IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M74, M75, M76, M77, M78 & M79 of 2014

BETWEEN:

COMMISSIONER OF STATE REVENUE
Appellant
and
LEND LEASE DEVELOPMENTS PTY LTD
Respondent

10

No. M80 of 2014

BETWEEN:

COMMISSIONER OF STATE REVENUE
Appellant
and
LEND LEASE IMT 2 (HP) PTY LTD
Respondent

20

No. M81 of 2014

BETWEEN:

COMMISSIONER OF STATE REVENUE
Appellant
and
LEND LEASE REAL ESTATE INVESTMENTS LIMITED
Respondent

APPELLANT'S SUBMISSIONS

30 **Part I: Publication**

1. We certify that these submissions are in a form suitable for publication on the internet.

Part II: Issues

2. In evaluating the substantive bargain contracted for between the Victorian Urban Development Authority **(VicUrban)** and Lend Lease Development Pty Ltd **(LLD)**, what did LLD bargain to give and VicUrban bargain to receive in return for the transfer of title to the several parcels of land in issue?

3. For the purposes of s 20(1)(a) of the **Duties Act** 2000 (Vic) (the **Act**), in relation to each of the seven parcels of land transferred to the Respondents, what consideration passed to move each transfer?

Solicitor for the Commissioner of State Revenue
Level 2, 121 Exhibition Street
Melbourne VIC 3000
DX 210192 MELBOURNE

Telephone: 9628 6932
Fax: 9628 0550
Ref: Robert Trajceski
/Kim Ou-Young

Part III: ***Judiciary Act 1903***

4. The Appellant certifies that he considers that notice is not required pursuant to s 78B of the *Judiciary Act 1903*.

Part IV: Reports of reasons

5. The judgment of the Court of Appeal of the Supreme Court of Victoria has not been reported. Its media-neutral citation is *Lend Lease Development Pty Ltd v Commissioner of State Revenue* [2013] VSCA 207 **(Court of Appeal's reasons)**.

6. The judgment of Pagone J at first instance ([2012] VSC 108) is reported as *Lend Lease Development Pty Ltd v Commissioner of State Revenue* (2012) 87 ATR 504; 2012 ATC

10 ¶20-311 **(Trial judge's reasons)**.

Part V: Relevant Facts

A. The 2001 Development Agreement

7. Lend Lease Development Pty Ltd (**LLD**) was at all relevant times in the business of development.[1] It entered into a Development Agreement on 18 May 2001 (the **2001 Development Agreement**) with VicUrban (then the Docklands Authority[2]). The 2001 Development Agreement (which was varied and restated in 2006 and 2008 (**2006 Development Agreement** and **2008 Development Agreement** respectively))[3] provided for an interlocking set of rights and obligations by which the Victoria Harbour Precinct of the Docklands[4] was to be transformed from a polluted, disused industrial

---

[1] It was referred to as the "Developer" in the 2001 Development Agreement, which agreement provided for the development of the Victoria Harbour Precinct by development activities. For convenience, these submissions refer to "LLD" although Lend Lease Real Estate Investments Ltd (**LLREI**), not LLD, was ultimately the purchaser of the C9 Stage (LLREI entered into a Development Agreement with LLD: Spiropoulos affidavit at [86]) and Lend Lease IMT Pty Ltd (**LLIMT**) was the purchaser of the V5 Stage (the agreements by which LLIMT came to be the purchaser of that Stage are referred to in the Spiropoulos affidavit at [118]-[120]).

In respect of the C9 Stage: the C9 Land Sale Contract between VicUrban and LLREI provided for the additional contributions at issue to be paid by the purchaser (cl 11(b), **GS-45**). In respect of the V5 Stage, the Development Management Agreement contemplated that LLD could elect whether to have the Contribution Payments to be made by LLIMT paid to it or to VicUrban (cl 1.3(b), **GS-62**). The V5 Land Sale Contract was silent on whether LLD or LLIMT would make the relevant payments (**GS-63**), while the V5 Stage Deed allowed for both possibilities (cll 2.3-2.4, **GS-64**).

[2] The Authority was established by the *Docklands Authority Act 1991* (Vic). The name of that Act was changed to the *Docklands Act 1991* (Vic) by Act No 59 of 2003, s 91. VicUrban was established by the *Victorian Urban Development Authority Act 2003* (Vic) and acquired the functions previously conferred on the Authority under the *Docklands Act*. VicUrban was the successor in law of the Authority pursuant to s 81 of the *Victorian Urban Development Authority Act 2003* (Vic).

[3] References to the Development Agreement without reference to a specific version are to the Development Agreement as amended from time to time. Where it is necessary, particular versions will be referred to.

[4] A copy of the Victoria Harbour Precinct Master Plan map is at **GS-4**. A map depicting the various Stages in that precinct is at **GS-5**.

area, cut off from the Melbourne CBD to an area in which people would live, find recreation and work.

8. The Development Agreement provided for the transformation of the Victoria Harbour Precinct area of the Docklands (defined as the "Land" in the 2001 Development Agreement) by:

   (a) the undertaking (by both VicUrban and LLD) of the various works necessary to take the Victoria Harbour Precinct from a disused, polluted industrial site to an environmentally remediated area that was well-connected to the Melbourne CBD,[5] had suitable road infrastructure and enjoyed the social and cultural amenity (including the Docklands Park, the Grand Plaza and the Public Art[6]) necessary for the successful development of the individual parcels of land within the Precinct, and which thereby permitted each parcel of land to have the necessary characteristics giving it value as a development site;

   (b) obliging both LLD and VicUrban to enter into Land Sale Contracts for the transfer of title to the various parcels of land comprising the Precinct (with each parcel referred to as a "Stage") (cl 4.1(a))[7]; and

   (c) the development by LLD of those Stages, and the sharing of the gross proceeds of the sale by LLD of parts of those Stages with VicUrban.

9. The works to be undertaken by VicUrban included the External Infrastructure works (cl 11.1), which were the works necessary to "deliver [the] services, transport connections and utilities specified in Schedule U" to the 2001 Development Agreement (cl 1.1). The External Infrastructure works included the construction of various roads (with associated drainage), the Bourke Street pedestrian bridge linking the Victoria Harbour precinct to the Melbourne CBD, infrastructure works for the water supply and related connections as well as traffic signals. In addition to the External Infrastructure works, which were partly complete at the time of entry into the 2001 Development Agreement,[8] that agreement also provided for other infrastructure works such as the

---

5 By the Collins Street Bridge (cl. 11.10; Sch DD) and Collins Street Extension (cl 11.11; Sch K), and the Bourke Street Pedestrian Bridge (cl 11.1; Sch U).

6 Cl 10.

7 The Recitals record that VicUrban "has agreed to sell the Developer the Land on the terms and conditions contained in the Land Sale Contract and this Agreement". The names of the Stages with which the Appeals are concerned are set out in the Spiropoulos affidavit at [14].

8 Cl 11.1(a).

Collins Street Bridge Works, to be undertaken by VicUrban[9], and the Bourke Street Extension, to be undertaken by LLD[10].

