

**THE MEANING OF 'MARKET VALUE' IN AUSTRALIA'S *INCOME TAX ASSESSMENT ACT 1997***

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**ABSTRACT**

The article examines the use of the term 'market value' in certain sections of Australia's *Income Tax Assessment Act 1997*. It highlights the significant disparity which potentially arises between the hypothetical market context, which established legal principle suggests should be applied to market value determinations, and real-world market scenarios faced by taxpayers. As shown by the court and tribunal decisions examined in the article, inconsistency exists as to the extent to which market forces operating in the real world impact upon market value determinations. As a result, there is an absence of clear guidance from the courts and the Administrative Appeal Tribunal (AAT) on a key issue — how market factors faced by taxpayers in the actual market in which they engage should feed into the assumptions underlying the hypothetical market by which market value determinations are made. This is the source of significant uncertainty and confusion for taxpayers. The article sheds some light on this problem and suggests a possible solution.

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## I INTRODUCTION

This article examines the use of the term 'market value' in certain sections of Australia's *Income Tax Assessment Act 1997* (ITAA97). Although this term is used in a number of sections in the Act, the Act does not provide a sufficient definition of what the term actually means. The result is that interpretation of the term is open to dispute between the Australian Taxation Office (ATO) and taxpayers, leading to uncertainty in the enforcement of Australian taxation law.

The article focuses on the use of the term in the capital gains tax provisions (ss 110-25(2)(b) and 116-20(1)(b)), the trading stock provisions (ss 70-30 and 70-90) as well as in the application of the CGT small business relief concession in Division 152 (especially s 152-20(1)). It examines the guidance that might be obtained on the interpretation of the term from various court and Administrative Appeal Tribunal (AAT) decisions as well as from the ATO itself.

A number of questions arise. In determining 'market value', do we consider a seller's market or a buyer's market? Do we consider the group price which is set when a number of products are sold together or do we apply an individual product price? What about the retailer setting the price — do we take into account the price that might be offered by a new retailer entering the market or do we apply the price set by an established retailer? These are some of the questions which taxpayers have had to grapple with without clear guidance from the Act. This article attempts to shed some light on these questions.

In doing so, the analysis conducted in this article reveals that a significant disparity potentially arises between the hypothetical market context which established legal principle suggests should be applied to market value determinations and real-world market scenarios faced by taxpayers. As shown by the court and tribunal decisions examined in this article, inconsistency exists as to the extent to which market forces operating in the real world impact upon market value determinations. As a result, there is an absence of clear guidance from the courts and the AAT as to the way in which real-world market factors faced by taxpayers should be taken into account in the hypothetical market by which market value determinations are made. This is the source of significant uncertainty and confusion for taxpayers.

This article therefore argues for a clearer statement of principle from the courts and the AAT on the connection which should be made between the hypothetical market applied to market value determinations and the actual market faced by the taxpayer. The article also points out that, in order for the courts and the AAT to be in a position to do so, it may be necessary for statutory valuation principles to be incorporated into the ITAA97.

## II LEGISLATIVE CONTEXT

Section 110-25(2)(b) of the ITAA97 concerns the first element of cost base of a CGT asset and the way in which that element is determined when property instead of money is given in order to acquire the relevant asset. According to the section, one must work out the market value of that property at the time of acquisition.

Section 116-20(1)(b) concerns the determination of the capital proceeds received by a taxpayer for a CGT event when property instead of money is received. According to the section, one must work out the market value of that property at the time of the CGT event.

Both sections envisage that the relevant property that is given or received has a monetary value to be determined as if that property had been traded on a market applicable to that property at the time of acquisition or at the time of the CGT event. No guidance is given in the legislation as to the features of that market.

Section 70-30 triggers a notional transaction for the taxpayer when that taxpayer starts to hold as trading stock an item that the taxpayer already owns. Under this notional transaction, the taxpayer is treated as if, just before the item became trading stock, the taxpayer had sold the item to someone else (at arm's length) and immediately bought it back for its cost or market value (whichever the taxpayer elects). This monetary amount is normally a general deduction under s 8-1 as an outgoing in connection with acquiring trading stock. The amount is also taken into account in working out the item's cost for the purposes of s 70-45 (which concerns valuing trading stock at the end of the income year).

Section 70-90 specifies that, if a taxpayer disposes of an item of trading stock outside the ordinary course of business that the taxpayer is carrying on and of which the item is an asset, then the assessable income of the taxpayer includes the market value of the item on the day of disposal.

Once again, under the abovementioned trading stock provisions, it is envisaged that, at the time of holding the relevant item as trading stock or at the time of disposal, a monetary value for the item of trading stock is determined as if the item had been traded on a market. The characteristics of that market are not specified.

Finally, some mention should also be made of the application of the CGT small business relief concession in Division 152. Under s 152-10(1)(c)(ii), a capital gain which a taxpayer makes in respect of the occurrence of CGT event in relation to a CGT asset of the taxpayer, may be disregarded if the taxpayer satisfies the maximum net asset value test. By means of s 152-20(1), the sum of the market values of the assets of the taxpayer is taken into account when conducting the test. Despite the fact that the taxpayer does not actually dispose of or exchange any assets, the application of the test involves some consideration of the value the taxpayer would have received if the taxpayer's assets had been individually traded on a market.<sup>1</sup>

From the above discussion it can be seen that it is only in the case of the operation of s 70-90 that a possibility exists of a monetary price being received in connection with an actual sale. In determining whether that monetary price was at market value, the

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<sup>1</sup> Section 152-20(1) uses the words 'the sum of the market values of those assets'. Similar wording is also used in s 855-30(2) concerning the application of the 'TARP' test. The operation of s 855-30(2) was recently considered by the Federal Court in *Resource Capital Fund III LP v FCT* [2013] FCA 363. Edmonds J (at [94]-[97]) confirms the view that the test applies on an individual asset basis (and does not contemplate the value the taxpayer would have received if all of the taxpayer's assets had been traded together on a market on a going concern basis).

relevant enquiry will be to determine the extent to which the actual circumstances underlying the transaction conform to the hypothetical market context traditionally applied by the courts to determine market value. In particular, it will be necessary to determine whether the seller and buyer were willing, not anxious and properly informed arm's length parties.<sup>2</sup>

In the case of the operation of all the other sections mentioned above, no monetary price as such is received. Either property is exchanged for property (ss 110-25(2)(b) and 116-20(1)(b)) or the taxpayer maintains ownership of the relevant property and no actual exchange takes place (ss 70-30 and 152-20(1)). Nevertheless, despite the absence of some monetary price, the relevant sections call for an assessment to be made of that property's market value. As mentioned above, this presupposes that some assessment be made as to the monetary price that would have been received had the property been traded (notionally) on some form of market. The precise terms of the operation of that market are not specified. According to extensive case authority, in this instance, it may be useful to consider the price at which that asset or a comparable asset was sold either before or after the relevant date in an arm's length dealing. Unless there are exceptional circumstances, such a sale price will be a good indicator of market value in the hypothetical market place traditionally applied by the courts to determine market value.<sup>3</sup>

The next part of this article will examine the way the abovementioned 'gaps' in the legislation are filled in by the courts. In particular, it will examine the way the courts determine the general features of the hypothetical market in which the notional trades referred to above are considered to have occurred.

