The Mischief Rule and Add-backs: a Critique of *Shinohara*

Hon Michael Kent KC
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In *Shinohara & Shinohara* [2025] FedCFamC1A 126 delivered on 23 July 2025 (*"Shinohara"*) a Court exercising appellate jurisdiction determined that the recent amendments to s 79 of the *Family Law Act 1975* (Cth) ("the Act") now preclude the approach of including the value of notional property or "add-backs" in a balance sheet constructed for the purpose of determining s 79 orders.

The central contention of this paper is that the reasoning in *Shinohara* is problematic for several reasons, summarised below and developed thereafter.

First, ascertaining the purpose of legislation is the basic task of Courts in what the High Court has characterised as the "modern approach" to statutory interpretation. Context, including identification of the existing state of the law, and identification of the "mischief" the statute was intended to remedy, is fundamental. The reasoning in *Shinohara* does not reflect this approach when construing the amendments to s 79 of the Act, and results in an erroneous interpretation.

Second, accurately identifying the existing law is the first step in the task of interpreting the amendments to s 79. To the extent that *Shinohara* purports to state the existing common law concerning add-backs, it does not do so.

Third, if *Shinohara* is properly taken as a dictate to trial Judges exercising jurisdiction under s 79 (or s 90SM) that it is an error of law to include the value of notional add-backs in constructing a balance sheet for assessment purposes, then *Shinohara* impermissibly fetters the wide s 79 discretion.

Purpose in Context: Modern Approach to Statutory Interpretation

The new s 79(3)(a) provides that the Court:

(a) is to identify:

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(i) the existing legal and equitable rights and interests in any property of the parties to the marriage or either of them; and

(ii) the existing liabilities of the parties to the marriage or either of them.

Citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, the Court in *Shinohara* focused upon the wording of s 79(3)(a)(i) and said:

> 121 Statutory interpretation focuses on the plain and ordinary meaning of the words in the section. The text of s 79(3)(a)(i) is clear. **Only** the existing property of the parties is to be identified and **only** that existing property is to be divided or adjusted.
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> 122 This single conclusion is reinforced, when read in the context of s 79, not to permit more than one potential meaning (*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]).
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> (emphasis added)

Notably, the Court in *Shinohara* in purporting to focus "on the plain and ordinary meaning of the words in the section" found it necessary to supplement those words by adding the word "only" which does not appear in the section. Moreover, isolating s 79(3)(a)(i) in this way was prone to produce a misconceived interpretation of the meaning and intended effect of the amendments given the need to consider context, starting with the state of the existing law.

Far more was required before it could be open to conclude that the amendments to s 79 were intended to do away with 30 years of established jurisprudence concerning add-backs. The ascertainment of the purpose of amendments is essential to the task of their proper interpretation. *Shinohara* does not engage with the task of identifying the purpose of the amendments nor the defects or mischief in the existing law which it is said the amendments were designed to address.

Accepting that the prior jurisprudence as to notional add-backs makes clear it is a methodology, in exceptional cases, driven by the imperative of achieving just and equitable adjusting orders with respect to existing property, it would be illogical to conclude that this is some kind of mischief or defect in the law requiring legislative correction.

The modern approach to statutory interpretation is set out by the High Court in a much-quoted passage in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 ("*CIC Insurance*") at p 408. Brennan CJ, Dawson, Toohey and Gummow JJ observed that:

> … the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the

> law and the mischief which, by legitimate means such as [by reference to reports of law reform bodies], one may discern the statute was intended to remedy [*Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461, cited in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312, 315]. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd* [(1986) 6 NSWLR 363 at 388], if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent [*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320-321].

