

# Revenue Rulings

## Landholder Provisions – Meaning of 'Associated Transaction'

Revenue Ruling DA.057

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### Preamble

The landholder provisions in Part 2 of Chapter 3 of the *Duties Act 2000* (the Act) charge duty on relevant acquisitions in landholders.

A landholder is any company or unit trust scheme (whether private or public) that has land holdings in Victoria with an unencumbered value of \$1 million or more.

Section 78 of the Act sets out the various ways a person may make a relevant acquisition in a landholder. One such way is through the aggregation of interests acquired by the person with interests acquired by any other person in an 'associated transaction'.

An 'associated transaction' is defined in section 3(1) of the Act to mean the acquisition of an interest in a landholder by a person and the acquisition of an interest in the landholder by another person in circumstances in which –

- (a) those persons are acting in concert; or
- (b) the acquisitions form, evidence, give effect to or arise from substantially one arrangement, one transaction or one series of transactions.

The purpose of this Ruling is to provide guidance on the application of the 'associated transaction' definition in section 3(1) of the Act and to explain the factors the Commissioner of State Revenue (the Commissioner) will take into account in determining whether or not persons have acted in concert or their acquisitions form, evidence, give effect to or arise from substantially one arrangement, one transaction or one series of transactions for the purposes of the section.

### Ruling

The 'associated transaction' definition in section 3(1) of the Act focuses on a relationship between acquisitions of two or more persons. For the

purposes of the definition, this relationship may be established by one of two ways – either by persons acting in concert or acquisitions forming, evidencing, giving effect to or arising from substantially one arrangement, one transaction or one series of transactions. It is not necessary that both limbs of the definition be satisfied for acquisitions to constitute an 'associated transaction'. It is also not necessary that the persons who made the acquisitions be associated persons as defined under section 3(1) of the Act.

Where acquisitions of interests satisfy at least one of the two limbs of the 'associated transaction' definition in section 3(1) of the Act, the acquisitions are to be regarded as an 'associated transaction'. Unlike the aggregation of interests of associated persons, the Commissioner does not have discretion to disassociate the interests acquired by persons in an 'associated transaction'. For information on the meaning of the term 'interest' and details on how and when an interest may be acquired, please see Revenue Ruling DA.056.

The following paragraphs set out the Commissioner's views on the interpretation of the phrases 'acting in concert' and 'substantially one arrangement, one transaction or one series of transactions' as appearing in the 'associated transaction' definition in section 3(1) of the Act.

#### Acting in concert

The phrase 'acting in concert' is not defined in the Act. At common law, the phrase has generally been interpreted as involving knowing conduct, the result of communication between parties and not simply simultaneous actions occurring spontaneously: see *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331, per Bowen CJ at 337; *Bank of Western Australia Ltd v Ocean Trawlers Pty Ltd & Ors* (1995) 13 WAR 407; (1995) 16 ACSR 501, per Owen J at 524.

For persons to be considered to be 'acting in concert', there must be at least an understanding between the persons as to a common purpose or object: see *Adsteam Building Industries Pty Ltd v Queensland Cement and Lime Company Ltd* (No 4) [1985] 1 Qd R 127; *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers* (1992) 111 ALR 502. The understanding can be informal as well as unenforceable (see *Bank of Western Australia Ltd* (supra) at 524; *Federal Commissioner of Taxation v Lutovi Investments Pty Ltd* (1978) 140 CLR 434, per Gibbs and Mason JJ at 444), and may be inferred from the circumstances surrounding the acquisitions under consideration, including what the persons have done, as well as by direct evidence: see *Bank of Western Australia Ltd* (supra) at 525; *Adsteam* (supra) at 133; *Urban Consolidation and Development Pty Ltd and Ors v Commissioner of State Revenue* [2011] VCAT 593 at 49-53.

The Commissioner considers that two or more persons will be acting in concert where there is direct or indirect evidence of communication between them and that communication shows a common purpose or object of an understanding, agreement or plan (whether written or oral) regarding the persons' acquisitions of interests in a landholder. This will be the case even if the persons acquire interests separately and for their own benefit.

Where there is no communication between persons and their acquisitions of interests in a landholder arise from simultaneous actions occurring spontaneously, the acquisitions would not be seen as resulting from those persons acting in concert. However in certain circumstances the acquisitions may still constitute an 'associated transaction' if the acquisitions form, evidence, give effect to or arise from substantially one arrangement, one transaction or one series of transactions.