### III GENERAL PRINCIPLES

The relevant question to be asked in determining the market value of an asset is 'what would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?'<sup>4</sup> This was expanded on by Isaacs J, who stated that:

to arrive at the value of the land at that date, we have ... to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land and cognisant of all circumstances which might

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<sup>2</sup> Bernard Marks, 'Valuation Principles in the Income Tax Assessment Act' (1996) 8 *Bond Law Review* 114, 130.

<sup>3</sup> *Syttadel and Holdings Pty Ltd v Commissioner of Taxation* [2011] AATA 589; *McDonald v The Deputy Federal Commissioner of Land Tax (NSW)* (1915) 20 CLR 231, 238; *Cordelia Holdings Pty Ltd v Newkey Investments Pty Ltd* [2004] FCAFC 48, [128]; *Re Jack Woodhouse and Joyce Woodhouse v Secretary, Department of Social Security* [1987] AATA 73, [31]; *Psarreas v Secretary, Department of Families, Community Services and Indigenous Affairs and Anor* [2006] AATA 670, [27]; *Kirkovski v Secretary, Department of Family and Community Services* [2004] FCA 790, [8]; *Brockhoff v Secretary, Department of Family and Community Services* [2002] AATA 234, [26]; *Orica Ltd v Commissioner of Taxation* [2010] FCA 197.

<sup>4</sup> *Spencer v the Commonwealth of Australia* (1907) 5 CLR 418, 432.

affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood as then appearing to persons best capable of forming an opinion, of a rise or fall for what reasons so ever in the amount which one would otherwise be willing to fix as to the value of the property.<sup>5</sup>

It appears then that the hypothetical market context to be applied to the determination of market value involves a notional one-to-one transaction between a single buyer and a single seller. This principle is not only confirmed by *Spencer*. In the High Court case of *Abrahams v FCT* it was held that the applicable 'value' (for estate duty purposes) was 'the price which a willing but not anxious vendor could reasonably expect to obtain and a hypothetical willing but not anxious purchaser could reasonably expect to have to pay ... if the vendor and purchaser had got together and agreed on a price in friendly negotiation'.<sup>6</sup> In addition, in the High Court case of *Commissioner of State Revenue (Vic) v Pioneer Concrete (Vic) Pty Ltd* it was held that, in determining the applicable 'value' (for stamp duty purposes), 'there is no warrant, either in the language of the statute or in principle, for departing from the hypothetical inquiry as to the point at which a desirous purchaser and not unwilling vendor would come together'.<sup>7</sup> Similarly, in *Case 2/99* the AAT held that the best evidence of market value was what parties dealing at arm's length, at the conclusion of business negotiations, have themselves agreed upon.<sup>8</sup>

The value of the asset must be determined by considering its optimal value, where the asset is used for its 'highest and best use'. This principle has been confirmed in a number of case and tribunal decisions.<sup>9</sup>

The result of these considerations is that the actual sale price may not necessarily inform the market value of the asset where there is a disparity in the bargaining power of the buyer and seller, or where the asset is being valued considering a use other than its highest and best use.<sup>10</sup>

When there are buyers who are willing to pay more for an asset than its intrinsic value there is the issue as to how to deal with these special buyers. The value which they are willing to pay includes some 'special value' which is the additional value a purchaser is prepared to pay and may reflect many factors including economies of scale, reduction in competition, securing of a source of supply or outlet for products and additional value which is unique to the purchaser.<sup>11</sup>

How to deal with these purchasers in Australia is not entirely clear. One decision held that all possible purchasers be taken into account, even a purchaser prepared for his own reasons to pay a fancy price.<sup>12</sup> A question also arises as to whether the purchaser

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<sup>5</sup> Ibid 441.

<sup>6</sup> (1944) 70 CLR 23, 29 (Williams J).

<sup>7</sup> (2002) 209 CLR 651, 667.

<sup>8</sup> 99 ATC 108, 132.

<sup>9</sup> *Re Jack Woodhouse and Joyce Woodhouse v Secretary, Department of Social Security* [1987] AATA 73; *Marion Elizabeth Collis v Federal Commissioner of Taxation* 96 ATC 4831; *Hustlers Pty Ltd and Anor v The Valuer-General* (1967) 14 LGRA 269.

<sup>10</sup> This issue is explored in further detail below in Part V.

<sup>11</sup> Marks, above n 2, 135.

<sup>12</sup> *Brisbane Water County Council v Commr of Stamp Duties* (NSW) [1979] 1 NSWLR 320, 324.

who pursues the special market value would make a bid which reflects that complete value or whether he or she would bid just enough to outbid those interested purchasers for whom the asset had no special value. Marks points out that the 'one more bid' contention on the part of the special purchaser has been considered but rejected in both taxation and compulsory acquisition cases.<sup>13</sup>

These then are the key assumptions underlying the hypothetical market which is applied by courts to market value determinations. It is apparent, however, that these assumptions may have no grounding whatsoever in the actual real-world markets in which taxpayers operate. The question therefore arises — does the construction and application of this hypothetical market place allow for any input from the real world of the taxpayer?

It is submitted that the answer to this question is not entirely evident from the cases. Various principles have been stated in the cases, but these do not draw a clear picture of the connections to be made between actual markets and the market value hypothetical.

First, in *Commissioner of State Revenue (Vic) v Pioneer Concrete (Vic) Pty Ltd*<sup>14</sup> it was stated that 'it follows that the exercise required by par (B) is a determination of the amount for which such an estate might reasonably have been sold if it had been sold, free from encumbrances, in the open market on the date of the sale'. The High Court did not, however, provide an explanation as to the features of this 'open market' and its connection to the actual market that would ordinarily be faced by the taxpayer. Similarly, in *Brisbane Water County Council v Commissioner of Stamp Duties (NSW)* it was held that market value is 'the best price which may reasonably be obtained for the property to be valued if sold in the general market'.<sup>15</sup> These comments suggest that we are called upon to apply a wide and general market rather than a specialised market in which the best possible price might be limited. While this helps to shed further light on the circumstances applying on the demand side of the market, the supply side of the market is left unclear. Are we entitled to consider the possibility of a number of sellers in the market chasing a few purchasers?

Case authority in fact suggests that the demand side of the market will be consistent with real-world demand. This understanding is supported by the UK case of *Estate of Lady Fox v IR Commrs* [1994] STC 360, where Hoffman LJ held that, while the hypothetical seller was anonymous the 'hypothetical buyer is slightly less anonymous' and that he 'reflects reality in that he embodies whatever was actually the demand for that property at the relevant time'.<sup>16</sup> This understanding has not been consistently applied in Australian cases.<sup>17</sup>

The understanding that we consider the 'open' or 'general' market when determining market value and that we do not consider the operation of a specialised market in which a taxpayer might trade does not have application in all circumstances. The terms of a particular legislative provision may in fact require that we refer to a specialised market

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<sup>13</sup> Marks, above n 2, 158.

<sup>14</sup> (2002) 209 CLR 651, 667.

<sup>15</sup> [1979] 1 NSWLR 320, 324.

<sup>16</sup> [1994] STC 360, 372.

