

*About the presenter*

Michael Hines has been practising as a barrister for over twenty years. He appears in and advises on revenue, commercial, and equity cases, wills and estates, and family law property disputes. He has appeared in many reported cases including *Kennon v Spry* (2008) 238 CLR 366 and *Commissioner of State Revenue v Lend Lease Funds Management Pty Ltd* [2011] VSCA 182. He is a past part time senior lecturer and fellow of the Law School of the University of Melbourne teaching post graduate tax, and the author of numerous articles and of the LBC loose leaf service, "Stamp Duties Victoria". Michael is on Dever's List.

1. The current provisions of Part 2 of Chpt 3 of the *Duties Act 2000* (Vic), under which duty is chargeable on *relevant acquisitions* in certain entities holding interests in land in Victoria,<sup>1</sup> now appear in the *Duties Amendment (Landholder) Act 2012*.
2. The provisions came into effect on 1 July 2012. Except where otherwise indicated, my commentary is confined to these provisions. For transitional provisions applying to earlier transactions, see s12 of the amending Act.
3. Under the legislation as amended, the entity is characterised as being a private landholder or a public landholder that has landholdings in Victoria with a value of \$1 million or more. The percentage of landholdings to other assets is irrelevant. A private landholder can be a private unit trust scheme, a private company, or a wholesale unit trust scheme. A public landholder can be a listed company, or a public unit trust scheme.<sup>2</sup>
4. Taxable transactions are acquisitions of significant interests or further interests. A significant interest in a private company or a wholesale unit trust scheme is 50% or more; whereas, a significant interest in a private unit trust scheme is 20% or more. A significant interest in a public landholder is 90% or more.
5. There is an obvious advantage here which a private company has over a private unit trust. You can acquire more of a private company without attracting the tax than you can of a unit trust scheme. But this advantage may need to be balanced against other considerations. For example, although the company income tax rate is lower than the highest rate for individuals, discount capital gains are available to trusts but not companies.
6. Another point to consider is that the shareholders of a company have no interest in its assets; whereas, beneficiaries, depending on the terms of the trust, may and often do have an interest in the assets of the trust.
7. Duty is not chargeable on transfers of shares in private Victorian companies.<sup>3</sup>
8. If a person acquires an interest in a trust where the trust property includes land, it will be necessary to consider whether the acquisition of the interest, eg, of units in the trust is a dutiable transaction under Chpt 2 of the Act, if not a relevant acquisition under Chpt 3. Chpt 2 deals with dutiable transactions, whereas Chpt 3 contains the landholder provisions.
9. What is a unit trust scheme? The definition in s4(1) describes it as any arrangements made for the purpose, or having the effect, of providing for persons having funds available for investment, facilities for the participation by them, as beneficiaries under a trust, in any profits, income or distribution of assets arising from the acquisition, holding, management

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<sup>1</sup> Previously \$1 million, now \$1.5 million.

<sup>2</sup> See ss70, note and 71.

<sup>3</sup> See ss7(3A), 10(1)(b) and s4(1), 'marketable securities'.

or disposal of any property whatsoever pursuant to the trust. Unit means a right or interest whether or not described as a unit of a beneficiary under the scheme.

