IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

Nos M74 – M79 of 2014

Commissioner of State Revenue

Appellant

Lend Lease Development Pty Ltd

Respondent

No M80 of 2014

Commissioner of State Revenue

Appellant

Lend Lease IMT 2 (HP) Pty Ltd

Respondent

No M81 of 2014

Commissioner of State Revenue

Appellant

Lend Lease Real Estate Investments Limited

Respondent

RESPONDENTS' SUBMISSIONS

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Part I: Publication

1. These submissions are in a form suitable for publication on the Internet.

Part II: Issues

2. The issues raised by the appeals concern the identification of the consideration for a 'dutiable transaction' within the meaning of the *Duties Act 2000* (Vic) (the **Duties Act**), being the transfer of an estate in fee simple in a parcel of undeveloped land within the wider context of a land development agreement. Each transfer of land was effected by a separate Land Sale Contract and instrument of transfer.

3. The central issue is whether there was any error in the findings made by the Court of Appeal, after a detailed analysis of the contractual arrangements, that the consideration for the transfer of land in each case was the Stage Land Payment, being the price specified in the relevant Land Sale Contract, and that the various contribution payments under the Development Agreement were for matters other than the transfer of the land?[1]

Part III: Section 78B notices

4. The Respondents do not consider that any notice should be given in compliance with s 78B of the *Judiciary Act 1903*.

Part IV: Material facts

5. The material facts are set out in paragraphs [11] to [124] of the Court of Appeal's reasons for judgment. The Appellant's statement of 'Relevant Facts' is incomplete and contains significant misstatements. In particular:

   (a) the Appellant's description of LLD's obligations under the Development Agreement[2] fails to recognise LLD's core obligation to design and construct the Developer's Project and to carry out the Works, in accordance with the approved documentation;

   (b) the Appellant omits a full description of the obligations undertaken by VicUrban to carry out infrastructure and other works in the wider Docklands area in return for the promises made by LLD in the Development Agreement;

   (c) the Appellant misstates the effect of the provisions concerning the Total Land Price payable by LLD to VicUrban for the purchase of the relevant land, including a misstatement of the effect of cl 4.7 and Schedule C of the Development Agreement;

   (d) the Appellant misstates the character and effect of a number of other payments, including the final or additional land payment, such as by wrongly describing certain payments as 'top up' payments;

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1 *Lend Lease Development Pty Ltd v Commissioner of State Revenue* [2013] VSCA 207 ('**Court of Appeal's reasons**') at [258].

2 Appellant's submissions, para 10. Similarly, it is misleading to suggest that all LLD acquired when it entered into the Development Agreement was 'the right to acquire parcels of land': *cf* Appellant's submissions, para 12.

(e) the Appellant does not fully or accurately describe the nature and effect of the payments in relation to the assumption by VicUrban of obligations with respect to the construction of the Grand Plaza, and the payments made in return for construction beyond the specified initial build out limits.

The significance of these omissions and misstatements is explained more fully below. However, in the light of the inaccuracies in the Appellant's description of the relevant facts, it is necessary to commence with a summary of the mutual rights and obligations that arose under the Development Agreement.

The Development Agreement

6. As the Court of Appeal stated, the Development Agreement, 'while it did not itself effect a dutiable sale or transfer of land, constituted a detailed, ongoing and multi-faceted contractual framework for the sale of land in the [Victoria Harbour] Precinct in conjunction with its development' (emphasis added), with 'multiple and inter-connecting obligations' between LLD (as 'Developer') and VicUrban.[3]

(a) The Development Agreement provided not only for the sale of undeveloped land in Stages by VicUrban to LLD (or related entities), but also for the development of that land by LLD and the undertaking of development works by both VicUrban and LLD in the wider Docklands area.[4]

(b) The development would take place over a number of years, throughout which there was an ongoing relationship between VicUrban and LLD under the Development Agreement that went far beyond that of vendor and purchaser (or transferor and transferee) of land.[5]

(c) In addition to providing for contracts to be entered into for the sale and transfer of the Land[6] by VicUrban to LLD, the Development Agreement recited that LLD had submitted a Bid Proposal for the development of the Land, that VicUrban and LLD had 'agreed to the terms and conditions which will regulate the use and development of the Land' (emphasis added), and acknowledged 'that the development of the Land will need to be dynamic to achieve the Objectives' set out in clause 2(d).[7]

(d) This broader concern with development, rather than simply the sale and transfer of land, reflected the statutory functions of VicUrban in relation to the development of the Docklands area, including by entering into agreements with other persons

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3 Court of Appeal's reasons at [14].

4 Court of Appeal's reasons at [3].

5 See Court of Appeal's reasons at [48], [220], [239], [240]. As the Court of Appeal stated at [220]: 'Once it is appreciated that the parties were engaged in a commercial relationship that was intended to endure over a considerable period of years and that payments of various kinds, and for various things, would be made over that time at separate intervals, the fact of the transfer of the land loses much of its essential character within the arrangement.'

6 The 'Land' was defined in clause 1.1 of the Development Agreement as 'the whole or any part of the land set out in certificate of title volume 10269 folio 531 and known as Victoria Harbour Precinct, Docklands Area as set out in Schedule V and includes Area A of the Gasworks Site'.

7 Recitals C, E and F. See also Recitals G and H, by which the parties acknowledge the need to negotiate and agree further terms and specifications to ensure the development of the Land in accordance with the Objectives.

concerning the use or development of land in the Docklands area.[8] In this regard, the Development Agreement represented a 'contracting out' by VicUrban of its function to develop the Docklands area, and fulfilled the statutory objectives of promoting and encouraging the involvement of the private sector in that development and providing oversight and co-ordination of development by others.[9] This is evident in the fact that the Development Agreement imposed obligations on VicUrban and LLD, separately, to carry out specified works, and to provide infrastructure or infrastructure connections, beyond the boundaries of the Land and in the wider Docklands area.

7. LLD's primary obligation under the Development Agreement was to design and construct the Developer's Project and to carry out the Works.[10] The 'Developer's Project' was defined in clause 1.1 as 'the planning, design, development, construction and commissioning of all Stages and the Works and all off-site facilities as described in the Bid Proposal and the Approved Design Documentation (other than the External Infrastructure)'.[11] 'Works' was defined to mean "the works to be carried out by the Developer to complete the Developer's Project in accordance with this agreement and includes temporary and remedial works, landscaping and construction and installation of Developer's Infrastructure and connection to the External Infrastructure". The Developer's Project was required to meet particular specifications and standards, and to conform to and be integrated with development in adjoining precincts.[12] LLD itself undertook to construct certain infrastructure works on land outside any of the Stages,[13] while VicUrban had concomitant obligations in relation to certain buildings and works in the wider Docklands area.[14]

The Stage Land Payments

8. One element of the Development Agreement involved the transfer of the Land to the Developer in 'Stages' for the purposes of its development and ultimate sale to third parties.

   (a) Clause 4.1(a) provided that VicUrban and the Developer 'must enter into and settle a Land Sale Contract for the purchase by the Developer of each Stage for the Stage Land Payment on or before the Stage Release Date for that Stage' (emphasis added).

   (b) The 'Stage Land Payment' was defined as the Developer's contribution for each Stage, which was a proportion of the 'Total Land Price' being the Developer's

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8 *Docklands Act 1991* (Vic), ss 10, 24(2); see also Development Agreement, Recital A.

9 *Docklands Act 1991* (Vic), s 10(a), (b) and (c).

10 Court of Appeal's reasons at [14], [26]. See Development Agreement, clause 13.1; see also clause 6 (Planning), clause 9 (Design Development).

11 LLD accepted responsibility for all risks relating to the Developer's Project as set out in a Risk Allocation Table: cl 5.1, Schedule G. See also the definition of the 'Works' in clause 1.1.

12 Development Agreement, clauses 2(f), 4.16, 9.1, 9.2, 9.6, 11.5, 11.9, 13.1, 13.2, 13.3 and 13.4.

13 See Development Agreement, clauses 1.1 ('Developer's Infrastructure'), 11.3, 11.4, 11.9 (Bourke Street Extension), 11.11 (Collins Street Extension).