10. Under the Development Agreement[11] between LLD and VicUrban, LLD:

   (a) was both entitled and also obliged to acquire title to the various Stages to be effected by the entry into of a series of Land Sale Contracts (cl 4.1(a));

   (b) was required to make certain payments to VicUrban (detailed further below) before taking title to any Stage (cl. 4.7(a)(i)), as well as certain other payments (detailed further below) at later dates, in particular, on or before the Initial Reconciliation Date (cl 4.7(a)(ii));

10 (c) was to acquire Stages subject to encumbrances which included a Registrable (General Obligations) Agreement (cl 4.1(c); Sch Q), which agreement included a provision that the obligations of the Developer under that agreement[12] ran with the land, Sch J, cl 5.3). The execution of that Registrable Agreement was a condition precedent to VicUrban entering into a Land Sale Contract for the sale of any Stage (cl 4.2(j)); and

   (d) was permitted to market, and agree to sell, any part of a Stage before it took title to that Stage (defined as the "Actual Stage Release Date") (cl 4.6). (Note also that, in keeping with the contractual entitlement to call for title to the various Stages, it was permitted for development work to be carried out on the C3/4 Stage
20 before title passed.[13]).

11. Under the Development Agreement, as well as being obliged to transfer title by the anticipated series of Land Sale Contracts, VicUrban:

---

[9] 2001 Development Agreement Cl 11.10.

[10] 2001 Development Agreement Cl 11.9.

[11] References are to the 2001 Development Agreement. While the terminology and precise methods of calculation varied to some extent in each of the 2006 and 2008 Development Agreements, the essential structure of the bargain between LLD and VicUrban was the same.

[12] Under the Registrable Agreement the owner's covenants included an undertaking not to sell or otherwise part with the land unless the transferee entered into a contract with VicUrban in substantially the same terms as the Development Agreement: Development Agreement Sch J, cl 5.1(b). That obligation ran with the land under the terms of the Registrable Agreement: see the Development Agreement Sch J, cl 5.3.

The nexus between the payments and the land was further reflected in the basis upon which, and the terms of, the various valuations obtained by LLD for stamp duty purposes. In each case, the valuation was conducted on the basis that the various contributions in issue (eg the External Infrastructure Contribution, the Gasworks Site Remediation Contribution and the Integrated Public Art Contribution) were encumbrances upon the land to be deducted from the unencumbered value in arriving at the "assessed encumbered market value": see eg the Dock 5 valuation at **GS-8**, cll 1.6, 2.3.

[13] Spiropoulos affidavit at [60]; Construction Licence Agreement, Recitals, cll 1.1 (definition of Permitted Use, and definition of Works), 2.1, 4.1, 5 and Sch 7, **GS-30**.

(a) was required to undertake works (by a contract between VicUrban and a third party[14]) for the remediation of the Gasworks Site[15] to satisfy a Clean Up Notice issued by the Environment Protection Authority of Victoria (cl 7.8, Sch II). LLD was required to contribute by way of the Gasworks Site Remediation Contribution, with part payable for each Stage before title was transferred (cll 1.1 and 4.7(a)(i));

(b) undertook External Infrastructure works (certain elements of which it warranted had been installed and completed substantially in accordance with Sch U at the time of execution of the 2001 Development Agreement) (cl 11.1). LLD was required to contribute by way of the External Infrastructure Contribution, with part payable for each Stage before title was transferred (cll 1.1 and 4.7);

(c) was required to undertake the "Collins Street Bridge Works" (which bridge provided another link between the Melbourne CBD and the Victoria Harbour Precinct) (cl 11.10);

(d) was required to procure works for the completion of the "Docklands Park" (cl 11.12, Sch EE; and

(e) (following variations) was obliged to construct the Grand Plaza.[16]

12. What LLD acquired when it entered into the Development Agreement was the right to acquire parcels of land[17] which possessed or would possess certain characteristics: the parcels of land were in a location which was linked to the Melbourne CBD by new transport links, were proximate to areas of recreation, enjoyed the amenity of public art, and were no longer contaminated by the former gasworks (or proximate to contaminated land). Those characteristics, plainly enough, constituted features which informed the value of those parcels of land as development sites.

B. Land Sale Contracts

13. Cl 4.1 of the Development Agreement gave LLD the right to obtain title to the various Stages. Not surprisingly, in the context of a large scale, extended development which

---

14 Referred to in the definition of Gasworks Site Remediation Contract in cl 1.1.

15 Part of the Gasworks Site is within the Victoria Harbour Precinct: Spiropoulous affidavit at [164].

16 Initially (under the 2001 Development Agreement) LLD was required to construct the Grand Plaza, spending not less than $20 million (cl 13.2). However, under the 2006 Development Agreement, LLD was required to accrue a "Grand Plaza Retention Levy" from which to deduct its progress claims relating to the construction of the Grand Plaza. Then under the 2008 Development Agreement, the construction obligation moved to VicUrban, with LLD required to make contributions known as a Grand Plaza Contribution and a Grand Plaza Additional Payment.

17 By the entry into Land Sale Contracts for each "Stage": Clause 4.1(a).

was expected to[18] take many years to complete, the Development Agreement provided for the transfer of titles to specific Stages to be effected by the entry into of a series of sequential Land Sale Contracts. The entry into those specific contracts did not detract from the fact that the Development Agreement provided for the sale of all of the Land to LLD for the Total Land Price (cl 1.1, Sch C).

14. The character of the particular Land Sale Contracts as giving effect to, and being inextricably connected with, the Development Agreement was reflected in their terms as follows:

    (a) defaults under the Development Agreement entitling VicUrban to terminate that agreement were treated as defaults entitling termination of the relevant Land Sale Contract;[19]

    (b) provision was made for the delivery of the executed Registrable (General Obligations) Agreement referred to in cl 4.1(c), Schs J and Q of the Development Agreement which provided for all of LLD's obligations under the Registrable Agreement to run with the land (see para 10(c) above);[20] and

    (c) four of the Land Sale Contracts included "entire agreement" clauses which stipulated that the Development Agreement, as well as the Land Sale Contract itself, constituted the entire agreement for the sale and purchase of the particular parcel of land.[21]

15. The effect of cl 4.1 of the Development Agreement was to confer on LLD the right to acquire the various Stages. It is the existence of this substantive right which explains why LLD took a Construction Licence[22] to permit Works on the C3/4 land *in anticipation* of contracts of sale being entered into for that land.[23] In fact, the

---

18 Eg. see the Milestone events and dates in Sch A to the 2001 Development Agreement, which extended out 102 months (8.5 years) from the date of the agreement.

19 See, eg the C9 Land Sale Contract (**GS-45**, cl 8.2).

20 Eg, see cl 18 and Annexure 2 to the Dock 5 Land Sale Contract (**GS-6**).

21 A clause to that effect is found in the 21 July 2004 Dock 5 Land Sale Contract (cl 7) (**GS-6**), the 7 April 2007 Mosaic Land Sale Contract (cl 7) (**GS-21**), the 20 December 2007 C3/4 Land Sale Contract (**GS-27**) (cl 7, which also included the Construction Licence Agreement (**GS-30**)) and the Funding and Project Facilitation Deed in the entire agreement clause), the 17 April 2008 C10 Land Sale Contract (cl 7) (**GS-35**). Cf the 7 May 2008 C9 Land Sale Contract, the 15 July 2008 Merchant Key Worker Land Sale Contract (**GS-52**) and the 24 June 2010 V5 Convesso Land Sale Contract (**GS-63**) each of which contained an entire agreement clause providing that the Land Sale Contract superseded all previous negotiations and agreements in relation to the transaction.