<sup>17</sup> As shown in the discussion in Part V.

when determining market value. This appears to be the case when interpreting trading stock provisions. There is a line of case authority which suggests that when dealing with the valuation of stock, we look to the actual market that would ordinarily be engaged by the taxpayer for guidance. For instance, in *Australasian Jam Co Pty Ltd v FCT* it was held by Fullagar J of the High Court<sup>18</sup> that

it is not to be supposed that the expression 'market selling value' contemplates a sale on the most disadvantageous terms conceivable. It contemplates, in my opinion, a sale or sales in the ordinary course of the company's business — such sales as are in fact effected. Such expressions in such provisions must be interpreted in a commonsense way with due regard to business realities, and it may well be — it is not necessary to decide the point — that, in arriving at market selling value, it is legitimate to make allowance for the fact that normal selling will take place over a period.

Similarly, in *BSC Footwear Ltd v Ridgway* the House of Lords held that 'market value' means the price at which the stock could be expected to be sold in the market in which the trader sold; in the case of a retail trade that market must be the retail market.<sup>19</sup>

The valuation of stock and the connections which apply between the hypothetical market and the taxpayer's actual market were also considered by the AAT in the case of *NT1997/305 v Commissioner of Taxation*.<sup>20</sup> Senior Member Block conducted an examination of relevant authorities including the cases of *Inland Revenue NZ v Edge* (1956) 11 ATD 91, *Case J43 9 T.B.R.D.* (Commonwealth Taxation Board of Review No. 1), and *Charrington & Co Ltd v Wooder* (1914) AC 71. Based on these authorities, Senior Member Block applied two key principles to the market value determination.<sup>21</sup> Firstly, the appropriate market was the market in which the goods would normally be sold. Secondly, market value was to be determined in the light of the circumstances under which a particular sale takes place.

While this line of authority may require a distinction to be drawn in certain circumstances between the open/general market and the particular market engaged by the taxpayer, there is a lack of clarity, however, as to the next step to be made after considering this particular market. Are we somehow called upon to 'graft' onto that market the various hypothetical assumptions mentioned in *Spencer* and to make a theoretical market value determination? The cases suggest that real-world market factors do have a role to play in the hypothetical market exercise conducted by the courts when determining market value. While this role is asserted in general terms, the precise nature of the role is left unclear.<sup>22</sup>

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<sup>18</sup> (1953) 88 CLR 23, 31.

<sup>19</sup> [1972] AC 544, 545.

<sup>20</sup> [1999] AATA 130.

<sup>21</sup> *Ibid* [21]-[22].

<sup>22</sup> Waddell J of the NSW Supreme Court put forward his own view in *Brisbane Water County Council* as to how the line of authority concerning market value determination in a particular market might be reconciled with that authority concerning market value determination in a general market. At p 326 of his judgment, Waddell J draws a distinction between price and value. In his view, the particular market authorities concern the determination of market price in a particular market for the purposes of a legislative provision. This is to be distinguished from determinations of 'value' which 'points to something inherent in the item in question, rather than to the price at which it might change hands in particular circumstances. It may be more difficult to read 'market value' as meaning value in a particular market.'

This view is also supported by comments made in the Explanatory Memorandum to the *New Business Tax System (Consolidation, Value Shifting, Demergers and Other Measures) Bill 2002*. In paragraph 10.77 of that Memorandum it is pointed out that, in working out market value, the courts will make appropriate assumptions about the market in question. These assumptions can be affected by the actual transaction under consideration. For example a large volume of goods sold could be expected to attract a discount. Each item would have a lower market value in such a situation than if it had been sold alone. Apart from this example, however, the Memorandum does not provide much detail on how circumstances underlying actual transactions under consideration will impact upon the hypothetical market assumptions.

We therefore have limited guidance from Parliament, the courts and the AAT as to how real-world market factors impacting on taxpayers feed into the hypothetical market assumptions which underlie market value determinations. This understanding becomes particularly apparent when Australian case authority is examined in the context of certain specific real-world market scenarios.

The final point to be made in this part of the article concerns the jurisprudential origins and applications of the abovementioned general principles concerning the determination of market value. The *Spencer* case concerned the compulsory acquisition of property by government. The test in *Spencer* has also been applied in cases of state probate and succession duty, federal estate duty, land tax, and has long since been assumed to apply to the valuation of property for state stamp duties.<sup>23</sup> It has also been applied in cases concerning the application of assets tests in the context of social security and pension entitlements.<sup>24</sup> The courts have consequently intermixed valuation precedents from a variety of statutes into a single body of valuation jurisprudence, regardless of whether the relevant term has been 'value' or whether it has been qualified by the terms 'market', 'fair market' or 'open market'.<sup>25</sup> Principles derived from statutory interpretation conducted by the courts of a number of different statutes have all been stirred together in the same pot. Given, however, the confusion which this situation has generated for taxpayers, it may be necessary for clear and separate statutory valuation principles to be incorporated into the ITAA97.

#### IV VIEW OF THE AUSTRALIAN TAXATION OFFICE

The ATO's website provides a guide to taxpayers and their advisers (including valuers) on the processes to be followed when establishing market value for taxation purposes.<sup>26</sup>

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<sup>23</sup> Marks, above n 2, 121.

<sup>24</sup> *Re Jack Woodhouse and Joyce Woodhouse v Secretary Department of Social Security* [1987] AATA 73; *Brockhoff v Secretary, Department of Family and Community Services* [2002] AATA 234; *Kirkovsky v Secretary Department of Family and Community Services* [2004] FCA 790; *Psarreas v Secretary Department of Families, Community Services and Indigenous Affairs and Anor* [2006] AATA 670; *Evans v Secretary Department of Social Security* [1993] AATA 497; *Blaszczyk v Secretary Department of Family and Community Services* [2005] AATA 1224.

<sup>25</sup> Marks, above n 2, 118.

<sup>26</sup> Australian Taxation Office *Market Valuation for Tax Purposes* (23 June 2014) <<http://www.ato.gov.au/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Market-valuation-for-tax-purposes/>>.



The ATO's market valuation guidelines are also discussed by Churchill and Sammut.<sup>27</sup> This part of the discussion will briefly examine the relationship between the ATO guidelines and the general principles discussed in Part III above, and identify those particular approaches of the ATO which relate to key issues and themes considered further in parts V and VII below.

Under the heading 'What "market value" means', the ATO emphasises that the meaning of the term 'will depend on its statutory context' and that 'in each instance you need to take into account the context in which the term is used, and pay particular attention to its definition and any specific requirements in that context.' Although this approach to the interpretation of 'market value' where used in the ITAA97 is strictly correct, it ignores the point made in Part III above that, in reality, the courts have intermixed valuation precedents from a variety of statutes into a single body of valuation jurisprudence.

Under the same heading, the ATO then proceeds to state that 'business valuers in Australia typically define market value as the price that would be negotiated in an open and unrestricted market between a knowledgeable, willing but not anxious buyer and a knowledgeable, willing but not anxious seller acting at arm's length.' Reference is also made to the way 'value' is described in the International Valuation Standards. While these comments are helpful, the ATO fails to clarify why the approach taken by valuers to the interpretation of market value is relevant to the statutory interpretation exercise which needs to be conducted in the context of the ITAA97. To what extent are the understandings of the valuers which the ATO refers to grounded in Australian judicial interpretation of the ITAA97? Are these standards perhaps being developed and applied by representative professional bodies to which valuers belong in a manner which does not precisely reflect and adapt to developments in established Australian legal principle?<sup>28</sup>

Under the heading 'Judicial Interpretation', the ATO quotes the same judgment extracts from *Spencer* as are referred to in Part III above. From *Spencer*, the ATO in fact derives the following general principles concerning the interpretation of market value:

- the willing but not anxious vendor and purchaser;
- a hypothetical market;
- the parties being fully informed of the advantages and disadvantages associated with the asset being valued (in the specific case, land); and
- both parties being aware of current market conditions.