14 See *e.g.* Development Agreement, clause 7.8 (Gasworks Site Remediation), clause 11.1 (External Infrastructure), 11.10 (Collins Street Bridge), 11.12 (Docklands Park).

contribution for the cost of the Land in the sum of $49.7 million subject to escalation provisions.[15]

(c) A deposit of $5 million (which represented approximately 10% of the Total Land Price) was payable on the execution of the Development Agreement,[16] which is consistent with the characterisation of the Total Land Price as the consideration for the transfer of the Land, and the Stage Land Payment as the consideration for the transfer of each Stage.

(d) Contrary to the Appellant's submissions, neither the Total Land Price nor the Stage Land Payment was subject to 'a mechanism where the proceeds exceeded the initially anticipated proceeds'.[17] The mechanism for fixing the Stage Land Payment did not involve any sharing of the proceeds of sale.[18] Rather, Schedule C contained escalation provisions by which the specified payment for future Stages would be both indexed for inflation and adjusted to take account of increases in *projected* revenue, thereby ensuring that the Stage Land Payment reflected the development potential of the land at the date of the relevant transfer.

(e) The transfer of land for each stage was effected by a separate Land Sale Contract and transfer instrument. In large measure, the terms of each Land Sale Contract reflected the terms of a standard or generic land sale contract that was annexed to the Development Agreement.[19] The purchase price stated in each Land Sale Contract was in accordance with the above terms of the Development Agreement.

The payments in dispute

9. The Development Agreement also provided for LLD to make payments to VicUrban at various times for various things not related to the transferred Stage land. The timing of these payments was chiefly governed by clause 4.7, both initially and as later amended. It provided for a range of payments to be made on or before the Actual Stage Release Date (*i.e.* the date on which LLD took title to the Stage pursuant to clause 4.1) and at subsequent reconciliation dates – an 'Initial Reconciliation Date' (28 days after the first receipt by LLD of any proceeds of sale in respect of the Stage), bi-annual 'Interim Reconciliation Dates', and a Stage Reconciliation Date (2 years after Stage Practical Completion). These payments relevantly included:

(a) **External Infrastructure**:[20] VicUrban was obliged to construct certain infrastructure on land outside the boundaries of the stages to be transferred to

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15 2001 Development Agreement, clause 1.1 (definitions of 'Total Land Price' and 'Stage Land Payment'), Schedule C; 2006 and 2008 Development Agreements, clauses 1.1 (definitions of 'Base Land Payment' and 'Stage Land Payment'), 4.7(a), (g).

16 Clause 3.1(c).

17 *Cf.* Appellant's Submissions, para 16(a).

18 See Court of Appeal's reasons at [173], [249].

19 Court of Appeal's reasons at [2].

20 2001 Development Agreement, clauses 1.1 ('Minimum External Infrastructure Contribution', 'Project External Infrastructure Contribution'), 4.7(a)(i)(B), 4.7(a)(ii)(B), Schedule C; 2006/2008 Development Agreement, clauses 1.1 ('Base External Infrastructure Contribution', 'Balance of the Base External Infrastructure Contribution'), 4.7(a)(i)(A)(II), 4.7(a)(i)(C)(II), 4.7(b)(ii). See Court of Appeal's reasons at [49]-[56].

LLD.[21] In return, LLD was obliged to make a payment to VicUrban of a capped amount of $23.6 million (subject to escalation provisions), which was collected from LLD by means of payments calculated as a proportion of either the projected proceeds of sale (for payments due on or before an Actual Stage Release Date) or the actual proceeds of sale (for payments due at subsequent reconciliation dates) of each stage.[22] Once the cap was reached, no further contributions in respect of external infrastructure were payable, whether on the release of subsequent Stages or otherwise.

(b) **Gasworks Site Remediation**:[23] VicUrban was obliged to carry out an environmental remediation of the 'Gasworks Site', which was an area formerly occupied by the West Melbourne Gas Works.[24] In return, LLD was obliged to pay to VicUrban an amount capped at $27 million (subject to escalation provisions), which was collected by way of instalments in a similar manner to the External Infrastructure Contribution.

(c) **Stage Integrated Public Art**:[25] VicUrban was obliged to provide artworks in public spaces within the Docklands area outside the boundaries of the land comprising the relevant Stages.[26] LLD was obliged to pay to VicUrban a fixed proportion (0.2%) of the Stage Development Cost in respect of each Stage to fund this artwork.

(d) **Grand Plaza**:[27] The Grand Plaza Works involved the construction of a waterfront promenade and associated landscaping and enhancements in an area outside the boundaries of the land comprising the relevant Stages.[28]

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21 The external infrastructure comprised road works and other infrastructure linking both the Precinct and the Docklands area more generally to the Melbourne CBD and adjoining suburbs: see Development Agreement, clause 1.1 ('External Infrastructure'), clause 11, Schedule U. While some of the external infrastructure was in place at the time of entry into the Development Agreement, there remained obligations to be performed by VicUrban in relation to the provision of external infrastructure.

22 It is incorrect to characterise the external infrastructure payments due at subsequent reconciliation dates as 'top up payments': *cf.* Appellant's Submissions, para 16(b), (c). Both the payments on or before the Actual Stage Release Date and the payments at subsequent reconciliation dates were made 'on account of' the total External Infrastructure Contribution, which was a capped amount (subject to escalation provisions).

23 2001 Development Agreement, clauses 1.1 ('Minimum Gasworks Site Remediation Contribution', 'Project Gasworks Site Remediation Contribution'), 4.7(a)(i)(C), 4.7(a)(ii)(C), Schedule C; 2006/2008 Development Agreement, clauses 1.1. ('Base Gasworks Site Remediation Contribution', 'Balance of the Base Gasworks Site Remediation Contribution'), 4.7(a)(i)(A)(III), 4.7(a)(i)(C)(III), 4.7(b)(iii). See Court of Appeal's reasons at [58]-[64].

24 Development Agreement, clause 1.1 ('Gasworks Site'), Schedule AA. The Gasworks Site was largely outside the Precinct, but overlapped with the area of several Stages (namely, C9 (Myer), C10 Montage, and part of Mosaic and C3/C4). LLD also had its own obligations in relation to remediation of the Stage land: see Development Agreement, clause 7.7.

25 Development Agreement, clauses 1.1 ('Stage Integrated Public Art Contribution'), 4.7(a)(iii), 10.1(c). See Court of Appeal's reasons at [66]-[68].

26 Development Agreement, clause 10.1(c)(ii). LLD was also required itself to allocate and spend an amount on 'Integrated Public Art' in public spaces relating to individual buildings and public spaces within the Precinct: see Development Agreement, clause 10.1(a), (b).

27 See Court of Appeal's reasons at [78]-[86].

28 See the Grand Plaza Staging Plan and Grand Plaza Concept Plan contained in Schedules BB and CC to the Development Agreement.

Under the 2001 and 2006 Development Agreements, LLD was responsible for the construction of the Grand Plaza Works at its own expense.[29] Clause 13.2A of the 2006 Development Agreement required LLD to accrue a notional 'Grand Plaza Retention Amount' against which it was to deduct its progress claims in respect of the Grand Plaza Works.

Under the 2008 Development Agreement, VicUrban assumed the obligation (previously imposed on LLD) to procure the construction of the Grand Plaza Works.[30] Clause 13.2(b) provided that, '[i]n consideration of [VicUrban] agreeing to procure the construction of the Grand Plaza Works', LLD must pay to VicUrban the 'Grand Plaza Contribution' of $22.8 million, which was collected by instalments calculated by reference to the projected proceeds of sale on or before each Actual Stage Release Date until the full amount had been paid.[31] In respect of the C9 (Myer) Stage, LLD also agreed to pay VicUrban a 'Grand Plaza Additional Payment'.[32]

(e) **Final/Additional Land Payment**:[33] In the event that the actual proceeds of sale in respect of a Stage exceeded the projected or anticipated proceeds of sale, the Development Agreement provided for LLD to make further payments to VicUrban comprising the amount by which 2.74% of the Actual Gross Proceeds of Sale exceeded the Stage Land Payment. Such payments arose from the manner in which the Development Agreement provided for the parties to share in the proceeds of sale of the stages following their development and, as the Court of Appeal observed, enabled VicUrban 'to share in the benefit of any additional revenue generated from the ultimate sale of the developed land'. This sharing of proceeds also reflected the fact that both VicUrban and LLD had undertaken external works in the wider Docklands area that contributed to the success of the development.