22 At **GS-30**.

23 Construction Licence Agreement (Recitals, cl 2.1 and Sch 7) (**GS-30**).

Construction Licence was entered into on 24 October 2006, more than a year before the date of the corresponding Land Sale Contract.[24]

C. Payments required under cl 4.7

16. The payments common to all Stages, which were required to be made under cl 4.7 on or before each "Actual Stage Release Date" (defined in cl 1.1 to mean, in relation to a stage, "the date the Developer takes title to the Stage pursuant to clause 4.1"), were:

(a) the Stage Land Payment, which was calculated as a percentage (2.74%) of the anticipated gross revenue to be derived by the Developer on the sale, and which was subject to a mechanism where the proceeds exceeded the initially anticipated proceeds (cl 4.7 and Sch C). The Stage Land Payment was the amount recorded in the Land Sale Contracts and is (with two exceptions[25]) the amount that the Court of Appeal found constitutes the "consideration" for the transfers the subject of these appeals. Further payments described as "Final Land Payment" (Dock 5) and "Additional Land Payment" (C3/4) were assessed,[26] as was an estimated amount described as an "Estimated Land Payment" (C9).[27] These further amounts were payable if the subsequent sale of lots within a Stage delivered Actual Gross Proceeds of Sale so that the Stage Land Payment was less than 2.74% of those proceeds;[28]

(b) an amount in respect of the External Infrastructure Contribution, which amount was set for each Stage by reference to the anticipated gross proceeds of sale for that Stage.[29] The total contribution of the Developer to the costs of the External Infrastructure[30] was set at a maximum of $23.6m, subject to variation and escalation (definition of "Project External Infrastructure Contribution"; Sch C). Top up payments were again due if the amount paid turned out to be less than a specified percentage of the Actual Gross Proceeds of Sale received by the Developer (eg 2001 Development Agreement cl 4.7(a)(ii)(B));

---

24 At **GS-27**.

25 The two exceptions are C10 and V4 MKWH (Spiropoulos affidavit at [72] and [107]).

26 Dock 5 Second Reassessment (Spiropoulos affidavit [34]-[37] and [192]-[198], **GS-17**); C3/4 Assessment (Spiropoulos affidavit at [63] and [192]-[198], **GS-31**). See also Court of Appeal's reasons at [89]-[90], [93].

27 C9 Assessment (Spiropoulos affidavit at [95] and [192]-[198], **GS-48**). See also Court of Appeal's reasons at [106].

28 2001 Development Agreement cl 4.7(a)(ii), 2006 and 2008 Development Agreements cll 4.7(b)-(d).

29 2001 Development Agreement Sch C.

30 The nature of the External Infrastructure works is set out in Sch U to the 2001 Development Agreement and is referred to in para 9 above.

(c) an amount in respect of the Gasworks Site Remediation Contribution, which amount was set for each Stage by reference to the anticipated gross proceeds of sale for that Stage.[31] The total contribution of the Developer to the costs of the Gasworks Site Remediation was capped (subject to variation and escalation) with a similar "top up" payment mechanism by reference to the Actual Gross Proceeds of Sale received by the Developer (eg 2001 Development Agreement cl 4.7(a)(ii)(C));

(d) the "Stage Integrated Public Art Contribution", which was referable to integrated Public Art in the Precinct (eg 2001 Development Agreement cl 1.1, cl 10.1(c)).

10 17. The obligations imposed by cl 4.7 of the 2001 Development Agreement were in some cases subsequently modified. For the Dock 5 Stage, a new cl 4.7A was inserted into the 2006 Development Agreement. This clause, together with cl 19 of the Dock 5 Land Sale Contract, set, for the purposes of the Dock 5 Stage, fixed amounts for the Minimum External Infrastructure Contribution, Minimum Gasworks Site Remediation Contribution and the Stage Integrated Public Art Contribution, in replacement of the amounts payable under cl 4.7 of the Development Agreement. For the three later Stages (C9, V4 MKWH and V5) additional agreements, described as "Stage Deeds" were entered into.[32] Those Stage Deeds made specific provision for various contributions to be paid by the purchaser of those Stages but the inclusion of those
20 specific provisions did not alter the character of the payments in issue. For example, in place of the terms of the Development Agreement, but nevertheless using the defined terms in the Development Agreement, the C9 Stage Deed made specific provision for the amount of the Integrated Public Art Contribution, the External Infrastructure Contribution and other amounts.[33]

18. In addition to these common contributions, other payments were made which were assessed by the Commissioner as forming part of the consideration for the transfer of various Stages:

(a) amounts variously described as "Grand Plaza Additional Payments" and "Grand Plaza Contributions".[34] As noted above, the obligation to construct the Grand
30 Plaza (which is a large area for public recreation alongside Etihad stadium)

---

31 2001 Development Agreement Sch C.

32 C9 Stage Deed between VicUrban, LLD and Lend Lease Corporation Ltd (as Performance Guarantor) **(GS-46)**, V4 MKWH Stage Deed **(GS-53)**, and V5 Stage Deed **(GS-64)**.

The C9 Stage Deed (cl 2.3) recognised that LLREI could make the payments referred to in cl 4.7 of the Development Agreement and, if that occurred, VicUrban would give good discharge to LLD. Similar provision was included for the possibility that the relevant payments could be made by LLIMT in respect of the V5 Stage (V5 Stage Deed, cll 2.2 and 2.4).

33 C9 Stage Deed, cl 2.1 **(GS-46)**.

34 Spiropoulos affidavit at [199]-[209].

initially rested with LLD but was transferred to VicUrban under the 2008 Development Agreement, with LLD obliged to make the stated contributions.[35] From 10 May 2007, the Grand Plaza Contribution was, like other payments, required to be made before title passed;[36]

(b) in two cases (C3/4 and C9) an "Additional Authority Payment" was assessed. These amounts reflected construction beyond the "Initial Build Out" and were based on the Projected Gross Revenue on Sale;[37]

(c) for C3/4, the Commissioner made an assessment in respect of estimated outstanding amounts payable by LLD to VicUrban for that Stage;[38]

10 (d) for the Mosaic and V4 MKWH Stages, the Commissioner assessed amounts for GST, which arose because some of the Stages were assessed on a GST exclusive basis, with GST identified separately;[39]

(e) for C10 and C9, there was Non-Monetary Consideration, which was the value agreed between LLD and VicUrban of certain infrastructure construction works carried out by LLD on land adjoining those two Stages.[40] The C10 Land Sale Contract specifically provided that those works were part of the consideration for the C10 land with a GST exclusive market value of $1,908,836.[41]

Part VI: Appellant's argument

The Legislation

20 19. In Victoria, a liability for duty arises under the Act when a "dutiable transaction occurs" (s 11). A "transfer of dutiable property" is a dutiable transaction (s 7(1)(a) and (2)). "Dutiable property" is defined so as to include an "estate in fee-simple" (s

---

35 2001 Development Agreement cl 13.2; 2006 Development Agreement cll 13.2 and 13.2A; 2008 Development Agreement cl 13.2.The position in respect of those payments is accurately set out in the Court of Appeal judgment at [78]-[86].

36 2008 Development Agreement, cl 13.2(c).

