

**IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY**

No A29 of 2015

**ON APPEAL FROM THE FULL COURT OF
THE SUPREME COURT OF SOUTH AUSTRALIA**

BETWEEN

**ACQUISTA INVESTMENTS PTY
LTD**

First Appellant

**VEOLIA ENVIRONMENTAL
SERVICES (AUST) PTY LTD**

Second Appellant

and

**THE URBAN RENEWAL
AUTHORITY (a statutory
corporation)**

First Respondent

**THE STATE OF SOUTH
AUSTRALIA**

Second Respondent

**ADELAIDE CAPITAL
PARTNERS PTY LTD**

Third Respondent

APPELLANTS' SUBMISSIONS

Part I: Certification

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

Part II: Issues

2 What are the legal principles at common law that apply to determining whether the decision by the first respondent (*the Authority*) to enter into the Deed granting the third respondent (*ACP*) options to purchase significant public land owned by the Authority is amenable to judicial review?

3 Does the fact that Cabinet made the decision to grant the options to sell the land and to enter the Deed purportedly on behalf of the Authority mean that there was not a valid delegation and exercise of power under the relevant legislation?



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4 If there was not a valid exercise of power under the relevant legislation, did the executive nevertheless have executive power to decide that the Authority should enter into the Deed?

5 Was the decision to enter into the Deed legally unreasonable and *ultra vires* in circumstances where Cabinet failed to take into account the mandatory requirements of subsec 11(1) of the *Public Corporations Act 1993* (SA) which required a public corporation to perform its commercial operations in accordance with prudent commercial principles and use its best endeavours to achieve a level of profit consistent with its functions?

Part III: Section 78B of the *Judiciary Act 1903*

10 6 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary¹.

Part IV: Citations

7 Intermediate appellate court: *Acquista Investments v Urban Renewal Authority* (2015) 123 SASR 147, (2015) 324 ALR 663.

8 Primary court: *Acquista Investments v Urban Renewal Authority* [2014] SASC 206.

Part V: Facts

9 The appellants through a joint venture are participants in the waste management industry in South Australia.

10 The appellants are one of two competitors of ResourceCo Holdings Pty Ltd (*ResourceCo*), which is a 50% shareholder in ACP {Reasons for Judgment 20th July 2015 (FC) [119], [120]}.

11 On 13th December 2013, the Authority entered into the Deed with the Minister for State Development and ACP by which the Authority granted free options to ACP to purchase 407 hectares of land owned by the Authority at Gillman, South Australia {FC [110]}.

12 The Gillman land the subject of the Deed was variously described as “a prime piece of industrial land earmarked for development as part of the Greater 30 Year Plan for Adelaide” and as “arguably the most strategically positioned industrial land development opportunity in the Australian market” {FC [155], [158]}.

13 In order to facilitate the development of the Gillman land it is necessary to fill part of the land with millions of cubic metres of fill {FC [133], [148]}. ResourceCo (the 50%

¹ At least so far as the issues are joined to date. It is possible, but presently unknown to the appellants, whether the Notice of Contention paragraph [5] filed by the first and second respondents and the Notice of Contention paragraph 2.2 filed by the third respondent raise issues of the kind considered by this Court in *Kirk v Industrial Court (NSW)* (2009) 239 CLR 531.

shareholder in ACP) has access to significant volumes of fill material to infill the land {FC [160]}.

Cabinet's decision

14 The decision to enter into the Deed was made by Cabinet, purportedly as delegate of the Authority {FC [30], [288]}.

15 The Authority did not (by the chief executive or the Board) make any separate decision to enter into the Deed independently of Cabinet.

