to the wives in those cases (and it might be observed that in each case it is the wife who receives the lower proportion of the assets) of between 27.5 per cent and 40 per cent. I do not propose to descend into a detailed analysis of each of those decisions; doing so is, in my view, contrary to the principles to which I have earlier referred. I am also conscious of the fact that authorities different to those collated might be produced in an alternative table and be said to be illustrative of a different "range" – a difficulty inherent in all non-exhaustive comparisons. Nevertheless, results arrived at by an appellate court in other cases where there is a reasonable degree of comparability with the case under consideration cannot, if the jurisprudence is to have a genuine semblance of consistency (despite the wide discretion within it), be simply cast aside as irrelevant."

Contrast this with the subsequent decision of the Full Court of the Family Court in *Wallis and Manning* (2017) FLC ¶93-759; [2017] FamCAFC 14 (in a judgment written by Murphy J.) it was held:

> 45. However, reference to and the use of comparable cases is, potentially at least, a different matter. Reference to comparable cases serves a principle central to the exercise of a wide discretion, namely, that like cases should be treated alike. That end seeks to avoid "arbitrary and capricious decision-making" which is the antithesis of "consistency in judicial adjudication"….
>
> 56. With respect to his Honour, we are unable to agree that anything said by the Full Court in *Fields & Smith*[49] "decries" the use of comparable cases, although the Full Court there make it plain, and with respect we agree, that *if* comparable cases are used to *inform* the discretion, some analysis of those cases so as to ascertain their

comparability should be undertaken. So much is also entirely consistent with what the High Court has said in *Barbaro*, above, in respect of a different wide discretion informed by statutory criteria.

57. We respectfully agree with the Full Court in *Petruski* that "[w]hat another judge may do in another case on the basis of the facts in that case can rarely if ever **determine** what is done in the case at hand" and what is also said to similar effect in *Daymond*, above, and *Claughton*, above. It is axiomatic that, in a guided but otherwise unfettered discretion the result in another case, or indeed in many other cases, cannot *determine* the result in the case under consideration. If it did, the discretion would be improperly fettered.

58. However, it is one thing to say that an earlier-decided case, or a combination of earlier-decided cases, cannot determine the result of the instant case, but quite another thing to say, as the court did in *Petruski*, that any comparison with those cases is "unhelpful". The latter suggestion is, in our respectful view, inconsistent with both High Court authority and the Full Court authority to which we have referred.

59. None of the three cases to which we have referred above cite or discuss the earlier Full Court decision in *G v G*, above. We reiterate, and seek to emphasise, that the earlier Full Court had said in that case that the "duty and function" of the appellate court is to "scrutinise" the trial judge's exercise of discretion by a process that comprises "careful analysis", "the promulgation of guidelines" *and* "comparison of like cases". Doing so fulfils not only the primary function of an appeal court which is to correct error[50] and also to "ensure a reasonable measure of consistency of **outcomes (and therefore predicability [sic] of result) in similar cases** for the ultimate outcome of the litigating public." (Emphasis added).[51] Moreover, that Full Court specifically contemplated that a conclusion by the Full Court that an assessment is "plainly wrong" by reference to "the residuary category of error in discretionary judgment identified in *House*",[52] might be informed by the fact that the case appealed is "significantly out of step with the assessment made in the earlier cases".

60. We are also respectfully unable to agree that Deane J, in the passage quoted both in *Daymond*, above, and by us, was referring only to the "need for consistency between general principles enunciated in each case". Contrary to what the Full Court asserts in *Daymond* (citing *Petruski*) we consider that Deane J was indeed "suggesting that realistically there should be a consistency of results"[53] not, as the Full Court suggests "simply where some factual circumstances coincide" but, rather, where genuine comparability exists, to provide "assistance and guidance in determining what is just and appropriate".[54]

61. That Deane J is referring not merely to "consistency in general principles", but also consistency in *assessments* is evident not merely by reference to the words actually used by his Honour ("what is just and appropriate") but also by reference to the counterpoint of that desired consistency: the "wilderness of single instances" and a "codeless myriad of precedent". His Honour opens the paragraph earlier quoted by us by saying: "It is plainly important that, conformably with the ideal of justice in the individual case, there be general consistency from one case to another of underlying notions of what is just and appropriate in particular circumstances".