#### **Substantially one arrangement, one transaction, or one series of transactions**

The word 'arrangement' is not defined in the Act. The *Butterworths Legal Dictionary* (1997) defines an 'arrangement' as "generally, an agreement, plan, or compact, the legal effect of which depends on the context in which it is used."

At common law, the term 'arrangement' has been interpreted in different ways in different statutory contexts. In the context of income tax legislation, an 'arrangement' has been interpreted as constituting

a wider course of action than a single agreement, and includes "all kinds of concerted action by which persons may arrange their affairs for a particular purpose or so as to produce a particular effect": see *Bell v Federal Commissioner of Taxation* (1953) 87 CLR 548 at 573.

In the stamp duty context, the term 'arrangement' has been interpreted as having a broad meaning and as including a series of transactions: see *Chief Commissioner of State Revenue v Pacific General Securities Ltd & Finmore Holdings Pty Ltd* (2004) 58 ATR 17; cf. *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1; *Australand Investments Ltd v Commissioner of State Revenue* [2009] VSC 453. The term is not limited to describing dealings between two or more persons (i.e. bilateral or multilateral arrangements), and may include unilateral arrangements which have been planned and implemented by one person alone: see *Pacific General Securities Ltd* (supra); *Chief Commissioner of State Revenue v Pacific General Securities Ltd & Finmore Holdings Pty Ltd* (No. 2) (2005) 63 ATR 127; *Urban Consolidation and Development* (supra); cf. *Lutovi Investments Pty Ltd* (supra), per Aickin J at 463.

The Commissioner considers that the phrase 'substantially one arrangement, one transaction or one series of transactions' includes cases where the relationship between the acquisitions is an integral and not a fortuitous one depending merely on such circumstances as contiguity in time or place: see *Old Reynella Villages Pty Ltd v Commissioner of Stamps* (1989) 51 SASR 378, at 381-382 and *Attorney-General v Cohen and Another* [1937] 1 KB 478, per Greene LJ at 491.

In considering whether acquisitions of interests in a landholder constitute 'substantially one arrangement, one transaction or one series of transactions', the Commissioner will look at the substance of the several acquisitions and in particular whether there is some essential unity, some oneness, some unifying factor between the acquisitions: see *Jeffrey v Commissioner of Stamps* (SA) (1980) 23 SASR 398, at 405; *Urban Consolidation and Development* (supra).

The requisite unity for acquisitions to comprise 'substantially one arrangement, one transaction or one series of transactions' under section 3(1) of the Act is to be inferred from the circumstances surrounding and the relationship between the acquisitions, including the conduct of the parties to

the transactions. In determining whether or not the requisite unity exists, it is not necessary that any of the parties be associated persons, although such circumstances may be relevant to the determination.

Acquisitions of interests in a landholder that result from separate yet interdependent contracts (in that completion of each contract is conditional on the completion of all the other contracts) is an obvious example of when acquisitions will be considered to constitute an 'associated transaction'. Due to the interdependent nature of the contracts, such acquisitions demonstrate the essential unity required to form, evidence, give effect to or arise from substantially one arrangement, one transaction or one series of transactions.

Equally, the unity of acquisitions may arise where the acquisitions result from a single contract, plan or agreement. In this regard, the Commissioner recognises that interests acquired by independent members of the public under a genuine public offer may constitute an 'associated transaction'. While the term 'associated transaction' is broadly defined in section 3(1) of the Act, the Commissioner has taken the position that he will not regard acquisitions of interests by independent members of the public as an associated transaction if the acquisitions are made in response to a genuine public offer under a product disclosure statement or prospectus lodged with the Australian Securities and Investments Commission. However, the Commissioner's position will not apply if it is found that other circumstances exist which indicate that the acquisitions form part of substantially one arrangement, one transaction or one series of transactions or the acquirers acted in concert in making the acquisitions. An example of such a circumstance is if, under a public offer, one person's acquisition in a landholder is made subject to and conditional upon another person's acquisition. The Commissioner's position will also not apply where the Commissioner considers that a person is taking advantage of this concession, particularly in cases where the public offer does not convert the landholder to either a listed company or public unit trust scheme.

The Commissioner's position to not regard acquisitions made in response to a genuine public offer as constituting an 'associated transaction' is only relevant in the context of applying the 'associated transaction' provisions. The Commissioner's views do not extend to the application of sections 89B and 89C of the Act which specifically contemplate the

aggregation of interests acquired by the public where the acquisitions relate to the conversion of a private unit trust scheme to a public unit trust scheme or a private company to a listed company.