16 The decision to enter the Deed and grant options to ACP over the land was made by Cabinet:

10 (a) following an unsolicited approach by ACP to the Premier of South Australia {FC [61]};

(b) without there having been any form of marketing of the land in an open and competitive process {FC [212]};

(c) without the Authority obtaining any current valuations of the land (which amounted to a breach of the Authority's own guidelines) {FC [65]};

(d) without the Authority engaging any real estate agent to advise as to the process which should be adopted to sell the land {FC [360]};

(e) without any consideration being given to the interest that had been shown in the land by third parties, including the appellants {FC [151]};

20 (f) in circumstances where the Board of the Authority had recommended to the Minister for Housing and Urban Development (*the Minister*) that the proposal by ACP be rejected and the land be offered to the market for sale in a transparent and open manner {FC [197]}; and

(g) in circumstances where, prior to Cabinet making the decision to enter into the Deed, the Department of Treasury and Finance sent a minute to the Treasurer (who then was also the Premier and Minister for State Development) recommending rejection of the ACP proposal in favour of an open marketing and sale process {FC [209]}.

30 17 As competitors of ResourceCo the appellants had a real commercial interest in the land that constitutes a special interest quite different from members of the public {FC [232]}. The appellants had expressed interest in the land to the Authority during 2013 (which was prior to the decision to sell the land to ACP) {FC [231]}.

18 Further, the appellants were willing and able purchasers of the Gillman land as at December 2013 when Cabinet accepted the unsolicited proposal of ACP without having undertaken any transparent or open process {FC [193]}.

19 The appellants were likely to purchase either the whole or large portions of the land before it is remediated because it would be of limited interest to all but a few major players in the waste management industry {FC [193]}.

The relevant statutory framework

20 The Authority is a statutory corporation established pursuant to the *Housing and Urban Development (Administrative Arrangements) Act 1995 (SA) (the Act)*.

10 21 The Authority owns the land. The Authority is managed by the Board which pursuant to sec 16 of the Act is responsible to the Minister for overseeing the operations of the statutory corporation.

22 Under sec 21 of the Act the powers of the Authority included the disposal of real property.

23 Under sec 19 of the Act the Board may delegate a function or power conferred or vested in the Board (or its statutory corporation) to certain specified persons.

24 The relevant delegation in the present case was the Property Delegation which was set out at {FC [254]}. By that delegation the execution of a contract concerning the disposal of land over \$4.4 m was delegated to the CEO of the Authority with the Minister's approval.

20 25 Pursuant to sec 9 of the Act the Authority is subject to the control and direction of the Minister. There is no suggestion of that control or direction being exercised in this dealing.

26 By the provisions of the *Public Corporations Act*, overarching obligations were imposed upon the Authority and its delegates in respect of its operations.

27 Importantly, subsec 11(1) of the *Public Corporations Act* provided that a public corporation must perform its commercial operations in accordance with prudent commercial principles and use its best endeavours to achieve a level of profit consistent with its functions.

The role of the Board of the Authority and Cabinet

28 The factual background concerning the decision-making process and leading to the entry into the Deed was set out in full in the judgment of DeBelle AJ {FC [153]ff}.

30 29 A summary of the relevant events is as follows.

30 Following the initial unsolicited approach by ACP to the Premier in June 2013, there were several meetings between representatives of the Authority and ACP {FC [156]}.

31 The representatives of the Authority met with ACP at the direction of the Premier's office. The Board of the Authority was not advised of the initial approach by ACP until 26th August 2013 (some 2 months after the initial approach) {FC [157]}.

32 On 29 August 2013, ACP wrote to the Premier making a more formal proposal {FC [158]}.

33 On 13th September 2013, a draft Cabinet submission was sent by the CEO of the Authority to the Minister {FC [161]}. The draft Cabinet submission was prepared and sent by the CEO of the Authority to the Minister without any authority from the Board of the Authority {FC [161]}.

10 34 On 23rd September 2013, the Minister and the Premier presented a submission to Cabinet. Relevantly the submission recorded that the proposal did not provide an opportunity for market testing demand or pricing for the land {FC [163]}.

35 The submission to Cabinet did not mention the specific approach which had been made by the appellants and another third party by that time. Rather the Cabinet submission recorded in general terms that the Authority had received a number of unsolicited offers {FC [164]}.

