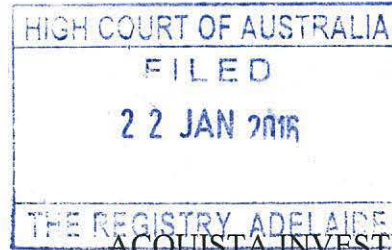


IN THE HIGH COURT OF AUSTRALIA  
ADELAIDE REGISTRY



No.A29 of 2015

BETWEEN:

ACQUISTA INVESTMENTS PTY LTD  
First Appellant

VEOLIA ENVIRONMENTAL SERVICES  
(AUST) PTY LTD  
Second Appellant

and

URBAN RENEWAL AUTHORITY  
(a Statutory Corporation)  
First Respondent

THE STATE OF SOUTH AUSTRALIA  
Second Respondent

ADELAIDE CAPITAL PARTNERS PTY LTD  
Third Respondent

### THE THIRD RESPONDENT'S SUBMISSIONS

#### Part I: Internet Certification

1. I certify that this submission is in a form suitable for publication on the internet.

#### Part II: Issues on Appeal

2. The Third Respondent contends that the issues on the appeal are:

- 2.1. What are the principles that apply to the issue of amenability to review?
- 2.2. Was the decision to enter into the contract legally unreasonable by reason of the asserted failure to take into account what the Appellants contend are mandatory considerations imposed by section 11 of the *Public Corporations Act*?
- 2.3. If so, was the trial Judge correct in concluding that this would not result in the invalidity of the contract?
- 2.4. Was the Chief Executive authorised by delegation or otherwise to execute the contract and, if not, what effect did this have on the validity of the contract?

Filed on behalf of the Third Respondent  
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- 2.5. Did the executive have executive power to decide to sell the land to the Third Respondent ('ACP')?

**Part III: Certification**

3. It is certified that, after consideration, notice in compliance with section 78B of the Judiciary Act 1903 is not necessary.

**Part IV: Facts**

- 10 4. The recitation of facts in Part V of the Appellants' Submissions mainly consists of a recitation of the facts and inferences relied upon by the dissenting Judge in the Full Court (Debelle AJ) in support of his conclusion that the decision to contract was legally unreasonable.
5. The Appellants' Submission at [16(c)] is not supported by the reference given [Full Court Reasons (FCR) 65] - there is no finding that there was a breach of the Marketing & Pricing Policy: see [FCR 206] and [FCR 359]. Also, [16(e)] and [16(g)] refer to findings by Debelle AJ in dissent. Those findings were not made by the majority. They should be read in light of the conclusions of the majority judgement in respect of those matters at, inter alia, [FCR 67] to [FCR 69]. Further, [16(f)] of the Appellants' Submissions omits any reference to the subsequent resolution of the Board of the First Respondent ('the Authority') which formed the Board's ultimate advice on the matter [FCR 79].
- 20 6. Contrary to the Appellants' Chronology (see entry at 13 November 2013) and the Appellants' Submissions at [39] the first draft deed was provided with the ACP proposal dated 29 August 2013 [TR 105] [FCR 61].
7. The following additional facts are material to the finding by the majority that the decision to enter into the contract was not legally unreasonable.
8. The Authority had owned most of the land for more than 30 years and had detailed knowledge of the geographical and other features of the land, and the extent of interest in the land over that period [FCR 78].
- 30 9. The land had been earmarked for development for a significant period of time [trial Judge's Reasons (TR) 76-83]. Prior to June 2013 the Authority had expected to develop 230 hectares of the Gillman land and had commenced preparation of a master plan and had prepared projections of revenue and costs of sales in acting as master developer over 15 or 20 years [TR 89- 90]. The land was important industrial land primarily because of the economic and employment benefits if the land was developed as part of the 30-Year Plan for Greater Adelaide [FCR 71].
10. The private sector had not previously expressed interest in developing the land. There had been little interest in the land unless the government funded the substantial infrastructure needed to ready the land for subdivision. The limited interest that had been expressed had been from industries for smaller land purchases for purposes including landfill. The government had been subject to long-term lobbying to incur

the substantial development costs involved in releasing the land to market [TR 152,155, FCR 200].

