SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCI 2023 0076

OLIVER HUME PROPERTY FUNDS (BROAD GULLY RD) DIAMOND CREEK PTY LTD — Applicant

v

COMMISSIONER OF STATE REVENUE — Respondent

JUDGES:	KENNEDY, MACAULAY and LYONS JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	21 June 2024
DATE OF JUDGMENT:	8 August 2024
MEDIUM NEUTRAL CITATION:	[2024] VSCA 175
JUDGMENT APPEALED FROM:	[2023] VCAT 634 (Judge Macnamara, Vice President)

TAXATION – Where Information Memorandum issued for subscription of shares in a landholder entity – Where shares issued in order for landholder to conduct a single development project through a manager – Information Memorandum required that target of 1.8 million shares be achieved otherwise applicant money returned – Where landholder was to be wound up at the end of the project – Vice President held that acquisitions by 18 shareholders of 1.8 million shares satisfied the definition of 'associated transaction' in s 3(1) and were therefore to be aggregated under s 78(1)(a)(ii)(C) – Whether Vice President erred in construction of s 78 where investors did not know each other – No error established – Leave to appeal granted – Appeal dismissed.

Duties Act 2000, ss 3(1) (definition of 'associated transaction' para (b)), 78(1)(a)(ii)(C).

Attorney-General v Cohen [1937] 1 KB 478; *Jeffrey v Commissioner of Stamps* (1980) 23 SASR 398; *Re Clancy v Commissioner of Stamp Duties* (1998) 40 ATR 99; *Re Urban Consolidation and Development Pty Ltd v Commissioner of State Revenue* (2011) 84 ATR 725; *Radiology Partners Pty Ltd v Commissioner of State Revenue* (2019) 2 QR 1; *Wakefield v Commissioner of State Revenue* [2019] 3 Qd R 414, discussed.

Counsel

Applicant:	Mr MT Flynn KC with Mr CM Sievers
Respondent:	Mr DJ Williams AM KC with Ms CM Pierce

Solicitors

Applicant:	Pitcher Partners Legal Pty Ltd
Respondent:	Solicitor for the Commissioner of State Revenue

KENNEDY JA
MACAULAY JA
LYONS JA:

1 The applicant is a special purpose vehicle established for the purpose of a property development project at Diamond Creek known as the 'Diamond Creek project'. In 2011, the applicant purchased the property at 272 Broad Gully Road, Diamond Creek, Victoria ('the Property'). In 2014, the applicant circulated an 'Information Memorandum' which sought to raise $1.8 million through an issue of 1.8 million shares in order to fund the development of the Property. It was a condition of the Information Memorandum that the target of 1.8 million shares be achieved by 26 June 2014. In the result, on 2 July 2014, the applicant issued 1.8 million shares to 18 investors.

2 Chapter 3 of the *Duties Act 2000* (the 'Act') treats certain transactions as transfers for the purposes of imposing duty. In particular, it imposes duty on the acquisition of a 'significant interest' in a 'landholder'. A 'landholder' includes a company or unit trust that owns land worth $1 million or more. A 'significant interest' is, relevantly, 50 per cent or more in the case of a landholder private company. That threshold may be reached by a single acquirer, or, in some cases, the interest of one person may be 'aggregated' with other persons. In particular, this may occur if a person acquires their interest with others in an 'associated transaction'. Acquisitions are 'associated transactions' if they 'form, evidence, give effect to or arise from substantially one arrangement, one transaction or one series of transactions'.[1]

3 The respondent assessed the applicant for duty on the basis that the investors acquired their interests in the applicant via an 'associated transaction'. A Vice President of the Victorian Civil and Administrative Tribunal (the 'Tribunal') upheld this assessment.[2]

4 The applicant now seeks leave to appeal the decision of the Tribunal on a question of law. As the Tribunal was constituted by a Vice President, an application for leave to appeal his decision is made directly to this Court, and is restricted to an appeal on a question of law only.[3]

5 For the following reasons, we consider that the Vice President made no error in upholding the assessment. Although we will grant leave to appeal, the appeal will be dismissed.

Background

6 The applicant is a member of the Oliver Hume Property Funds Group ('OHPFG') and a part of the wider Oliver Hume Group of companies. OHPFG provides a funds management vehicle with the objective of generating returns for investors from property development activities.

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1 The Act, s 3(1) (definition of 'associated transaction' para (b)).

2 *Oliver Hume Property Funds (Broad Gully Rd) Diamond Creek Pty Ltd v Commissioner of State Revenue (Review and Regulation)* [2023] VCAT 634 ('Reasons').

3 *Victorian Civil and Administrative Tribunal Act 1998*, s 148(1)(a).

7 The sole witness in the proceeding was Mr David Rogers, who is the applicant's managing director. The respondent did not cross examine Mr Rogers or object to any of his evidence. Mr Rogers provided details of 18 projects implemented by OHPFG. Each project sought to raise funds through an Information Memorandum and identified a targeted return to shareholders once the project was completed. In all but two cases, the actual rate of return was equal to or higher than the target rate.

8 For each project, a special purpose entity was established to acquire and hold the land and shares in the special purpose entity were offered to investors. Details of the offer were set out in the Information Memorandum. The projects were marketed and promoted to potential investors in a number of ways, including:

(a) details of the project and the Information Memorandum were made available on OHPFG's website;

(b) details of the project and the Information Memorandum were made available to persons on a database maintained by OHPFG;

(c) through agency channels as part of consultancy and referral agreements entered into with third parties;

(d) preparation of a report by a property research group, which distributed the Information Memorandum to its database of over 7,000 subscribers; and

(e) marketing personally undertaken by Mr Rogers.

9 OHPFG was not concerned with, and had no preference as to how, or from where, investors were sourced.

10 On 12 May 2014, an Information Memorandum was circulated, which sought to raise $1.8 million through the issue of 1.8 million shares in the applicant at $1.00 per share to obtain equity funding for the development of the Property. The Information Memorandum provided, inter alia, that:

(a) the Information Memorandum was issued pursuant to the exemption for sophisticated investors under s 708(8) of the *Corporations Act 2001* (Cth). It had not been lodged with ASIC and is not regulated by the *Corporations Act 2001* (Cth) (cl 1.1);

(b) the applicant was seeking to raise $1.8 million through the issue of 1.8 million shares at $1.00 per share in order to undertake the development of the project. The minimum application amount was $50,000 for 50,000 shares, with investment thereafter in increments of 10,000 (cl 1.2);

(c) applications for shares could only be made using the application form attached to the Information Memorandum (cl 1.2);

(d) it was a condition of the offer made under the Information Memorandum that the target subscription of 1.8 million ordinary shares be achieved by 26 June 2014

(ie, the closing date). If this condition was not satisfied, then all application money (without interest) would be returned to the applicants (cl 1.2);

(e) as soon as the target subscription of 1.8 million ordinary shares was achieved, shares would be allotted (cl 1.4);