36 Cabinet acted on the recommendation contained in the Cabinet submission by resolving to reject the ACP offer but to approve the Authority entering into negotiations with ACP to seek to reach agreement {FC [165], [167]}.

20 37 The relevant employees of the Authority did not send the September Cabinet recommendation to the Board {FC [167]}.

38 Up to this point the Board had very little knowledge of the ACP proposal. The relevant officers of the Authority were acting at the direction of the Premier and not the Board {FC [170]}.

39 Between October 2013 and November 2013, representatives of the Authority met with representatives of ACP which led to the production by ACP of the first draft of the Deed dated 13th November 2013 {FC [171]-[172]}.

40 In the period 13th November 2013 and 28th November 2013, a series of four papers were provided to the Board seeking their approval to the transaction (as to which see DeBelle AJ's judgment at {FC [174]ff}).

30 41 On around 21st November 2013, the Board recommended to resolve to advise the Minister to reject the ACP proposal and instead offer the land to the market for sale in a transparent and open manner {FC [197]}.

42 On 25th November 2013, there was a Board meeting of the Authority. After the Board had noted its decision to recommend that Cabinet reject the ACP proposal, the Minister joined the meeting {FC [199]}.

43 Debelle AJ inferred that the Minister had been informed of the Board's decision to recommend to Cabinet to reject the ACP offer and that upon attending the meeting he urged the Board to reconsider its view and recommend the approval of the ACP offer {FC [199]}.

44 Debelle AJ held that the Board was not informed of the appellants' interest in the land nor did the Minister inform the Board of interest expressed by a significant third party (E & A Ltd). There was no evidence to explain why the fact that two major companies were
10 interested in the land had not been drawn to the attention of the Board {FC [201]}.

45 Debelle AJ described the conduct of the Minister in failing to advise the Board of the third party interest as a grave oversight if not a grave omission {FC [202]}.

46 On 28th November 2013, the Board (having earlier rejected the ACP proposal on 21st November 2013) recommended that advice be provided to Cabinet that the ACP offer represented a good value offer based on independent valuation advice and comparable market evidence {FC [207]}.

47 At the time that this so-called advice was provided there were no current valuations in existence {FC [179]}. The valuations which were relied upon had been prepared in February
20 2010, more than 3 years earlier {FC [179]}.

48 On 29th November 2013, the CEO of the Authority prepared a draft Cabinet submission which made reference to the Board's recommendation as to a good value offer. The submission did not state that the Board of the Authority had earlier, on 21st November 2013, recommended to reject the ACP proposal {FC [208]}.

49 Also on 29th November 2013, the Department of Treasury and Finance sent a minute to the Treasurer (who was then also the Premier and Minister for State Development) recommending a rejection of the ACP proposal in favour of an open and transparent process. There was no evidence as to whether the minute was drawn to the attention of Cabinet {FC [209]}.

50 On 2nd December 2013, the Premier and Minister signed a Cabinet submission which
30 attached a draft deed. Again the Cabinet submission made no reference to the fact that the Board had earlier recommended that the ACP proposal be rejected {FC [210]}. Whilst there was no express reference to the earlier rejection by the Board, the Treasury and Finance minute attached to the Cabinet submission did refer to the fact that the Board had resolved to

recommend rejection of the ACP offer and instead offer the land to the market for sale in a transparent and open manner (see the reasons for judgment of the primary judge at [510]).

51 A number of errors and omissions contained in the Cabinet submission were identified by Debelle JA {FC [211]ff}. Significantly, the submission failed to assess the most appropriate method by which to sell the land {FC [213]}.

52 On 2nd December 2013, Cabinet approved the ACP offer as documented in the draft deed {FC [216]}.

53 Thereafter, various members of the Board resigned {FC [217], [220]}.

10

54 On 11th December 2013, the Deed was executed by the CEO of the Authority and Mr Weatherill as both Premier and Minister for State Development {FC [221]}. The form of the Deed executed was materially different from that which was before Cabinet on 2nd December 2013 {FC [222]}.