The reference in *CIC Insurance* to context being used "in its widest sense" was focused on by McHugh J in *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, where his Honour said:

> [C]ontext is not limited to the text of the rest of the statute. For purposes of statutory construction, context includes the state of the law when the statute was enacted, its known or supposed defects at that time and the history of the relevant branch of the law, including the legislative history of the statute itself. It also includes in appropriate cases "extrinsic materials" such as reports of statutory bodies or commissions and parliamentary speeches – **indeed any material that may throw light on the meaning that the enacting legislature intended to give to the provision.**
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> (emphasis added)

The need to identify the mischief that an amending statute is seeking to remedy was referred to by Hayne, Heydon, Crennan and Kiefel JJ in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at [47]:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. **The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.**
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> (emphasis added)
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> (footnotes and citations omitted)

The role of context was emphasised by the plurality (Kiefel CJ, Nettle and Gordon JJ) in *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 as follows:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

The Explanatory Memorandum[2] for the 2025 amendments states that the intention of the amendments was to codify existing case law. Obviously, the amendments are not intended to be inconsistent with existing case law. Properly interpreted, s 79(3)(a)(i) is a statutory expression of the statement made by the High Court at [37] in *Stanford v Stanford* (2012) 247 CLR 108 ("*Stanford*") discussing the just and equitable requirement in s 79(2) as follows:

> First, it is necessary to begin consideration of whether it is just and equitable to make a property settlement order by identifying, according to ordinary common law and equitable principles, the *existing* legal and equitable interests of the parties in the property…
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> (emphasis in original)

In *Shinohara*, the Court did not acknowledge that, following the decisions in *Stanford* and *Bevan & Bevan* (2013) FLC 93-545 ("*Bevan*"), three different Full Courts in *Vass* & Vass (2015) 53 Fam LR 373 (*"Vass"*), *Calder & Calder* (2016) FLC 93-691 *("Calder")* and *Trevi & Trevi* (2018) FLC 93-858 *("Trevi")* have affirmed that *Stanford* does not abolish the discretion to use the methodology of notional add-backs in constructing a balance sheet.

There can be no doubt as to the state of the existing case law, either when the s 79 amendments were passed by parliament or at the time they came into effect on 10 June 2025. The case law supported the maintenance of the discretion, in appropriate cases, to use add-backs as a reasoning method to arrive at a just and equitable outcome. As the Explanatory Memorandum makes plain, the amendments were intended to give effect to existing common law. As was submitted to the Court in *Shinohara*, there is nothing contained in the Explanatory

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[2] Explanatory Memorandum, Family Law Amendment Bill 2024 (Cth) 4 [3]-[4], 18 [51]; see also 38 [43]-[49] *Cf* 45 [85]

Memorandum expressly on the topic of add-backs. That absence is telling as to whether or not s 79(3)(a)(i) was intended to have the effect ascribed to it by the Court in *Shinohara*.

At [117] of *Shinohara* the Court posed for itself the question as to whether s 79(3)(a)(i) of the Act "permitted", as part of the identification of existing legal and equitable rights and interests in property, the identification of items notionally added back which no longer exist. The answer to that question is obviously no.

The more appropriate question to be posed and answered is whether the amendments to s 79, read as a whole and in their context in the widest sense, reveal any legislative intent to alter the established common law concerning add-backs. The answer to that is equally obvious: there is not.

The Settled Common Law Concerning Add-Backs

As long ago as 1994 in *Townsend & Townsend* (1995) FLC 92-569 ("*Townsend*") Nicholson CJ dealt with the sale of a valuable taxi license, by the husband who had, by the time of the trial, disposed of the proceeds. The Chief Justice explained the logic of add-backs in this way:[3]

> In my view, what occurred in this case… was, in fact, a premature distribution of a proportion of the matrimonial assets. What the husband did was to distribute to himself an asset in which the wife had a legitimate interest. **In such circumstances I consider that it would be unjust in the extreme to simply treat such conduct by the husband as a matter to which regard should be had under section 75(2).** It seems to me that the husband has had the benefit of that money. Had he retained, for example, the taxi licence instead of selling it, that would have been brought into account as an item of property which would have been dealt with in the same way as the remaining items of property in this case. Accordingly, I am of the view that the correct way in which to deal with the husband's receipt of those moneys is to bring them into the pool of assets on a **notional** basis and make a distribution accordingly.
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> (emphasis added)

In *Townsend*, Fogarty J agreed the Court is entitled, in appropriate cases, to give direct weight to any premature distribution of assets before trial and then referred to Baker J's decision in *Kowaliw & Kowaliw* (1981) FLC 91-092*,* suggesting a similar logic could be applied to waste.

