

## Local Government Land: the Gillman effect!

It has been well publicised that yesterday, the ICAC issued a public statement about the sale of government land at Gillman. This statement was made by the ICAC in accordance with section 25 of the *Independent Commissioner Against Corruption Act 2012* on the basis that it was in the public interest to do so. The public statement does no more than confirm that the matter is under investigation by the ICAC to determine if there is any evidence of maladministration. If this process identifies any evidence to suggest that there is conduct that falls within the definition of *corruption*, the Commissioner has confirmed that it will be pursued.

For those who are not aware of the salient facts of the recent Supreme Court decision (*Acquista Investments Pty Ltd & Anors v The Urban Renewal Authority & Ors* [2014] SASC 206) the plaintiffs, Acquista Investments and Veolia Environmental Services (trading as Integrated Waste Services), met with Renewal SA to put forward a proposal for the land. Renewal SA did not pursue that proposal but, instead, entered into a contract with Adelaide Capital Partners ("ACP"). Subsequently, the plaintiffs sought judicial review of the decision of Renewal SA to enter into the contract with ACP. A primary consideration was the fact that the contract was entered into without a public tender process.

Justice Blue of the Supreme Court was highly critical that Renewal SA:

- had accepted ACP's unsolicited offer and said to do so was *imprudent or unreasonable*;
- failed to compare the advantages and disadvantages of entering into the contract without engaging in a competitive marketing sales process;
- failed to explore the interest of third parties in purchasing the land as an alternative to ACP doing so; and
- failed to obtain or seek a reliable and relevant valuation of the land.

The Court found that "*the decision maker [the Chief Executive of Renewal SA] was ignorant of matters that may be regarded as pre-requisites to an informed, prudent or rational decision.*" The Court held that the decision by the Chief Executive to enter into the contract with ACP was made in disregard of prudent commercial principles and was an "*irrational decision and a decision that no reasonable person in the position of decision-maker could rationally have made.*" However, the Court did not void the contract.

This decision is likely to be the subject of appeal, particularly in relation to the Court's decision to uphold the validity of the contract that was entered into.

### Is this relevant for councils?

Relevantly, the comments made by the Supreme Court regarding the failures of Renewal SA are readily translatable to local government land disposals and the processes that councils are subject to. One fundamental issue for councils is the legislative responsibility set out at section 6(a) of the *Local Government Act 1999* ("LG Act") "*to act as a representative, informed and responsible decision-maker in the interests of its community.*" This obligation should underpin every transaction that a council contemplates when disposing of land and, in our view, should be demonstrable from the decision-making process.

In addition, the Court's comments in *Acquista Investments* highlight the importance of, not only the appropriateness of the relevant contracts and tender policy, but also the underlying need to implement, follow and review these policies and to record reasons for decisions made under them.

In light of *Acquista* and the statutory obligations, when determining to dispose of land, our advice is that councils are required to:

1. consider legislative and policy implications, particularly for land that is classified as community land under section 193 of the LG Act;
2. consider the application of the council's contracts and tenders policy under section 49 of the LG Act in relation to proposal to dispose of land;
3. consider whether an open tender process is appropriate;
4. ensure the disposal process is open, transparent and adheres to proper probity practices;
5. carefully balance public interest considerations as well as commercial and non-commercial factors;
6. consider section 37 of the LG Act and any delegations that are in place allowing the Chief Executive Officer (or his/her delegate) to enter into a contract on behalf of the Council; and
7. consider appropriate advice from a commercial property agent with expertise in determining the most advantageous method of marketing and selling commercial and/or industrial land, the likely levels of interest from third parties and a market valuation of the relevant land; and
8. record the reasons for proceeding with the sale to the purchaser.

Before a sale of land process is commenced a council should always consider open and effective competition in the market, value for money, ethical behaviour and fair dealing, probity, accountability, transparency and environmental protection – all of which are necessary in the context of the council's dealing with public land held for the benefit of its community.

*"A primary consideration was the fact that the contract was entered into without a public tender process"*

Further, it is also necessary to ensure that records are maintained that evidence proper consideration of these matters, such as a report from council administration that addresses all matters that the council is required to take into account with reasons for making the sale decision. This will ensure a fully informed, reasonable and responsible decision is made in the best interests of its community.

We will continue to keep you informed and will report the outcome of any appeal once it is known.

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