The relevant witness: Mr Rollison

55 The Authority did not call evidence from the CEO (Mr Hansen), the Acting CEO (Mr Buchan), any member of the Board, the Minister, or the Premier.

56 Rather, the Authority called Mr Rollison (an employee of the Authority). His evidence was that there was no practical impediment to the Authority calling for expressions of interest in the land or obtaining current valuations {FC [223]}.

20

57 Mr Rollison also said he was unaware of any previous instance where the Authority had granted a free option over a large parcel of land or had granted a licence to use a large parcel of land after an option had been exercised to purchase only a portion of the land {FC [223]}.

The grounds of challenge

58 The appellants challenged the decision to enter into the Deed *inter alia* on the grounds that:

- (a) the decision had not been made by Cabinet pursuant to a valid delegation from the Authority under sec 19 of the Act;
- (b) the decision was legally unreasonable and *ultra vires* in circumstances where Cabinet failed to take into account the mandatory requirements of subsec 11(1) of the *Public Corporations Act*.

30

The findings of the Full Court

59 On appeal, Debelle AJ held that the decision to enter into the Deed was amenable to judicial review, had not occurred pursuant to valid delegation and was legally unreasonable {FC [239], [291], [349]}.

60 Debelle AJ would have made orders declaring the Deed invalid and of no effect and would have granted an injunction restraining the further effectuation of the Deed {FC [381]}.

61 The majority held that the decision to enter into the Deed was not amenable to review {FC [90]-[103]}. This finding (which was contrary to the decision of the primary judge and the decision of Debelle AJ) was sufficient to dispose of the appeal.

62 Additionally, the majority held that the decision to enter into the Deed was made under a valid delegation, or alternatively was a proper exercise of executive power, and that the decision was not legally unreasonable {FC [34], [37], [88], [103]}.

Part VI: Argument

10 Ground 2: Amenability to review

63 Debelle AJ upheld the finding of the primary judge that the decision to enter into the Deed was amenable to review {FC [247]}.

64 Debelle AJ's decision was correct in circumstances where the appellants had challenged whether the Authority had entered into the Deed pursuant to a proper exercise of delegated authority under the Act and additionally claimed that the decision was in breach of subsec 11(1) of the *Public Corporations Act* and legally unreasonable.

65 In circumstances where the Court had determined that the appellants had sufficient standing to seek relief, the Court was plainly in a position to consider the grounds of challenge raised by the appellants and grant the relief sought which included a declaration that the entry into the Deed was invalid and an injunction.

20 66 Since at least *City of London Lighting v London* [1903] AC 434 courts have made declarations as to whether contracts entered into by public authorities were invalid: see also *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1. Similarly, this Court has endorsed the use of equitable remedies to enjoin statutory authorities from entering into contracts which were beyond power: *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund* (1998) 194 CLR 247 at 257; see also *Corporation of the City of Enfield v Development Assessment Corporation* (2000) 199 CLR 135 at 144ff.

30 67 Debelle AJ was correct to hold {FC [241]} that the court has a duty to determine whether there had been compliance with the delegation and to determine whether the decision is within power: see *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 35-36. The review of questions of law (namely the legality of the decision) distinguishes the matter from merits review.

68 Further, here the subject matter of the Deed involved the grant of a free option by a public corporation to sell significant public land for a significant price without any public process. It is properly described as a matter of government with State significance. As DeBelle AJ held {FC [244]} this is no ordinary contract and was quite outside the range of ordinary contracts.

69 If it be a necessary requirement of amenability, the subject matter of the Deed gave the matter a public law element as contrasted with merely private affairs: see *Victoria v Master Builders' Association* [1995] 2 VR 121 at 163.

70 In *Master Builders*, the Full Court of the Supreme Court of Victoria held that the Victorian government's decision to create a 'black list' of contractors not eligible for government building contracts was amenable to judicial review. Tadgell J (at 136 and 137) rejected the submission that the Victorian government was merely exercising the capacity of any juristic person to determine with whom and on what terms it will enter into contracts.