The last bullet point mentioned above requires further examination. It was shown in Part III that case law suggests that the demand side of the hypothetical market will be consistent with real-world demand. The supply side of the market is left unclear. The ATO appears to be of the view, however, that both should reflect real-world

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<sup>27</sup> Michael Churchill and Kalem Sammut, 'ATO market valuation guidelines: risky business' *Taxation in Australia* November 2013, 272.

<sup>28</sup> This issue is explored in more detail in Part VII.

circumstances and that both assumed actors in the hypothetical market by which market value is determined should be treated as being aware of these current circumstances. The precise basis on which this understanding is extracted from *Spencer* is not made clear by the ATO. In addition, as was mentioned in Part III, the understanding that the hypothetical buyer embodies current real-world demand has not been consistently applied in Australian cases.

The ATO's market valuation guidelines, as published on the ATO's website, also provide specific guidance on the processes which should be adopted when determining market value in the hypothetical market. One of the key processes highlighted by the ATO is based on the understanding that the assumed actors in the hypothetical market should be transacting on the basis of the relevant asset's 'highest and best use'. Under the heading 'Highest and best use' the ATO points out that:

you should assess market value at the 'highest and best use' of the asset as recognised in the market. The concept of 'highest and best use' takes into account any potential for a use that is higher than the current use. The current use of an asset may not reflect its optimal value. Optimal value is defined by the IVSC as: ...the most probable use of a property which is physically possible, appropriately justified, legally permissible, financially feasible, and which results in the highest value of the property being valued.

Consideration of an asset's 'highest and best use' raises an important question. Given that, in determining market value, we are to conduct a hypothetical transaction between assumed market actors with knowledge of the relevant asset's 'highest and best use', what is the relationship that should apply between that use and real-world market forces? Must there be actual demand for the highest and best use in the real world in order for it to be reflected in market value? Or is this a mere theoretical demand which underpins the abovementioned hypothetical transaction? The extract from the ATO's website quoted above mentions that the highest and best use must be 'as recognised in the market'. This suggests that, in the ATO's view, the demand for highest and best use is not merely theoretical but that it must be backed up by actual demand for this use in the relevant real-world market. There is, however, contradictory case authority on this issue.<sup>29</sup>

Another procedural matter concerns the effect which the existence of 'special value' for a market participant should have on the determination of market value. According to the ATO's website, under the heading 'Special Value':

It is sometimes argued that an asset has special value to a particular buyer. Usually this is not relevant in deriving market value. Where there is clear evidence that the special value is known or available to the wider market, this would be reflected in an objective valuation of the asset. However, even where the seller knows that you value the item in a special way, this usually only means that the item will sell (and the market value will be) at the higher end of the usual market value range. On the other hand, if two or more hypothetical purchasers were assumed to exist, both having a special use for the item, the special value may be reflected in the market value.

The general principles applying to the determination of market value when a special purchaser is active in the relevant market were considered in Part III above. The

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<sup>29</sup> As shown in Part V below.

abovementioned views of the ATO appear to be an acceptance of the 'one more bid' approach, namely, that the presence of the special purchaser in the market should not have a significant upward influence on the determination of market value because, rather than making a bid which fully reflects the special value, all that the special purchaser would do is to bid just enough to outbid those interested purchasers for whom the asset had no special value. It was shown in Part III that this understanding has been rejected by case authority. Even if one special-value buyer is assumed to exist in the hypothetical market, the seller would hold out and would not sell to that buyer until an offer was made which reflected the special value.<sup>30</sup>

A further procedural matter concerns the determination of market value at times where there are major fluctuations in equity markets or the economy. On its website, under the heading 'Prospective Market Value', the ATO points out that, because of the effect of economic fluctuations and other market changes, it does not rule prospectively on market value if there is no reliable method for approximating the market value at the future time. The commentary under this heading in fact makes clear that the ATO makes a determination after the event giving rise to the market value has occurred. The commentary suggests that this post-event determination will take into account the effect of any underlying economic fluctuations. This approach, however, potentially conflicts with case authority suggesting that market value determinations are to be made on the basis of a stable market in which major economic fluctuations in the economy are ignored.<sup>31</sup>

A final point to be made in this part of the discussion concerns the comments made by the ATO on its website under the heading 'Who may undertake a market valuation?' According to the ATO, 'except for the most straightforward valuation processes, valuations undertaken by persons experienced in their field of valuation would be expected to provide more reliable values than those provided by non-experts.' This comment clearly places the onus on the taxpayer to utilise the services of experienced valuation experts when making market value submissions — a process that imposes significant administrative cost on the taxpayer. This administrative cost is further exacerbated by the fact that in court and tribunal proceedings examining market value determinations, it is the taxpayer who carries the burden of proving the unreliability of the Commissioner's valuation.<sup>32</sup>

## V SCENARIOS FOR CONSIDERATION

The next part of this article will examine the likely determinations of market value to be made when the real-world market in which the taxpayer operates is characterised by certain specific scenarios.

The first scenario is that of a 'buyer's market'. Such a market would exist when there are many sellers willing to sell the property but few willing buyers. Should this real-world feature of the market be allowed to impact upon the determination of market value?

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<sup>30</sup> Refer to discussion of *Re Jack Woodhouse and Joyce Woodhouse v Secretary, Department of Social Security* [1987] AATA 73 in Part V below.

<sup>31</sup> Discussed in Part V below.

<sup>32</sup> This issue is explored in more detail in Part VII below.

The second scenario is similar to the first but considers the reverse side of the coin — a ‘seller’s market’. This would be one where there are few sellers willing to sell but many willing buyers. Does the concept of ‘market value’, as applied by the courts and the AAT, take into account this supply/demand equation?

The third scenario considers the question of how market value is to be determined when in the real world applicable to the taxpayer the relevant property is ordinarily traded on a ‘group discount’ basis. Do we apply the discounted group price in determining market value or do we set an individual product price which does not take into account the volume discount?

The fourth scenario examines the final question raised in the introduction to this article — should the identity of the seller (whether an established market player or new seller keen to enter a market) be allowed to impact upon the market value determination?

### ***A Scenarios 1 and 2 — Buyer’s Market/Seller’s Market***

Ordinarily, the market price of an item reflects the price point at which demand meets supply. Therefore, one would expect a higher market value to apply in a seller’s market and a lower market value to apply in a buyer’s market.

There is, however, conflicting authority on the question of whether effect should be given to the interplay of real-world market supply and demand forces when determining market value.