37 The Additional Authority Payment was payable under cl 4.7(b)(iv), (c)(ii), (d)(ii) of the 2006 and 2008 Development Agreements and, for the C9 Stage, cl 2.2(b)(xi) of the C9 Stage Deed (**GS-46**). C3/4 Assessment (Spiropoulos affidavit [63] and [185]-[191], **GS-31**); C9 Assessment (Spiropoulos affidavit at [95] and [185]-[191], **GS-48**). See also Court of Appeal's reasons at [94]-[96], [103].

38 Under cl 4.7(b)-(d) of the Development Agreement, various amounts were payable on dates after the settlement of the Land Sale Contract: C3/4 Assessment (Spiropoulos affidavit at [63], **GS-31**). See also Court of Appeal's reasons at [98].

39 Mosaic Assessment (**GS-23**); V4 MKWH Second Assessment (Spiropoulos affidavit at [110] **GS-56**).

40 C9 Assessment (Spiropoulos affidavit at [95] and [210]-[220] **GS-48**); C10 Varied Assessment (Spiropoulos affidavit at [79] and [210]-[220] **GS-38** and **GS-39**). See also Court of Appeal's reasons at [100]-[102] and [107].

41 C10 Land Sale Contract cl 10.3 (**GS-35**).

10(1)(a)(i)). Accordingly, the transfer of each Stage was a "dutiable transaction" attracting a liability to pay duty.

20. Duty was payable by the Respondents "on the dutiable value of the dutiable property" (s 18), with the amount of the "dutiable value of dutiable property" prescribed by s 20(1) in the following terms:

> *The **dutiable value** of dutiable property that is the subject of a dutiable transaction is the greater of–*
>
> *(a) the consideration (if any) for the dutiable transaction (being the amount of a monetary consideration or the value of a non-monetary consideration); and*
>
> *(b) the unencumbered value of the dutiable property.*

21. Section 21 addresses matters that are to be included in, or excluded from, the "consideration for the transfer of dutiable property". For example, and significantly in this case, s 21(3) provides that "[t]he consideration for the transfer of land on the sale of that land does not include any amount paid or payable in respect of the construction of a building to be constructed on that land on or after the date on which the contract of sale was entered into".

22. By its terms, the Act relevantly imposes duty on transactions and not on instruments.[42]

Consideration for the transfer

23. Save as is noted in relation to s 21 above, the Act does not define what is meant by the expression "consideration for the transfer". Nevertheless, certain propositions regarding both the meaning of "consideration" in s 20(1)(a) of the Act and also the necessary nexus between the "consideration" and the dutiable transaction are not controversial.

24. First, "consideration" is to be given the wider meaning which the word carries in a conveyancing context and not its narrower meaning in the law of contract. As stated by Dixon J in *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)* "the consideration is ... the money or value passing which moves the conveyance or transfer".[43] Accordingly, in that case, the Court found that there was consideration in money or money's worth for the return of capital to shareholders by the *in specie* distribution of shares held by the company in other companies.[44] The return of the paid

---

42 Cf, eg *The Stamps Act 1958* (Vic), s 17(1) and Sch 3, cl VI.

43 (1948) 77 CLR 143 at 152 (Dixon J) (***Archibald Howie***). See also Williams J at (1948) 77 CLR 143 at 157.

44 There, the question was which limb of s 66 of the *Stamp Duties Act 1920-1940* (NSW) applied: sub-s(3)(a) applied to conveyances without consideration in money or money's worth; sub-s (3A) applied to

up capital was "the discharge *pro tanto* of a claim of the shareholder upon the assets of the company"; the reduction in the amount and value of the shares afforded adequate consideration in money or money's worth for the reduction in capital.[45]

25. Dixon J's identification in *Archibald Howie* of the conveyancing (not contractual) meaning of consideration being the applicable one was reiterated by Kitto J in *Davis Investments Pty Ltd v Commissioner of Stamp Duties (NSW)*.[46] Like Dixon J, Kitto J referred to the consideration "upon" which conveyances are made, being the money or value which moves the conveyance.[47] Consideration for a conveyance is not limited to consideration temporally received upon the conveyance of title. Rather, consideration may comprise executory promises to be fulfilled after settlement.[48]

26. Second, the price expressed by the parties in a written agreement to be the consideration does not determine the identity of all that money or value which moves the transfer.[49] On the contrary, the enquiry is one of substance, not form.

27. In *Chief Commissioner of State Revenue (NSW) v Dick Smith Electronics Pty Ltd*,[50] the price stated in a written agreement for a parcel of shares was $114m "minus the dividend amount", which was defined as all retained earnings of the subject company to a stated maximum. The agreement provided that, prior to completion, the vendors of the shares were to ensure that the company declared a dividend equal to the dividend amount, which was to be funded by a loan to the company made by the purchaser. By examining the substance of the parties' relationship, not merely the formal expression of the price, the Court found that:[51]

> *The consideration which moved the transfer by the Vendors to the Purchaser of the Shares ... was the performance by the Purchaser of the several promises recorded in the Agreement in consequence of which the* ***Vendors received*** *the sum of $114,139,649. It was only* ***in return for*** *that*

---

conveyances made upon a bona-fide consideration in money or money's worth of less than the unencumbered value of the property; and sub-s (3B) applied to conveyances made upon a bona-fide consideration in money or money's worth of not less than the unencumbered value of the property conveyed.

45 *Archibald Howie* at 153.7 and 154.2, per Dixon J.

46 (1958) 100 CLR 392 (***Davis Investments***).

47 *Davis Investments* at 414.9 and 415.1, per Kitto J.

48 See *The Colonial Mutual Life Assurance Society Ltd v The Federal Commissioner of Taxation* (1953) 89 CLR 428 where the only consideration for the transfer of the relevant land was the right to receive the rental income from certain premises to be constructed on adjoining land as part of a large property development. See also: *Duff v Blinco* [2007] 1 Qd R 407 where Keane JA said, at [37], that "[a] contract for sale, or an agreement to sell, consists of executory promises to transfer land for money"; *The King v Registrar of Titles; ex p Moss* [1928] VR 411 at 417.

49 *R v The Bullfinch Proprietary (WA) Ltd* (1912) 15 CLR 443 at 447—448 per Griffith CJ.

50 (2005) 221 CLR 496 (***Dick Smith***).

51 *Dick Smith* at [75] 519, per Gummow, Kirby and Hayne JJ.

> ***total sum*** *(paid by the various steps and in the various forms required by the Agreement) that* ***the Vendors were willing to transfer*** *to the Purchaser the bundle of rights which their shareholding in the Company represented.* (emphasis added)

28. As the Court's approach in *Dick Smith* shows, the focus is on "what was received by the Vendors so as to move the transfers". It is that which "moves the conveyance or transfer".[52] The Court's expression of the test in *Dick Smith* requires the Court to examine the bargain struck between the parties and identify what the vendor was to

10 receive in return for the transfer of the dutiable property in question.[53]

29. More than that, the analysis of that question is to be undertaken by examining the substance of the parties' bargain. As expressed by the majority of the Court in *Dick Smith*, while it may in some sense be accurate to have described the vendors as having sold their shares "ex dividend", that characterisation was apt to confuse by inviting examination of the considerations influencing the form in which the transaction was cast. The real question was what the vendors had bargained to receive and did receive; to which the answer was $114m.[54] By contrast, the minority in *Dick Smith* proceeded by breaking up the bargain and seeking to identify separate consideration for the several promises, including the declaration of the dividend and the loan.[55]

20 30. Having regard to the foregoing, the identification of the consideration for a dutiable transaction need not be overcomplicated. The task ought to be undertaken having regard to the following matters:

    (a) first, the applicable test is contained in the statutory language of s 20(1)(a) of the Act. The usual rules of construction apply to taxing statutes, as they do to other statutes;[56]

    (b) second, the starting point is that referred to by the majority of the Court in *Dick Smith*, namely, what promises (whether in the form of contractual commitments to pay monetary amounts or to do other things) did the vendor receive from the

---

52 *Archibald Howie* at 152.4 per Dixon J.