62. The statements made in the three cases to which we have referred emerge from grounds and arguments in each very much centred on the earlier cases referred to representing a "range" and the Full Court's statements were made prior to the decision of the High Court in *Barbaro*. In any event, on our reading of the three decisions, in so far as the arguments referred to "comparable cases" they were either not truly comparable (for example *Daymond*); were raised "only vaguely" in support of other arguments (for example *Claughton*) or did not arise directly by reference to any pleaded grounds (for example *Petruski*). The statements made by the Full Courts in those cases should be seen as *obiter*.

63. To the extent that any or all of those cases stand for the propositions that comparable cases cannot or should not be used by trial judges in seeking to promote consistency in results in arriving at just and equitable assessments or suggest that the Full Court cannot or should not have reference to comparable cases in determining if a trial assessment is "plainly wrong" or are otherwise "unhelpful" within that process, we respectfully disagree and would hold to the contrary.

64. In our view, each of the High Court and the Full Court of this court has postulated a role both for guidelines in the "generality of cases or a particular class of cases"[55] *and* a role for comparable cases for determining what is just and appropriate in a particular case. Much more recently, in the discretionary context earlier described, the judgment of the plurality in *Barbaro* again provides, in our respectful view, powerful guidance in respect of the use of comparable cases for the exercise of the s 79 discretion.

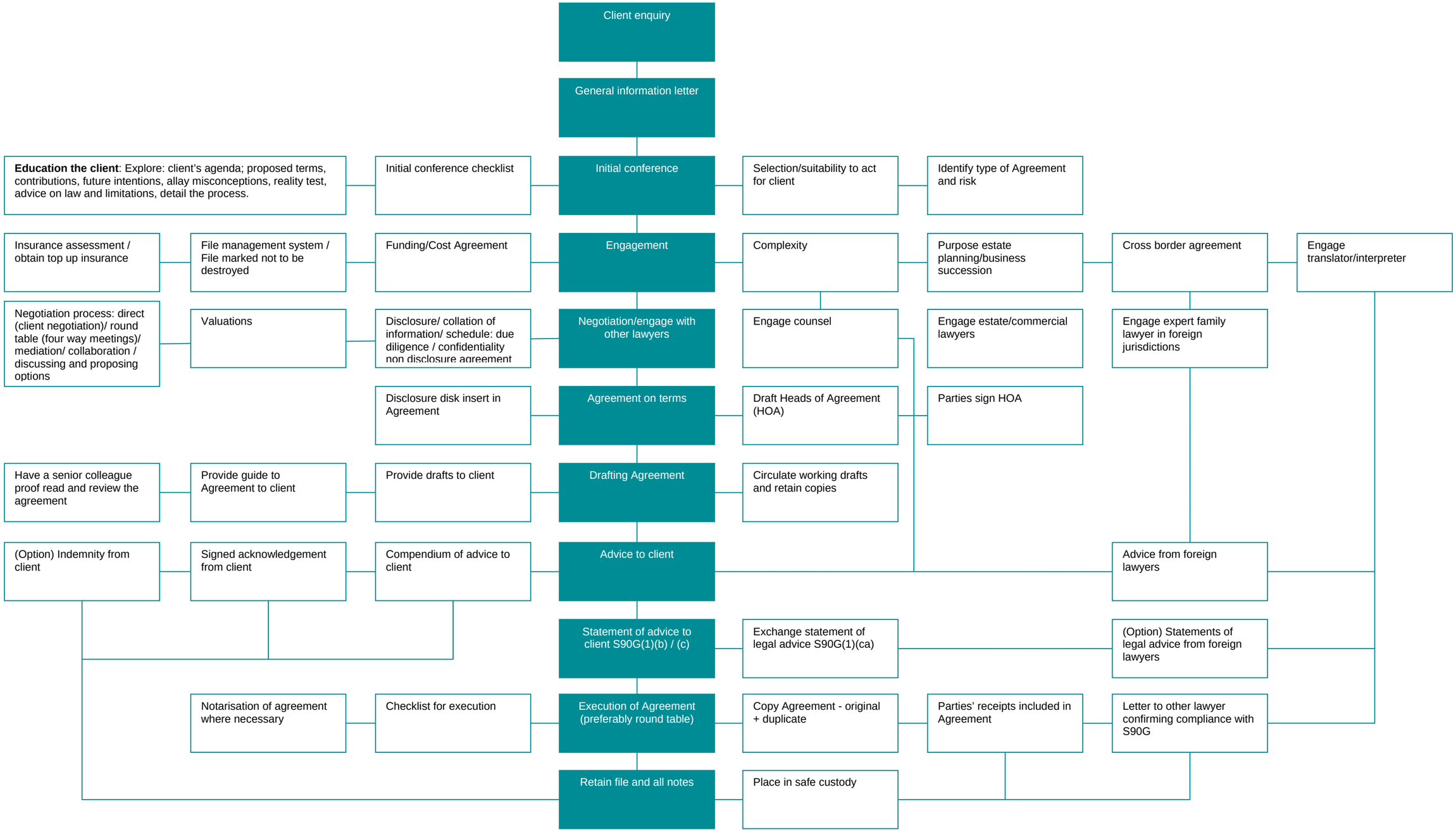
SUMMARY OF REPORTED DECISIONS OF THE FAMILY COURT OF AUSTRALIA [AND U.K. DECISIONS] REGARDING SPOUSAL MAINTENANCE INVOLVING HIGH WEALTH INDIVIDUALS