(f) **Additional Authority Payment**:[34] Under the 2006 and 2008 Development Agreements, in the event that the development of a Stage was to exceed specified build out limits, 'Additional Authority Payments' were payable by LLD to VicUrban. These payments comprised an amount payable on or before the Actual Stage Release Date to obtain the additional build out authority. The payments were based on projected gross revenue on sale, and further amounts payable at the

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29 2001 Development Agreement, clause 13.2. It has never been suggested by the Appellant that the performance by LLD of the Grand Plaza Works itself constituted consideration for the transfer of the Land.

30 2008 Development Agreement, clause 1.1 ('Grand Plaza Contribution', 'Grand Plaza Additional Payment'), clause 13.2.

31 2008 Development Agreement, clause 13.2(b) and (c). There were exceptions in respect of specified Stages, where the payment in respect of the Grand Plaza Contribution was to be made on the Stage Practical Completion (Stages C1, C3 and C4 Victoria Harbour), or where no payment was made in respect of the Grand Plaza Contribution (ANZ Stage).

32 2008 Development Agreement, clauses 1.1 and 13.2(d), (e). The Grand Plaza Additional Payment was payable on or before the Actual Stage Release Date, but was subsequently reconciled against actual figures on the Initial Reconciliation Date: 2008 Development Agreement, clause 13.2(e).

33 2001 Development Agreement, clauses 4.7(a)(ii)(A), (b), (c) and (e); 2006 and 2008 Development Agreement, clauses 4.7(b)(i), (c)(i), (d)(i) and (f). See Court of Appeal's reasons at [89]-[90, [93].

34 2006 and 2008 Development Agreements, clause 1.1 ('Initial Build Out' and 'Additional Build Out), clauses 4.7(a)(ii)(B), (b)(iv), (c)(ii), d(ii), (e)(ii) and (f). See Court of Appeal's reasons at [94]-[97].

subsequent reconciliation dates based on actual gross proceeds of sale. The Development Agreement expressly provided that VicUrban 'may elect to allocate all or part of the Additional Authority Amount to public infrastructure comprised of infrastructure works and community focused projects which will be of benefit to residents, workers and visitors of the Docklands Area'.[35]

10. LLD carried out infrastructure works on land described as public areas that adjoined the C9 (Myer) stage and the C10 (Montage) stage pursuant to a Construction Licence Agreement entered into between VicUrban and LLD on 5 February 2008.[36] The works included road works, sewage, and communication connections. In relation to those two Stages, the Appellant assessed an amount by way of 'non-monetary consideration' representing the value of those construction works undertaken by LLD.[37]

The Assessments

11. The Respondents paid duty on the basis that the consideration for each of the transfers was the purchase price recorded in each land sale contract (which corresponded to the Stage Land Payment under the Development Agreement).[38] In relation to four Stages,[39] the purchase price was greater than the unencumbered value of the land. In relation to three Stages,[40] the land was valued at an amount greater than the purchase price, so that duty was paid by reference to the unencumbered value. The following table summarises the amounts applicable in respect of each Stage as the purchase price, or unencumbered value, and the amount assessed by the Appellant as 'consideration' for the transfer:[41]

Stage	**Purchase price ($)**	**Valuation ($)**	**Assessed Dutiable Value ($)**
Dock 5	4,323,364	2,575,000	9,738,698.83
Mosaic	1,228,979	1,600,000	2,575,660.30
C3/C4	924,800	less than 924,800[42]	2,248,166.99
C10 (Montage)	1,539,966.57	3,900,000	6,164,104.92
C9 (Myer)	4,761,821	700,000	22,556,030.53
V4 (MKWH)	956,758.50	2,047,500[43]	2,738,318.11

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35 2006 and 2008 Development Agreements, clause 11.13.

36 Spiropolous affidavit, paras 210-220; Exhibit GS-71.

37 Court of Appeal's reasons at [100], [107]. See also clause 4.3 of the C9 (Myer) Stage Deed; Special Condition 10.3 of the C10 (Montage) Land Sale Contract, which addressed the value of the construction works for the purposes of calculating goods and services tax (GST).

38 Court of Appeal's reasons at [42].

39 Dock 5, C3/C4, C9 (Myer) and V5 (Convesso).

40 Mosaic, C10 (Montage), V4 (MKWH).

41 See Court of Appeal's reasons at [88], [112]-[113] (Dock 5); [91], [114] (Mosaic); [92], [115] (C3/C4); [99], [116]-[117] (C10 (Montage)); [103], [118] (C9 (Myer)); [109], [119] (V4 (MKWH)); [110], [120] (V5 (Convesso)).

42 The 'improved project related site value' was $12,100,000, but this figure needed to be reduced by the cost of improvements made by LLD prior to the date of sale (in accordance with Revenue Ruling DA.010), with the result that the unencumbered value of the land was less than the contract price.

Stage	Purchase price ($)	Valuation ($)	Assessed Dutiable Value ($)
V5 (Convesso)	7,697,764	6,650,000	21,275,135.00

12. The Assessments arrived at a 'dutiable value' of the property transferred to LLD by including as consideration for the transfer, in addition to the Stage Land Payment, any payments or amounts identified at paragraph 9 and 10 above (including LLD's progress claims accrued to the retention account) that arose in connection with each Stage, regardless of the fact that many of the payments were specifically for other works or things. For the reasons set out below, the Assessments were demonstrably wrong in a number of respects, resulting in an artificial and unrealistic inflation of the dutiable value of the dutiable property that was the subject of the transfers.

Part V: Applicable legislation

13. In addition to the provisions referred to in the Appellant's Submissions, the Respondents rely on ss 3 ('dutiable property', 'dutiable transaction' and 'dutiable value'), 9, 11, 12, 14, 15, 25 and 261 of the Duties Act. The text of those provisions (taken from Reprint 75 as at 1 August 2010) is set out in an Annexure to these submissions.

Part VI: Argument

14. In summary, the Respondents submit:

(a) The consideration for each transfer was the Stage Land Payment, which was generally the amount recorded as the purchase price in the land sale contract and (with the inclusion of GST) specified as the consideration in the land transfer instruments. In all but three appeals (Mosaic, C10 (Montage) and V4 MKWH), this amount was greater than the unencumbered value of the land at the time of the transfer.

(b) In broad terms, LLD promised to make additional payments (other than the Stage Land Payment) in return for promises by VicUrban to carry out or complete works in relation to other land in the Docklands area as part of the overall development of the Precinct and the Docklands area more generally, and in order to obtain rights to carry out the Developer's Project according to the agreed design, building specifications and build out limits, and to derive profits from that project pursuant to the Development Agreement. These additional payments arose from the exchange of other promises in the Development Agreement, and are not properly characterised as having been made 'for' the transfer of the Stage Land. The obligations to make such payments were distinct from the obligation to pay for the transfer of the undeveloped land comprising each Stage.

(c) While paying lip service to the statutory question, the Appellant impermissibly seeks to transform that question into an inquiry based on the subjective

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[43] This Stage was owned jointly by LLD and a third party (Melbourne Affordable Housing) as tenants in common, with LLD holding a 63% interest. The figure of $2,047,500 represents 63% of the valuation of $3,250,000.

motivations of the vendor/transferor – *i.e.* what did the vendor receive in return for being 'willing to engage in the dutiable transaction'.

(d) There was no error in either the principles applied, or the outcome reached, by the Court of Appeal on the question whether the contribution payments formed part of the consideration 'for' the transfer of the land in each Stage.

The statutory question

15. Chapter 2 of the Duties Act charges duty on dutiable transactions. In each of the present appeals, the relevant 'dutiable transaction' was 'a transfer of dutiable property' comprising an estate in fee simple in land in Victoria: ss 7(1)(a), (2) and 10(1)(a)(i). The liability for duty arises and is to be assessed when the dutiable transaction occurs: s 11(1).

16. Duty is charged on the 'dutiable value' of the dutiable property that is the subject of the dutiable transaction: s 18. 'Dutiable value' is determined in accordance with s 20, as the greater of 'the consideration (if any) for the dutiable transaction (being the amount of a monetary consideration or the value of a non-monetary consideration)' and 'the unencumbered value of the dutiable property'.