53 See also *Paul v Commissioners of Inland Revenue* [1936] SC 443 (***Paul v Inland Revenue***) where, at 452.2, the Lord President emphasised the need to address substance not form in identifying what was the bargain struck by the parties: "In a sense, what the Court has to decide is a question of fact, whether in reality there was *one bargain* for the transfer to the vassal [purchaser] of the land and house upon the sale thereof" (emphasis added). Those remarks were made in the context of a statutory regime where, as described by the Lord President (at 451.6), "[t]he amount of the stamp duty depends upon the amount or value of the consideration for the sale".

54 *Dick Smith* at [73] 518 per Gummow, Kirby and Hayne JJ.

55 At [30] 507, [36] 509 and [40] 510 per Gleeson CJ and Callinan J.

56 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [57] 49.

purchaser in return for being willing to engage in the dutiable transaction? Several further points arise in relation to this step:

(i) the substance of the bargain between the parties and the nature of their mutual obligations and promises must form the starting point of the analysis. Many bargains involve numerous steps, stages or interconnected rights and obligations which must not be obscured by any attempt to carve up the promises and allocate the sums payable to them severally, but distinctly (ie, on the basis that any payment can necessarily be consideration for one, and only one, dutiable transaction);

10 (ii) a particular promise need not be exclusively linked to the transfer of dutiable property for it to constitute part of the consideration for the transfer and so be the subject of s 20(1)(a). To the extent that a sum of money or a promise may "move" more than one thing, it does not thereby cease to "move" (and so be consideration for) the transfer that is the dutiable transaction.[57] There is no express statutory requirement that the consideration be "exclusively" or "solely" for the dutiable transfer. Nor is there any cause to read any such words into the statute;[58]

(iii) the parties are free to bargain for any type of consideration to move the transfer. This is recognised by s 20(1)(a), which refers specifically to "non-
20 monetary consideration". Thus, as one example, a vendor may agree to transfer land in return for a future proceeds sharing arrangement, whereby the receipt of money is deferred until land is again sold, following its development;

(iv) the enquiry to identify the consideration which moved the transfer is not temporally limited by reference either to the date of provision of the consideration – consideration received after the date of transfer of title is still consideration for the transfer – or on the state of the land at the date of

---

[57] In the analogous context of section 9-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth), the Court has held (in *Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342 at [28], per Gleeson CJ, Gummow, Heydon, Crennan and Kiefel JJ) that "*The circumstance that the deposit forfeited to the taxpayer had various characteristics does not mean that the taxpayer may fix upon such one or more of these characteristics as it selects to demonstrate that there was no taxable supply. It is sufficient for the Commissioner's case that the presence of one or more of these characteristics satisfies the criterion of "consideration" for the application of the GST provisions respecting a 'taxable supply'*". Section 9-5 provided that a person makes a taxable supply if, inter alia, "you make the supply for consideration". Further, the Court's finding in *Commissioner of Taxation v Qantas Airways Ltd* (2012) 247 CLR 286 at [14] 292, per Gummow, Hayne, Kiefel and Bell JJ that the expression "for consideration" in the GST Act similarly does not "adopt contractual principles" but "requires a connection or relationship between the supply and the consideration" is instructive.

[58] Eg the criteria set out by McHugh J in *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 113-16.

transfer. In many instances it will be of no moment to the parties whether certain steps have been taken before settlement, or whether they are undertaken after settlement; the promise and the performance of the promise are not relevantly different;

(c) third, the statutory expression "consideration for the transfer" is a composite expression, the application of which is not assisted by any attempt to read the word "for" as referring to any narrow causative relationship. Ultimately, the question of what consideration moved the transfer is a practical question of fact; what did the vendor *in fact* require before it was "willing" to transfer the land? It is not necessary, or fruitful, to engage in a fine analysis of the causative relationship between the consideration and the dutiable transfer as such an enquiry would be apt to distract and confuse;

(d) fourth, the substantive bargain between the vendor and purchaser is to be examined whether it is contained in one instrument, or several; the Act imposes duty on transactions, not instruments. The location of these promises in various instruments cannot determine the question whether consideration was received for a transfer of land. Nor can the parties – by the particular form of the bargain they have reached – obscure that bargain with labels, or by breaking down a total sum into different promises in different instruments;

(e) fifth, by its terms, s 20 contemplates that the dutiable consideration may exceed the "unencumbered value" of the land when it is transferred. That is because of the words "is the greater of" at the start of the provision. Thus, it captures premiums (or super premiums), paid, if their receipt by the vendor was what it required before it was willing to transfer the land; and

(f) sixth, the breadth of the test in s 20(1)(a) is fortified by the presence of s 21(3). The express exclusion from the consideration for the transfer of land of amounts payable for buildings constructed on that land on or after the date on which a contract of sale was entered into, evinces a legislative intent that, but for that express exclusion, even these payments would fall within s 20(1)(a). Again, one can contemplate a bargain whereby a vendor will be unwilling to transfer land without the receipt of such payments.

<u>*The resolution of these appeals*</u>

31. In this case, the question to be answered is: "What did VicUrban bargain to receive to render it willing to part with title to the various parcels of land?" That question is to be answered by reference to the substantive bargain struck between VicUrban and LLD. That bargain is embodied, not only in the Land Sale Contracts but also, among others, in the Development Agreement. In fact, the Land Sale Contracts owe their very

existence to the bargain struck by the parties and recorded in the Development Agreement.

32. Under the Development Agreement, VicUrban agreed to sell the Land (defined as the whole of the Victoria Harbour Precinct set out in the plan at Sch V)[59] for the Total Land Price.[60] Not surprisingly, in the context of a major development undertaking, the parties agreed that the Land would not all be sold at once, but would be released in Stages (being the parcels of land identified in the Staging Plan) to be released over nine years.[61] As recorded in the Recitals to the Development Agreement, VicUrban's agreement to the conveyance of the Land was "on the terms and conditions contained in the Land Sale Contract and this Agreement".

33. In return for selling the Land to LLD, by way of Stages, VicUrban required that LLD make certain payments to it. Those payments included not only the amount specified in the various Land Sale Contracts but also the payments in issue in these appeals.