11. ACP's August Proposal was put to Cabinet in the form of an initial Cabinet Submission dated 20 September 2013.<sup>1</sup>
12. The Cabinet submission identified various risks and deficiencies in the initial proposal, but also stated numerous matters in favour of the proposal including that it was consistent with the 30-Year Plan for Greater Adelaide, State Government strategic policies and South Australia's Strategic Plan.<sup>2</sup>
- 10 13. The proposal was presented to and rejected by Cabinet on 23 September 2013, but Cabinet resolved that the Authority enter into negotiations with ACP with a view to preparing a revised proposal [FCR 65].
14. Subsequently, representatives of the Authority and ACP negotiated variations to ACP's August Proposal [FCR 171]. They agreed terms, subject to approval, in a draft Deed [FCR 66].
15. The Authority prepared a number of discussion papers for consideration of its Board. The third Board paper<sup>3</sup> contained a recommendation that the land be offered to the market, but noted that "*Cabinet had the ultimate authority to approve the ACP Proposal if it determined to do so having regard to whole of Government considerations*".<sup>4</sup>
- 20 16. The Board met on 25 November 2013 to discuss further the proposed purchase of the land by ACP. The notes of meeting<sup>5</sup> evidence that:
  - 16.1. The Minister and his advisor joined the meeting and that the Minister outlined the particulars of the proposal to develop a mining services hub to support the oil and gas industry.
  - 16.2. Following the Minister leaving the meeting, there was a Board discussion about the verbal advice that had been provided by the Department for Manufacturing, Innovation, Trade, Resources and Energy (*DMITRE*) which described the proposal as a "unique opportunity".
  - 30 16.3. The Board discussed the potential for the land to be placed on the market and the likelihood of other interest from bodies which could provide a similar strategic mining services hub focus.
  - 16.4. The Board discussed previous industry interest in purchasing the land. As a result of the Minister's presentation and the further Board discussion, the

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<sup>1</sup> Exhibit P1A (*P1A*) p572

<sup>2</sup> P1A p578

<sup>3</sup> P1A p835-847

<sup>4</sup> P1A p844

<sup>5</sup> P1 Vol 3 at p875-877

Board requested a further out-of-session discussion paper to enable the Board to advise the Minister in relation to the sale.

17. On 28 November 2013 a fourth Board paper<sup>6</sup> was prepared by the Authority which referred to the following matters:<sup>7</sup>

17.1. The value put on the land by the ACP offer was greater than the higher of the two independent valuations undertaken as part of the compulsory acquisition of the Dean Rifle Range land;

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17.2. “... *the level of expert financial analysis employed on the land was considered to be well in excess of any other property either within Renewal SA’s current portfolio, or those properties which Renewal SA had previously transacted upon.*”

17.3. The financial benefit of the ACP offer even when considering the worst case where ACP only exercises the first option is supported by the independent valuations;

17.4. Sales’ evidence on a number of parcels of land exceeding 50 hectares supports the value inherent in the ACP offer of \$30 per square metre;

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17.5. A number of unsolicited inquiries had been received for portions of the land (relating generally to land fill operations) and the fact that when discussing these inquiries with proponents the land had, in their view, held a very low value, much lower than that proposed by ACP;

17.6. ACP’s proposal to purchase and develop the land as a resources sector services hub provides for a much higher value-add and has the potential to see the land developed much sooner than otherwise.

18. On the basis of that fourth Board paper, the Board resolved to advise the Minister that:

18.1. a resources sector services hub is an appropriate use of the land; and

18.2. “*the ACP offer... represents a good value offer based upon independent valuation advice and comparable market evidence*” [FCR 68] and [FCR 207].<sup>8</sup>

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19. The Board noted that advice would be provided by other Government agencies and “*ultimately this will be a policy decision of Cabinet*”.

20. The Chief Executive of the Authority informed the Minister of the Board’s resolutions by letter dated 29 November 2013.<sup>9</sup>

21. The Minister recommended that Cabinet approve the proposal and took the revised proposal to Cabinet [FCR 210]. The Cabinet paper of 2 December 2013<sup>10</sup> referred to

<sup>6</sup> P1A p878-890

<sup>7</sup> see P1A p882-883

<sup>8</sup> Exhibit P1 vol 4 p1051-1052

<sup>9</sup> P1A p894

the “*significant financial modelling*” which had been undertaken by the Authority which led it to conclude that the ACP offer was a good value offer [FCR 213].<sup>11</sup> The material before the Cabinet also referred to other recent general expressions of interest in the land [FCR 69].<sup>12</sup> Included with the 2 December 2013 Cabinet paper was a Costing Comment from the Departments of Treasury and Finance<sup>13</sup> which considered potential Budget impacts on a worst case and best case scenario if the ACP proposal was accepted.