71 Eames J stated (at 163) that the question involved identifying a public law element in the decision of the task force as contrasted with merely private affairs. In turn that required an analysis of the power being exercised, the characteristics of the body making the decision, and the effect of determining that the exercise of the power is not amenable to judicial review.

72 The decision in *Master Builders* was applied by Higgins J in *MBA Land Holdings v Gungahlin Development Authority* (2000) 206 FLR 120 to set aside a decision of a statutory authority to grant a lease in circumstances where procedural fairness had not been accorded to tenderers. In determining that administrative law remedies were available, Higgins J appears (at 214 and 220) to have searched for "public law factor[s]" or "public elements" inherent in the tender process and obligations of the relevant authority.

73 The requirement for a public law element may be contrasted with decisions such as *Ex parte Walsh* [1985] QB 152 at 164ff where a decision by a health authority to terminate the employment of a senior nursing official was not amenable to review because the decision was one of master-servant and lacked any true public law element. It was said (at 180) that the position may have been different for example if a relevant question before the court had concerned whether there had been a proper delegation to the relevant decision maker (cf a primary ground of challenge in the present case).

74 There is a public interest in the powers given to statutory corporations and in ensuring that such powers are not abused. It is the Court's role and function to consider such matters where decisions of a statutory corporation that involve a public element are challenged. Such an approach is also consistent with the approach taken in the United Kingdom and Canada: *R*

v Legal Aid Board [1996] 3 All ER 1 at 11; *Molinaro v The Royal Borough of Kensington and Chelsea* [2001] BLGR 336, [2001] EWHC Admin 896 at [65]ff; *Shell Canada Products v Vancouver* [1994] 1 SCR 231.

75 In the present case a public law element was further introduced by the requirements in subsec 11(1) of the *Public Corporations Act* which required the Authority to perform its commercial operations in accordance with prudent commercial principles and use its best endeavours to achieve a level of profit consistent with its functions. As the decision was made by Cabinet as the purported delegate of the Authority (albeit the delegation miscarried – a matter referred to below) the Cabinet’s decision to enter into the Deed was not at large but was conditioned by subsec 11(1).

76 Similar statutory provisions in *MBA Land Holdings* ((2000) 206 FLR 120 at 147) and *R v Salford City* [2011] BLGR 982 at [95] had the result that what may otherwise be characterised as a mere contract for the sale of land was amenable to judicial review by reason of the legislative obligations on the relevant body to achieve a specified outcome.

77 Further, a decision to enter into a contract is amenable to judicial review where the decision was made by reference to matters other than commercial considerations because in those circumstances the public body is performing a public function: *Wheeler v Leicester County Council* [1985] AC 1054; *R v Lewisham*; *Ex parte Shell UK* [1988] 1 All ER 938 (being examples where the issues were non-commercial and amenability to review appears to have been assumed).

78 For example, the decision not to permit a change of use under a lease was amenable to review in *Molinaro* [2001] BLGR 336 at [63] because in doing so the council was giving effect to its planning policy through the contract.

79 Similarly, to the extent it is necessary to the amenability question, here the entry into the Deed was as a result of non-commercial matters and was said to give effect to governmental policy {FC [87], [144]}.

80 The majority in the present case, however, determined that the decision was not amenable to judicial review. The relevant principles or considerations are stated in different ways throughout the majority judgment. Thus at different stages of their reasoning the majority:

- (a) identify the question as being whether a decision of Cabinet to sell a parcel of land is a decision which could be susceptible of judicial review {FC [11]};
- (b) state that decisions of the executive will be reviewable but only if the ground of review is a lack of good faith or procedural fairness {FC [91], [98]};

(c) suggest that the decision is not subject to review because the decision was of no legal consequence to the appellants and the appellants had no legitimate interest in the decision-making process {FC [97]};

(d) state that the decision was not one which affected any rights, titles or legitimate expectations {FC [15]};

(e) suggest that the decision is not reviewable because the decision (according to the majority) involves policy and strategy considerations {FC [14], [103]}.