(f) the number of shares on issue at the date of the Information Memorandum was 100 with a value of $100 in the name of Synergy Funds Management Pty Ltd.[4] Upon completion of the offer, investors would own the overriding majority of the shares in the applicant, being 1.8 million, while Synergy Funds Management Pty Ltd would retain only a 'nominal interest' (cls 2.1 and 6.3.1);

(g) the funds raised were to be applied to repayment of loans used in funding the acquisition of the land (which had already been acquired in September 2011), as well as development costs (cl 2.2);

(h) shareholders could sell or transfer their shares at any time, subject to the constitution of the applicant and the *Corporations Act 2001* (Cth) and other laws (cl 1.6);

(i) investors delegated operations and investment decisions to the Board and to the applicant's management team (cl 5.3);

(j) investors also agreed to the applicant's appointment of a Manager, Synergy Property Syndications Pty Ltd,[5] to manage the day-to-day affairs of the applicant (cl 6.1.4) and to act as project manager of the project (cl 6.1.5). The Manager was also appointed as attorney to procure proxies and vote at a shareholders' meeting to approve any capital reduction (cl 2.4); and

(k) the Information Memorandum also cited special provisions in the applicant's constitution to the effect that:

(1) the management agreements could not be terminated except as permitted by those agreements and with the authorisation of a 90 per cent vote of the applicant's shareholders (cl 6.2.1); and

(2) the applicant must promptly do all things necessary or desirable to wind up the applicant as soon as the applicant had completed the project (cl 6.2.1).

11 Consistent with the terms of the Information Memorandum, the applicant's constitution contained the following clauses:

2.2 Key Agreements

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4 Synergy Funds Management Pty Ltd was a company controlled by and/or associated with Oliver Hume Corporation Pty Ltd.

5 Synergy Property Syndications Pty Ltd was also a company controlled by and/or associated with Oliver Hume Corporation Pty Ltd.

The [applicant] may not terminate:

(a) the Project Management Agreement to be entered into with Synergy Property Syndications Pty Ltd ABN 28 158 631 997; and

(b) the Management and Intermediary Agreement to be entered into with Synergy Property Syndications Pty Ltd ABN 28 158 631 997 and Synergy Funds Management Pty Ltd ABN 67 107 091 770;[6]

except as permitted respectively by those agreements, unless the [applicant] is authorised to do so by a resolution passed at a general meeting of the [applicant] at which the holders of 90% of the [applicant's] issued fully paid shares vote in favour of the resolution.

2.3 Completion of Project

The [applicant], its members and officers must promptly do all things necessary or desirable to wind the [applicant] up pursuant to a members' voluntary winding-up (as defined in the Act) as soon as the [applicant] has completed the Project.[7]

12 The Information Memorandum and share offer were marketed and promoted in the same manner as the other projects carried out by OHPFG outlined above.

13 Applicants were not provided with the names or any details of other applicants or a copy of application forms submitted by the other applicants. Nor would that information be provided to an applicant if requested. At all times the identities of applicants and details of individual applications remained confidential.

14 18 persons applied for a total of 1.92 million shares in the applicant (ie, for a total amount of $1.92 million). This meant that the share offer was 'oversubscribed'. Given there was an excess of 120,000 shares (above the target amount), the applicant chose to scale back application amounts for three investors.

15 On 2 July 2014, the applicant issued and allotted 1.8 million shares at a price of $1.00 per share (ie, a total of $1.8 million) to the 18 investors. This equated to a 99.99 per cent interest. The amount of each investment ranged from $50,000 to $200,000 (being from 2.8 per cent to 11.1 per cent of the available shares). Fourteen of the 18 were existing investors in the sense that their names were sourced from the OHPFG database, but four of the investors were new investors in the sense that their names were not to be found on the database. Fifteen of the investments were made by what were understood to be self-managed superannuation funds and the rest by trustees of other types of trusts. Thirteen of the investors were resident in Victoria, three in New South Wales and two in South Australia.

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6 This entity was to, inter alia, manage and promote the offer of the shares.

7 Cl 1.1 of the constitution defined 'Project' to mean 'the development of the land at 272 Broad Gully Road, Diamond Creek'.

16 No duty under the Act was assessed or paid at the time of the share allotment.[8] However, after subsequent correspondence between the State Revenue Office and the applicant, on 1 July 2020, the respondent issued a Notice of Assessment to the applicant in respect of the issue of the shares in the sum of $151,235. He also assessed penalty tax in the sum of $7,561.75 and interest of $9,365.92. The primary duty was assessed on the basis that the acquisition of shares by the 18 investors constituted a relevant acquisition of a 99.99 per cent interest in the applicant for the purposes of s 78(1)(a)(ii)(C) of the Act and that the unencumbered value of the applicant's land holding as at 2 July 2014 was $2.75 million.[9]

17 On 27 August 2020, the applicant lodged an objection against the assessment. On 11 August 2021, the respondent issued a Notice of Determination allowing the objection with respect to the penalty tax, but otherwise disallowing the objection.

18 At the request of the applicant, the respondent then referred the matter to the Tribunal under s 106 of the *Taxation Administration Act 1977*.

Statutory framework

19 The main purpose of the Act[10] was to 'create and charge a number of duties'.[11] Chapter 2 of the Act charged duty on 'transfers of dutiable property' and some other specific transactions concerning dutiable property.[12] Chapter 3 of the Act dealt with 'Certain Transactions Treated as Transfers'. Part 1 contained s 70 which provided that Chapter 3 charged duty on certain acquisitions of interests in landholders at the same rate as for a transfer of dutiable property. Part 2 rendered dutiable 'Acquisition[s] of Interests in Certain Landholders'. As indicated already, a 'landholder' was an entity (including a private company) which held land holdings in Victoria with a total unencumbered value of $1 million or more.[13] It is common ground that the applicant was a 'landholder'.

20 Section 77 of the Act created a liability to pay duty when a 'relevant acquisition' was made.

21 Section 78(1) of the Act defined the phrase, 'relevant acquisition', as follows:

> (1) For the purposes of this Part, a person makes a ***relevant acquisition*** if—
>
> (a) the person acquires an interest in a landholder—
>
> (i) that is of itself a significant interest in the landholder; or
>
> (ii) that amounts to a significant interest in the landholder when aggregated with other interests in the landholder

8 Reasons, [16].
9 Value of duty is 99.99 per cent x $2,750,000 x 5.5 per cent.
10 Given the share acquisition took place in July 2014, the parties agreed that Authorised Version No. 097 of the *Duties Act 2000* — which incorporated amendments as at 1 July 2014 — was applicable.
11 The Act, s 1.
12 Ibid s 7.
13 Ibid s 71.

acquired by all or any of the following—

(A) the person; or

(B) an associated person; or

(C) any other person in an **associated transaction**; or

…[14]