Three central propositions emerge from *Townsend*.

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[3] At 81,654

First, the methodology of bringing notional property into account directly by including it in a pool of assets on a notional basis is driven by the imperative of achieving just and equitable orders.

Second, in some cases it would be "unjust in the extreme" to deal with the issue only as a (then) s 75(2) matter. Those central propositions were repeated in *Trevi* almost a quarter of a century later.

Third, adding back does not seek to create property interests that do not exist. It is an accounting or balance sheet methodology to achieve justice and equity in the division of existing property interests. It is this final point that *Shinohara* appears to eschew.

The Full Court in *Farnell & Farnell* (1996) FLC 92-681 (*"Farnell"*) upheld the trial judge's exercise of discretion to add-back paid legal fees as a notional asset. Kay J made the point (reiterated by the Full Court in *Trevi*) that unless a party's payment of legal fees was fully counted against them when considering a property settlement order, the real effect was that the other party ended up subsidising part of their spouse's legal fees.

By 1995, the Full Court had made clear that add-backs were an appropriate methodology to achieve just and equitable adjustment orders concerning existing property interests having regard to a pre-distribution of assets, waste and the payment of legal fees.

In *Chorn & Hopkins* (2004) FLC 93-204 (*"Chorn"*) the Full Court delivered an important decision on add-backs, discussing 11 earlier cases and setting out guidelines as to how add-backs should be approached in various scenarios. In *Shinohara*, the Court made only passing reference to *Chorn* and even then only in the context of legal costs. *Chorn* encompassed significantly more than that, covering the law about add-backs comprehensively.

Again in *Omacini & Omacini* (2005) FLC 93-218 (*"Omacini"*) the Full Court identified the list of accepted categories of add-backs as they were stated 10 years earlier in *Townsend* and *Farnell*.

At [97] and [98] of *Shinohara* the Court quotes the well-known statements by the majority and the minority in *Bevan*, decided in 2013, where the Court queried whether notional add-backs needed to be reconsidered after the well-known statement by the High Court in *Stanford* as to identifying existing interests.

Full Court decisions after *Bevan,* however, confirmed in unequivocal terms the continued availability of the discretion to utilise add-backs.

The first was *Vass*, referred to in *Shinohara* at [100]. In *Vass,* in a passage not averted to in *Shinohara,* the Full Court observed at [139]:

> The decisions referred to seek to remind the Court that, however the exercise of discretion might seek to deal with property that is said to have been the subject of "add back", proper consideration must be given to existing interests in property, and the question posed by s 79(2) as a separate inquiry from any adjustment to property interests by reference to s 79(4) if a consideration of s 79(2) reveals that it is just and equitable to alter existing interests in property.

The second was *Calder*. Importantly the Full Court in *Calder* included two Judges of the majority in *Bevan* and that Full Court endorsed the statements in *Vass* confirming that in an appropriate case a trial Judge had the discretion to include add-backs. *Calder* was not cited by the Court in *Shinohara*.

The common law as it was prior to the 2025 amendments to s 79 is encapsulated in the judgment of Murphy J (with whom Alstergren DCJ, as his Honour then was, and Kent J agreed) in *Trevi*. Leaving aside the specific discussion of expenditure upon legal fees (at [31] to [42]) the central tenets included the following:

> **Guidelines for adding back to the property available at trial**
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> (a) Dissipation of property and expenditure other than on legal fees
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> 27 The Full Court held in *Omacini and Omacini* that addbacks fall into "three clear categories": where the parties have expended money on legal fees; where there has been a premature distribution of matrimonial assets; and "waste" or wanton, negligent or reckless dissipation of assets.
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> 28 However, the Full Court also made it clear that an addback does not necessarily occur whenever "a party has expended money realised from the disposition of assets that existed as at the date of separation", the Full Court describing such a proposition as "unduly simplistic". An earlier Full Court made the same point, saying that adding back is "the exception rather than the rule".
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> 29 The fundamental precept that addbacks are exceptional, reflected in the decisions just referred to, also mirrors what has been said in earlier decisions of the Full Court that, for example, "the Family Court must take the property of a party to the marriage as it finds it" at trial. An important parallel proposition is that the parties do not "go into a state of suspended economic animation" after separation. Thus, reasonably incurred expenditure does not usually come within accepted categories of addback.