10 **81** In considering the question of amenability to review the majority failed to have sufficient regard to (1) the relevant statutory framework (2) the identity of the decision-maker and (3) the nature of the challenge made by the appellants to the decision to enter into the Deed.

82 Against the statutory framework the decision by Cabinet to sell the land was not a decision of the executive. Rather Cabinet was purporting to exercise delegated power (albeit the delegation miscarried – a matter referred to below). The donee of the power being the Authority, a statutory corporation.

83 It was thus wrong of the majority to describe the decision made by Cabinet as an exercise of executive power which involved policy and strategy considerations {FC [14], [103]}. The Authority's ownership and governance, both enacted comprehensively, could not be rendered non-critical by assuming some kind of vestigial prerogative.

20 **84** Rather, the decision was made by Cabinet as the purported delegate of the Authority and the decision was not at large but was conditioned by defined statutory obligations including the exercise of prudent commercial principles contained in subsec 11(1) of the *Public Corporations Act*.

85 Moreover, the majority was not correct to seek to confine an available challenge to review for lack of good faith or procedural fairness or to consider whether the decision was one which affected any rights, titles or legitimate expectations {FC [15], [91], [98]}. There is nothing in the legislative framework that could limit the grounds of challenge to such matters and any such approach at law is unprincipled.

30 **86** It follows that the decision of the majority as to amenability was wrong. Their decision on this fundamental question infected their reasoning on the other matters the subject of the appeal being the delegation question, the executive power issue and unreasonableness.

Ground 4: The Property Delegation

87 Debelle AJ properly construed the Property Delegation {FC [272]-[274]} as requiring (1) a decision by the Authority to enter into negotiations to sell the land (2) the preparation of

a draft contract subject to ministerial approval (3) the obtaining of ministerial approval and (4) upon receipt of that approval, the execution of the contract by the CEO.

88 In the opinion of Debelle AJ {FC [282]ff, [289]ff} the fact that Cabinet was the relevant decision maker resulted in a failure by the Authority to comply with the requirements of the Property Delegation, which led to a finding that the decision to enter into Deed was *ultra vires* {FC [291]}.

89 Debelle AJ's construction of the Property Delegation and its application to the facts was correct. The Authority owned the land and had the power to sell it. The Property Delegation did not operate so as to absolve the Authority from any decision making function.

10 90 In circumstances where there was never any decision by the CEO, the Board or any other authorised officer of the Authority to negotiate to sell the land the process miscarried. Under the Property Delegation it was not open to the Authority to relinquish the entire decision making process to Cabinet or the Minister.

91 In addition, on any view step (3) of the Property Delegation required approval by the Minister. Debelle AJ was correct {FC [297]ff} to conclude that, in circumstances where Cabinet made all the decisions, there was no compliance with the terms of the Property Delegation.

20 92 In this regard, there was no evidence of a decision by the Minister to the effect that he approved the entry into the Deed. The Minister was not called to give evidence and there was no document tendered which was capable of proving that the Minister approved the entry into any version of the Deed including the final executed version.

93 By contrast, the decision by the majority as to compliance with the Property Delegation was wrong. The error in the majority's reasoning commenced with a failure to properly construe the requirements of the Property Delegation.

94 The majority appeared to approach the Property Delegation {FC [30]} by focusing on the position of the Minister but ignoring the requirement of the delegation that the CEO of the Authority make a decision to sell the land.

30 95 The majority also wrongly held {FC [30]} that as a matter of inference the Minister approved the entry into the Deed because the Minister (along with the Premier) had recommended the ACP proposal to Cabinet. This conclusion was wrong for the reasons set out in paragraph 92.

Ground 3: Executive Power

96 The majority also stated {FC [37]} that leaving aside the Property Delegation there had nevertheless been a valid exercise of executive power which was sufficient to give the Deed force and effect. The majority stated:

Further, the [Authority and the State] argued that the scheme of the [Act] and Regulations was not such as to rob the Premier, as head of government, of executive power to bind the State in contract, where the contract was incidental to the ordinary and well recognised functions of government. As seen, the [Act] makes clear that the Authority is subject to Ministerial control. It further empowers the Governor to transfer assets of the State to the Authority, and vice versa. These provisions support a construction that the [Act] was not intended to abrogate executive power in respect of State assets.