22 An 'associated person' was defined in s 3(1). It was an extremely wide-ranging definition, and embraced other expansive concepts including that of a 'related person' (in para (a)).[15]

23 The key concept in this case, however, was an 'associated transaction' which was also defined in s 3(1) as follows:

> ***associated transaction***, in relation to the acquisition of an interest in a landholder by a person, means an 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**;[16]

24 Section 80 made provision for how an interest may be 'acquired' and relevantly provided:

> (1) A person acquires an interest in a landholder if the person obtains an interest beneficially, including if the person's interest increases, in the landholder, regardless of how it is obtained or increased.
>
> (2) Without limiting subsection (1), a person may acquire an interest in a landholder in the following ways—
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> (a) the purchase, gift, allotment or issue of a unit or share;
>
> (b) the cancellation, redemption or surrender of a unit or share;
>
> (c) the abrogation or alteration of a right pertaining to a unit or share;
>
> (d) the payment of an amount owing for a unit or share.
>
> …

25 Section 79(1) provided that a person would have an 'interest' in a landholder if the person had an entitlement, whether directly or through another person, to a distribution

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14 Emphasis altered.

15 Which was further defined to include a 'relative' in para (a) of the definition of a 'related person' in s 3(1), which in turn had its own expansive definition.

16 Emphasis added.

of property from the landholder upon a winding up of the landholder. Section 79(2) then made provision for when a person would have a 'significant interest'. In the case of a private company (as here) or wholesale unit trust scheme, a person had a 'significant interest' if that person was entitled to 50 per cent or more of the property distributed. In the case of a private unit trust scheme, it was 20 per cent or more, and in the case of a listed company or public unit trust scheme, it was 90 per cent or more.

26 Where a 'relevant acquisition' results from the aggregation of interests, s 86(1) provided that duty is charged at the rate for the transfer of dutiable property on an amount calculated by multiplying the unencumbered value of all land holdings of the landholder in Victoria by the proportion of the value represented by the aggregated interests.[17] Under s 85(1) the person who makes the relevant acquisition, the landholder, and each person whose interest is aggregated, are jointly and severally liable to pay the duty. The landholder is also entitled to recover the duty from the acquirors under s 85(2).

27 It was not suggested that any individual investor acquired a 'significant interest' in the landholder (of 50 per cent or more). Nor was it suggested that the individual investors were 'associated persons' for the purpose of s 78(1)(a)(ii)(B). Rather, the respondent's case was that each investor made a relevant acquisition by reference to the aggregation provisions contained in s 78(1)(a)(ii)(C) because each investor acquired a significant interest when aggregated with the interests acquired by the other investors in an 'associated transaction'.

Vice President's reasons

28 After setting out the relevant background, including the statutory provisions and submissions, the Vice President considered that the concept of an 'arrangement' could include one that was 'unilateral'.[18] He also concluded that, in the light of the relevant authorities, it was appropriate to have regard to the actions and motives of both the transferor and the transferee.[19]

29 The Vice President referred to a hypothetical scenario where a land development company encountered a liquidity crisis and liquidated all of the allotments to a variety of members of the public with no connection with each other. He noted that counsel for the respondent had distinguished this hypothetical scenario as follows:

> [Counsel for the respondent] replied by stating that in the present instance there was a unity or 'oneness' of intention on the part of [the applicant's] investors. Whilst they were not acquainted with one another, they did have a unity of purpose in becoming shareholders in [the applicant]. In doing so, they bound themselves to the terms of a share offer and to the terms of the constitution. They there by joined albeit indirectly as shareholders rather than directly as principals in a development project. The management structure of the company for whose shares they had subscribed, laid down the regime under which this project would be carried out, including, it would seem, according to the share offer, a special clause in the constitution entrenching Oliver Hume's

17 The Act, ss 86(2) and (3).
18 Reasons, [62].
19 Ibid [63]–[64].

management role, absent 90% of shareholders resolving to the contrary. I accept this characterisation of the transaction. At least as regard the shareholders or 'acquirers'.[20]

30 The Vice President relevantly continued:

> There is clearly a unity of purpose as regards the transferor. The purpose being to raise equity via the enlistment of shareholders to enable the company to carry through a singular development project.
>
> Plainly there was an 'arrangement'. The authorities show the word whilst not of infinite width is very wide indeed, extending to situations where no legally enforceable rights and obligations are created. As it is, there were legally enforceable relationships in the form of the share offer, perhaps more accurately to be regarded as an invitation to treat with the shareholder applications constituting offers which might be accepted. Upon acceptance the shareholders acquired not only equity in the company and therefore for duty purposes a 'deemed' interest in the development property owned by [the applicant], they were also bound by the statutory contract constituted by the constitution and the rules laid down under the *Corporations Act*.
>
> Further, there was a 'oneness' or 'unity' of purpose as between the shareholders and [the applicant]. [The applicant] sought to have the shareholders as members and as providers of equity which was the very same objective which the shareholders had in lodging their application for shares in accordance with the Information Memorandum. The subscribers joined in that objective. Even if as [counsel for the applicant] contended, the landholder provisions (section 78) focus only upon the actions of the acquirers unlike the provisions of section 24 the necessary 'oneness' is to be found there.[21]

Proposed grounds of appeal

31 The applicant seeks leave to appeal on the following proposed grounds of appeal:

1. The Vice President erred by taking into account an irrelevant matter: that upon acceptance of their application for shares, each investor became bound by the statutory contract constituted by the applicant's constitution.

2. The Vice President erred by taking into account a second irrelevant matter: that the investors and the applicant shared a common objective — to have the shareholders as members and as providers of equity.

3. Having found that the acquirers of the shares in the applicant were not acquainted with one another, the Vice President erred in his construction of s 78(1) of the Act by finding that the definition of 'associated transaction' was satisfied even though the investors each subscribed for their shares independently of one another.

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20 Ibid [66].
21 Ibid [67]–[69].

4. His Honour necessarily should have found that in the absence of any connection between the investors, other than their desire to acquire equity in the applicant, where each investor separately and independently lodged an application for shares under the Information Memorandum issued by the applicant, the acquisitions of shares were not 'associated transactions' for the purposes of s 78 of the Act.

32 Although it was common ground that there has been no judicial consideration of the concept of an 'associated transaction' the subject of this application, both parties made reference to cases which have considered similar provisions. This included cases about provisions similar to s 24 of the Act,[22] which made provision for the aggregation of direct transfers (rather than aggregation of acquisitions in landholder entities).

33 Before considering the proposed grounds, we will therefore review those cases.

Relevant judicial authority

34 In the early English case of *Attorney-General v Cohen* ('*Cohen*'),[23] s 73 of the *Finance (1909–10) Act 1910* (UK) provided that there would be no doubling of the duty where the value of the consideration did not exceed 500 pounds, and the relevant instrument contained a statement certifying that the transaction 'does not form part of a larger transaction or of a series of transactions' in respect of which the aggregate amount exceeded 500 pounds.