30 Two fundamental premises emerge from *Omacini* and the authorities preceding it. **First, "adding back" is a discretionary exercise. When the discretion is exercised in favour of adding back, it reflects a decision that, exceptionally, in the particular circumstances of a case, justice and equity requires it.** The second premise is its corollary: in cases that are not "exceptional" justice and equity can be achieved, not by adding back, but by the exercise of a different discretion – usually by taking up the same as a relevant s 75(2) factor. Indeed, it has been said that the latter is "a course which is, perhaps, technically more correct" than adding back to the list of existing interests in property.

…

46 In *Stanford v Stanford,* the High Court emphasised as fundamental that a consideration of whether it is just and equitable to make a property settlement order begins by "identifying, according to ordinary common law and equitable principles, the *existing* legal and equitable interests of the parties in the property".

47 The essence of a claim for addbacks is that the asserted sum/s should be added to the value of the existing property interests of the parties and, subsequent to the assessment of contributions, credited to the spending party as part of the value of their assessed entitlements. Doing so does not offend what was emphasised by the High Court. Adding back does not seek to create property interests that do not exist. Rather, doing so emphasises that satisfying the respective requirements of ss 79(2) and (4) of the Act to do justice and equity can require an "accounting" or "balance sheet" exercise for the purposes of s 79(2) and (4), so as to include the value of the dissipated property or expended sums within the total value of the parties' existing interests in property, and to credit the value of same against the assessed entitlement of the dissipating or spending party."

(emphasis added)

(footnotes and citations omitted)

Since it was decided, *Trevi* has been applied, or referred to with approval, in numerous decisions at first instance and on appeal. In none of those decisions is the methodology approved in *Trevi* doubted or described as "conceptually dubious", being the characterisation ascribed (wrongly, this paper contends) in *Shinohara*.

In *Shinohara*, in the course of tracing the development of the jurisprudence on this topic (albeit relatively briefly and with the omissions of some authorities) the Court arrived at *Trevi* and summarised it in a singular paragraph:

> [101] Thereafter, in *Trevi & Trevi* (2018) FLC 93-858 ("*Trevi*") the Full Court described the propositions underscoring the notional adding back of property that did not exist to existing interests in property as "unduly simplistic" and that justice and equity can be achieved by taking up the consideration of the use of property that no longer exists as a relevant s 75(2) factor, the latter course being "perhaps, technically more correct". Notwithstanding that Full Court guidance, the conceptually dubious practice of notional add backs generally continued unabated.

As is clear from the paragraphs recited above, *Trevi* does not stand for the propositions ascribed to it at [101] of *Shinohara*. *Trevi* clearly stands for propositions to the contrary.

The term "unduly simplistic" was not a descriptor given by the Full Court in *Trevi*. Rather, that phrase was used in a particular context by the earlier Full Court in *Omacini* (as identified at [28] of *Trevi*). Context is important. What the Full Court in *Omacini* described as "unduly simplistic" was the trial judge's conclusion that "the mere fact that a party has expended money realised from the disposition of assets that existed as at the date of separation, will result in that expenditure being added back 'in the usual way'" (*Omacini* at [39]). The discretionary nature of the methodology is what the Full Court was referring to in *Trevi* at [30].