Reported Case	Outcome
Boulos (2007)	Lump sum spousal maintenance award of $2,250,000-00
Gollings & Scott (2007) FamCA 397	Periodic spousal maintenance award of $48,000-00 p.a. to the Wife. 17 year marriage with 4 children. Husband consistently earning > $500K p.a. Property pool: $694,263: Wife received 98% of pool
Wilson (1989) FLC 92-033	The wife filed an application seeking alteration to property interests and interim maintenance of $2,750 per week plus certain household expenses and interim lump sum maintenance of $200,000. The trial Judge allowed the wife $900 per week interim maintenance and household expenses plus $100,000 lump sum of which $72,000 related to expended legal expenses and $9,500 to outstanding accounts. The evidence indicated that the wife's expenditure for the pre-separation and post-separation periods was about $3,000 a week. The evidence indicated that the husband continued to live lavishly. A standard of living that in all the circumstances is reasonable for the party claiming spousal maintenance is not necessarily the same standard as that enjoyed by the party who is ordered to pay maintenance
Read and Chang [2010] FamCA 320	For 10 years wife received $18m from family trust ($2.9M in 2009). Wife ordered to pay husband the sum of $4,000 per week
Strahan [2010] FamCA 423; [2009] FamCAFC 166	Husband ordered to pay wife interim lump sum spousal maintenance of $325,000. Earlier order in 2007 by consent husband paid wife $375,000 (nature of payment reserved to trial judge) Nb wife sought $278,000 per month
Best (1993) FLC ¶92-418	This was an unusual, almost unique, case as the facts demonstrated. The wife had significant responsibilities in the support of herself and the parties' children but had limited financial means. Although the husband had earned a very substantial income over a number of years, the reality was that there was a very small margin between the parties' assets and their liabilities. The most striking feature of the case was the husband's very high and continuing earning capacity. The husband's profession gave him a continuing capacity steadily to earn his way out of his current financial position. The wife had no such capacity. In cases such as the present where there are minimal assets, but on the one side significant needs and on the other a significant future earning capacity, the power to order lump sum maintenance, which may be met by annual payments over a period of years against that income or savings from it, may be an appropriate course. In such cases, and provided that the requirements of the Act are otherwise satisfied, it may be a mistake to conclude that where there are few assets they should be divided and that that is the end of the matter other than for periodic maintenance
Coventry and Coventry and Smith [2004] FamCA 249	(See facts above) Pending property settlement being performed and the wife receiving her entitlements the husband was ordered to pay to the wife the sum of $1,200 per week by way of spousal maintenance