35 The defendants in *Cohen* purchased six lots situated in the same street on the same day from the same vendors at a public auction. Four of those conveyances contained a certificate under s 73[24] but the Crown challenged the certificates by bringing a claim for a penalty under s 5 of the *Stamps Act 1891* (UK). This provision only applied where there was an intent to defraud.

36 The trial judge held that the double tax was not payable on the basis that s 73 applied and the judges of the UK Court of Appeal by a majority (Slesser and Greene LJJ), upheld this decision.

37 Slesser LJ stated:

> The learned judge has come to the conclusion that though the parties are the same, the times of transaction close and the places, the subject-matter of the various conveyances, contiguous, these are casual matters which do not make it proper to say that they constitute parts of a series within the meaning of the section and that there was no evidence of any interdependence. In my view, the conclusion at which the learned judge has arrived is correct.[25]

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22 Section 24(1)(c) made provision for aggregation in certain circumstances where the dutiable transactions together 'form, evidence, give effect to or arise from what is, substantially, one arrangement relating to all of the items or parts of the dutiable property.'

23 [1937] 1 KB 478.

24 Two lots were sold for more than 500 pounds.

25 *Cohen* [1937] 1 KB 478, 481–2.

38 He considered that the mischief being addressed by s 73 was that persons should not evade their liability by breaking up a large transaction into a number of smaller transactions each of less than 500 pounds. He said:

> Similarly, where co-ordinated or interdependent transactions might not be so treated as to amount strictly in law to parts of 'a larger transaction,' nevertheless they might be so related that, in effect, one would cause or qualify another. … [T]he series is not to escape the full rate by being dissected into artificially discrete parts.[26]

39 Slesser LJ considered that there was no evidence at all that the lots were 'not entirely independent' or that the arbitrary coincidence of time or place constituted 'any such interdependence as to form a series.'[27]

40 Greene LJ emphasised that each transaction was 'separate and independent'. He considered that the conveyances could not be said to form part of a 'larger transaction.'[28] In considering the issue of whether the transactions constituted 'part of a series', he considered that the expression, 'part of a series', suggested that there is some 'integral relationship' between its parts and not that all that is required is that the transaction should be one of a number of transactions related to one another in time or space or both.[29] He contrasted the hypothetical situation where a builder was developing a building estate and had under one contract an option to purchase different plots. He suggested that there would be a 'matter of doubt' as to whether a particular conveyance could be part of a larger transaction, but that there would be in each case such an 'integral relationship' between the transactions as to constitute each indubitably part of a series of transactions.[30] He ultimately stated:

> In my opinion, read in its context, the phrase 'part of a series of transactions' is intended to sweep in cases where the relationship between the transactions is an integral and not a fortuitous one depending merely on such circumstances as contiguity in time or place, but is such that it would not or might not be sufficient to bring them within the phrase, 'part of a larger transaction'.[31]

41 In *Jeffrey v Commissioner of Stamps* ('*Jeffrey*'),[32] the Commissioner assessed duty on the basis that two conveyances 'together form or arise from substantially one transaction or one series of transactions' under s 66ab of the *Stamp Duties Act 1923–1978* (SA).

42 In that case, the two properties were adjacent and owned by one vendor and were sold to a mother and son. The second agreement (related to the son) was expressed to be subject to the fulfilment of certain special conditions in the first agreement which provided for the sale by the mother of another property and for her to obtain consent to build on the land purchased.

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26 Ibid 482.
27 Ibid 482–3.
28 Ibid 488.
29 Ibid 490.
30 Ibid 490–1.
31 Ibid 491.
32 (1980) 23 SASR 398.

43 The Supreme Court of South Australia held that the stamp duty was correctly assessed on the basis that the two conveyances arose from substantially one transaction; alternatively, as one series of transactions.[33] In so doing Jacobs J made extensive reference to *Cohen*. He focused on the word 'one' which pointed 'to some essential unity, some 'oneness', some unifying factor …'. He considered that it would be necessary to find a 'relationship or connection or interdependence' between the transactions.[34] He also stated that the word 'substantially' meant that the Commissioner was required to look at the 'substance' of the several transactions to determine whether they were 'in substance' one transaction.[35]

44 Jacobs J then dealt with matters raised by the appellants, including that the Commissioner had chosen not to hold an inquiry into whether this was properly a case of 'contract-splitting'. He indicated that it was possible to agree with the various submissions raised by the appellants, but in the end considered they did less than justice to the established facts. He stated:

> Here we have adjoining parcels of land, admittedly in separate Certificates of Title, which have at all material times been held in common ownership as one property; the two contracts were identical in form, save for the special conditions; they were obviously prepared by the same agent, and probably on the same day; each provides for the same nominal sum of money by way of deposit, unrelated to the purchase price; settlement under each contract is to be effected at the same place, and on the same day; the purchasers are related as mother and son; the son is not obliged to proceed with his contract unless his mother sells her existing property and obtains consent to build on the land she intends to purchase adjoining her son's intended purchase; both contracts are in effect subject to the same conditions, even although the mother's contract stands independently of the son's; and the purpose of those conditions is, *inter alia*, to enable the mother to finance the son in his purchase. There is thus an intended advancement of the son by the mother, who is to provide all or most of the purchase price for both parcels, just as there would have been had both properties been purchased by the mother in their joint names, whether as joint tenants or as tenants in common.[36]

45 He considered that all these factors combined to give the transactions the 'integration' and 'essential unity' at which the section was aimed. He also considered that if these factors were present in two transactions between strangers the result would be the same as the additional fact of a close family relationship did no more than add some weight to the conclusion.[37]

46 The decision of the Supreme Court of Victoria in *Re Clancy v Commissioner of Stamp Duties* ('*Re Clancy*')[38] turned on the meaning of a predecessor provision to s 24: s 68(1)(b) of the *Stamps Act 1958*. This provided for the aggregation of transfers where

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33 Ibid 408 (Jacobs J).
34 Ibid 405.
35 Ibid 406.
36 Ibid 407.
37 Ibid 407–8.
38 (1998) 40 ATR 99.

two or more instruments of conveyance together 'form, or arise from, substantially one transaction or one series of transactions'.