17. In support of the assessments, the Appellant does not rely on the 'unencumbered value' limb contained in s 20(1)(b) of the Duties Act. It was not in dispute below that the unencumbered value of the land transferred to the Respondents was, as at the date of its transfer, substantially less than the 'consideration' sought to be assessed by the Appellant. The Appellant has not disputed any of the valuations. In fact, in respect of most of the Stages, the unencumbered value was less than the Stage Land Payment, and in those cases where the unencumbered value was greater, the Respondents accepted that duty was payable by reference to that value.[44]

18. Accordingly, the statutory question on which these appeals turn is: for the purposes of s 20(1)(a) of the Duties Act, what was the 'the consideration ... for the dutiable transaction', being the transfer of the fee simple estate in land comprising each relevant Stage in its condition as at the time of the transfer?[45]

19. In this regard, s 25 of the Duties Act reflects a legislative intention that a dutiable transaction should be chargeable with duty only to the extent that it relates to dutiable property. A fortiori, an agreement or other relationship between parties should attract duty only to the extent that it involves a dutiable transaction in relation to dutiable property. Section 261 also supports this conclusion.

20. The purpose and function of s 20(1) must be kept constantly in mind: it is to identify the dutiable value of the dutiable property that is the subject of the dutiable transaction. Both paragraphs (a) and (b) of s 20(1) are aimed solely at that objective. Here, applying s 20(1) to each transfer of land, the sole objective of the provision is to identify the value of the fee simple estate in undeveloped land that VicUrban transferred to the relevant respondent.

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44 Court of Appeal's reasons at [42].

45 The terms of both the Development Agreement and the Land Sale Contracts established that LLD accepted the land in its condition prior to development and waived any claim to compensation in respect of the condition of the land: see e.g. Development Agreement, clause 7.9, Schedule S (clauses 3.1, 3.2, 3.4).

21. The Appellant re-writes and distorts the statutory question by contending that the central issue is "what promises … did the vendor receive from the purchaser in return for being willing to engage in the dutiable transaction?"[46] The Appellant takes this gloss on the Act so far as to contend that the enquiry is not focused on the state of the land at the time of transfer, and that it is irrelevant that the promises by the purchaser were made in exchange for promises given by the vendor about other matters.[47] As elaborated below, the Appellant's contentions are inconsistent with the language and structure of the *Duties Act* and the authorities that explain its proper construction.

Consideration 'for' the transfer

22. In determining what was the consideration for VicUrban's transfer of that fee simple estate to the relevant respondents, for the purposes of s 20(1)(a), the starting point is the amount stated in the agreement between the parties as the consideration for the transfer of the land.[48]

23. In providing that the 'dutiable value' is the greater of the consideration for the dutiable transaction and the unencumbered value of the dutiable property, s 20(1) safeguards the Revenue against the possibility that non-arm's length parties to a contract might seek to reduce the dutiable value by fixing the consideration at an amount less than the market value of the property transferred. Nevertheless, the presence of s 20(1)(b) implicitly recognises that the consideration for a dutiable transaction is *prima facie* determined by the parties. The use of unencumbered value as a comparator also shows that the focus is on the nature of the dutiable property in its condition at the time of the transfer.

24. Section 20(1)(a) identifies a particular nexus or connection between the consideration on the one hand and the dutiable transaction (the transfer of dutiable property) on the other.[49] The former must be 'for' the latter. Such language conveys notions of purpose, that is, it requires an identification of what money or value passes in order to bring about the transfer. The characterisation of the purpose of a payment is an objective inquiry, rather than one involving subjective intentions.[50] The language of s 20(1)(a) may be contrasted with the broader language adopted in some other statutory contexts – for example, the GST legislation contains a wide definition of 'consideration' that includes 'any payment, or any act or forbearance, in connection with a supply of anything' (emphasis added).[51]

25. In the context of stamp duties legislation, it has long been established that 'the word "consideration" should receive the wider meaning or operation that belongs to it in conveyancing rather than the more precise meaning of the law of simple contracts.'[52] The

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46 Appellant's Submissions paragraph 30(b).

47 Appellant's Submissions paragraph 30(b)(ii) and (iv).

48 *R v Bullfinch Pty (WA) Ltd* (1912) 15 CLR 443 at 447-448 (Griffith CJ), 449 (Barton J); see also *Walker v Commissioner for ACT Revenue* (1994) 28 ATR 1268 at [5].

49 Compare the observations by the primary judge: *Lend Lease Development Pty Ltd v Commissioner of State Revenue* [2012] VSC 108; (2012) 87 ATR 504 at [12].

50 Compare, in a different context, *Byrnes v Kendle* (2011) 243 CLR 253 at [17] (French CJ), [55], [59] (Gummow and Hayne JJ), [98]-[101], [114]-[115] (Heydon and Crennan JJ).

51 A New Tax System (Goods and Services Tax) Act 1999 (Cth), s 9-15. *Cf.* Appellant's Submissions, para 30(b)(ii) (fnt 57).

52 *Archibald Howie Pty Ltd v Commissioner of Stamp Duties* (1948) 77 CLR 143 at 152 (Dixon J). Dixon J noted that the difference in meaning was 'not very material because the consideration must be in money or money's worth', whereas under conveyancing law and practice, on the other hand, marriage or natural

point of this distinction is that the relevant inquiry does not focus on offer and acceptance, but rather on an identification of 'the money or value passing which moves the conveyance or transfer'.[53]

26. Applying this principle in *Archibald Howie*, the High Court held that the consideration for the transfer of property by a company to its shareholders in consequence of a reduction of capital was either the payment of capital that had been made by the shareholder on the initial allotment of the share, or the reduction in the amount and value of the shares following the distribution of the company's assets.[54] The facts of *Archibald Howie* are somewhat removed from the facts of the present case.

27. More helpfully, the same principle was applied by the High Court in *Davis Investments Pty Ltd v Commissioner of Stamp Duties (NSW)*,[55] where the majority held that the consideration for a transfer by a company to its sole shareholder of shares in other companies was the price stated in the contract (which was a nominal value significantly less than their market value). Dixon CJ observed that the question was one of 'characterisation' of the transaction: 'Must the price be characterised as the consideration or is it proper to characterise the further elements in the transaction which determine or govern its real effect the consideration?'[56] The majority characterised the transaction as one of purchase and sale, and as a transfer for a price fixed by the parties.[57] In reaching this result, the majority drew a distinction between the consideration for the dutiable transaction, and wider circumstances explaining the motives of the parties, or the economic efficacy of the transaction, in its whole context.[58]

***The decisions in* Dick Smith *and* Bambro (No 2)**

28. The principle identified by Dixon J in *Archibald Howie* – that the consideration for a transfer is 'the money or value passing which moves the conveyance or transfer' – was applied by the High Court in *Chief Commissioner of State Revenue (NSW) v Dick Smith Electronics Holdings Pty Ltd*.[59]

    (a) In that case, the vendors agreed to sell shares to the purchaser for the stated price of $114,139,649 *less* the amount of a dividend to be declared by the company before completion of the sale. The purchaser agreed that on completion of the sale agreement it would both pay the price for the shares and provide finance to enable the company to pay the dividend it had declared. Before completion the

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affection could be treated as consideration: *Chief Commissioner of State Revenue (NSW) v Dick Smith Electronics Holdings Pty Ltd* (2005) 221 CLR 496 at 505 [24]; *Director of Public Prosecutions (Vic) v Le* (2007) 232 CLR 562 at [35]-[41].

53 *Archibald Howie* at 152 (Dixon J). As a consequence, the consideration for a transfer may include money or value which moves to a person other than the vendor or transferor: see *e.g. Comptroller of Stamps v Buckland* [1959] VR 517 at 521, 528-529, 537.

54 *Archibald Howie* at 153 (Dixon J), 157 (Williams J).

55 (1958) 100 CLR 392. See also *Dick Smith* (2005) 221 CLR 496 at 506 [27] (Gleeson CJ and Callinan J), referring to *St Helen's Farm (ACT) Pty Ltd v FCT* (1979) 46 FLR 217 at 237 (Sheppard J).

56 (1958) 100 CLR 392 at 406.

57 (1958) 100 CLR 392 at 406, and 408-409 (Dixon J), 409-410 (McTiernan J).