97 The Authority owns the land. The Minister did not direct the Authority to dispose of the land in accordance with the power in sec 9 of the Act: see *Hughes Aircraft System International v Airservices Australia* (1997) 146 ALR 1 at 74-75.

98 The majority holding that the Premier's apparent executive power could not be "robbed" in circumstances where a statutory corporation has been vested with statutory power including to dispose of land it owns fails to have proper regard to the allocation by law of powers between the executive and the statutory corporation set up by legislation. The legislated capacity for the Minister to direct the Authority and the Governor (on advice) to remove property from the Authority cannot produce the result that those procedures need not actually be used in order to produce those results.

99 Any power vested in the executive to sell the land was clearly abrogated by the Act: see *New South Wales v Bardolph* (1934) 52 CLR 455 at 496; see also Seddon, *Government Contracts*, 5th ed at [2.5]. As Debelle AJ recorded {FC [320]}, dealings with Crown land have been subject to legislative control since at least 1853 such that executive powers to deal with Crown land are subject to extensive legislative controls.

100 A primary function of the Authority is to manage land vested in it, including the power to dispose of the land pursuant to sec 21 of the Act. It can hardly be said in the light of the statutory regime which included the requirements of subsec 11(1) of the *Public Corporations Act* that the power or residual power to dispose of the land has somehow been reserved to the executive.

101 As Debelle AJ held {FC [290]} "[t]o allow Cabinet's decision to stand would constitute a dramatic unwinding of centuries of constitutional development of the

Westminster system and, in particular, the fettering by Parliament of Crown and executive powers.”

102 Debelle AJ upheld the primary judge’s finding that the detailed legislative scheme provided by the Act and Regulations operated to abrogate the exercise of executive power to dispose of land owned by the Authority: {FC [316]-[334]}; see *Attorney-General v De Keyser’s Royal Hotel* [1920] AC 508, *Barton v The Commonwealth* (1974) 131 CLR 477.

103 Debelle AJ’s upholding of the primary judge’s conclusion {FC [324]} was plainly correct in circumstances where the legislative scheme has imposed functions and responsibilities upon the Authority formed under the Act. To reserve for the executive the power to dispose of land without regard for the legislative scheme is inconsistent with the Act which vested control to dispose of land in the Authority.

Ground 5: legally unreasonable

104 The issue of whether the decision was legally unreasonable arises if the appellants are unsuccessful as to the Property Delegation matter (ground 4) and the executive power matter (ground 3).

105 If so, it becomes necessary to determine whether the majority were correct to overturn the primary judge’s finding that the decision was legally unreasonable: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

106 In the present case, the requirement of subsec 11(1) of the *Public Corporations Act* was a mandatory factor which required the Authority in making a decision to dispose of land to perform its commercial operations in accordance with prudent commercial principles and use its best endeavours to achieve a level of profit consistent with its functions.

107 The majority were wrong to dismiss the requirements of subsec 11(1) of the *Public Corporation Act* as matters of internal governance of the Authority and in so doing to characterise the provision as directory, thereby adopting the language of *Australian Broadcasting Corporation v Redmore* (1989) 166 CLR 454: {FC [53]}. That case concerned the effect of non-compliance with procedures in relation to unabated power to deal with property, and a defence of illegality to claimed enforcement of a contract. That is not this case.

108 The majority’s approach to the construction of subsec 11(1) of the *Public Corporations Act* was infected by having determined that the decision was not amenable to review and that the decision involved “policy decisions [which are] quintessentially those of the Government or its Ministers”: {FC [84]}.

109 By approaching the matter in such a way, the majority failed to have regard to the statutory language of subsec 11(1) of the *Public Corporations Act* which made plain that the obligation under subsec 11(1) was mandatory.