On the one hand, Isaacs J’s comment in *Spencer* refers to the ‘then present demand for land’.<sup>33</sup> This implicitly suggests that the contemporaneous state of demand at the time of valuation should be taken into consideration when determining market value. This view is also supported by the *Estate of Lady Fox* case. In addition, cases such as *BSC Footwear, Edge* and *NT1997/305* all suggest that (especially in the case of trading stock valuations) market value is to be determined in light of the particular circumstances under which a particular sale takes place. On the basis of these authorities one could conclude that if the normal market in which the taxpayer would trade the relevant asset is affected by market factors such as those pertaining to a buyer’s market or to a seller’s market, then these factors are to be given effect in the market value determination.

On the other hand, it would appear that these understandings were not applied by the AAT in the case of *BHP Australia Coal v Federal Commissioner of Taxation*.<sup>34</sup> In that case, the AAT was required to determine the market value of the housing fringe benefits provided by the taxpayer to its employees. The taxpayer provided housing for its mining workers in a variety of towns, including that of Emerald. The AAT agreed with the taxpayer that in Emerald, normal demand conditions for housing did not exist as a result of the electrification of the railway and the construction of the TAFE College. Accordingly, the AAT found that, due to these factors, rental market demand in Emerald was temporary inflated and consequently disregarded market prices when determining

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<sup>33</sup> (1907) 5 CLR 418, 441.

<sup>34</sup> [1993] AATA 156.

the market value of the housing fringe benefit.<sup>35</sup> Figures from markets where normal supply and demand conditions were in operation were applied.<sup>36</sup>

This approach was also followed in the AAT decision of *Marion Elizabeth Collis v Federal Commissioner of Taxation*.<sup>37</sup> In that case it was suggested that where anxious prospective purchasers are in heated competition, leading to an inflated result, this should be disregarded when determining market value of the relevant asset. Compelling evidence of the existence of such a situation, however, is required.<sup>38</sup>

It would appear then that there is no clear direction from the courts/AAT as to the weight to be given to the contemporaneous state of demand and supply for a particular asset when determining its market value. It is submitted, however, that there may be a way in which the abovementioned apparently conflicting decisions might be reconciled. This becomes apparent when one considers the NSW Court of Appeal decision in *MMAL Rentals v Bernard John Bruning*.<sup>39</sup>

It was mentioned in Part III above that the valuation jurisprudence applying to the interpretation of market value in the ITAA is derived from a variety of statutory contexts where differences in wording such as 'market value' and 'fair market value' have been glossed over. In *MMAL Rentals*, however, the NSW Court of Appeal drew a distinction between the concepts of 'market value' and 'fair market value'. That case concerned the interpretation of a contract under which the majority shareholder in a car rental business could exercise a right in certain circumstances to purchase the shares of the minority shareholder for 'fair market value'. In making this distinction, the court implicitly acknowledged that 'market value' may reflect the effect of certain market factors such as whether a particular asset is thinly traded or the effect of market distortions, while such factors would not be taken into account when determining 'fair market value'.<sup>40</sup> Accordingly, the case suggests that while the operation of a buyer's market or seller's market should be taken into account when determining 'market value', such factors should perhaps be ignored in the determination of 'fair market value'. On the basis of this approach, one could perhaps argue that the AAT's thinking in *BHP Australia Coal Limited* and in *Collis* reflected a 'fair market value' interpretation rather than a 'market value' interpretation.

A qualification needs to be made, however, to the understanding that existing market demand and supply forces should be given effect in determining 'market value'. What if all buyers are not aware of the asset's highest and best use and consequently, the price set in the market place does not reflect the asset's optimal value? Would a court intervene in this instance to set a value which reflects a hypothetical market whereby all buyers are fully informed? The High Court case of *Marks and Others v GIO Australia Holdings Limited and Others* suggests that a court should intervene in this way.<sup>41</sup>

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<sup>35</sup> Ibid [25].

<sup>36</sup> Ibid [28].

<sup>37</sup> 96 ATC 4831.

<sup>38</sup> Ibid 4843.

<sup>39</sup> [2004] NSWCA 451. This case was also considered and applied by the Victorian Court of Appeal in *Toll (FHL) Pty Ltd v PrixCar Services Pty Ltd* [2007] VSCA 285.

<sup>40</sup> Ibid [57]–[58].

<sup>41</sup> (1998) 196 CLR 494, 514 (McHugh, Hayne and Callinan JJ).

This is also confirmed by the AAT decision in *Re Jack Woodhouse and Joyce Woodhouse v Secretary, Department of Social Security*.<sup>42</sup> That case concerned the value to be placed on land held by aged pensioners for the purposes of the application of the assets test under the Social Security Act 1947. The pensioners had in fact gone 'to market' and had attempted to sell the land by public auction. They refused to sell the land, however, as they did not receive an offer which was anywhere near the valuation which the government<sup>43</sup> had placed on their land for the purpose of the assets test. Various offers and bids were made but the AAT found that the highest of these did not represent the 'market value' of the land.<sup>44</sup>

So what did the AAT find was the market value of the land? In setting the market value, the AAT relied on the theoretical market constructed by the ATO's valuation expert. That theoretical market was based on the ATO's understanding of the highest and best use of the land (a multi-dwelling development) and the existence of a willing but not anxious seller who is not forced to sell but who can hold on and negotiate with an interested buyer so that buyer in fact ends up making an offer which approaches the value reflected by the highest and best use of the land. The AAT in fact ignored the outcome suggested by actual demand forces operating in the relevant real estate market at the time and instead applied a theoretical demand (based on an understanding of the highest and best use) to set the market value, irrespective of whether that theoretical demand bore any connection with actual demand.<sup>45</sup> The AAT further concluded that demand is not required in order to determine a market value.<sup>46</sup>

This conclusion, however, is contradicted by the Federal Court decision in *Marion Elizabeth Collis v Federal Commissioner of Taxation*.<sup>47</sup> In that case, two adjacent blocks of land were sold by the taxpayer to the same purchaser under two separate contracts. A question arose as to whether the price set for one of the blocks of land reflected an arm's length transaction, and the Commissioner applied the former s 26AAA ITAA36. The Federal Court found that a consideration of the block's highest and best use would take into account the special development potentialities that would come into play if the block was amalgamated with the adjacent block. The Federal Court further found that in applying such a consideration to the determination of the block's market value, there had to be evidence of the existence of demand for such a use in that area at that time.<sup>48</sup> In affirming this principle, the court applied the case of *Hustlers Pty Ltd and Anor v The Valuer-General* (1967) 14 LGRA 269 where it was held that there needed to be actual demand in existence for an asset's special potentialities, if such potentialities were to be taken into account in determining the asset's market value.<sup>49</sup>

There is thus a contradiction in the case authorities as to the necessary connection to be made between real-world market demand and the theoretical demand for highest and

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<sup>42</sup> [1987] AATA 73.

<sup>43</sup> It is interesting to note that in this case the Department of Social Security submitted valuation evidence utilising the services of an ATO valuer.

<sup>44</sup> *Re Jack Woodhouse and Joyce Woodhouse v Secretary, Department of Social Security* [1987] AATA 73 [33].

<sup>45</sup> *Ibid* [23].

<sup>46</sup> *Ibid* [32].

<sup>47</sup> 96 ATC 4831.

<sup>48</sup> *Ibid* 4832.

<sup>49</sup> *Ibid* 4841.

best use to be applied when determining market value. Given that *Collis* is a Federal Court decision, it would override the conclusion drawn by the AAT in *Woodhouse*.