Schedule 2

Flowchart of financial agreement

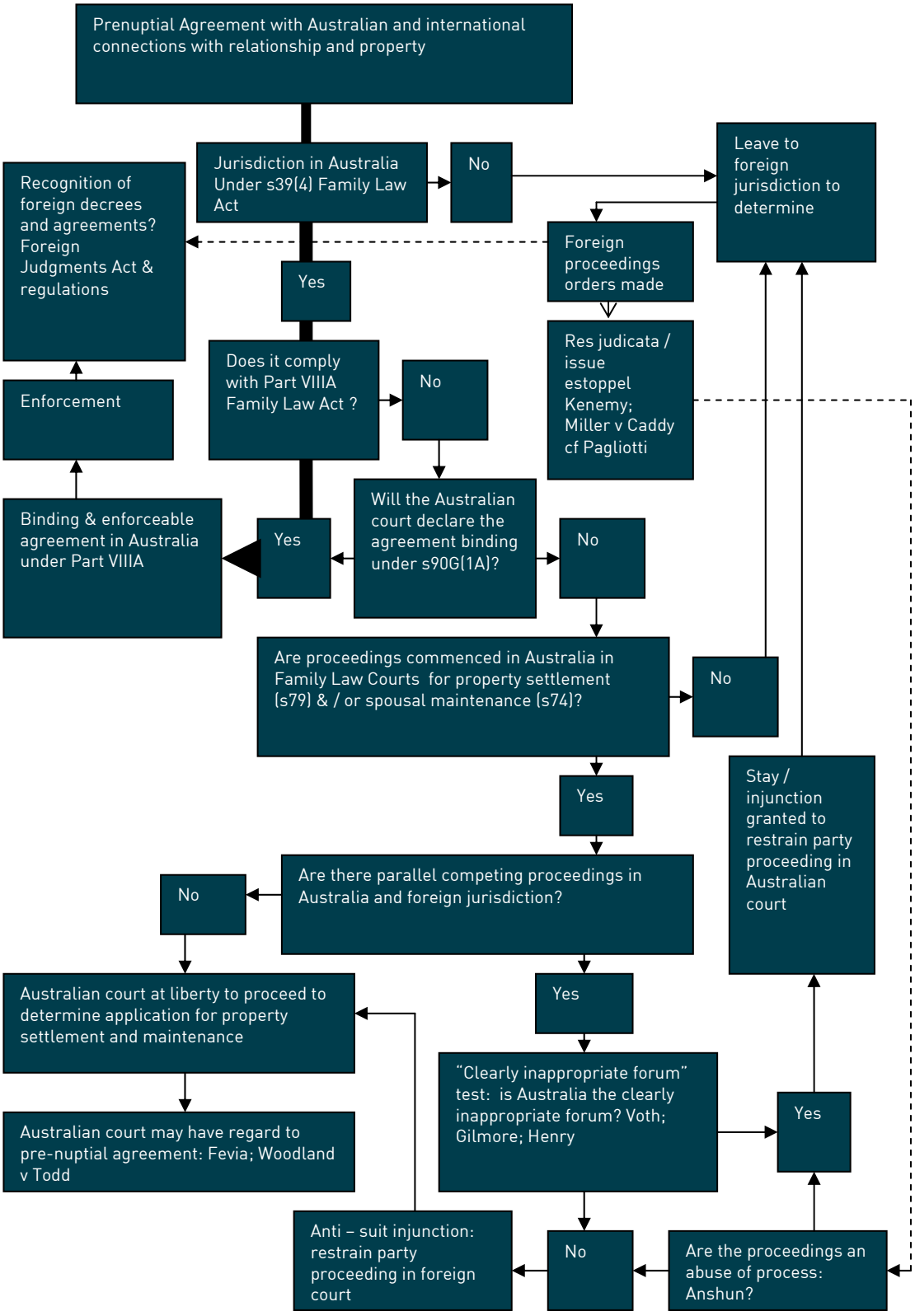
Suggested model for preparing a financial agreement



Pre-nup flow chart edited

Schedule 3

Agreement and forum dispute chart


Prenuptial Agreement with Australian and international connections with relationship and property
Jurisdiction in Australia Under s39(4) Family Law Act
No
Leave to foreign jurisdiction to determine
Recognition of foreign decrees and agreements? Foreign Judgments Act & regulations
Foreign proceedings orders made
Yes
Res judicata / issue estoppel Kenemy; Miller v Caddy cf Pagliotti
Does it comply with Part VIIIA Family Law Act ?
No
Enforcement
Will the Australian court declare the agreement binding under s90G(1A)?
Binding & enforceable agreement in Australia under Part VIIIA
Yes
No
Are proceedings commenced in Australia in Family Law Courts for property settlement (s79) & / or spousal maintenance (s74)?
No
Yes
Stay / injunction granted to restrain party proceeding in Australian court
Are there parallel competing proceedings in Australia and foreign jurisdiction?
No
Yes
Australian court at liberty to proceed to determine application for property settlement and maintenance
"Clearly inappropriate forum" test: is Australia the clearly inappropriate forum? Voth; Gilmore; Henry
Yes
Australian court may have regard to pre-nuptial agreement: Fevia; Woodland v Todd
Anti – suit injunction: restrain party proceeding in foreign court
No
Are the proceedings an abuse of process: Anshun?

Schedule 4

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