Contrary to the assertion at [101] of Shinohara that *Trevi* stands for the proposition that "justice and equity can be achieved by taking up the consideration of the use of property that no longer exists as a relevant s 75(2) factor", as is emphasised at [30] in *Trevi* it stands for the proposition that adding back is a discretionary exercise and when the discretion is exercised in favour of adding back it reflects a decision that in the particular circumstances of a case justice and equity requires it. This is in contrast to the "corollary" – that is, cases that are not exceptional, where justice and equity can be achieved not by adding back but by the exercise of a different discretion – consideration as a now s 79(5) matter.

The characterisation in *Shinohara* that these are equal, alternative choices is not a faithful reflection of the Full Court's statement in *Trevi*. As *Trevi* emphasises at [30], far from being "conceptually dubious", in some circumstances justice and equity demands the notional adding back of property and in other, different circumstances justice and equity can be achieved by the exercise of a different discretion – the use of the now s 79(5) factors.

As is readily apparent from *Trevi*, the long-standing approach in exceptional cases of adding back the *value* of notional property that has been dissipated to a pool or balance sheet of existing property interests is not a finding that the notional property exists or forms part of the parties' existing property interests. This is made clear in [47] of *Trevi*, a passage that was not cited in *Shinohara*. Rather, it is a methodology adopted, in the exercise of discretion, to crediting the full value of dissipated property or expended sums against the assessed

entitlement of the dissipating or spending party. It is a methodology driven by the imperative of achieving a just and equitable division of existing property interests.

As the common law existing prior to the 2025 amendments yields the conclusion that the law on notional add-backs was well settled and provided a valuable methodology, in exceptional cases, for achieving just and equitable orders, there was no defect or mischief in the law to be remedied by the s 79(3) amendments. As a consequence, the conclusions reached in *Shinohara* – based as they were on a platform that cannot, with respect be sustained – must be seen as incorrectly arrived at.

Nature of the Judicial Discretion Conferred by Section 79

Ascertaining the purpose of legislation is fundamental to its proper interpretation.

Consideration of the nature of the s 79 discretion informs its purpose.

In *Norbis v Norbis* (1986) 161 CLR 513 ("*Norbis*") the High Court considered the nature of the judicial discretion conferred by s 79 of the Act. *Norbis* concerned an appeal where the Full Court had determined that the trial Judge erred in law in failing to apply the "global approach" to the assessment of contributions and determination of just and equitable orders as distinct from the "asset by asset" approach.

The High Court found that the Full Court was not entitled to set aside the order of the trial Judge for failing to apply the global approach; and that it could not be found that the order made by the trial Judge reflected an improper exercise of the discretion conferred by s 79.

Mason and Deane JJ, in discussing the nature of the discretion, observed (at p 518):

> The sense in which the terms "discretion" and "principle" are used in these remarks needs some explanation. "Discretion" signifies a number of different legal concepts… Here the order is discretionary because it depends on the application of a very general standard – what is "just and equitable" – which calls for an overall assessment in the light of the factors mentioned in s. 79(4), each of which in turn calls for an assessment of circumstances. Because these assessments 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. The contrast is with an order the making of which is dictated by the application of a fixed rule to the facts on which its operation depends.

Further at p 521 their Honours said:

> Section 79(1) of the Act provides that the Court may make such order as it thinks fit altering the interests of the parties to a marriage in the property of the parties or either of them. In

> so providing, the Act confers a very wide discretion on the Court. But that discretion in not unlimited. Its exercise is conditioned by the requirement that it is just and equitable to make the order (s. 79(2)), and that the Court take into account the matters specified in s. 79(4)…

Wilson and Dawson JJ likewise emphasised the width of the discretion and the means by which justice and equity may best be served. At p 533 their Honours observed:

> … **the legislation confers a discretion upon the court which, provided the required matters are taken into account, does not dictate the employment of any particular method in the formulation of an appropriate order for the alteration of property interests.** The matters which are to be taken into account will sometimes require the division of assets, or some of them, upon the basis of their individual values, but in other cases no more than an overall division will be required. In some cases either approach may be adopted in part or in whole…
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> (emphasis added)

Brennan J observed at p 537:

> It is one thing to say that principles may be expressed to guide the exercise of a discretion; it is another thing to say that the principles may harden into legal rules which would confine the discretion more narrowly than the Parliament intended. The width of a statutory discretion is determined by the statute; it cannot be narrowed by a legal rule devised by the court to control its exercise… When a statutory discretion is to be exercised within prescribed limits according to what is "just and equitable", as in the *Family Law Act 1975* (Cth) (see s. 79(2)), it is impossible to devise a controlling legal rule which will do justice and be equitable in every case which comes within those limits and falls within the scope of the rule. There will always be an exceptional case. If it were possible to predicate of a legal rule that its application to every case falling within its scope would invariably produce a just and equitable result, there could be no objection to its application. In such a case, however, the limits of the discretion would not be narrowed by judicial decision because the legal rule would be found to be implicit in the text of the statute.
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> …
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> There may well be situations in which an appellate court will be justified in setting aside a discretionary order if the primary judge, without sufficient grounds, has failed to apply a guideline in a particular case. Where there is nothing to mark the instant case as different from the generality of cases, the failure will suggest that the discretion has not been soundly exercised. The distinction between such a guideline and a binding rule of law, though essential, may be thin in practice. But the distinction must be

> maintained and a failure to apply the guideline cannot be treated as an error of law: a failure to apply the guideline is no more than a factor which warrants a close scrutiny of the particular exercise of the discretion. **What cannot be shut out is the discretion of a primary judge not to apply the guideline when the circumstances of the particular case show that its application would produce an unjust or inequitable result or that another approach would produce a more just and equitable result.**
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> (emphasis added)

Acceptance that s 79 confers a wide judicial discretion to achieve the purpose of the legislation of producing just and equitable property adjustment orders resonates with the established jurisprudence concerning notional add-backs, which is likewise driven by the imperative of achieving justice and equity.

Section 79 provides a judicial discretion to make orders adjusting property interests according to what is just and equitable. In considering what order (if any) should be made the Court is to identify existing property interests and liabilities (ss 79(3)(a)(i)(ii)). There are then other considerations to be taken into account as enumerated in the subsections of s 79.

Notably, these include contributions to property which has ceased to be property of the parties or either of them (s 79(4)(a) and (b)) and any other relevant current and future considerations (s 79(5)). It goes without saying that if a notional asset has been directly taken into account, then it should not be double counted under s 79(5).

To the extent that *Shinohara* purports to dictate to trial Judges exercising the s 79 discretion that it is an error of law to include the *value* of notional add-backs in constructing a balance sheet for the purpose of arriving at just and equitable orders with respect to existing property interests, it is respectfully put that *Shinohara* impermissibly fetters the wide s 79 discretion in the same manner as the Full Court did in *Norbis,* which was critiqued by the High Court.

Inconvenience and Improbability of Result

Even if, contrary to the foregoing, the interpretation and effect of s 79(3)(a)(i) adopted by the Court in *Shinohara* is open, then before reaching that conclusion, principles of statutory construction require consideration of whether an alternative construction is reasonably open and more closely conforms to the legislative intent.

As earlier averted to by reference to the High Court's decision in *CIC Insurance,* "inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent…". The Explanatory Memorandum emphasises the

objectives of the 2025 amendments more generally to achieve fairness in various respects, including in the context of family violence and coercion and control.

One practical consequence of the interpretation adopted in *Shinohara* is that serious disadvantage is likely to be experienced by financially disadvantaged parties in s 79 (and s 90SM) proceedings (usually women) seeking to pursue relief. Why would a financially stronger party agree to interim partial property orders if there is the prospect of the amount or value not being brought fully to account because it has been expended and no longer exists as at trial? The Explanatory Memorandum accompanying the recent amendments refers variously to principles concerning fairness, safety and improving protections for people at risk of family violence. On the *Shinohara* approach, parties already at a financial disadvantage vis a vis the other party may be further disadvantaged in practice by reason of the amendments made to s 79.