### **B Scenario 3 — Group Price/Individual Product Price**

There are conflicting views on how market value is determined when the seller has the option of trading the relevant property on a group basis.

According to Marks, 'the hypothetical market place assumes that the particular asset will be sold in the best possible way, that is, to obtain the best price for the seller. Thus two or more items may be sold either together or separately to ensure the best price.'<sup>50</sup> If the group sale does not secure the best price for the individual item, then in Marks' view the item's market value will not reflect the group discount price.<sup>51</sup>

This understanding is contradicted by the Explanatory Memorandum to the *New Business Tax System (Consolidation, Value Shifting, Demergers and Other Measures) Bill 2002*. In paragraph 10.77 of that Memorandum it is stated that the assumptions made by a court when determining market value would be affected by the actual transaction under consideration. Accordingly, a large volume of goods sold could be expected to attract a discount. Each item would have a lower market value in such a situation than if it had been sold alone. This view is also supported by the AAT case of *NT 1997/305*.

### **C Scenario 4 — Identity of Seller — New Entrant or Established Participant?**

Where one of the market participants is willing to lower the price of the item it is selling into the market in order to increase its market share, that participant should be regarded as a 'special value' participant and the comments made in Part III above concerning the determination of market value in markets involving such participants would apply. If we follow the approach suggested by *Brisbane Water County Council* and include the special-value participant in the hypothetical market, this would lead to a lower market value determination in that context.

## **VI RELEVANCE OF OFFERS**

Another feature of real-world markets is the making of offers by interested parties to owners where the offers do not necessarily lead to an actual sale. Should such offers be accepted as an indication of market value? This question is particularly relevant to the interpretation of market value in those provisions where the taxpayer maintains ownership of the relevant property and there is no actual exchange or trade involving the property (s 70-30 and Division 152 ITAA97).

From 1915, there was clear authority from the High Court that offers are not to be taken into consideration when assessing market value.<sup>52</sup> Given the absence of a concluded transaction, there is no basis upon which to find that the offered price is in fact the

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<sup>50</sup> Marks, above n 2, 125.

<sup>51</sup> Ibid.

<sup>52</sup> *McDonald v The Deputy Federal Commissioner of Land Tax (NSW)* (1915) 20 CLR 231, 238.

market price. This principle has in fact been upheld in a number of court and tribunal decisions.<sup>53</sup>

At the same time, there are court and tribunal decisions which, without referring to *McDonald*, have given considerable weight to evidence of offers.<sup>54</sup>

The *McDonald* decision was examined by Wilcox J in *Goold & Rootsey v The Commonwealth*.<sup>55</sup> In his judgment, Wilcox J points out that the abovementioned principle from *McDonald* is derived from obiter comments made by Isaacs J and that Isaacs J should not be understood to have intended to exclude all offer evidence in all cases.<sup>56</sup> According to Wilcox J:

But it seems to me that, once the court is satisfied about genuineness, an offer made by an arms-length party to purchase the land under valuation is something that the judicial valuer ought to take into account in considering the possibility of a sale at a price different from that indicated by conventional evidence, such as an analysis of comparable sales, or of a hypothetical development, or a calculation of the capitalised value of the rental return. How much weight should be given to such an offer is a question to be determined by reference to the facts of the particular case. In some cases, the appropriate weight may be minimal; in others considerable.<sup>57</sup>

Wilcox J's reasoning was considered and supported by the Court of Appeal of New South Wales in *MMAL Rentals*.<sup>58</sup> In that case the court also indicated that it was not entirely convinced by the interpretation of the Full Court of the Federal Court in *McDonald* in *Cordelia Holdings*.<sup>59</sup>

From the above examination of case authority, it can be seen that we do not have clear guidance as to whether offers are relevant indicators of market value.

## VII PROCEDURAL FACTORS

A further point to be made concerns the underlying evidentiary process adopted in the court and tribunal decisions. The onus is on the taxpayer to prove that the Commissioner's valuation is incorrect. Failure to submit sufficient evidence as to the unreliability of the Commissioner's valuation will ensure that the taxpayer would not have discharged the burden of proof.<sup>60</sup> Any technical flaws in the taxpayer's valuation

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<sup>53</sup> *Cordelia Holdings Pty Ltd v Newkey Investments Pty Ltd* [2004] FCAFC 48, [128]; *Re Jack Woodhouse and Joyce Woodhouse v Secretary, Department of Social Security* [1987] AATA 73, [31]; *Syttadel and Holdings Pty Ltd v Commissioner of Taxation* [2011] AATA 589.

<sup>54</sup> *Venturi v Commissioner of Taxation* [2011] AATA 588, [72]; *Marion Elizabeth Collis v Federal Commissioner of Taxation* [1996] FCA 1717, [18] citing *Hustlers Pty Ltd and Anor v The Valuer-General* (1967) 14 LGRA 269, 274-278.

<sup>55</sup> [1993] FCA 157, [28]-[32].

<sup>56</sup> *Ibid* [32].

<sup>57</sup> *Ibid* [30].

<sup>58</sup> [2004] NSWCA 451, [86]-[87].

<sup>59</sup> *Ibid* [95].

<sup>60</sup> *Brockhoff v Secretary, Department of Family and Community Services* [2002] AATA 234, [23]-[25].



(such as lack of valuation experience on the part of the taxpayer's valuer,<sup>61</sup> or accounting errors)<sup>62</sup> will often lead to a finding for the Commissioner by default. As a result, there is little analysis in the decisions as to the appropriate principles that taxpayers should adopt when conducting their valuations and especially on the question of the relationship between real-world market factors and the assumptions underlying the hypothetical market.

The significant reliance on evidence given by expert valuers raises a further issue which is relevant to the development of valuation principle by the courts and the AAT. Expert valuers belong to professional bodies which have developed their own valuation standards and especially their own interpretation of how 'market value' determinations should be made.<sup>63</sup> While these standards provide a more detailed explanation of the market value concept and how it is to be applied, the relationship between these standards and applicable Australian case authority is not entirely clear. It appears that we may have a situation where, rather than the standards adapting to developments in established Australian legal principle, the AAT may be simply confirming the views of the expert valuer who, on the day, is most convincing in applying the separate standards developed by his or her own professional body.<sup>64</sup>

### VIII CLEARER STATEMENT OF PRINCIPLE

Before proceeding to consider a possible solution to the problems in the way 'market value' is interpreted and applied in the context of the ITAA97, it would be helpful to briefly recap and summarise the key inconsistencies in the decisions of the courts and the AAT which this article has highlighted and which reinforce the need for a clearer statement of principle from the courts and the AAT.

First, in Part III above (General Principles) it was pointed out that we refer to the 'open' or 'general' market when determining market value (unless the terms of a particular legislative provision direct us to refer to a specialised market) and that the demand side of that market should reflect real-world demand. However, it was shown in Part V(A) (Scenarios for Consideration — Buyer's Market/Seller's Market) that this understanding was not applied by the AAT in *BHP Australia Coal* and in *Collis*, with the result that there is an absence of clear direction from the courts/AAT as to the weight to be given to the contemporaneous state of demand and supply for a particular asset when determining

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<sup>61</sup> *Psarreas v Secretary, Department of Families, Community Services and Indigenous Affairs and Anor* [2006] AATA 670, [32]; *BHP Australia Coal Limited v Federal Commissioner of Taxation* [1993] AATA 156, [28].