58 Ibid, at 408-409.

59 (2005) 221 CLR 496 at 517-518 [71]-[72] (Gummow, Kirby and Hayne JJ); cf. at 504-505 [22] (Gleeson and Callinan J).

company declared a dividend of approximately $25 million. On completion, the purchaser paid approximately $88 million to the vendors, being the price for the shares less the declared dividend, and lent the company sufficient funds to pay the declared dividend, which was duly paid by the company to the vendors.

(b) By majority,[60] the Court concluded that the consideration which had 'moved' the transfer of the shares was the performance of the various stipulations in the agreement in consequence of which the vendors received the sum of $114,139,649.[61] The critical fact was that there was a direct and rational link between the amount of the dividend and its funding by the purchaser, and the purchase price for the shares.

29. The decision in *Dick Smith* does not warrant a conclusion that the consideration 'for' a transfer of unencumbered land must always encompass everything received by the vendors in connection with the purchaser's agreement to develop the land. It remains necessary in each particular case to identify what value passed in exchange for the transfer, *i.e.* what value 'moved' the transfer.[62] This is of particular importance in cases where an agreement imposes a number of rights and obligations on the parties, only one of which involves a transfer of dutiable property. In such cases, it is not simply a matter of gathering every promise exchanged between the parties, and characterising that whole collection of obligations as the consideration moving the transfer.[63] Nor is the consideration for the transfer to be ascertained simply by reference to an interdependence between the transfer of dutiable property and other obligations under the relevant agreement or agreements. Such issues did not arise on the facts addressed in *Dick Smith*, which involved a single 'one-off' transaction for the sale and transfer of company shares with a mechanism for the payment of the purchase price through two different channels.

30. The situation involving a 'composite' transaction, where an agreement deals with multiple matters including a sale and transfer of land, was addressed in *Bambro (No 2) Pty Ltd v Commissioner of Stamp Duties*.[64] In that case, the appellant agreed to purchase land for £600,000, and also agreed to pay £1,405,000 in return for which the vendor would procure the construction of buildings on the land after its conveyance. Notwithstanding that these two aspects 'were intended as parts of one integrated and indivisible transaction',[65] the Supreme Court of New South Wales held that duty should have been charged only on the consideration of £600,000. The Court concluded that the relevant instrument contained distinct matters, an agreement for the sale of the land and

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60 Gummow, Kirby and Hayne JJ; Gleeson CJ and Callinan J dissenting.

61 (2005) 221 CLR 496 at 519 [75], 520 [79].

62 Compare *Shop and Store Development Ltd v Commissioners of Inland Revenue* [1967] AC 472 at 495, 498, 503 (cited by the majority in *Dick Smith* (2005) 221 CLR 496 at [72]).

63 See *Shop and Store Development Ltd* [1967] AC 472 at 495 (Lord Morris): 'The question still has to be asked and answered: What was the consideration for the transfer or conveyance of the properties which the clothing company transferred or conveyed? This is not the same as the question: How would they stand when the whole arrangement was completed?'; and at 503 (Lord Wilberforce): 'The addition of the reference to the arrangement does nothing to alter the basic requirement that the consideration must be for the transfer. It does not achieve what, if the Revenue is to succeed, it must, namely, to substitute for the consideration for the transfer the consideration receivable under the arrangement as a whole.'

64 (1963) 63 SR(NSW) 522.

65 (1963) 63 SR(NSW) 522 at 526.

an agreement to build upon the land sold.[66] Those matters were distinct even though they were 'integrated or interlocked as parts of a single larger transaction or bargain or agreement' and the several parts of the agreement were 'interwoven or interlocked as one entire bargain or transaction, which in various events must stand or fall as a whole and with other interdependences between its parts'.[67] The Supreme Court of the Australian Capital Territory recently arrived at a similar conclusion in *Commissioner for ACT Revenue v Araghi*.[68]

31. The Appellant's attempt to distinguish the decision in *Bambro (No 2)* is misguided. The proposition that *Bambro (No 2)* arose in the context of an 'instruments-based' (as opposed to a 'transaction-based') duties regime conceals more than it reveals. This is because the NSW Act in question there, unlike the *Duties Act* (Vic), imposed duty on an "Agreement for the sale or conveyance (including exchange) of any property". Section 17(1) of the NSW Act also provided that an instrument containing or relating to several distinct matters is to be separately and distinctly charged with duty in respect of each such matter. Thus, the same analysis was required under the NSW Act as s 20(1) requires. This is confirmed by the fact that the Duties Act retains an equivalent provision to s 17(1) of the *Stamp Duties Act 1920* (NSW) which 'mandated'[69] the identification of 'distinct matters'.[70] The decision in *Bambro (No 2)* therefore provides real assistance in determining the consideration for a dutiable transaction which forms part of a composite transaction involving separate and distinct matters.[71]

32. The effect of the above cases is that, in order to ascertain 'the consideration (if any) for the dutiable transaction' within the meaning of s.20(1)(a) of the Act, it is necessary to identify as a matter of objective fact the money or value that passed for, or so as to move or bring about, the dutiable transfer. The question is one of characterisation, as illustrated by cases such as *Davis*, *Bambro*, and *Dick Smith*. It is necessary to consider the nature and purpose of any particular payment or promise to provide value, in order to determine whether it has the requisite nexus, such that it can be said to have been made or given for the purpose of bringing about, or so as to move, the transfer of land or other property. It may be evident that the particular payment or promise to provide value was expressly made or given in exchange for the other party's promise to undertake specified works or to do specified things. Moreover, it is clear from cases such as *Bambro (No 2)* that mere interdependence and integration into a composite agreement is not of itself sufficient to characterise a payment or promise as consideration for the transfer, nor is a mere causal connection in the sense that the transfers would not have taken place but for the payment or promise.[72]

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66 (1963) 63 SR(NSW) 522 at 528.

67 (1963) 63 SR(NSW) 522 at 527, 529.

68 [2013] ACTCA 54.

69 Appellant's Submissions, para 39.

70 See Duties Act, s 261.

71 See *e.g. Commissioner for ACT Revenue v Araghi* [2013] ACTCA 54.

72 See generally Court of Appeal's reasons at [145]-[148]. The Appellant conceded below that the satisfaction of a 'but for' test between payments and transfer was not a sufficient basis from which to infer that the payments were the consideration which moved the transfer, and was 'too imprecise and too remote to assist': see Court of Appeal's reasons at [193], [232].

The errors in the Appellant's arguments

33. The Appellant contends that the consideration for a transfer encompasses all of the promises received by the vendor in return for being willing to engage in the transfer.[73] The question formulated by the Appellant is inconsistent with the language of s 20(1). It also loses sight of the function and purpose of s 20(1), which is to identify the value of the property (here a fee simple estate in undeveloped land) that is being transferred at the time it is transferred (s 11(1)), by reference to the greater of its unencumbered value, or the money or value that passes in order to bring about that transfer.

34. In so far as the Appellant seeks to draw this proposition from the majority judgment in *Dick Smith*, he confuses the principle expressed by the majority with wider notions of motive or economic consequences of the kind rejected in *Davis*. It also confuses the governing principle with the way in which the majority of the High Court explained the particular facts which attracted that principle.[74] In concluding on the facts of the particular case that what moved the transfer was the 'performance of *all* of the various stipulations in the Agreement', the majority in *Dick Smith* was addressing a singular transaction, and should not be taken to have established any general principle that must be automatically applied in every case.

35. The principle advanced by the Appellant departs from the statutory question, and ultimately amounts to 'little more than a 'but for' test or a related test inviting an inquiry into motivation',[75] which the Appellant expressly conceded before the Court of Appeal was 'too imprecise and too remote to assist'.[76] The Court of Appeal rightly rejected the use of such a simple test of causation as the criterion for determining whether duty is attracted.[77] The phrase, 'consideration ... for the dutiable transaction', in s 20(1)(a) does not refer to contractual consideration in the sense of offer and acceptance, and it is therefore not appropriate to employ a criterion that would include everything the vendor 'bargained' to receive from the purchaser under a composite agreement such as the Development Agreement.

36. The argument that it is irrelevant that payments or promises are consideration for 'more than one thing' is clearly wrong.[78] In so far as payments or promises might 'move' multiple things under a composite agreement, s 20(1)(a) requires an identification of the consideration 'for' the dutiable transaction as distinct from other things. This may involve questions of characterisation or allocation. But it cannot be said that *all* of the payments or promises 'move' the dutiable transaction, and that nothing 'moves' the other aspects of the agreement or transaction. In appropriate contexts, it is possible for consideration to include 'distinct and separate' elements or components, even in

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73 Appellant's Submissions, paras 28, 30(b) and 33.