34. These payments were consideration for the transfer irrespective of the time at which they were made (before, after or at the same time as the transfer of title); timing of performance of the promises to make certain payments has no bearing on whether the promise was part of what "moved" the transfer (*Archibald Howie*) and constituted part of what the vendor required in order to convey title (*Dick Smith*). Amounts payable after transfer, or by reference to events following the settlement of a particular Land Sale Contract[62] are not thereby divorced from the consideration moving the transfers; executory consideration is good consideration for the conveyance of real property. (In any event, to the extent that timing is of any moment, the terms of the Development Agreement required that certain of those payments[63] had to be made before title passed.) Nor are they any less a part of the consideration moving the transfer because they were calculated by reference to the gross proceeds of sale received by LLD over time. As the price of transferring title, VicUrban required that those additional payments be made to it, should it transpire that the subsequent development was worth more than originally anticipated; a vendor is at liberty to set its price by reference to future proceeds if that is the bargain it strikes with the purchaser.

---

59 Development Agreement Recital D, cl 1.1 (definition of Land) and cl 4.1.

60 Defined in cl 1.1 as $49.7m, as varied and escalated in accordance with Sch C.

61 As set out in the initial Staging Plan at Sch T.

62 The Additional Land Payment, the Final Land Payment and the estimated payments (to the extent that they represented additional amounts payable by reference to the Actual Gross Proceeds): see the second part of para 16(a) above.

63 The Stage Land Payment, the External Infrastructure Contribution, the Gasworks Site Remediation Contribution and the Integrated Public Art Contribution and the Additional Authority Payment: see para 16 above. There were specific timing provisions for some of the payments in the V5 Stage Deed, cl 2.3 (**GS-64**).

Errors of Tate JA

35. In substance, the judgment of Tate JA[64] misapplied s 20(1) of the Act in two fundamental ways:

    (a) the First Error: Tate JA approached the identification of consideration in a way that was inconsistent with the approach adopted by the majority in *Dick Smith*;

    (b) the Second Error: although asserting to the contrary, in truth Tate JA adopted an instruments-based approach to the assessment of duty.

36. Tate JA, misunderstanding the true question in issue in *Bambro (No 2) Pty Ltd v Commissioner of Stamp Duties*,[65] adopted an approach which (contrary to *Dick Smith*) sought to disaggregate the parties' bargain, confused the value of the land upon its sale to third parties with its value *as development land*, and paid insufficient regard to the Development Agreement (which embodied the parties' bargain).

37. The First Error: Tate JA did not, as Her Honour was required by the terms of s 20(1) of the Act (as explained in *Dick Smith*) to do, examine the whole of the parties' bargain in identifying what VicUrban, as vendor, required to move the transfer of the various parcels of land.

38. What her Honour did – erroneously relying on *Bambro* as authority for the proposition that each "matter" the subject of the Development Agreement should be separately examined (with the consideration "for" each matter or promise separately identified)[66] – was to determine that the various payments in issue were "for", severally, the construction of particular works.[67] The approach of seeking to allocate particular payments to particular promises without regard to the substance of the parties' entire bargain is not merely reminiscent of the approach of the minority in *Dick Smith*, but further, and importantly, fails to pay adequate regard to what the majority in *Dick Smith* referred to as the "several promises ... in consequence of which" the vendors received the total sum they required in order to sell the shares.[68]

39. The purported application of *Bambro* was wrong for two reasons. First, *Bambro* was decided in the context of a statutory regime levying stamp duty on instruments not transactions.[69] Second, Sugerman J's focus on identifying the various "matters" the

---

64 With whom Warren CJ and Kyrou AJA agreed.

65 [1963] SR (NSW) 522 (***Bambro***).

66 Court of Appeal reasons at [204] (lines 31-35), [212] (lines 30-33). Her Honour's erroneous focus on differentiating matters also infects other parts of the Court of Appeals reasons, eg [223] (line 32), [226] (line 33).

67 Court of Appeal reasons at [212] (lines 30-33). See also at [258].

68 *Dick Smith* at [75] 519.

69 As was noted by Sugerman J in *Bambro* at 527.5.

subject of the instrument was *mandated* by the relevant legislation. The legislation provided for a different rate of duty to be imposed on agreements for the sale or conveyance of "any property", as compared with building and construction agreements, which fell into the residual category of "agreements not otherwise specifically charged with any duty" and which attracted nominal duty.[70] Each was a different "matter", and the legislation required that different "matters" the subject of a single instrument be separately identified and subject to duty as though expressed in a separate instrument.[71] It was that requirement which dictated Sugerman J's approach in identifying the conveyance of land and the agreement to build on the land as separate "matters", the
10 consideration for which was (thus) to be separately identified.[72]

40. Related to Her Honour's erroneous approach in seeking to identify different "matters", and thereafter allocate consideration to them, was the error of Tate JA in disregarding the contribution of the gas site remediation works, the external infrastructure works, the public art and the Grand Plaza as contributing to the character of the land (and hence the value of the land) acquired by the Respondents. The error was to misapprehend the distinction between the realised (or realisable) value of the land upon its ultimate transfer to third parties in its fully developed state[73], on the one hand, with the enhanced value the land had *as development land* which was enjoyed by the Respondents, on the other. Rather than taking title to parcels of land which were
20 polluted (or proximate to polluted land[74]), which were cut off from the Melbourne CBD and which lacked any amenity in the form of parks or art, the Respondents took title to development land which had those very characteristics.[75] This error, further, caused Her Honour wrongly to exclude from the consideration for any parcel of land any promise to do work on neighbouring land, notwithstanding that such work was beneficial to the land transferred, and relevant to its development potential.[76] In truth, the development in question here is no different from the ordinary case of the developer of a housing estate who sells to purchasers at an amount which includes the cost of the

---

70 *Bambro* at 527.8 to 528.1.

71 *Stamp Duties Act 1920-1958* (NSW), s 17(1), as referred to in *Bambro* at 527.8 and 528.7. Indeed, it was this different statutory focus which led to the Solicitor-General in *Bambro* submitting that *Paul v Inland Revenue* ought to be distinguished. The Solicitor-General submitted that *Paul v Inland Revenue* was concerned with legislation under which the conveyance (and not the instrument) was the subject of duty. Sugerman J accepted the distinction on the basis that, under the English and Scottish cases, the question was "What was the consideration?" whereas the question arising on the NSW legislation was "What is the property agreed to be sold or conveyed?": *Bambro* at 527.1-527.5

72 *Bambro* at 528.6 ff.

73 Court of Appeal's reasons at [208]-[212], [214], [216].

74 It is uncontroversial that the value of a piece of land proximate to a blighted piece of land such as a tip or polluted gasworks site would be lower than it would be if the blight were remedied.

75 For reasons already identified, it is not relevant to enquire which of those works had been completed at the date of each of the relevant transfers.

76 Court of Appeal's reasons at [225] and [230].

services (such as roads and sewage) which the developer has constructed or has agreed to construct. That such an amount is part of the consideration is uncontroversial.

41. Her Honour may have misapprehended that *Bambro* stood for the proposition that any works affecting the land to be undertaken after the date of transfer had to be disregarded in assessing the consideration moving the transfer.[77] But in fact, in *Bambro*, the evaluation of the state of the land at the date of transfer was simply (and only) a reflection of the need, under the then prevailing statutory regime, to identify the "property" conveyed by the relevant "matter" (which was the land, and not the land with the shopping centre, the agreement to build being a separate "matter").[78]

10 42. Tate JA was also diverted from the proper task identified by the majority in *Dick Smith* (namely, identifying what the vendor required to part with title, being that which "moved" the conveyance) by focusing on the fact that VicUrban undertook (or was required to undertake) some "palpable" works; illustratively, in respect of public art works.[79] The undertaking of tangible activities by VicUrban in no way gainsays the fact that VicUrban required more than just the payments specified in the Land Sale Contracts in order to convey title; it required the various payments now in issue as well. (In any event, Tate JA's approach was in error as it implicitly, but wrongly, proceeded on the basis that a payment can only be "for" one thing; as already noted, the statutory expression "consideration .... for the dutiable transaction" is a composite expression.)