10. There has to be a trust and implicitly some investment by the beneficiaries. But is there any limitation besides this? Should the word 'investment', for example, be read in contradistinction to speculation, or could it just refer to the provision of funds or indeed any kind of financial accommodation? Could an enterprise, such as a partnership be a unit trust scheme, even if the beneficiaries agree to manage a business, rather than simply contribute capital?<sup>4</sup>
11. The definitions of related person and associated person have been extended. Nevertheless, note that partners are associated persons in virtue of the partnership only if they are natural persons.
12. Assuming that there is a unit trust scheme, it comes into being when the arrangements referred to in the definition are made.
13. This is important because an interest in a landholder is not counted for the purposes of determining whether a person made a relevant acquisition if the interest was acquired at a time when the landholder did not own land (which includes interests in land)<sup>5</sup> in Victoria.<sup>6</sup>
14. Hence, you can avoid paying duty on acquisitions in companies and trusts by ensuring that the acquisitions are made *before* the entity acquires its landholding.
15. The acquirer(s) of the relevant interests are primarily liable, but the landholder is liable as well, and both are responsible for lodging an acquisition statement within 30 days after the date of the relevant acquisition.<sup>7</sup>
16. The determination of whether there has been or will be an acquisition of significant interests or further interests requires one to take account of acquisitions by associated person and of associated transactions.<sup>8</sup>
17. The rates of duty charged for relevant acquisitions in private landholders and for substantial dutiable transactions is 5.5%,<sup>9</sup> although there is a concessional phasing-in of duty on relevant acquisitions where the landholdings in Victoria of a landholder are more than \$1million but do not exceed \$2 million.<sup>10</sup> There is a concessional rate of duty for most public landholders.<sup>11</sup> For private landholders, the rate is applied to the proportion of the entity's landholdings in Victoria represented by the relevant interest(s) acquired.<sup>12</sup> Where the interest is a significant interest rather than further interests, and the significant interest is made up of an aggregate of acquisitions, interests acquired more than 3 years earlier are – for the purposes of calculating the amount of duty - excluded from the relevant interests acquired.<sup>13</sup> (I am loosely paraphrasing the language of the statute: close attention should be directed to the actual words of the statute when analysing a particular case.) The rate is applied to the value of the land calculated at the date of acquisition of the interest

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<sup>4</sup> See *Smith v Anderson* (1880) 15 ChD 247, 276.

<sup>5</sup> See s72 of the Act.

<sup>6</sup> See s78(5) of the Act.

<sup>7</sup> See ss83 and 85.

<sup>8</sup> See s78.

<sup>9</sup> See s28(1).

<sup>10</sup> See s89.

<sup>11</sup> See ss87 and 88.

<sup>12</sup> See s86.

<sup>13</sup> *Ibid.*

acquired.<sup>14</sup> There are particular provisions for the calculation of duty on relevant acquisitions which are further interests.<sup>15</sup>

18. There are important differences in how duty is calculated under Chpt 3 as compared Chpt 2.
19. In the first place, for the purposes of Chpt 3, the purchaser under an uncompleted agreement for the sale of land is taken to be entitled to the whole of the land.<sup>16</sup>
20. Under Chpt 2, the rate of duty is applied to the value of the land at the time of the contract pursuant to which the transfer is made.<sup>17</sup> There is no provision which deems a purchaser to be entitled to the whole of the land.
21. Besides holding land under an uncompleted agreement, a landholder may also hold land through a linked entity in accordance with s75 (a 20% test applies), or through a discretionary trust except to the extent determined by the Commissioner under s76.
22. If a beneficiary holds its interest (or part thereof) in the landholder on trust, and there are changes in the beneficial ownership of the property of that trust, this could give rise to relevant acquisitions, which, in the absence of the trust, would not have arisen.
23. This is because the entitlement which the beneficiary ('B') of a trust has through the trustee ('T') with an interest in the landholder on a vesting of trust property in the beneficiaries, is, like the trustee's interest in a landholder, an interest in a landholder for the purposes of a relevant acquisition.<sup>18</sup>
24. So if, for example, before 12 December 2011, B's indirect interest in the landholder increased from 17% to 27%, that could be a relevant acquisition attracting duty under Chpt 3, notwithstanding that no alteration had taken place in T's direct interest. Not only the entity acquiring the interest, but also the trustee of the landholder (not T) is liable for the duty in such cases.<sup>19</sup>
25. On the other hand, holding an interest in a landholder in trust, could prevent relevant acquisitions which would otherwise have arisen, from arising. This is because a trustee (eg, T) who holds or acquires an interest in a unit trust scheme is to be treated as a separate person in respect of each trust of which the trustee is a trustee.<sup>20</sup> For example, suppose T is a trustee of a trust for B and C, and that, say 11% of T's acquisitions totalling 20% should be treated as an acquisition by C because it is held on trust for C. Suppose C previously had no interest in the landholder, direct or indirect. The material acquisition is C's, not T's, and it falls below the 20% threshold for relevant acquisitions, provided that the trusts for B and C are separate trusts. The issue would be whether the trust for B and the trust for C are separate trusts in the relevant sense, even though, for example, there is only one trust deed.