- 10 22. In summary, the material in the Board and Cabinet submissions indicated that the Authority considered that the ACP proposal represented good value for the land; it met all strategic development objectives for the land; it would provide greater returns and limit the financial risks associated with the Authority’s intended development of the land for release to the market itself [see previous references and FCR 176]. It also accelerated the intended release of the land to market compared to the Authority’s existing plans.<sup>14</sup>
23. The Minister approved the execution of the contract by the Chief Executive [FCR 31] and [TR436-437]. The Chief Executive, as well as the Minister for State Development and the Premier, thereafter executed the contract. The Chief Executive had delegated power under the Property Delegation to execute the contract with the approval of the Minister.
- 20 24. There were no allegations of any kind made against ACP nor were there any findings made against it [TR 482]. The State and the Authority in their conduct of the case have maintained and continue to maintain that they are bound by the execution of the Deed. The Option has been exercised by ACP and the parties’ rights and obligations are now subject to the Land Sale Contract.

#### **Part V: Legislation**

- 30 25. In addition to the Appellants’ statement that s 11 of the *Public Corporations Act* is applicable, ACP says that the statutory provisions applicable to this matter include Part 4 and ss 31 to 33 of the *Public Corporations Act* and ss 8, 9, 16, 21, 22, 23 and ss 27 to 30 of the *Housing and Urban Development (Administrative Arrangements) Act 1995* (**‘HUD Act’**) and Regulations 6 and 9 of the *Housing and Urban Development (Administrative Arrangements) (Urban Renewal Authority) Regulations 2012*.
26. *Public Corporations Act* remains in force.
27. The provisions of the HUD Act remain in force as the Urban Renewal Act 1995.
28. The Regulations in the *Housing and Urban Development (Administrative Arrangements) (Urban Renewal Authority) Regulations 2012* were repealed in 2014.

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<sup>10</sup> P1A p975-1048

<sup>11</sup> P1A p984

<sup>12</sup> P1A p984

<sup>13</sup> P1A p995-999

<sup>14</sup> P1A p878, p883 and p978

## Part VI: Answer to Appellants' Argument

### Ground 2: Amenability to review

29. The majority's reasoning on the amenability issue turned on the particular factual and statutory context and the arguments that were advanced by the Appellants [FCR 14], [FCR 15], [FCR 56], [FCR 91] to [FCR 104]. The majority accepted that review may be available to determine the limits of statutory power and whether the decision exceeded those limits [FCR 92].
- 10
30. The majority at [FCR 55] and the trial Judge at [TR 481] and [TR 491] reasoned correctly as a matter of construction that it was not intended that s 11 of the *Public Corporations Act* restricted the Authority's power to contract or that a contravention of the section would have the effect that a contract entered into by the Authority was invalid or unenforceable. That reasoning was correct for the reasons given by the trial Judge at [TR 473-491] and the majority at [FCR 40-54]. In so doing the majority applied well established principle to the construction of the statute.
31. Further, with respect to the challenge to the delegated authority, the majority at [FCR 34] and [FCR 93] and the trial Judge at [TR 438-439] found that the Chief Executive was authorised to execute the contract pursuant to the Property Delegation. The majority also reasoned that it doubted that the decision was amenable to review on this ground because it concluded that the HUD Act did not require such a delegation as a condition of the Chief Executive's power to execute the contract [FCR 93].
- 20
32. Further, contrary to [70] to [72] of the Appellants' Submission, the decisions of *Victoria v Master Builders' Association* [1995] 2 VR 121 and *MBA Land Holdings v Gungahlin Development Authority* (2000) 206 FLR 120 are in no way inconsistent with the approach of the majority of the Full Court. In both decisions, in the particular statutory context it was held that the decisions would only be reviewable to the extent that they were taken in the exercise of a public duty **and** "that they affect rights, interests or legitimate expectations".<sup>15</sup> The majority at [FCR 92] found (correctly it is submitted) that the decision to contract with ACP did not affect any rights, titles or legitimate expectations of the Appellants.
- 30
33. The reasoning of the majority at [FCR 92] applied with equal force to the unreasonableness argument, which is based solely on an alleged failure to comply with what are asserted to be the mandatory considerations in s 11 of the *Public Corporations Act*. That reasoning is consistent with the observations of McPherson JA as a member of the Queensland Court of Appeal in *RP Data v Brisbane City Council*<sup>16</sup> and the trial Judge at [TR 620] and [TR 627].