47 In that case a mother executed 19 transfers of land to her daughters at a 'family meeting'. The Administrative Appeals Tribunal had found that there was a 'family arrangement' designed to lock out the son (from making a claim under pt 4 of the *Administration and Probate Act 1958*); that it was a 'composite exercise'; that it would not go ahead 'unless all were in agreement'; and was so as 'to achieve a common purpose'.[39]

48 The decision on appeal largely turned on whether a statutory declaration was in the requisite form so as to avoid the relevant aggregation provisions. However, the court also considered that it 'cannot be seriously denied' that the 19 transfers 'together form, or arise from, substantially one transaction or one series of transactions' for the purposes of s 68.[40]

49 In *Wakefield v Commissioner of State Revenue* ('*Wakefield*'),[41] a mother subdivided a hobby farm into seven lots and transferred five of the lots by way of gift of one lot each to her four children and one grandchild. The Commissioner assessed duty on the five lots on the basis of the aggregation provisions contained in s 30 of the *Duties Act 2001* (Qld). This section applied to dutiable transactions 'that together form, evidence, give effect to or arise from what is, substantially 1 arrangement'. Sub-section (3) further provided that all 'relevant circumstances' relating to the dutiable transactions must be taken into account, while sub-s (4) identified what those relevant circumstances included.[42]

50 Bowskill J first considered the purpose of s 30. She accepted that a purpose was to combat attempts to evade or minimise payment of duty by the structure, or timing, of what is really one transaction, as multiple transactions. However, that the operation of the provision was not limited to intentional avoidance measures. The purpose was also to ensure that taxpayers in similar circumstances were treated consistently and equitably regardless of how transactions may be structured or documented.[43]

51 Bowskill J observed that s 30 adopted a similar form of words to s 24 of the Victorian Act. She then identified five relevant principles:

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39 *Re Clancy v Commissioner of State Revenue* (1998) 40 ATR 1089, 1095 [25]–[27] (G Gibson, Deputy President).

40 (1998) 40 ATR 99, 103 [14] (Balmford J).

41 [2019] 3 Qd R 414; [2019] QSC 85.

42 Sub-section (4) provided that relevant circumstances included: (a) whether the transactions are contained in 1 instrument; (b) whether any of the transactions are conditional on entry into, or completion of, any of the other transactions; (c) whether the parties to any of the transactions are the same; (d) whether any party to a transaction is a related person of another party to any of the other transactions; (e) the time over which the transactions take place; (f) whether, before the transactions take place, the dutiable property the subject of the transactions was used together, or dependently with one another, by the transferor or transferors; (g) whether, after the transactions take place, the dutiable property the subject of the transactions will be used together, or dependently with one another, by the transferee or transferees.

43 *Wakefield* [2019] 3 Qd R 414, 430 [48]; [2019] QSC 85.

1. In order for s 30 to apply, there must be 'some unifying factor' that brings the dutiable transactions within the section. That unifying factor may be the purpose or objective of either (or both) the transferor(s) or the transferee(s) (a unity of purpose) or it may be some other relationship, connection or interdependence between the transactions.

   The words of s 30 support the need for a 'unifying factor' to be shown, having regard to the use of the word 'together' in s 30(1); the phrase 'substantially 1 arrangement', emphasising the adjective '1'; and the need to take into account 'all relevant circumstances relating to the dutiable transactions', words which are apt, including having regard to the specific circumstances identified in s 30(4), to invite consideration of circumstances which connect the dutiable transactions in some way.

2. 'Arrangement' is a word of wide, but not unlimited meaning. It was described, albeit in the context of a different provision of the previous *Stamp Act* 1894, as 'a comprehensive word which extends to embrace all kinds of concerted action by which persons may arrange their affairs for a particular purpose or to produce a particular result'. An arrangement is something less than a legally enforceable contract or agreement; it may be an understanding or a plan which is not enforceable. It may be inferred from the circumstances. The arrangement need not be bilateral, as between the transferor(s) and the transferee(s), but may be unilateral, having regard to the objectives of the party(ies) on either side of the transactions. But in either case, an arrangement, in its ordinary meaning, connotes a plan, with a purpose or objective, of some kind.

3. The use of the word 'substantially', in the phrase 'what is, substantially 1 arrangement', invites consideration of the substance of the dutiable transactions, looked at together, as opposed to the form, to determine whether the transactions, *together*, form etc. what is, substantially (or really or essentially), one arrangement, although as a matter of form they may appear as separate transactions.

4. The determination to be made under s 30(1) is a question of fact, involving matters of degree, taking into account all relevant circumstances relating to the dutiable transactions (s 30(3)) including, but not limited to, the factors identified in s 30(4).

   The circumstances that are relevant will depend on the individual case, but the phrase 'relating to' is broad enough to encompass circumstances surrounding the dutiable transactions, not merely the transactions themselves.

5. The objectives, actions and conduct of both the transferor(s) and transferee(s) are potentially relevant. Under the *Duties Act* 2001 the obligation to pay transfer duty falls on all parties to a dutiable transaction. There is nothing in the words of s 30, particularly ss 30(3) and 30(4), which supports a construction that the primary focus is on the

objectives, actions or conduct of the transferee(s).[44]

52 Bowskill J ultimately considered that s 30 did not apply in that case. In particular, she found that:

(a) there was no evidence of any 'single familial arrangement' (as the Commissioner's delegate had found) where there was no evidence of any agreement involving the transferees and the delegate had accepted that the individual transactions 'were not conditional or dependent on each other';[45]

(b) the timing and the fact that the solicitor was the same was insufficient. Further, the fact that the transferor was the same and the parties were related was relevant, but not enough because there needed to be 'some relationship or connection or interdependence *between the transactions*; not merely a relationship between the parties';[46] and

(c) there was no 'unifying factor' from the transferees' perspective beyond the timing and relationships and no 'relationship, or connection, or interdependence between the dutiable transactions themselves.' The 'element of unity' was missing and even though, from the transferor's perspective, there was an intention to divest herself of the property, this was not enough.[47]

53 In *Radiology Partners Pty Ltd v Commissioner of State Revenue* ('*Radiology Partners*')[48] the Supreme Court of Queensland again considered s 30 of the *Duties Act 2001* (Qld). In that case a trustee of a unit trust held a meeting at which a quorum of six of the existing unitholders attended — who were trustees of family trusts. The minutes of the meeting recorded that all unitholders had requested that the trustee redeem their units and that it was voted unanimously that all units be redeemed. Further, it was resolved to approve and register allotments of units to nine self-managed superannuation funds. Each of the six family trusts was related to its corresponding self-managed superannuation fund, but were not otherwise related to the other family trusts and self-managed superannuation funds.

54 The redemptions and acquisitions were effected by separate instruments, but the Commissioner applied s 30 on the basis that the six redemptions were aggregated and treated as a trust surrender, while the nine acquisitions were also aggregated as a trust acquisition.[49]

55 Wilson J agreed with this approach. He placed significant reliance on the minutes of the relevant meeting which specified the desired outcomes and '"connote[s] a plan, with a purpose or objective" for the original unitholders to redeem their units and the new unitholders to acquire their units.'[50] He was satisfied that there was some arrangement

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44 Ibid 431–3 [53] (emphasis in original) (citations omitted).
45 Ibid 434–5 [61].
46 Ibid 435 [62]–[63] (emphasis in original).
47 Ibid 436 [65]–[66].
48 (2019) 2 QR 1; [2019] QSC 192.
49 Ibid 6 [10] (Wilson J).
50 Ibid 32 [110]–[111], citing *Wakefield* [2019] 3 Qd R 414, 432 [53.2].

to substitute all of the old unitholders with the new unitholders (thereby changing the beneficial ownership of the trust from one group to another).[51] Although the redemptions and acquisitions were not conditional upon each other he considered that there was a 'wider arrangement' and concluded that the restructure was effected by a single resolution which reflected a 'unity of purpose.'[52]

56 Finally, the case of *Re Urban Consolidation and Development Pty Ltd v Commissioner of State Revenue*[53] considered the same provisions as are applicable in this case, although it was not a decision of a court, but a decision by another Vice President of VCAT.