20 43. The Second Error: Tate JA concluded that the learned primary judge erred by beginning his analysis "*with the obligations under the Development Agreement rather than with each Land Sale Contract*".[80] Her Honour, instead, fixed on each Land Sale Contract, as the instrument which "*effected*" the dutiable transaction.[81]

44. Her Honour should have identified, by careful regard to the substantive bargain between the parties, what in truth moved each dutiable transfer. Upon that analysis, it was the Development Agreement which provided for the whole of the Land to be transferred; the entry into separate Land Sale Contracts was merely the *mechanism* agreed by the parties to effect that part of their bargain in view of the fact that they had agreed that the land would be broken up into, and released in, Stages.[82]

---

77 Although noting Her Honour's later disavowal of timing as having significance: Court of Appeal's reasons at [236]ff.

78 *Bambro* at 528.6-528.9. Recalling that the relevant class of instruments was agreements for the "sale or conveyance ... of any property".

79 Court of Appeal's reasons at [214] (lines 10-12). See too: Court of Appeal's reasons at [212] (lines 30-33).

80 Court of Appeal's reasons at [218].

81 Court of Appeal's reasons at [228] (lines 17–19).

82 It also follows from what has been said that Tate JA erred in disregarding the significance of the entire agreement clauses by reference to *Bambro*: Court of Appeal's reasons at [229].

45. Tate JA's focus on the Land Sale Contracts infected other aspects of her reasoning. In particular, that focus caused Her Honour to disregard, or at least fail to pay due regard to, the significance of the inter-relationship between the promises as being relevant to the identification of consideration[83]. It further caused Her Honour to fail to recognise that the various post-transfer payments were reflective of the enduring commercial relationship of the parties under the Development Agreement.[84] Further, Her Honour erred in distinguishing *Dick Smith* on the basis that it related to a "simple one-off transaction";[85] the force of *Dick Smith*'s injunction to examine the bargain struck between the parties is equally (if not more) compelling in a more complex commercial
10 setting such as the one at issue in these appeals.

Part VII: Legislation

46. The seven transfers of land in question occurred between October 2006 and June 2010. The relevant provisions of the *Duties Act 2000* (Vic) did not change during that time. The text of ss 7, 10, 11, 20 and 21 (taken from reprint 75, incorporating amendments as at 1 August 2010) is set out in the Annexure to these submissions.

Part VIII: Orders sought

47. The Appellant has notified the Respondents that, in M78 of 2014 (viz., C10 Montage) and M81 of 2014 (viz., C9 Myer), he does not press ground of appeal 6(c). That ground related to the assessment of the "Grand Plaza Retention Amount".

20 48. Accordingly, in each of appeal M78 of 2014 and M81 of 2014, the Appellant seeks the following orders:

(1) Each appeal be allowed.

(2) The Respondent pay the Appellant's costs of each appeal to the High Court, including costs of the application for special leave to appeal.

(3) Otherwise:

(a) the orders of Court of Appeal of the Supreme Court of Victoria made 15 August 2013 in each matter be set aside;

(b) each matter (including questions of costs in the Supreme Court) be remitted to the Court of Appeal to be re-determined in accordance with this Court's
30 reasons.

49. In each of the remaining six appeals, the Appellant seeks the following orders:

---

83 Court of Appeal's reasons at [222]ff (section headed "Interdependence of the obligations").

84 Court of Appeal's reasons at [240]ff (section headed "Profit sharing").

85 Court of Appeal's reasons at [241].

(1) Each appeal be allowed.

(2) The Respondent pay the Appellant's costs of each appeal to the High Court, including costs of the application for special leave to appeal.

(3) The orders of the Court of Appeal of the Supreme Court of Victoria made 15 August 2013 in each matter be set aside. In lieu -

(a) each appeal to that Court be dismissed with costs;

alternatively,

(b) each of the six matters (including questions of costs in the Supreme Court) be remitted to the Court of Appeal to be re-determined in accordance with
10 this Court's reasons.

Part IX: Estimate

50. The estimate of the time required for the presentation of the Appellant's oral argument (including reply) is 2.5 hours.

Dated: 19 September 2014

Philip Solomon

Tel: 03 8600 1711
Fax: 03 8600 1725
solomon@chancery.com.au

Chancery Chambers

Catherine G Button

Tel: 03 9225 6766

cbutton@vicbar.com.au

Ninian Stephen Chambers

David Morgan

Tel: 03 9225 6821
Fax: 03 9225 8668
david.morgan@vicbar.com.au

Ninian Stephen Chambers

ANNEXURE

SECTION 7

Imposition of duty on certain transactions concerning dutiable property

(1) This Chapter charges duty on—

(a) a transfer of dutiable property; and

(b) the following transactions—

(i) a declaration of trust relating to dutiable property the specification of which forms part of the declaration of trust or part of the transaction constituted by the declaration of trust;

(ii) a surrender of dutiable property;

(iia) a disclaimer of an interest or a right in respect of dutiable property (other than dutiable property referred to in section 10(1)(b) or section 10(1)(c)) under the will or codicil of a deceased person or in or under the estate of a deceased person, irrespective of whether the will, codicil or estate has been fully administered;

(iib) a vesting of land in Victoria by, or expressly authorised by, statute law of this or another jurisdiction, whether in or outside Australia;

(iii) a vesting of dutiable property by a court order or an order of the Registrar of Titles;

(iv) the enlargement of a term into a fee-simple under section 153 of the **Property Law Act 1958**; or

(v) the granting of a lease for which any consideration other than rent reserved is paid or agreed to be paid, either in respect of the lease or in respect of—

(A) a right to purchase the land or a right to a transfer of the land;

(B) an option to purchase the land or an option for the transfer of the land;

(C) a right of first refusal in respect of the sale or transfer of the land;

(D) any other lease, licence, contract, scheme or arrangement by which the lessee, or an associated person of the lessee, obtains any right or interest in the land that is the subject of the lease other than the leasehold estate;

(va) the transfer or assignment of a lease for which any consideration is paid or agreed to be paid, either in respect of the transfer or assignment or in respect of—

(A) a right to purchase the land or a right to a transfer of the land;

(B) an option to purchase the land or an option for the transfer of the land;

(C) a right of first refusal in respect of the sale or transfer of the land;

(D) any other lease, licence, contract, scheme or arrangement by which the transferee or assignee, or an associated person of the transferee or assignee, obtains any right or interest in the land that is the subject of the lease other than the leasehold estate;

(vi) any other transaction that results in a change in beneficial ownership of dutiable property (other than an excluded transaction).

10 (2) Such a transfer or transaction is a ***dutiable transaction*** for the purposes of this Act.

(2A) Despite subsection (1)(b)(vi), an excluded transaction that results in a change in beneficial ownership of dutiable property is a dutiable transaction if it is part of a scheme or arrangement that, in the Commissioner's opinion, was made with a collateral purpose of reducing the duty otherwise chargeable under this Chapter.