#### *Acquisition of control and of economic entitlement*

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<sup>14</sup> See ss77 and 80.

<sup>15</sup> See ss86. See also the examples given in Revenue Ruling DA 056 and at the SRO website-Duties-Landholder acquisitions- Duty calculations.

<sup>16</sup> See ss74.

<sup>17</sup> See ss20 and 22.

<sup>18</sup> See s80 and Revenue Ruling DA 056.

<sup>19</sup> See ss80 and 82.

<sup>20</sup> See s 80(4); old s77(2AB).

26. Where a person acquires directly or indirectly control over the landholder, other than by a relevant acquisition dutiable under the Part 2 of Chpt 3,<sup>21</sup> duty can be charged under the landholder provisions in Chpt 3 of the Act.
27. Thus, under s82 (1), if a person within a 3 year period acquires, directly or indirectly, control over a private landholder, other than by a relevant acquisition dutiable under Part 2, then, on the acquiring of that control, the person is taken to have made a relevant acquisition in the landholder of— (a) 100%; or (b) a lesser percentage determined by the Commissioner to be appropriate in the circumstances.
28. ‘Control’ is the capacity to determine or influence the outcome of decisions about the landholder’s financial and operating policies taking into account the practical influence the person can exert and the person’s rights and any practice or behaviour affecting the landholder’s financial or operating policies.<sup>22</sup>
29. It appears that ‘control’ is interpreted in a more restrictive way by the Commissioner than the literal meaning of these words suggests.<sup>23</sup>
30. As from 1 July 2012, there can also be an acquisition by gaining a 50% economic entitlement where acquired other than by means of a relevant acquisition.<sup>24</sup>
31. Thus under s81(5), if—
  - (a) an economic entitlement acquired by the person, either alone or together with an associated person; or
  - (b) the total economic entitlements acquired by the person, either alone or together with an associated person, within a 3 year period— amounts or amount to an interest of 50% or more in a private landholder [noted in talk that these words removed by subseq Act, although apparently no difference in substance], the person is taken to have made a relevant acquisition of— (c) that percentage interest in the landholder; or (d) a lesser percentage interest in the landholder determined by the Commissioner to be appropriate in the circumstances.

Under s81(6), the duty chargeable on the relevant acquisition is calculated in accordance with section 86(1), as if all acquisitions of economic entitlements by the person or an associated person (or both) within the 3 year period were a single acquisition.
32. An acquisition by a person before 1 July 2012 of an economic entitlement must not be aggregated under s81 with an acquisition made afterwards.<sup>25</sup>
33. As with the provisions which deal with the acquisition of control, the wording is wide. It’s left to the good sense of the Commissioner to apply it fairly.
34. There are various concessions and exemptions of the kind one would expect: eg, acquisitions by liquidators and executors, and provision for exemptions corresponding to those in Chpt 2.<sup>26</sup> The provisions dealing with anomalous outcomes has been tightened.<sup>27</sup> Acquisitions

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<sup>21</sup> See s79(5) and s82 Of the Act as now amended.

<sup>22</sup> See s79(6).

<sup>23</sup> See the examples given in Revenue Ruling DA 055 and at the SRO website-Duties-Landholder acquisitions- Relevant acquisitions.

<sup>24</sup> See s81 of the Act as now amended. See also the examples given in Revenue Ruling DA 055 and at the SRO website-Duties-Landholder acquisitions- Relevant acquisitions.

<sup>25</sup> See s31(4) of Schedule 2 to the Act.

<sup>26</sup> See s89D.

<sup>27</sup> See s89E.

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securing the provision of finance are excluded.<sup>28</sup> There are provisions dealing with tax avoidance schemes, and there are technical provisions, eg for registration of various types of schemes.

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<sup>28</sup> See s89F.