57 In that case there were four unitholders in a unit trust each of whom held 300 units. One of the unitholders committed a default and transferred 100 units to each of the other unitholders and exited the trust — by way of three identical agreements.

58 The Vice President referred to the submissions of the Commissioner that the facts fell within the concept of an 'associated transaction' (both limbs). This conclusion could be reached by inference given that the transferor was the same; the transferees were the remaining unitholders; the sale agreements were identical; the agreements were entered into on the same day and for the same consideration; and the acquisitions were the result of common circumstances, being the default of the unitholder selling its units. Counsel for the Commissioner also identified there was no evidence of independent negotiation and that 'in substance' the unitholders 'acted as one.'[54]

59 The Vice President accepted the Commissioner's submissions and found that the only reasonable inference was that the purchase of the units by each applicant was an 'associated transaction' under both limbs of the definition.[55]

Summary

60 Some care ought be taken in utilising cases which concern different legislation, since legislative provisions must be construed according to their own unique language, purpose and context. Each also turns on its own particular factual context.

61 Nevertheless, in considering whether there is some 'oneness' or 'unifying factor', a number of these cases highlight the importance of some 'interdependence' or other connection between the relevant transactions. It remains, then, to consider the Victorian definition of an 'associated transaction' in the light of this context.

62 More particularly, we will commence with proposed grounds 3 and 4 given that the applicant (properly) conceded that it could not obtain the relief it sought absent success on those grounds.

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51 *Radiology Partners* (2019) 2 QR 1, 32 [112]; [2019] QSC 192.
52 Ibid 32 [113], [116]–[117].
53 (2011) 84 ATR 725; [2011] VCAT 593.
54 Ibid 736 [51]–[52] (Judge Jenkins, Vice President).
55 Ibid 736 [53].

Proposed grounds 3 & 4

Applicant's submissions

63 The applicant highlighted that at [68] of the Reasons, the Vice President identified two legally enforceable, multilateral arrangements, namely, the applications for shares that the applicant accepted and the resulting statutory contract. The applicant conceded that both these contracts were 'arrangements,' but contended that they were not relevant arrangements for the purposes of the 'associated transaction' definition.

64 First, it submitted that the share subscription contract was an arrangement between the applicant and each investor, but the only shares issued under each of those arrangements were the shares issued to the particular investor.

65 Second, it submitted that the statutory contract was not a relevant contract (which submission was also advanced in respect of proposed ground 1). The applicant highlighted that under s 140 of the *Corporations Act 2001* (Cth), every shareholder becomes bound to the terms of the applicant's constitution such that the Tribunal's construction of s 78(1)(a)(ii)(C) of the Act would undermine the requirement that a shareholder acquire, or increase, a 'significant interest' before they become liable for duty. It would also leave very little room for the 'associated person' and 'acting in concert' aggregation limbs to operate.

66 The applicant supported its contentions by reference to a hypothetical example involving 'Powerco', which sought to raise capital by offering a 55 per cent interest to the public. It submitted that, on the Tribunal's construction, even if a new investor, 'Amy', acquired an interest of only one per cent, then she would become jointly and severally liable for duty simply because she was bound by Powerco's constitution, even though she had no connection with any other acquirer. This consequence would be amplified by the effects of s 78(1)(b) if she acquired a further interest.[56]

67 In oral submissions, counsel submitted that it would be unlikely for Parliament to intend to produce a result that individuals with no connection with each other should find themselves jointly and severally liable for the whole duty, even if they only acquired a small interest.

68 The applicant also contended that the Vice President should have found that the acquisitions of shares were not associated transactions because both the legislative purpose behind aggregation, and the authorities concerning similar legislation, indicate that if there are multiple acquirers there must be some 'unity of purpose' or a sufficient degree of 'oneness' between them. There is no case in which acquisitions by multiple acquirers were aggregated where the connection between the parties and the transactions was 'merely casual or fortuitous'.[57] In oral submissions, counsel

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56 This provision applies if a person acquires a further interest in the landholder after that person has already made a 'relevant acquisition' under s 78(1)(a).

57 Citing *Cohen* [1937] 1 KB 487*; Jeffrey* (1980) 23 SASR 398*; Re Clancy* (1998) 40 ATR 99*; Wakefield* (2019) 3 Qd R 414*; Radiology Partners* (2019) 110 ATR 369.

emphasised that the investors were all independent of each other in that each made their own independent decision to subscribe.

69 Regarding the legislative purpose, the applicant submitted that there is no suggestion that the investors were involved in contract-splitting. The alternative rationale is to ensure that taxpayers in similar circumstances are treated consistently and equitably regardless of how they might structure or document their transactions. However, the Vice President's construction results in taxpayers in dissimilar circumstances being treated similarly, and taxpayers in like circumstances being treated differently (referring again to the Powerco example).

70 In oral submissions counsel also made reference to s 78(2) which provided that a person was not an 'associated person' (for the purposes of sub-ss (1)(a)(ii) or (b)) if the Commissioner is satisfied that the interests of the persons were acquired, and will be used, 'independently' and were not acquired, and will not be used, 'for a common purpose'. Counsel submitted that this ought to inform the meaning of the concept of an 'associated transaction'. In particular, he submitted that we should infer that Parliament would not intend to exclude such persons as 'associated persons', but still include them under the 'associated transaction' rubric.

71 Counsel also maintained that, notwithstanding the need to achieve the target of $1.8 million, the offers made by each individual were not interdependent and it was 'fortuitous' as to whether the target of $1.8 million was reached. He highlighted that if any unitholder withdrew an offer others could still go ahead; that each individual was indifferent about who else subscribed; and that the $1.8 million requirement did not emanate from any of the acquirers. In the alternative, counsel contended that, even if the need to achieve $1.8 million was relevant, it did not justify aggregation.

72 The applicant submitted that the relevant 'arrangement' could not be unilateral and that the question should be viewed 'solely or primarily' from the perspective of the acquirers given that the entire division is concerned with relevant acquisitions. If it was viewed from the point of view of the disponer the threshold could be so readily reached that it would undermine the need for the relevant 'significant interest' (in this case of 50 per cent or more). Counsel highlighted that, although this was contrary to the principles espoused in *Wakefield,* the judge ultimately focused on the transferees when she came to apply the provision in that case.