110 The failure to take into account a mandatory relevant factor had the result that the decision was legally unreasonable: *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 40-41.

111 Given the subject matter of the transaction involved the sale of land, the relevant prudent commercial principles were readily identifiable: see DeBelle AJ {FC [355]ff}.

10 112 A prudent vendor would consider whether it was more appropriate to sell land by private treaty or by public auction or some other form of competitive process: see DeBelle AJ {FC [357]ff}.

113 The appropriate method of sale was a fundamental question which had to be considered by the decision-maker in order to comply with the requirements of subsec 11(1) of the *Public Corporations Act*.

114 It was unreasonable to sell land by accepting an unsolicited offer without first exploring the merits and likely results of engaging in a competitive marketing and sales process: see DeBelle AJ {FC [357], [368]}.

20 115 The Cabinet submissions disclose that the decision-maker failed to examine at all the question of whether it might be better to place the land on the market for sale by competitive process rather than accepting the private and unsolicited offer. That was a breach of sec 11 of the *Public Corporations Act*.

116 The desire on the part of Cabinet to consider policy and other extraneous factors relevant to the decision did not remove the requirement of the decision-maker to comply with the requirements of sec 11 of the *Public Corporations Act*.

30 117 To the extent that such factors were relevant the examination of those factors had to occur in the context of a decision as to the fundamental question of which was the most appropriate process by which to sell the land so as to achieve both an adherence to prudent commercial principles and a maximisation of those policy and other extraneous factors. As DeBelle AJ recorded at {FC [371]} “there was no attempt to weigh those policy issues against the fundamental question [of] whether it would be more prudent to accept the offer [from ACP] or more prudent to sell the land by competitive process, a question that had to be considered at very outset”.

118 Further, to the extent it is necessary to consider other aspects of the decision, it is apparent that by reason of the matters set out in paragraph 16 above the decision to enter into

the Deed does not accord within the range of acceptable outcomes which are rationally defensible. Those matters include (1) the flawed approach in relying upon historical valuations (which was a breach of the Authorities' own guidelines) (2) the fact the Board of the Authority had advised Cabinet to reject the ACP proposal on 21 November 2013 and instead put the land to open market (3) the fact that the interest of the appellants and other third parties in the land was ignored (4) as was the independent advice of Treasury to not proceed with the proposal which advice was issued to the Treasurer (who was also the Premier and Minister for State Development).

Part VII: Legislation

10 **119** *Public Corporations Act 1993 (SA)*

11 - General performance principles

(1) A public corporation must perform its commercial operations in accordance with prudent commercial principles and use its best endeavours to achieve a level of profit consistent with its functions.

(2) A public corporation must perform its non-commercial operations (if any) in an efficient and effective manner consistent with the requirements of its charter.

(3) Where a public corporation's charter identifies any operations of the corporation as non-commercial operations, the operations are to be regarded as such for the purposes of this section.

20 **120** This provision is still in force at the time of these submissions.

Part VIII: Orders sought

121 The appeal be allowed.

122 The orders of the Full Court of the Supreme Court of South Australia made on 20th July 2015 be set aside and in lieu thereof:

(a) Declare that the deed between the Minister for State Development, the Urban Renewal Authority and Adelaide Capital Partners Pty Ltd and dated 13th December 2013 is invalid and of no effect.

(b) Order that the Urban Renewal Authority, the Minister for State Development and Adelaide Capital Partners Pty Ltd, their servants or agents, be restrained from taking any steps to effectuate the Deed made between the Minister for State Development, the Urban Renewal Authority and Adelaide Capital Partners Pty Ltd and dated 13th December 2013.

(c) The respondents pay the appellants' costs of the trial and of the appeal to the Full Court of the Supreme Court of South Australia.

123 The respondents pay the appellants' costs of the application for special leave to appeal and the appeal.

Part IX: Time estimate

124 The appellants estimate 3 hours will be required for the presentation of its oral argument.

17th December 2015

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