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<sup>15</sup> *Victoria v Master Builders' Association* (1995) 2 VR 121 at 160-161 per Eames J; see also at 135 per Tadgell J and at 155 per Eames J (both referring to the judgement of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374)

<sup>16</sup> (1995) 90 LGERA 42 at 46

34. In *Mercury Energy v Electricity Corporation of New Zealand*,<sup>17</sup> Lord Templeman stated at 391 in respect of a statutory corporation with objectives similar to that under the *Public Corporations Act*, that “it does not seem likely that a decision by a state owned enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith”.
35. ACP submits that the majority correctly held that the decision to enter into the contract by the Authority through its agents or delegates was not amenable to review on the stated grounds and in the particular statutory and factual context.

10 **Ground 4: The Property Delegation**

36. The Authority had contractual capacity as a natural person. The general contracting capacity in s 21 of the HUD Act was also conferred on the Authority. The power was not conferred on or required to be exercised by the Board. Contrary to the Appellants’ Submissions at [21] the management of the Authority was not vested in the Board [FCR 24] and [FCR 125].
37. Section 19 of the HUD Act provided that the Board may delegate powers conferred on the Board or the Authority.
- 20 38. The Board delegated to the Chief Executive power to **execute** a contract concerning a disposal of land worth over \$4.4 million with the Minister’s approval: columns 1 and 2 of the Property Delegations Table. The Delegation Guidelines provide further guidance:
1. This delegation allows delegates to approve and execute contracts for the disposal of land owned by Renewal SA. It should be noted that where the contract sale price is over \$4,400,000 the Renewal SA Board of Management has determined that the Minister must **approve** the land sale contract and note that the Chief Executive is **subsequently approved to enter into the related land sale contract. The land sale contract must ultimately be executed by Renewal SA (through the Chief Executive) as it is the registered proprietor of the land; (emphasis added)**
- 30 39. The trial Judge correctly found at [TR406] that the Chief Executive therefore had power to enter into the contract provided that he first obtained the approval of the Minister.
40. It is not in dispute that the Chief Executive executed the contract on 11 December 2013. Both the trial Judge at [TR 438] and the majority of the Full Court at [FCR 31] and [FCR 34] found that the Chief Executive executed the contract having first obtained the approval from the Minister to do so in accordance with the Property Delegation. Once it was accepted that the Minister approved the execution of the contract and that the Chief Executive had delegated authority to bind the Authority by executing the contract, the conclusion of the trial Judge and the majority must
- 40 logically be correct.

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<sup>17</sup> [1994] 2 NZLR 385

41. Debelle AJ's construction of the Property Delegation at [FCR 273] namely to imply a four-step process, is not supported by the words of the Property Delegation or the Delegation Guidelines at 6.4.1. The Property Delegation simply requires ministerial approval before execution of the contract by the Chief Executive.
42. However, if the four-step process is implied as found by Debelle AJ, then in fact those steps have been complied with:
- 42.1. There is no dispute that the officers of the Authority negotiated with ACP with respect to the terms of the ACP Proposal received in June 2013. The fact that they did so at the request of the Premier or the Minister (to whose control the Authority was subject) [FCR 285] does not mean that they did not decide to do so.
- 42.2. A draft contract was prepared and attached to ACP's letter of 29 August 2013. Following the ongoing negotiations between the Authority and ACP a further draft of the contract was produced on 13 November 2013. The draft contract was attached to the 2 December 2013 Cabinet submission.
- 42.3. The Minister did in fact provide his approval as found by the trial Judge at [TR 433] and the majority at [FCR 31].
- 42.4. It is not in dispute that the Chief Executive of the Authority executed the Contract after receiving the 3 December 2013 email from the office of the Minister.
43. Debelle AJ's conclusion as to ministerial approval in step 3 above relies on the allegedly material differences between the draft contract and the contract as executed by the Chief Executive. Debelle AJ does not reject the view accepted by the trial Judge and the majority that the Minister approved execution by the Chief Executive of the draft contract presented to Cabinet [FCR 298].
44. Debelle AJ's conclusion is, as the majority and the trial Judge correctly observed, contrary to a concession which was made by the Appellants before the trial Judge and which was not resiled from before the Full Court. The terms of that concession are set out at [FCR 35] and [TR 436]. The proposition relied on by Debelle AJ also was not advanced or argued at any time before the Full Court.