Respondent's submissions

73 The respondent submitted that the connection between the investors is that which arises from the circumstances surrounding the offer of shares on the terms of the Information Memorandum. This entailed the investors, as a condition of taking an interest in the development of the Property, binding themselves to the applicant's constitution, agreed management structure and a capital structure determined by the applicant's management team.

74 The respondent contended that, even accepting that the investors were not known to each other and did not coordinate their applications, and even assuming that this amounts to an absence of a connection (which the respondent does not accept), this does

not necessitate the conclusion that their respective acquisitions of shares were not 'associated transactions' for the purposes of s 78(1).

75 The respondent submitted that the second limb of the definition of an 'associated transaction' does not focus upon the relationships between, or conduct and community of purpose of, the acquirers as that focus is directed by the reference to an 'associated person' (in s 78(1)(a)(ii)(B)), and by the first 'acting in concert' limb of the definition. To focus narrowly on the relationships between, and conduct and community purpose of, the acquirers in applying the second limb would render it otiose.

76 In oral submissions the respondent supported the decision of the Vice President by reference to a number of key factual matters. In particular, he cited four key 'connections':

(a) each acquisition could not proceed unless others proceeded at the same time on the same terms adding up to an amount of $1.8 million. This meant that each acquisition was not independent of each other as in, for example, *Wakefield*;

(b) each shareholder bound themselves to a constitution that entrenched a management agreement save for a 90 per cent vote to the contrary. This meant there was a 'oneness of purpose', not just about the acquisitions themselves;

(c) the members also committed themselves to a voluntary winding up at the end of the project (under cl 2.3 of the constitution). This showed that the applicant thereby constituted itself a single purpose vehicle with a single purpose and a single manager (absent a vote of the requisite 90 per cent); and

(d) there was also a common intention to make this company one that was controlled by a small number of investors (as to 99.99 per cent), rather than being an Oliver Hume 100 per cent entity.

77 Counsel submitted that these factors suggested that the acquisitions all arose out of substantially the same one arrangement, or substantially one series of transactions.

78 Counsel also submitted that it did not matter whether the investors knew each other personally as they were not required to be associated with each other. Rather, the focus should be on whether the transactions were interdependent (which they were).

79 Counsel also submitted that the concern that acquisitions of shares in every publicly listed company would be problematic is not correct given that there were special features present in this case.

Consideration

80 The proper construction of the concept of an 'associated transaction' turns on the words used, as well as the context and purpose of the legislation.[58] The fact that the Act is a

[58] *Visser v The King* (2023) 68 VR 188, 219 [100] (Emerton P, Priest, McLeish, T Forrest and Kennedy JJA); [2023] VSCA 10, citing *R v A2* (2019) 269 CLR 507, 520–2 [32]–[37] (Kiefel CJ and Keane J), 545 [124] (Bell and Gageler JJ).

taxing statute also does not make it immune to the general principles governing the interpretation of statutes.[59]

81 It may be accepted that one purpose of the provision is to combat attempts to evade tax by 'contract-splitting'. However, like s 30 in *Wakefield*, there is no requirement for there to be a tax avoidance purpose, or other 'intent to defraud' (as was the case in *Cohen*). In fact, para (b) of the definition of an 'associated transaction' does not require the relevant acquirers to have any particular intention at all.

82 Rather, a consideration of Chapter 3 as a whole evinces a Parliamentary intention to ensure that, as far as possible, any transfer of an economic interest in land is treated similarly for revenue purposes. Where such a transfer is not effected by a simple direct transfer of land, but is rather effected by the acquisition of a 'significant interest' in a landholder, it should be taxed in a similar way as if there was a direct transfer of the interest in the land.

83 Turning then to the words, it is useful to repeat para (b) of the definition of an 'associated transaction' which applies to acquisitions of an interest in a landholder where:

> the acquisitions form, evidence, give effect to or arise from substantially one arrangement, one transaction or one series of transactions …

84 The focus of the language is hence not on the individuals concerned, but on the relationship between the acquisitions and the singular 'arrangement' or 'transaction' (or 'series of transactions'). This immediately distinguishes the definition from the concept of an 'associated person', which focuses on relationships between people. Thus, when the *State Taxation Acts (Tax Reform) Act 2004* ('2004 Amendment Act') introduced aggregation by way of 'associated transaction'[60] the Explanatory Memorandum stated:

> [H]ere, it is the nature of the dealing itself which causes the aggregation and would generally apply where some or all parties are not associated persons.[61]

85 There is a further qualification when comparing para (b) of the definition of an 'associated transaction' with para (a). Thus, para (a) is concerned with whether individual persons 'act[ed] in concert'. This phrase has been said to connote 'knowing conduct the result of communication between parties'[62] and to at least involve 'an understanding between [the parties] as to their common purpose or object'.[63] However, para (b) is not restricted to 'knowing conduct', nor even joint conduct. Rather, the second limb focuses on the objective terms and circumstances surrounding the acquisitions (such as the minutes in *Radiology Partners*).

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59 *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297, 323 (Mason and Wilson JJ); [1981] HCA 26.

60 By way of the proposed s 79(1)(a)(iii).

61 Explanatory Memorandum, State Taxation Acts (Tax Reform) Bill 2004 18.

62 *Bank of Western Australia v Ocean Trawlers Pty Ltd* (1995) 13 WAR 407, 431 (Owen J).

63 *Adsteam Building Industries Pty Ltd v The Queensland Cement and Lime Co Ltd (No 4)* [1985] 1 Qd R 127, 132 (McPherson J).

86 Such a conclusion is confirmed by reference to the legislative history. While the concept of 'acting in concert' had no precedent in the Act, the predecessor of para (b) of the definition applied where persons acquired their interests 'jointly or separately'.[64] The fact that para (b) makes no reference to whether the acquirers acted jointly or separately suggests that Parliament intended that the concept of an 'associated transaction' would turn on objective circumstances, rather than the subjective knowledge or intentions of the acquirers.

87 For similar reasons, reference to the 'purpose' of the transferee or transferor, even if not irrelevant, can distract from a consideration of whether the acquisitions give effect to substantially one single arrangement, transaction, or series of transactions, when considered objectively. Thus, although Bowskill J suggested that the 'unifying factor' might be some common 'purpose', she also allowed for the fact that it may be some other relationship or 'interdependence' between the acquisitions. Such interdependence may exist even if the individuals concerned did not actively communicate with each other. This is also consistent with the fact that an 'acquisition' may occur without any active involvement of an acquirer as, for example, where there is a cancellation of a share.[65]

88 For similar reasons, the applicant's reliance on s 78(2) was unhelpful given it was concerned with acquisitions by 'associated persons' under s 78(1)(a)(ii)(B). This latter provision is based on relationships (with a carve out where people act 'independently' and not for a 'common purpose'). This is to be compared with s 78(1)(a)(ii)(C) which focuses on commonality of enterprise by persons who are not necessarily related to each other at all. Consistent with the different nature of liability, the legislature has chosen not to expressly carve out the matters specified in s 78(2) from the concept of an 'associated transaction', which could have readily been done.