74 This is clear from the separate headings used in the judgment. The majority deals with the question of principle in paras [71]-[72] under the heading 'The consideration for duty purposes', which refers to the principles derived from *Archibald Howie*. The majority then deals with the application of those principles to the circumstances of the particular agreement for transfer of shares under the heading 'Consideration "for" the transfer in this case' (emphasis added).

75 Court of Appeal's reasons at [233].

76 Court of Appeal's reasons at [193].

77 Court of Appeal's reasons at [146], [232].

78 *Cf.* Appellant's Submissions, para 30(b)(ii).

circumstances where the vendor was only willing to enter into the transaction if the purchaser undertook to pay the aggregate amount.[79] The authorities in the context of the GST legislation do not support the proposition for which they are cited by the Appellant.[80]

37. Nor does the fact that the consideration for a transfer might exceed the unencumbered value of the land provide any assistance in identifying the consideration in any particular case.[81] As submitted above, the structure of s 20(1) is primarily intended to protect the Revenue by ensuring that the parties to a dutiable transaction cannot artificially reduce the dutiable value *below* the unencumbered value of the dutiable property.

38. The presence of s 21(3) of the Duties Act (which addresses issues arising in relation to particular transactions involving 'house and land' packages) does not imply any legislative intention that the consideration for a transfer would otherwise include amounts payable in respect of the construction of a building on the land.[82] The Appellant's argument that such an implication arises is both unsound and unsafe. In this regard, the maxim *expressio unius est exclusio alterius* is 'a valuable servant, but a dangerous master', and must be applied with care.[83]

39. In any event, the Appellant's arguments do not provide any criterion by reference to which payments or promises received by the vendor can be attributed to the transfer as opposed to other matters dealt with in the agreement or relationship between the parties. The suggestion that one should examine 'the substance of the parties' bargain' does not advance matters any further.[84] Taken to its logical conclusion, the Appellant's test would mean that VicUrban was only 'willing' to transfer the land in return for LLD's promise to construct the Developer's Project, so that even the value of the Works comprising the Development Project would constitute consideration for the transfers. However, that would be an absurd result.

40. Further, the practical implications of the test for which the Appellant contends seem to be that a mere interdependence of obligations is sufficient. This would have anomalous

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79 See *Roxborough v Rothmans of Pall Mall Australia Limited* (2001) 208 CLR 516 at 524 [13], 527 [21] (Gleeson CJ, Gaudron and Hayne JJ), 537 [55] (Gummow J).

80 *Cf.* Appellant's Submissions, para 30(b)(ii), fnt 57. *Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342 was concerned with a very different question of whether a forfeited deposit was consideration for a 'taxable supply' for the purposes of the GST legislation. The Court held that the relevant taxable supply was the making of the contract, rather than the conveyance of the real property (which did not ultimately take place). However, it was clear that there was only one taxable supply, and there was no need to allocate the consideration between multiple different supplies: (2008) 236 CLR 342 at 346 [5], 356 [42]. Similarly, *Commissioner of Taxation v Qantas Airways Ltd* (2012) 247 CLR 286 concerned the payment of GST on a taxable supply arising from a flight reservation, in circumstances where the passenger ultimately failed to take the flight. Again, no question arose of consideration paid for more than one thing.

81 *Cf.* Appellant's Submissions, para 30(e).

82 *Cf.* Appellant's Submissions, para 30(f).

83 *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94, referring to *Colquhoun v. Brooks* (1888) 21 QBD 52 at 65; see also *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 575.

84 *Cf.* Appellant's Submissions, para 29. The decision in *Paul v Commissioners of Inland Revenue* [1936] SC 443 at 552 was directed to the question whether or not there was in substance a single bargain for the sale and transfer of a house and land. That question has no relevance to the present appeals.

consequences for many commonplace composite transactions, such as an agreement for the sale of land together with a business conducted on or in conjunction with that land (including plant, stock and goodwill).[85]

41. The Respondents do not submit that the instrument in which a promise is located is determinative of the question whether the promise should be characterised as consideration for the transfer.[86] Nor did the Court of Appeal suggest otherwise.[87] On the contrary, the Court of Appeal engaged in a thorough examination and analysis of the obligations imposed by both the Development Agreement and the Land Sale Contracts and their relationship to the dutiable transaction.

42. In some circumstances, an executory promise to share in future profits might be capable of forming part of the consideration for a transfer of land,[88] but that will not necessarily be so in every case. It remains necessary to examine the nature and purpose of the relevant promise, whether it was given in consideration for other matters, and its connection with the transfer of the land (as opposed to its subsequent development).

43. It is possible that consideration for a transfer might be received after the date of the transfer (*e.g.* a promise to make future payments). But it does not follow that the statutory inquiry under s 20(1) is not temporally limited by reference to the state or condition of the land at the date of transfer. The Commissioner's argument that there are no such temporal limitations under s 20(1) fundamentally alters the statutory question, which is directed to the identification of the dutiable value of the dutiable property that is the subject of the transfer.[89] Similarly, the timing of the payments is not determinative, but may nevertheless be relevant to their characterisation.[90]

44. The relevant question is not 'What did VicUrban bargain to receive to render it willing to part with title to the various parcels of land?'[91], but rather 'What was the money or value passing from the purchaser to VicUrban for, or so as to move, the transfer of the land comprised in each Stage?' The Appellant's submissions indicate the answer to that question, namely, '[u]nder the Development Agreement, VicUrban agreed to sell the Land ... for the Total Land Price'.[92] The Total Land Price is the aggregate of the purchase prices paid for each Stage by way of the Stage Land Payment under each Land Sale Contract.

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85 Some issues arising in relation to the interdependent sale of land together with business goods are addressed, albeit not exhaustively, by s 22B of the Duties Act.

86 *Cf.* Appellant's Submissions, para 30(d).

87 See *e.g.* Court of Appeal's reasons at [135], [141], [191], [219]. The Court of Appeal referred to 'instruments' in the context of correcting an erroneous submission by the Commissioner: see at [190]-[191].

88 Court of Appeal's reasons at [197], [244]-[255]. *Cf.* Appellant's Submissions, para 25. The decision in *Colonial Mutual Life Assurance Society Ltd* (1953) 89 CLR 428 addressed a different legal question. In any event, on the facts of that case it was clear from the terms of the contract that the purchase price comprised a right to future rental income: (1953) 89 CLR 428, 454. *Colonial Mutual* does not suggest that an executory promise should in all cases be characterised as consideration for a transfer of land, particularly where the contractual documents identify a specified amount as the purchase price for the land (see Development Agreement, clause 4.1(a), and each of the Land Sale Contracts).

89 *Cf.* Appellant's Submissions, para 30(b)(iv).

90 *Cf.* Appellant's Submissions, para 34. See general Court of Appeal's reasons at [236]-[239].

91 *Cf.* Appellant's Submissions, para 31.

92 Appellant's Submissions, para 32.

The consideration for the transfers in the present appeals

45. In the present case, the relevant 'dutiable transactions' were the transfers of the fee simple estate in the land comprised in each Stage. Those transfers were effected by the Land Sales Contracts and the transfer instruments. The Development Agreement provided the framework for those Land Sale Contracts in that it contemplated an agreement to sell and transfer land 'for' a specified land payment. But the Development Agreement also covered a wide range of ongoing rights and obligations in relation to the development of that land, or for the performance of construction works on public land, which did not themselves constitute or involve a 'dutiable transaction'. An agreement for the development of land is not itself subject to duty under the Duties Act.

46. This does not involve any attempt to 'carve up' and 'allocate' the individual promises under the Development Agreement.[93] Rather, it requires an identification of those payments or promises that are properly characterised as consideration 'for' each of the transfers. It is not possible to adopt a simplistic approach that every payment or promise contained in the Development Agreement was made 'for' the transfer of the undeveloped Stage land. As submitted above, the Development Agreement was not merely an agreement that contemplated the sale and transfer of land, but also encompassed mutual rights and obligations in relation to the development of the land and the performance of works on adjacent land, in accordance with the agreed limits and features of the Developer's Project.