### *Ground 3: Executive Power*

45. ACP adopts the State's submissions on the authority of the Premier to bind the State. The Premier warranted (with the authority of Cabinet) to procure that all persons under their **control** take such action as is necessary or desirable to give effect to the contract. The Premier executed the contract with the authority of Cabinet. The Crown accepts it is bound by that agreement to transfer the land.



46. The power of the Executive to agree to sell Crown land could only be abrogated by express words or by necessary implication.<sup>18</sup> The HUD Act does not expressly or by necessary implication abrogate that power.
47. The Authority is subject to both control and direction of the Minister. The Minister may with the concurrence of the Treasurer transfer assets from the Authority to the Minister: s 23 of the HUD Act. The HUD Act therefore provides a number of mechanisms by which the Executive can give effect to a decision or agreement by the Executive to sell Crown land.
- 10 48. The existence of these statutory powers to give subsequent effect to the decision or agreement to sell the land is contrary to the contention that the Executive's power was abrogated by necessary implication.

***Ground 5: Legal Unreasonableness***

49. The assessment of “*legal unreasonableness*” turned on the particular statutory context and the nature of the decision under consideration. The issue for determination was whether there was an intelligible justification for the relevant decision: *Minister for Immigration and Citizenship v Li*.<sup>19</sup>
- 20 50. Neither the *Public Corporations Act*, nor the HUD Act, prescribed any particular mode of sale for government land.
51. The functions of the Authority as set out in the HUD regulations relevantly include:
- 51.1. the development of land “*in the public interest*” - regulation 6(1)(a);
  - 51.2. facilitating development that is attractive to potential investors - regulation 6(1)(b);
  - 51.3. disposing of land with a view to managing projects involving the development of land - regulation 6(1)(c)(ii);
  - 51.4. the promotion of Government policies particularly in areas identified for redevelopment - regulation 6(1)(g); and
  - 51.5. to support development that promotes growth in employment and the economy - regulation 6(1)(l).
- 30 52. The ACP Proposal involved more than just a sale of land and was quite different from that associated with any other expression of interest [FCR 13]. It represented an opportunity for the Government to see a strategic parcel of land fully remediated and developed in a way that provided all of the advantages of and was consistent with the 30 Year Plan for Greater Adelaide.

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<sup>18</sup> *Barton v The Commonwealth* (1974) 131 CLR 477

<sup>19</sup> (2013) 249 CLR 332 at [76]

53. Despite the land being held by the Authority (or its statutory predecessors) for more than 30 years [FCR 78] and being earmarked for development [TR 76]-[TR 90], no similar proposal for development of the land had been received [FCR 86].
54. Section 5 of the September Cabinet submissions recognised the risk associated with accepting the ACP Proposal because it *“does not provide an opportunity for market testing demand or pricing for the land”*. The submission then addresses that risk by comparing the price offered by ACP with what was known about the value of the land. It concludes that *“the ACP Proposal appropriately manages the risk of achieving public value in relation to the land transaction”*.
- 10 55. On the topic of value, the Board specifically advised the Minister in its Fourth Discussion Paper that:
- “The ACP offer of \$45 million ... represents a good value offer based upon independent valuation advice and comparable market evidence.*
56. This advice was supported by the Discussion section of the Fourth Board Paper which included references to the Board’s consideration of those matters set out above at [16].
57. The Board’s advice was set out in the 2 December 2013 Cabinet submission which in addition provided advice:
- 20 57.1. that the ACP proposal allows the State to achieve the forecast development profits for the project without incurring the identified development costs, thereby reducing the financial risk to Government;
- 57.2. from the Department of Manufacturing, Innovation, Trade, Resources and Energy (DMITRE) that the State is experiencing very strong exploration activity for oil and gas and that the ACP proposal represents an opportunity to create a cluster of contractors whose presence will increase as the level of exploration activity increases;
- 57.3. that the ACP proposal includes development in a shortened timeframe thus providing an opportunity for accelerated employment growth;
- 30 57.4. from the Department of Treasury and Finance of the financial impacts of the possible best case and worst case scenarios associated with the ACP proposal.
58. Having regard to the matters set out above there was at least an evident justification for the decision. The information before the Cabinet supported the view that the ACP offer represented good value for the land, it would accelerate the development of the land, and involve significantly greater returns to the Authority and remove the significant development risk associated with the Authority’s intended development of the land.