89 This does not mean that it is not relevant to consider whether there was some 'interdependence' between the acquisitions, consistently with the authorities earlier cited. However, the focus is on the relationship between the acquisitions. In this regard, the key concept is the requirement for the acquisitions to form, evidence, give effect to, or arise from, substantially '*one*' arrangement (or '*one*' transaction or '*one*' series of transactions). Of the definition of 'associated transaction' (initially introduced into s 79(9)) the Explanatory Memorandum stated:

> Sub-section (9) is in aid to sub-section (1)(a)(iii) and defines an 'associated transaction' on the basis of the '*oneness*' of the circumstances by which persons acquire (aggregated) interests by acting in concert or by virtue of one transaction

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64 Before the enactment of the 2004 Amendment Act, the land rich provisions aggregated interests of associated persons but did not contain a concept of an 'associated transaction'. The definition of an 'associated person' nonetheless extended to a 'related person' defined as follows in para (f) of the definition of that term (emphasis added):

> (f) persons are related persons for the purposes of Chapter 3 if they (*whether jointly or separately*) acquire interests in a private corporation and the acquisitions form, evidence, give effect to or arise from substantially one transaction or one series of transactions …

65 The Act, s 80(2)(b).

or series of transactions.[66]

90 This adoption of the concept of 'oneness' also appears to reflect the language of the authorities cited above. Hence, it is relevant to consider whether there is some connection or interdependence between the circumstances by which the persons acquired their interests, such that the acquisitions might be characterised as, essentially, 'one' arrangement.

91 This objective characterisation process is consistent with the purpose of the chapter as earlier described. It ensures that the 'associated transaction' definition applies to ensure that where a significant interest in a landholder is acquired through 'substantially' one arrangement, that arrangement should be treated as a single transfer of the economic interest in the land. In this way, Parliament intended to ensure that, not just people, but dealings, are taxed consistently and equitably, regardless of the form they might take and in accordance with the 'substance' of what has really occurred.

92 Turning then to the facts of this case, we consider that the objective interconnecting factors cited by the respondent are capable of supplying the necessary 'oneness' for the purposes of para (b) of the definition of an 'associated transaction'.

93 Thus, first, the acquisitions were interconnected in circumstances where no individual acquisition could go ahead at all unless a total of $1.8 million was raised. If this condition was not satisfied then all application money was to be returned. Regardless of whether this condition 'emanated' from the acquirers, the acquisitions could not thereby be described as relevantly independent of each other. This was despite the fact that each acquirer may not have met the others, or even communicated with them.

94 Next is the entry into the statutory contract constituted by the constitution. Although this fact, without more, cannot be determinative (as it would operate in the case of any acquisition of shares), the *content* of that contract was highly relevant in this case. Thus, the terms of the constitution provided that the acquirers, together, had an interest in an entity which was to undertake a single land development project, via an entrenched management structure. The singularity of the undertaking is underscored by the fact that the entity was to be wound up at the end of the project. This 'singularity' or 'oneness' suggests that, overall, and 'in substance', the acquisitions gave effect to a single venture for the development of the Property by the applicant.

95 Finally, the effect of the acquisitions of the shares on the same day, and in the same way, was to substantively alter the shareholding in the landholder from being an Oliver Hume entity to an entity owned by a group of private investors (as to 99.99 per cent). Although the investors retained a right to sell their shares, there would be a limited market for those shares. In any event, any such right does not detract from the 'oneness' with which the ownership of the landholder was substantively altered by the issue of the shares on 2 July 2014.

96 The factors cited arose regardless of whether the acquirers were personally 'acquainted with one another,' (as highlighted by proposed ground 3), or whether they regarded

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66 Explanatory Memorandum, State Taxation Acts (Tax Reform) Bill 2004 19 (emphasis added).

themselves as independent subscribers. For reasons already explained, such factors are not determinative of whether there is an 'associated transaction'. In fact, the short answer to proposed grounds 3 and 4 is that, given the interconnectedness between the acquisitions, it is inappropriate to describe them as being 'independent', or that there was an 'absence of any connection'. Nor was there merely some 'casual' or 'fortuitous' connection. For similar reasons, the Powerco example does not assist the applicant in circumstances where, unlike that hypothetical example, there was a connection between the acquisitions in this case.[67]

97 It is also unnecessary to consider whether any of these individual factors, considered on their own, would be sufficient to satisfy para (b) of the 'associated transaction' definition. In our view, they together combined to support a finding that the acquisitions formed, evidenced, gave effect to, or arose from, substantially 'one arrangement', or alternatively 'one series' of transactions.

98 The reasons of the Vice President are not on all fours with the above analysis. However, he was correct to find that the investors bound themselves to a constitution and thereby joined in a single 'development project' with an entrenched management structure. He also made no error in finding that the acquisitions were 'associated transactions,' even though the acquirers were not acquainted with each other. Nor should he 'necessarily' have found that the acquisitions were not 'associated transactions' for the purposes of s 78.

99 In fact, in the light of the objective interconnecting factors we have cited, we consider that the Vice President was correct to uphold the respondent's assessment. Thus, the total acquisition of a 99.99 per cent interest in the applicant (in identical circumstances and at the same time) gave effect to a singular 'arrangement' or 'plan'[68] for the applicant to conduct a single property development project through an agreed management structure for the benefit of the investors. Such an arrangement was 'bilateral' (to the extent that is necessary) given that it involved both the investors and the applicant. It could also be readily inferred from all the circumstances, regardless of the knowledge or intentions of the individual investors. In the alternative, the integral relationship between the acquisitions mean that they could also be characterised as pertaining to 'one series' of transactions within the meaning of the definition.

100 Proposed grounds 3 and 4 are hence rejected.

Proposed grounds 1 and 2

101 The applicant's complaint in respect of proposed ground 1 has some merit, but has already been dealt with, above. The fact that each investor became bound by the constitution may have been of marginal relevance of itself, but the *content* of that constitution was highly significant. Consistent with the applicant's concession, proposed ground 1 also cannot affect the result.

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67 And note that the example might also not work if Powerco was a listed company where a total of 90 per cent or more would need to be issued: The Act, s 79(2)(c).

68 *Wakefield* [2019] 3 Qd R 414, 432 [53.2] (Bowskill J); [2019] QSC 85.

102 In respect of proposed ground 2, it is also largely immaterial. There is certainly merit in the complaint that a shared objective to obtain equity was of marginal, if any, relevance, as it may be present in any capital raising. Further, while a unity of purpose may be of some relevance, for reasons given already, we consider that the focus should be on the objective characterisation of the dealing. Suffice to say that the objective circumstances in this case support the existence of a singular purpose to undertake a property development.

Conclusion

103 We accept that there was merit in the appeal, such that we will grant leave. However, the appeal will be dismissed.