In negotiations and often for the purposes of “levelling the playing field” in relation to the ability to pay legal costs of litigation, interim property settlement orders are agreed to. The party paying the lump sum to the other has, up until *Shinohara*, been comfortable in the knowledge that it is likely that the amount of that interim property settlement order will be added back onto the balance sheet against the party who has received it. There may well now be push back against agreeing to an interim property settlement order to fund legal costs in circumstances where *Shinohara* stands for the proposition that it may not be added back at full value but be considered in a more general way. Again, such an outcome is likely to adversely impact the party already at a financial disadvantage, and will disproportionately impact women (including on the basis acknowledged in the Explanatory Memorandum that "statistically women are more likely to experience family violence and systems abuse").

Paradoxical examples might arise with partial property settlements. Take an example where a party has received a partial property settlement. They have an option of putting the proceeds towards the acquisition of a new property or taking an expensive overseas trip to Europe. If the first option is taken the full value of the partial property settlement will be included on the balance sheet in the value of the new property when the Court identifies existing assets. If the money is expended on a European trip, then that money will not be added onto the balance sheet but will be taken into account in some non-mathematical way along with all other current and future considerations.

Or, a party may borrow $100,000 to pay for legal fees. On the *Shinohara* approach, the debt for legal fees is an existing liability and must be included, but the paid legal fees are not notionally added back to balance it out.

The Explanatory Memorandum and the Supplementary Explanatory Memorandum make explicitly clear that the new amendments are not intended to interfere with the case law in relation to the treatment of liabilities. However, if the logic of *Shinohara's* interpretation of s 79(3)(a)(i) is followed to its conclusion, that **only** existing assets can be placed on the balance sheet then **only** existing liabilities (s 79(3)(a)(ii)) can be placed on the balance sheet. That reasoning has potential implications in a number of areas relating to liabilities, capital gains tax being a prime example.

Shinohara raises the issue as to whether the first two limbs of the longstanding authority in *Rosati & Rosati* (1998) FLC 92-804 at paragraph 6.36 on the treatment of capital gains tax will need to be reconsidered. The first two of the four principles set out in that paragraph are:

(1) Whether the incidence of capital gains tax should be taken into account in valuing a particular asset varies according to the circumstances of the case, including the method of valuation applied to the particular asset, the likelihood or otherwise of that asset being realised in the foreseeable future, the circumstances of its acquisition and the evidence of the parties as to their intentions in relation to that asset.

(2) If the Court orders the sale of an asset, or is satisfied that a sale of it is inevitable, or would probably occur in the near future, or if the asset is one which was acquired solely as an investment and with a view to its ultimate sale for profit, then, generally, allowance should be made for any capital gains tax payable upon such a sale in determining the value of that asset for the purpose of the proceedings.

The liability to pay capital gains tax does not exist unless there is a disposition of an asset. The disposition of an asset from one party to another attracts rollover relief and in that case the liability to pay capital gains tax does not crystallise.

If there is to be a realisation of an asset in the foreseeable future or if the asset is an investment property which will ultimately be sold for profit, following the logic in *Shinohara* only existing liabilities can be added to the balance sheet. Arguably an asset in respect of which contracts for sale have not been exchanged as at the date of the hearing is not an asset in respect of which an **existing** capital gains tax liability has crystallised.

Whilst the factors in s 79(5) may permit the Court to adjust percentage outcomes, having regard to matters such as the manner in which liabilities were incurred and wastage, that is a wholly inadequate mechanism for producing the just and equitable outcomes in property orders that notional add-backs achieved when circumstances demanded it.

Conclusion

The directive to trial Judges in *Shinohara* against the use of notional add-backs imposes a gloss on the statute and impermissibly fetters their discretion. The correctness of the decision in *Shinohara* is clearly open to challenge, which might come in a number of forms. Given that arguably there are two conflicting Full Court decisions – *Shinohara* and *Trevi* – it may be open to trial Judges to maintain the methodology established by the jurisprudence over 30 years. The issues arising following *Shinohara* might also be remedied by a future appellate court (whether that be the High Court or a Full Court) or even a further clarifying legislative amendment emphasising that, to avoid doubt, there was no legislative intention to change existing case law by the s 79 reforms.