47. The contribution payments required under the Development Agreement were not made in return for the transfer of land by VicUrban to the Respondents, nor were those payments required '[a]s the price of transferring title'.[94] When properly analysed, the payments were in connection with the development of the Land in the context of the Precinct and the Docklands area, and were made by LLD in return for other promises made by VicUrban in relation to the ongoing development of the land and the wider Docklands area, and the realisation of proceeds of sale from that development.

48. It is ultimately a question of objective fact whether or not any particular payment or promise can be characterised as part of the consideration for the relevant dutiable transaction.[95] It was the role of the Court of Appeal, as the intermediate appellate court undertaking an appeal by way of re-hearing, to undertake that characterisation, and it did so fully and carefully. There was no material error in the analysis of the Court of Appeal which affected its findings of fact on the statutory question in relation to each of the payments in dispute.

49. The Assessments are demonstrably perverse in a number of respects, as can be illustrated by the following examples.

    (a) The Grand Plaza Contribution was an obligation undertaken by LLD under the 2008 Development Agreement, in return for VicUrban's assumption of the obligation to procure the construction of the Grand Plaza, thereby relieving LLD of its construction obligations under the previous agreements. The obligations

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93 *Cf.* Appellant's Submissions, para 30(b)(i).

94 *Cf.* Appellant's Submissions, paras 33, 34.

95 *Cf.* Appellant's Submissions, para 30(c).

related to ongoing construction works on land outside the relevant Stages. In no sense can it be said that these payments were made 'for' the transfer of the land comprised in the Stages.

(b) The Grand Plaza Retention Amount was wrongly assessed. It arose under the 2006 Development Agreement at a time when the obligation to construct the Grand Plaza rested on LLD, and was 'no more than an accounting obligation to maintain a fund against which LLD would deduct its progress claims with respect to the construction of the Grand Plaza'.[96]

(c) The Additional Authority Payment arose under the 2006 and 2008 Development Agreements, and was payable in respect of the development of the land by LLD beyond specified initial build-out limits, and was therefore 'inherently a payment relating to construction and development and not a payment that moved the transfer of the land'.[97] Having been paid to increase the build out limits that governed its construction work, the payment was referable to the actual gross proceeds of sale, and involved a distribution or sharing of profits from the additional development of the land.

(d) The Final/Additional Land Payment is not properly treated as a 'top up' of the Stage Land Payment.[98] Unlike the Stage Land Payment, which was stipulated as a fixed amount based on the anticipated or projected sale proceeds at the time of the transfer,[99] the Final/Additional Land Payment involved a distribution of the actual gross proceeds of sale received by LLD. Such a distribution or sharing of the proceeds of sale tends to show that the payments were 'for' the development works as opposed to the transfer of the land in its undeveloped state.[100] It provided a further return to VicUrban from the successful development to which it had contributed by all of its infrastructure works in the wider precinct.

(e) The non-monetary consideration involved construction works undertaken by LLD on areas immediately adjoining the C9 (Myer) and the C10 (Montage) Stages, in order to facilitate the Developer's Project. Those works were carried out in performance of LLD's development obligations, and did not have a sufficient connection with the transfer of the land to be characterised as consideration for the transfer within the meaning of s 20(1) of the Duties Act.[101]

(f) The payments in respect of External Infrastructure, Gasworks Site Remediation and Stage Integrated Public Art were fixed and capped amounts which predominantly related to works carried out on land outside the relevant Stages that would assist the overall development of the Precinct. Those contributions were recovered by instalments payable at various times in connection with the release

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96 Court of Appeal's reasons at [252].

97 Court of Appeal's reasons at [255].

98 Court of Appeal's reasons at [249]-[250] and [255].

99 Court of Appeal's reasons at [28], [41], [173], [180].

100 See Court of Appeal's reasons at [248].

101 This position is not altered by the GST clauses in the relevant C10 (Montage) Land Sale Contract or the C9 Stage Deed, which dealt with consideration 'for GST purposes' and reflected an arrangement whereby certain GST amounts payable by LLD and VicUrban would be offset against each other.

and subsequent development of each Stage.[102] As the Court of Appeal noted,[103] the works in question were not 'designed or constructed to enhance the value of the land at the time of transfer', but rather 'were intended to enhance the value of the land to be realisable upon sale' following the completion of its development.

50. Even assuming that some of these payments were made in respect of works which contributed to the ultimate 'transformation' of the Precinct or the Docklands area,[104] that does not support a characterisation that those payments were made 'for' the transfer of the undeveloped Stage land. In particular, it is inconsistent with the manner in which these proceedings have been conducted to suggest that the works carried out by VicUrban outside the boundaries of the land comprised in each Stage 'informed the value of those parcels of land as development sites'.[105] To the extent that the development potential of the land as it stood at the time of transfer was enhanced by the relevant works, that was taken into account in the Stage Land Payment.[106] Further, the Appellant's submissions fall into the same error that was made by the primary judge, by shifting focus to the condition of the land 'in the form and state intended to be secured through the development' as opposed to the dutiable property that was the subject of the transfer.[107]

51. The conclusion that the contribution payments were not part of the consideration for the transfer of the dutiable property is further supported by the fact that proprietary interest transferred to the Respondents was subject to, or qualified by, the obligations to make those payments. As the Appellant notes,[108] the obligations under the Development Agreement were incorporated in a Registrable Agreement and took effect as covenants that were annexed to and ran with the land, binding any successor in title. Those covenants qualified or burdened the interest in land that was the subject of the land sale contracts and the transfer instruments.[109] While the Court of Appeal rejected the Appellant's contention that the Registrable Agreements amounted to 'encumbrances' for the purposes of s 21(1) of the Duties Act (and that conclusion is not challenged by the Appellant on these appeals),[110] the fact that the payment obligations were a burden on the title held by the Developer is inconsistent with those obligations being characterised as consideration provided by the Developer for the transfer of the land.[111]

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102 Contrary to the Appellant's Submissions at para 34 (fnt 63), these contribution payments were not exclusively made before title to the land passed to the Respondents.

103 Court of Appeal's reasons at [216]; see also at [208], [210].

104 *Cf.* Appellant's Submissions, paras 8(a) and 12; and see Court of Appeal's reasons at [208].

105 Appellant's Submissions, para 12. As found below, the manner in which the Stage Land Payment was calculated already reflected the development potential of the land, and in most cases was greater than the value of the land as a development site at the time of transfer: Court of Appeal's reasons, paras [75], [173], [221], [249].

106 See Court of Appeal's reasons at [75], [249]-[250].

107 Court of Appeal's reasons at [206]-[211].

108 Appellant's Submissions, para 14(b). See Development Agreement, clause 1.8(b), 4.1(c)(ii), Schedules J and Q.

109 Compare *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd* (2002) 209 CLR 651 at 664-666; *Vopak Terminals Australia Pty Ltd v Commissioner of State Revenue* (2004) 12 VR 351 at 380 [71], 383 [78].

110 Court of Appeal's reasons at [275]-[287].

111 Thus, if LLD as the Developer were to sell the land in the course of its development, the purchaser would assume the ongoing obligations to make contribution payments required under the Development

There was no error in the Court of Appeal's decision

52. The Court of Appeal's decision did not involve error in either of the ways alleged by the Appellant.

(a) Far from seeking to 'disaggregate' the bargain between VicUrban and LLD, the Court recognised that the Development Agreement and associated documents embodied a composite and multi-faceted transaction, only one aspect of which involved a dutiable transaction in the form of the transfer of land. In such circumstances, it was incumbent on the Court to identify those payments or promises that passed value for, or so as to move, the transfer and thereby constituted consideration for the dutiable transaction within the meaning of s 20(1) of the Duties Act. The Court of Appeal acted correctly in distinguishing the dutiable transactions (the transfers) from other matters covered by the Development Agreement that were not dutiable (*e.g.* the development of the land).