<sup>62</sup> *Ciprian and Ors v Commissioner of Taxation* [2002] AATA 746, [17].

<sup>63</sup> See for instance The International Valuation Standards which have been developed by The International Valuation Standards Council and which are applied by the Australian Property Institute and the Property Institute of New Zealand (2007) <[http://propertystandards.propertyinstitute-wa.com/documents/InternationalValuationStandards-4\\_000.pdf](http://propertystandards.propertyinstitute-wa.com/documents/InternationalValuationStandards-4_000.pdf)>. Please note that the website reference is based on IVS 2007, which has since been superseded by IVS 2013.

<sup>64</sup> See for instance the recommendation made in paragraph 7.2 of APES 225 by the Accounting Professional and Ethical Standards Board to members involved in the provision of valuation services. Churchill and Sammut (above n 27, 272) also refer to the guidance which various professional bodies have issued on aspects of the valuation process.

its market value. On this point it was further suggested that the courts/AAT should clarify whether it is only when a concept of 'fair market value' is applied (as distinct from 'market value') that normal demand and supply conditions are to be assumed and that real-world, contemporaneous market conditions are to be ignored.

Secondly, in Part V(A) (Scenarios for Consideration — Buyer's Market/Seller's Market) it was shown, through an analysis of *Marks*, *Woodhouse*, *Collis* and *Hustlers* that there is a contradiction in the case authorities as to the necessary connection to be made between real-world market demand and the theoretical demand for 'highest and best use' when determining market value. On the one hand, *Marks* and *Woodhouse* suggest that market value should reflect an asset's highest and best use even though no actual buyer in the market may be pursuing that use. *Collis* and *Hustlers*, however, suggest that there needs to be actual demand in existence for an asset's special potentialities, if such potentialities are to be taken into account in determining that asset's market value. Again, this inconsistency requires clearer resolution by the courts/AAT.

Finally, in Part VI (Relevance of Offers) it was shown through an analysis of various court and tribunal decisions that further clarification is required of the weight to be given to offers by interested parties to owners which do not necessarily lead to an actual sale. This issue is of particular relevance to the interpretation of market value in provisions such as s 70-30 and Division 152 ITAA97, where the taxpayer maintains ownership of the relevant asset and there is no actual exchange or trade involving that asset.

## **IX INCORPORATION OF STATUTORY VALUATION PRINCIPLES INTO THE ITAA97 — THE WAY FORWARD?**

In light of this article's call for a clearer statement of principle from the courts/AAT, a key question arises: given the varied contextual origins and applications of valuation jurisprudence, can we rely on the courts and the AAT to continue to develop this jurisprudence in a way which will provide, for the purposes of the ITAA97, a clearer statement of principle which will resolve the inconsistencies highlighted by this article?

Taxation and rating statutes in Australia, the United Kingdom, the British Commonwealth and the United States have traditionally provided the barest of valuation criteria and legislators have consequently relied on judicial common sense for establishing valuation rules.<sup>65</sup> However, administrators in the United States have taken this one step further and have actually codified judicially developed taxation rules into regulations.<sup>66</sup> Would application of this approach in Australia help to resolve the problems this article has highlighted? It is the author's view that incorporation of statutory valuation principles into the ITAA97 is a possible solution which would be of assistance to taxpayers and which would help to reduce the administrative cost imposed by the current regime. In particular, Australia should expressly address four matters:

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<sup>65</sup> Marks, above n 2, 115.

<sup>66</sup> Ibid.

- the question of how real-world market factors should impact upon market value determinations and the distinction to be made between 'market value' and 'fair market value';
- the effect that should be given to market demand and supply forces;
- the influence on market outcomes of particular market participants; and
- the weight to be given to unaccepted offers made to sellers by interested parties.

The valuation standards developed by professional bodies can play a helpful role in this exercise. For instance, it is worthwhile examining the guidance given by the International Valuation Standards Council (IVSC) on some of the issues mentioned above. In its International Valuation Standards 2013,<sup>67</sup> the IVSC defines 'Market Value' as:

The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had acted knowledgeably, prudently and without compulsion

Useful definitions are also provided for the terms 'Special Purchaser' and 'Special Value'.

A section at the beginning of the standards is dedicated to a discussion of the 'IVS Framework'. The discussion here makes clear the nature of the hypothetical exercise which underlies the determination of market value. According to the IVSC, 'value is not a fact but an opinion of either: (a) the most probable price to be paid for an asset in an exchange, or (b) the economic benefits of owning an asset' and that 'a value in exchange is a hypothetical price and the hypothesis on which the value is estimated is determined by the purpose of the valuation' (para 8).

In the discussion under Part III above, reference was made to the distinction drawn between price and value by Waddell J of the Supreme Court of New South Wales in *Brisbane Water County Council*. A similar distinction is in fact also drawn by the IVSC. According to the IVSC, 'price is the amount asked, offered or paid for an asset. Because of the financial capabilities, motivations or special interests of a given buyer or seller, the price paid may be different from the value which might be ascribed to the asset by others.'<sup>68</sup>

Having supported the distinction between price and value and having clarified the hypothetical nature of the valuation determination, the IVSC then proceeds to clarify the way the real world feeds into this determination. Contrary to the position taken in *BHP Australia Coal* and in *Collis*, the IVSC does not support an approach whereby normal demand and supply conditions are to be assumed and real-world, contemporaneous market conditions are to be ignored. Rather, it specifies that 'references in IVS to the market mean the market in which the asset or liability being valued is normally

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<sup>67</sup> International Valuation Standards Council, *International Valuation Standards 2013 Framework and Requirements* (1 January 2014) <<http://www.ivsc.org/download-docs/?nid=733&nidc=6c29793a140a811d0c45ce03c1c93a28>>.

<sup>68</sup> *Ibid* [6].

exchanged on the valuation date and to which most participants in that market, including the current owner, normally have access'.<sup>69</sup> It further specifies:<sup>70</sup>

Markets rarely operate perfectly with constant equilibrium between supply and demand and an even level of activity, due to various imperfections. Common market imperfections include disruptions of supply, sudden increases or decreases in demand or asymmetry of knowledge between market participants. Because market participants react to these imperfections, at a given time a market is likely to be adjusting to any change that has caused disequilibrium. A valuation that has the objective of estimating the most probable price in the market has to reflect the conditions in the relevant market on the valuation date, not an adjusted or smoothed price based on a supposed restoration of equilibrium.