**Factors the Commissioner will take into account to determine whether persons are 'acting in concert' in relation to acquisitions or acquisitions which 'form, evidence, give effect to or arise from substantially one arrangement, one transaction or one series of transactions'**

In determining whether acquisitions constitute an 'associated transaction' for the purposes of section 78 of the Act, the Commissioner will consider, among other things, the following –

- The existence of any agreement, understanding or arrangement (written or oral) between the vendor(s) and/or the purchasers (acquirers) of the interests in the landholder.
- Whether there is any interdependency between the acquisitions, including whether completion of any of the acquisitions is conditional on the completion of any other acquisition.
- Whether the acquisitions of the interests were negotiated independently or together and/or arise from common circumstances.
- Whether the persons from whom the interest(s) were acquired are the same or associated persons.
- The relationship (if any) of the persons who acquired interests in the landholder.
- The period of time over which the interests were acquired.

Examples 1, 2 and 3 are situations where the Commissioner would not consider the acquisitions by two or more persons to constitute an 'associated transaction'.

**Example 1**

Company A is the responsible entity of a landholder that is a private unit trust scheme (the Landholder). Company B is the sole unit holder of the Landholder. To fund future property purchases by the Landholder, Company A and Company B resolve to register the Landholder as a managed investment scheme and offer the public a 50% interest in the Landholder pursuant to a product disclosure statement. As a means of building investor confidence and ensuring a successful public capital raising, Company A negotiates with a highly regarded

institutional investor (Cornerstone Investor) to take an investment of 19% in the Landholder. The Cornerstone Investor agrees to take its interest in the Landholder on the condition that the public offer achieves a minimum level of public subscriptions. Having achieved the minimum level of public subscriptions, Company A issues units to the Cornerstone Investor (19%) and the public shortly after the close of the subscription period. In this case, the Commissioner would not consider the acquisitions by the public and the Cornerstone Investor as constituting an 'associated transaction' as none of the acquisitions by the public were made conditional upon any other acquisition including the Cornerstone Investor's acquisition. Even though the Cornerstone Investor's acquisition was dependent upon the attainment of a certain level of public subscription, the Commissioner would not regard the Cornerstone Investor's acquisition as forming an 'associated transaction' with the public subscriptions as this would negate the Commissioner's concession on acquisitions by the public under a genuine public offer. However, in circumstances where there are two or more cornerstone investors, and their acquisitions are made subject to and conditional upon each other, the Commissioner would regard the acquisitions by the cornerstone investors as constituting an 'associated transaction'.

### **Example 2**

Company A is the responsible entity for a landholder that is a private unit trust scheme (the Landholder). To reduce the level of debt and raise capital for future property purchases by the Landholder, Company A obtains the consent of the sole unit holder to offer fifteen investors known to it (none of whom are associated persons) the opportunity to invest in the Landholder. The offer is unrestricted in that investors can apply for any number of units in the Landholder. In addition, the offer is not conditional upon the achievement of a minimum level of subscriptions in order for the offer to proceed. Ten of the investors independently decide to take an interest in the Landholder. One of the investors acquires a significant interest, which constitutes a relevant acquisition in the Landholder on its own. None of the other investors acquires a significant interest. In this case, the Commissioner would not regard any of the acquisitions by the investors (including the investor with the significant interest) as

together constituting an 'associated transaction' as the investors' acquisitions were not conditional on each other. Furthermore, the investors did not act in concert in making the acquisitions.

### **Example 3**

Company A is the trustee of the XYZ Family Trust (the Family Trust) and owns a 50% interest in a landholder that is a private company (the Landholder). On 1 July 2012, Company A exercised a discretion under the deed governing the Family Trust and distributed in specie 50% of the shares (a 25% interest) it held in the Landholder to one of the discretionary objects of the Family Trust, being X. On 1 July 2013, Company A again exercised its discretionary power under the deed governing the Family Trust and distributed in specie its remaining 25% interest in the Landholder to another discretionary object of the Family Trust, being Company B. Company B and X are not associated persons under the Act. The Commissioner would not regard the above in specie distributions as constituting an 'associated transaction' provided it could be shown that they were made pursuant to two independent unilateral decisions by the trustee of the Family Trust. If the decisions to distribute the two interests were connected (other than being made pursuant to the same power and by the same trustee), the Commissioner would consider the acquisitions by Company B and X to constitute an 'associated transaction'.

Examples 4, 5, 6, and 7 are situations where the Commissioner would consider the acquisitions by two or more persons to constitute an associated transaction.