(3) Despite subsection (1), the assignment of a term referred to in section 153 of the **Property Law Act 1958** is not a dutiable transaction unless it is a transaction referred to in subsection (1)(b)(va).

(3AA) Despite subsection (1), the granting, transfer, assignment or surrender of a lease creating or giving rise to a residency right in a retirement village within the meaning
20 of the **Retirement Villages Act 1986** is not a dutiable transaction.

(3AAB) Despite subsection (1), the granting of a lease is not a dutiable transaction if the lease was granted as a result of the exercise of an option for a further term where—

(a) the option was provided for by a lease which was granted before 21 November 2008; and

(b) the lease referred to in paragraph (a) required the payment of consideration for the exercise of the option.

(3A) Despite subsection (1), a transfer of marketable securities, or a transaction referred to in subsection (1)(b) in respect of marketable securities, that takes place or occurs on or after 1 July 2002 is not a dutiable transaction.

30 (4) In this Chapter—

beneficial ownership includes, but is not limited to, ownership of dutiable property by a person as trustee of a trust;

change in beneficial ownership includes, but is not limited to—

(a) the creation of dutiable property;

(b) the extinguishment of dutiable property;

(c) a change in equitable interests in dutiable property;

(d) dutiable property becoming the subject of a trust;

(e) dutiable property ceasing to be the subject of a trust;

declaration of trust means any declaration (other than by a will or testamentary instrument) that any identified property vested or to be vested in the person making the declaration is or is to be held in trust for the person or persons, or the purpose or purposes, mentioned in the declaration although the beneficial owner of the property, or the person entitled to appoint the property, may not have joined in or assented to the declaration;

excluded transaction means—

(a) the purchase, gift, allotment or issue of a unit in a unit trust scheme;

10 (b) the cancellation, redemption or surrender of a unit in a unit trust scheme;

(c) the abrogation or alteration of a right pertaining to a unit in a unit trust scheme;

(d) the payment of an amount owing for a unit in a unit trust scheme;

(e) any combination of the transactions referred to in paragraphs (a), (b), (c) and (d).

SECTION 10

10 What is *dutiable property*?

(1) ***Dutiable property*** is any of the following—

20 (a) each of the following estates or interests in land in Victoria—

(i) an estate in fee-simple;

(ia) a life estate;

(ib) an estate in remainder;

(ii) a Crown leasehold estate;

(iii) a term referred to in section 153 of the **Property Law Act 1958** that may be enlarged into a fee-simple under that section;

* * * * *

(v) a land use entitlement;

(ab) a lease, if the lease is of a kind referred to in section 7(1)(b)(v) or
30 7(1)(b)(va);

(ac) an interest in any dutiable property referred to in paragraph (a) or (ab) other than—

(i) a security interest;

(ii) an option to purchase;

(iii) a lease other than a lease referred to in paragraph (ab);

(b) shares—

(i) in a Victorian company; or

(ii) in a corporation incorporated outside Australia that are kept on the Australian register kept in Victoria;

(c) units in a unit trust scheme, being units—

(i) registered on a register kept in Victoria; or

(ii) that are not registered on a register kept in Australia, but in respect of which the manager (or, if there is no manager, the trustee) of the unit trust scheme is a Victorian company or is a natural person resident in Victoria;

(d) goods in Victoria, if the subject of an arrangement that includes a dutiable transaction over an estate or interest in land elsewhere referred to in this section, including goods used in connection with a business carried on or in connection with the land, but not including the following—

(i) goods that are stock-in-trade;

(ii) materials held for use in manufacture;

(iii) goods under manufacture;

(iv) goods held or used in connection with primary production;

(v) livestock;

(e) an interest—

(i) under the will or codicil of a deceased person disposing of property elsewhere referred to in this section; or

(ii) in or under the estate of a deceased person comprising property elsewhere referred to in this section;

* * * * *

(g) an interest in shares referred to in paragraph (b) or in units referred to in paragraph (c) (other than an interest as mortgagee).

(2) Despite subsection (1), the following marketable securities are not dutiable property—

(a) shares, or units in a unit trust scheme, that are listed for quotation on the Australian Stock Exchange or a recognised stock exchange;

(b) an interest in shares or units referred to in paragraph (a), whether or not the interest is listed for quotation on the Australian Stock Exchange or a recognised stock exchange.

SECTION 11

11 When does a liability for duty arise?

(1) A liability for duty charged by this Chapter arises when a dutiable transaction occurs.

* * * * *

SECTION 20

20 What is the *dutiable value* of dutiable property?

(1) The ***dutiable value*** of dutiable property that is the subject of a dutiable transaction is the greater of—

10

(a) the consideration (if any) for the dutiable transaction (being the amount of a monetary consideration or the value of a non-monetary consideration); and

(b) the unencumbered value of the dutiable property.

(2) In determining the dutiable value of dutiable property, there is to be no discount for the amount of GST (if any) payable on the supply of that property.

(3) Despite subsection (1), the dutiable value of a lease referred to in section 10(1)(ab) that is the subject of a dutiable transaction is the greater of—

20

(a) any consideration (being the amount of a monetary consideration or the value of a non-monetary consideration) other than rent reserved that is paid or agreed to be paid; and

(b) the unencumbered value of the land that is subject to the lease.

SECTION 21

21 What is the consideration for the transfer of dutiable property?

(1) The consideration for the transfer of dutiable property is taken to include the amount or value of all encumbrances, whether certain or contingent, subject to which the dutiable property is transferred.

30

* * * * *

(3) The consideration for the transfer of land on the sale of that land does not include any amount paid or payable in respect of the construction of a building to be constructed on that land on or after the date on which the contract of sale was entered into.

(4) The consideration for the transfer of land that is a lot on a plan of subdivision within the meaning of the **Subdivision Act 1988** on a sale of that lot is taken

not to include an amount, attributable to that lot, in respect of refurbishment of that lot carried out on or after the date on which the contract of sale was entered into and before the date of the transfer if—

(a) the transferor was a first registered proprietor within the meaning of the **Transfer of Land Act 1958** of that lot; and

(b) the sale of that lot to the transferee is the first sale of the lot after registration of the plan of subdivision; and

(c) the transferee has not entered into a contract for refurbishment of the lot, other than in respect of the refurbishment referred to above.

10 * * * * *

(4A) Subsection (3) or (4) does not apply unless the transfer, when presented to or lodged with the Commissioner, is accompanied by—

(a) a copy of the building permit, or building approval or permit; and

(b) a copy of the contract with the transferee for the construction or refurbishment; and

(c) a statutory declaration in the approved form by the transferor as to (but not limited to) whether or not the transferor has entered into any agreement with the transferee in respect of works (other than construction or refurbishment) to be undertaken in relation to the land or
20 the lot before the transfer; and

(d) if the Commissioner requires, a statutory declaration in the approved form by the transferee declaring that the transferee has not entered any contract, other than the contract referred to in paragraph (b), for the construction of the building or refurbishment of the lot; and

(e) if the Commissioner requires, a statutory declaration in the approved form by the person that issued the building permit or building approval or permit.

(5) In this section—

refurbishment means building work for which a building permit has been
30 issued under the **Building Act 1993**, being work for the conversion of an existing building for which such a permit or approval is required.