Part V above conducted an extensive analysis of the likely determinations of market value to be made by the courts and the AAT when the real-world market in which the taxpayer operates is characterised by certain specific scenarios. It is a useful exercise to compare these determinations with the specific guidance given by the IVSC in its standards. As regards the Buyer's Market/Seller's Market scenarios, the IVSC clearly states that the interplay of real-world market supply and demand forces should be given effect when determining market value.<sup>71</sup> As regards the Group Price/Individual Product Price scenario, the IVSC's view is that the outcome depends on a case-by-case analysis whereby an examination is conducted as to whether the relevant item is normally traded on a group basis by market participants (thereby transferring the related synergies to all market participants) or whether the synergies arising from the volume sale are entity specific. If the volume sale constitutes a factor that is specific to a particular participant and is not available to market participants generally, then it should be excluded from the inputs used in the market-based valuation.<sup>72</sup> Finally, as regards the Identity of the Seller — New Entrant or Established Participant Scenario, the IVSC would clearly view this scenario as raising a special value/entity-specific factor that, contrary to the approach taken in *Brisbane Water County Council* and *Woodhouse* as well as by the ATO in its guidelines, should be altogether excluded from the inputs used in a market-based valuation.<sup>73</sup>

The IVSC's statements on the incorporation of an asset's 'highest and best use' into the market value determination process are also of interest.<sup>74</sup> As regards the question of whether it is necessary for an actual market participant to be pursuing the 'highest and best use' in order for it to be taken into account in the market value determination, the IVSC does not state a clear position. It simply states that such use 'is determined by the use that a market participant would have in mind for the asset when formulating the price that it would be willing to bid'<sup>75</sup> and that 'to establish whether the use is possible, regard will be had to what would be considered reasonable by market participants'.<sup>76</sup> Contrary to the position taken in *Collis* and *Hustlers*, these comments leave open the

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<sup>69</sup> Ibid [13].

<sup>70</sup> Ibid [14].

<sup>71</sup> Ibid [11], [16], [17], [30(d)] and [30(e)].

<sup>72</sup> Ibid [20] and [21].

<sup>73</sup> Ibid [20].

<sup>74</sup> Ibid [30(h)], [32] and [34].

<sup>75</sup> Ibid [32].

<sup>76</sup> Ibid [34].

understanding that 'highest and best use' can still be applied as a theoretical demand to the market value determination exercise, provided that such demand would be considered 'reasonable' by participants (even though no participant is actually pursuing that demand).

A further matter to be cross-checked against the IVSC Standards concerns the relevance of offers (as discussed in Part VI above). It is submitted that, although the IVSC does not state a specific position on this matter, its approach to the determination of market value leaves open the possibility that use might be made of an unaccepted offer as an input in a market-based valuation. This particularly becomes apparent when the IVSC's understanding of a 'willing seller' is considered.<sup>77</sup> This understanding does not depend on reference to an actual concluded transaction. According to the IVSC:

'and a willing seller' is neither an over eager nor a forced seller prepared to sell at any price, nor one prepared to hold out for a price not considered reasonable in the current market. The willing seller is motivated to sell the asset at market terms for the best price attainable in the open market after proper marketing, whatever that price may be. The factual circumstances of the actual owner are not a part of this consideration because the willing seller is a hypothetical owner;

While the IVSC Standards operate on the basis that 'at any given date it is only assumed that there is a willing buyer, not a particular willing buyer',<sup>78</sup> to the extent that the unaccepted offer conforms with the best price attainable in the open market after proper marketing, it could nevertheless constitute a relevant indicator of market value.

Finally, the IVSC Standards also provide guidance on another key observation made in the analysis conducted in Part V of this article, namely, the distinction to be made between 'market value' and 'fair market value'. 'Fair value' is treated as being an entirely separate concept from that of 'market value' in the standards.<sup>79</sup> The key difference is that special value and special participants are disregarded in market value determinations, while they are taken into account in determinations of fair value.<sup>80</sup> At the same time, the standards reveal a likely reason why confusion may exist on this issue. International accounting bodies such as the IFRS also apply an understanding of 'fair value'. The IVSC points out, however, that the IFRS concept of fair value is different from that of the IVSC, and in fact is generally consistent with the IVSC's understanding of market value.<sup>81</sup>

This observation suggests a further improvement that might be considered as part of any statutory amendments made to the ITAA97 to deal with the question of market value: namely, the use of a consistent term throughout the legislation so that differences between market value and fair market value or other terms are minimised.

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<sup>77</sup> Ibid [30(e)].

<sup>78</sup> Ibid [45].

<sup>79</sup> Ibid [38].

<sup>80</sup> Ibid [41], [45] and [46]. It should also be noted that such an approach is contrary to *Brisbane Water County Council* and the case authority identified by Marks as supporting the inclusion of the special participant in the hypothetical market by which market value determinations are made (above n 2, 160).

<sup>81</sup> Ibid [39].

Having examined the guidance to be obtained from the IVSC Standards on those issues which were summarised in Part VIII of this article as requiring a clearer statement of principle from the courts and the AAT, it can be seen that this analysis could serve as a useful starting point for the drafting of statutory valuation principles to be incorporated into the ITAA97. A key issue which this drafting exercise would need to address, however, is inconsistency between the standards and case authority. A further issue to be addressed is how the principles might be incorporated into the ITAA97, given the almost unlimited set of circumstances in which taxpayers may find themselves in trying to make the valuation. Once again, the IVSC Standards provide some direction on this issue. The analysis conducted in this part of the article has focused almost entirely on the points made by the IVSC at the beginning of its standards under the heading 'IVS Framework'. The IVS Framework provides the fundamental conceptual understandings which underlie the appropriate reference to be made to real-world market factors as 'inputs' in the hypothetical market value determination process. In a similar way, in the context of the ITAA97, the objective of the exercise would not be to attempt to draft an exhaustive list of suggested market value approaches for each conceivable circumstance arising in the ITAA97. Rather, the principles could be incorporated as a 'Market Value Framework' which would give clear conceptual guidance to taxpayers, the ATO, the courts and the AAT on the appropriate treatment to be given to real-world market factors as 'inputs' in the market value determination process and thereby overcome the inconsistencies and problems highlighted by this article. It is submitted that clarification of this 'input' issue is relevant to most, if not all, circumstances in which a market value determination is required to be made under the ITAA97 and would justify statutory amendment.

## X CONCLUSIONS

The analysis conducted in this article has highlighted a number of problems in the way the term 'market value' is interpreted and applied in the context of the ITAA97. Using specific real-world market scenarios as a starting point, the article has shown that case authority does not provide clear guidance as to how market value is to be determined when such scenarios impact on taxpayers. In addition, the article has shown how the views of the ATO on the application of this term not only impose significant administrative cost on taxpayers but also are not entirely consistent with case authority. The absence of clear guidance from parliament, the courts and the AAT on how real-world market factors should feed into assumptions underlying the hypothetical market by which market value determinations are made has been a recurring theme of the analysis.

In addition to highlighting these problems, the analysis has also outlined a possible solution. While ideally it should be left to the courts and the AAT to continue to develop valuation jurisprudence in a way which will provide a clearer statement of principle, this article has recommended the incorporation of certain statutory valuation principles into the ITAA97 as a means of assisting this process.

As pointed out in Part IX, the objective of the exercise would be the establishment of a clear conceptual framework dealing with the fundamental question of how real-world market factors arising in markets engaged by taxpayers should be treated as 'inputs' in hypothetical market value determinations. While not specifying a specific approach for

the almost unlimited set of circumstances in which taxpayers may find themselves in trying to make a valuation, this exercise would nevertheless seek to provide a conceptual framework that would guide a response to a fundamental 'input' question relevant to most, if not all, such circumstances.

This article has also suggested that as part of this exercise, consideration should also be given to the use of a consistent term throughout the legislation so that differences between market value and fair market value or other terms are minimised.

Apart from assisting the courts and the AAT, such statutory amendments would also help to demystify the market value determination process for ordinary taxpayers, thereby helping to reduce the administrative cost imposed by the current regime.