(b) The Court of Appeal acknowledged that duty under the Duties Act is imposed on transactions and not on instruments.[112] It nevertheless remains accurate to describe the land sale contracts as having effected the dutiable transaction (*i.e.* the transfers), and such language continues to be used in the Duties Act itself.[113] However, the Court recognised that the consideration for the transfers was not necessarily limited to the promises made in the land sale contracts, noting only that 'proper attention must be paid to the specificity they provide in the context of the totality of obligations assumed under the Development Agreement'.[114] In determining whether the contribution payments under the Development Agreement could be characterised as consideration for the transfers of land, the Court carried out a detailed analysis of the provisions of the Development Agreement and the nature of the relevant payments made thereunder.[115]

Part VIII: Estimated length of oral argument

53. It is estimated that the Respondents require approximately 4 hours.

Dated: 10 October 2014

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Agreement. In such circumstances, it cannot be the case that the contribution payments payable under the Development Agreement form part of the consideration for the initial transfer, and then again form part of the consideration for the transfer to the subsequent purchaser.

112 Court of Appeal's reasons at [135] (fnt 128), [141] (fnt 139); and more generally at [125]-[129].

113 See *e.g.* Duties Act, s 9, 14, 17(1), 260, 261, 265, 267, 269 and 272.

114 Court of Appeal's reasons at [191]. To a large extent, the Court's identification of the instruments which effected the transaction was in order to correct an erroneous submission made by the Commissioner that the dutiable transaction was the Development Agreement: see Court of Appeal's reasons at [190]-[191], [219].

115 *Cf.* Appellant's Summary of Argument, para 11.

domestic relationship means—

(a) a registered domestic relationship; or

(b) a relationship between two persons who are not married to each other but who are living together as a couple on a genuine domestic basis (irrespective of gender);

S. 3(1) def. of *domestic relationship* inserted by No. 27/2001 s. 3(Sch. 1 item 2.1(a)), substituted by No. 12/2008 s. 73(1)(Sch. 1 item 17.1), amended by No. 4/2009 s. 37(Sch. 1 item 10.1).

dutiable property has the meaning given by section 10;

dutiable proportion, for a mortgage, means the proportion of the amount secured by the mortgage worked out under section 159;

S. 3(1) def. of *dutiable proportion* inserted by No. 46/2001 s. 3(1)(a).

dutiable transaction has the meaning given by section 7(2);

dutiable value—

(a) of dutiable property has the meaning given by section 20;

(b) of a motor vehicle has the meaning given by section 219;

eligible first home owner has the meaning given by section 61;

eligible pensioner has the meaning given by section 58;

eligible rollover fund means an entity that is an eligible rollover fund in accordance with section 242 of the Superannuation Industry (Supervision) Act 1993 of the Commonwealth and includes an entity the trustee of which is satisfied will be an eligible rollover fund within 12 months after

Column 1 *Dutiable transaction*	*Column 2* *Property transferred*	*Column 3* *Transferee*	*Column 4* *When transfer occurs*
vesting by order of the Registrar of Titles	the vested property	the person in whom the property is vested	when the order takes effect
enlargement of interest into fee-simple	the estate in fee simple	the person in whom the term was previously vested	when the interest is enlarged
granting of a lease for consideration other than rent reserved	the leased property	the lessee	when the lease is granted
transfer or assignment of lease	the leased property	the transferee or assignee	when the lease is transferred or assigned
any other transaction that results in a change in beneficial ownership of dutiable property	the property the beneficial ownership of which is changed	the person who obtains the beneficial ownership or whose beneficial ownership is increased	when beneficial ownership changes

9 What form must a dutiable transaction take?

(1) A dutiable transaction may be effected or evidenced—

(a) wholly in writing; or

(b) partly in writing and partly orally; or

(c) wholly orally as evidenced by whole or part performance.

(2) A dutiable transaction may be effected or recorded by any means, including electronic means.

(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;

* * * * *

S. 10(1)(f) amended by No. 46/2004 s. 4(c), repealed by No. 36/2005 s. 7.

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

S. 10(1)(g) amended by No. 79/2001 s. 4.

(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;

S. 10(2)(a) amended by No. 9/2002 s. 3(Sch. item 4.2).

(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.

S. 10(2)(b) amended by No. 9/2002 s. 3(Sch. item 4.2).

11 When does a liability for duty arise?

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

* * * * *

S. 11(2) repealed by No. 30/2002 s. 4(c).

12 Who is liable to pay the duty?

Duty charged by this Chapter is payable by the transferee, unless this Chapter requires another person to pay the duty.

13 The liability of joint tenants

For the purpose of assessing duty charged by this Chapter, joint tenants of dutiable property are taken to hold the dutiable property as tenants in common in equal shares.

14 Necessity for written instrument or written statement

(1) If a dutiable transaction that is liable to ad valorem duty under this Chapter is not effected by a written instrument, the transferee must make a written statement in the approved form.

(2) The written statement must be made within 3 months after the liability arises.

(3) If a dutiable transaction is completed or evidenced by a written instrument within 3 months after the date on which the dutiable transaction occurs, the requirement to lodge a statement and pay duty in respect of the statement may be satisfied by the lodgement of, and payment of duty on, the written instrument within 3 months after the date on which the dutiable transaction occurs.

S. 14(4) inserted by No. 79/2001 s. 5.

(4) For the purposes of this Act, an instrument of transfer of an estate in land is to be taken to effect the transfer of dutiable property referred to in section 10(1)(d) in respect of that land.

S. 14(5) inserted by No. 71/2004 s. 8.

(5) This section does not apply in respect of a dutiable transaction that is effected electronically in accordance with the **Electronic Transactions (Victoria) Act 2000**.

15 Lodging written instrument or statement with Commissioner

S. 15 amended by No. 71/2004 s. 9 (ILA s. 39B(1)).

(1) A transferee who is liable to pay duty in respect of a dutiable transaction must, within 3 months after the liability arises, lodge with the Commissioner—

(a) the written instrument that effects the dutiable transaction or, if there is more than one such written instrument, each one of them as provided by section 10; or

(b) the written statement made in compliance with section 14.

S. 15(2) inserted by No. 71/2004 s. 9.

(2) This section does not apply in respect of a dutiable transaction that is effected electronically in accordance with the **Electronic Transactions (Victoria) Act 2000**.

S. 15(3) inserted by No. 36/2010 s. 4.

(3) A written instrument that effects a dutiable transaction or a written statement made in compliance with section 14 is taken to be lodged with the Commissioner if—

(a) the on-line duty payment system is used in respect of the dutiable transaction effected or evidenced by the instrument or written statement; and

(b) it is determined that—

(i) duty is payable on the dutiable transaction and the duty is paid in full; or

(ii) no duty is payable on the dutiable transaction.

25 Apportionment—dutiable property and other property

(1) If a dutiable transaction relates to dutiable property and property that is not dutiable property, it is chargeable with duty under this Chapter only to the extent that it relates to dutiable property.

(2) If a dutiable transaction relates to different types of dutiable property for which different rates of duty are chargeable under this Chapter, the dutiable transaction is chargeable with duty under this Chapter as if a separate dutiable transaction had occurred in relation to each such type of dutiable property.

26 Partitions of marketable securities

In determining the duty to be paid on any dutiable transaction that gives effect to a partition or division of any marketable securities the Commissioner must, before assessing the duty (if any) payable on the transaction, deduct from the value of those marketable securities the value of the beneficial interest in those marketable securities held prior to the transaction by the transferee.

27 Partitions of land

In determining the duty to be paid on any dutiable transaction that gives effect to a partition or division of any estate in land, the Commissioner must, before assessing the duty (if any) payable on the transaction, deduct from the value of that estate the value of the beneficial interest in that estate held prior to the transaction by the transferee.

(3) The instrument in respect of which the application is made must be produced to the Commissioner unless the Commissioner dispenses with its production.

261 Instruments to be separately charged with duty in certain cases

S. 261 amended by No. 46/2001 s. 21.

An instrument that contains, gives effect to, or relates to, two or more distinct matters or transactions is to be separately and distinctly charged with duty in respect of each such matter or transaction, as if each matter was expressed in a separate instrument.

262 Execution of instruments

For the purposes of this Act, an instrument described in column 1 of the Table is taken to be executed when it is executed by the parties specified in column 2 opposite that instrument.

TABLE

Column 1 *Instrument type*	*Column 2* *Executing parties*
Transfer of land under the **Transfer of Land Act 1958**	Transferor and transferee
Conveyance of land (general law)	Grantor
Transfer of marketable securities	Transferor and transferee
Mortgage	Mortgagor or person who gives the mortgage
Lease	Lessor and lessee (whether both execute the original lease or one executes the original and the other executes a counterpart)