### **Example 4**

Three individuals (the Acquirers), who are not associated persons as defined in the Act, resolve to acquire in equal shares all of the issued share capital of a landholder that is a private company (the Landholder). The Acquirers appoint an agent to negotiate the purchase of the share capital of the Landholder on their behalf and arrange joint finance for the acquisitions. In this instance, although none of the Acquirers obtains a significant interest in his or her own right (i.e. an interest of 50% or more), the Commissioner would regard the acquisitions as constituting an 'associated transaction' because the Acquirers acted in concert by negotiating and making the acquisitions and obtaining joint finance.

### Example 5

X holds all of the units in a landholder that is a private unit trust scheme (the Landholder). X decides to realise his investment and offers all of his units in the Landholder for sale to the market. Y becomes aware of the sale and offers to purchase 15% of the units. X advises Y that he will only sell to Y a 15% interest in the Landholder if Y can secure purchasers for the balance of his interest in the Landholder. To ensure that Y can secure the purchase of a 15% interest in the Landholder, Y contacts a number of business associates to acquire the balance of X's interest. A number of Y's business associates agree to acquire the balance of X's interest in the Landholder, with no individual purchaser agreeing to acquire a significant interest in their own right (i.e. an interest of 20% or more). To ensure the complete sale of his interest in the Landholder, X prefers one contract be utilised but is convinced by the other parties to use separate but interdependent contracts (contracts that are subject to and conditional on the completion of each other). Y and the business associates engage an accountant to conduct due diligence and a solicitor to prepare all the necessary documentation including the contracts of sale. Y and the business associates share the costs of these professional services in proportion to the interest each of them is to acquire in the Landholder. In this case, the Commissioner would consider the acquisitions as constituting an 'associated transaction' because Y and the business associates acted in concert in the making of the acquisitions and the acquisitions arise from or form part of substantially one arrangement, one transaction or one series of transactions for the acquisition by them of X's interest in the Landholder.

### Example 6

A landholder that is a private unit trust scheme (the Landholder) has ten unit holders each holding a 10% interest in the Landholder. None of the unit holders are associated persons as defined under the Act. Three of the unit holders (the Exiting Unit Holders) decide to sell out their interests in the Landholder at the same time, i.e. a combined 30% interest (the sale units). Under the deed governing the terms of the Landholder, an exiting unit holder must offer its units for sale to the remaining unit holders before offering the units for sale to external

parties. Two of the remaining unit holders (the Acquirers) agree that they will acquire the 30% interest in equal proportions, with a view to using their interests together to obtain control of the Landholder. The Acquirers jointly negotiate with the Exiting Unit Holders and require completion of the sale of each Exiting Unit Holder's sale units to be conditional upon one another to ensure that they obtain control over the Landholder. In this case, the Commissioner would regard the acquisitions of the Exiting Unit Holders' interests in the Landholder as constituting an 'associated transaction' as the Acquirers acted in concert to acquire the sale units, and the Acquirers will use the interests for a common purpose. The acquisitions would also be considered to arise from or form part of substantially one arrangement, one transaction or one series of transactions and be considered as an associated transaction as they were interdependent.

### Example 7

The trustee and sole unit holder of a landholder that is a private unit trust scheme (the Landholder) resolve to offer units in the Landholder to a select group of professional investors under a confidential information memorandum. The offer of units under the information memorandum identifies the targeted group of investors and restricts investment in the Landholder to only those investors. It is a condition of the offer, that each investor is restricted to a maximum interest of 19.9% in the Landholder and the offer of units will not proceed unless all of the units on offer are subscribed for by the group of professional investors. If one of the professional investors declines the offer, the offer will lapse and none of the investors' subscriptions for units in the Landholder will be accepted. As the acquisitions arise under a conditional private placement involving the acceptance of restrictions and conditions relating to the acquisitions in the Landholder, the Commissioner would regard the acquisitions by the professional investors as constituting an 'associated transaction' as the acquisitions arise from or form part of substantially one arrangement, one transaction or one series of transactions.

The above examples and considerations are provided as a guide only and are not an exhaustive list of the matters or factors the Commissioner may consider. Each matter will be considered on its own facts in

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determining the application of the provisions.

A taxpayer who is uncertain of the application of the 'associated transaction' definition in section 3(1) of the Act in a particular case may contact the Landholder Acquisitions Branch at the State Revenue Office or request a private ruling in accordance with Revenue Ruling GEN.009. In all cases, the onus is on the taxpayer to provide the Commissioner with the necessary information in order to make an informed decision as to whether a person has made a relevant acquisition by way of an 'associated transaction' under section 78 of the Act.

**Please note that rulings do not have the force of law. Each decision made by the State Revenue Office is made on the merits of each individual case having regard to any relevant ruling. All rulings must be read subject to Revenue Ruling GEN.001.**