59. Further, the finding of unreasonableness by Debelle AJ, which is supported by the Appellants on this appeal, is founded on the proposition that the contracting power in the HUD Act was limited by s 11(1) of the *Public Corporations Act*. The finding is based on Debelle AJ's conclusion that the performance principles in s 11(1) were mandatory considerations that were bound to be taken into account as a condition of the validity of any contract entered into by the Authority and that those principles were not considered at all. ACP submits that Debelle AJ erred in both of those conclusions.
- 10 60. ACP submits that the majority correctly found that the performance principles contained in s 11 are not mandatory in the sense that they do not confine power. On this construction of s 11, the Appellants' contention must fail.
61. It is hardly to be supposed that that it was a purpose of the legislature that the validity of a contract entered into by the Authority should depend on whether a court ultimately rules there has been compliance with s 11 of the *Public Corporations Act*. See the trial Judge's reasoning at [TR 473] relying on *Project Blue Sky Inc. v Australian Broadcasting Authority*.<sup>20</sup> This is especially apparent when considering the obligation in s 11 (2) to perform non commercial operations in an "efficient" and "effective" manner.
- 20 62. Section 11 applies generally to all activities of all public corporations. The contractual capacity and power of the Authority contained in the HUD Act is not expressly or by implication restricted by s 11 of the *Public Corporations Act*. Section 11 should not be construed in a way that the validity and enforceability of all manner of dealings with public corporations would turn on a subsequent assessment by a Court as to compliance with the section. Such a construction would result in uncertainty and would be destructive of the commercial efficacy of the contractual capacity conferred on the Authority: see *Project Blue Sky* at [98]; *Australian Broadcasting Corporation v Redmore Pty Ltd*;<sup>21</sup> *ANZ Banking Group Ltd v The University of Adelaide*;<sup>22</sup> and *Gnych v Polish Club Ltd*.<sup>23</sup>
- 30 63. ACP submits, contrary to the finding of the trial Judge at [TR 472] and Debelle AJ at [FCR 354], that the thrust of s 11 is towards the conduct of the "operations" of the Authority rather than the legality of any individual decision. The decision was not in contravention of s 11 of the *Public Corporations Act*, to the extent, if at all, that the section contained a legally enforceable obligation to be objectively determined by the Court.
64. The precise content of the performance principles would be difficult to ascertain and likely to be the subject of different views. The "duty" is of a kind that could be

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<sup>20</sup> (1998) 194 CLR 355 at [98]

<sup>21</sup> [1989] 166 CLR 454 at 459-460

<sup>22</sup> [1993] 59 SASR 587 at 597-598

<sup>23</sup> [2015] HCA 23

fulfilled in a variety of ways: see *Yarmirr v Australian Telecommunications Corporation*.<sup>24</sup>

65. Further, the principles refer to goals such as “reasonable endeavours” and require consistency with the Authority’s functions, which are likely (as in this case) to involve conflicting policy considerations to be resolved in the public interest.
66. That is not to say, that the general performance principles imposed on the Authority under s 11 of the *Public Corporations Act* have no force, or that a contravention of them is without consequence.
- 10 67. Both the HUD Act and the *Public Corporations Act* provide for substantial scrutiny of the activities of the Authority and consequences for its officers and Board members in the event that there are contraventions of the Acts. The legislation provides for a detailed scheme of auditing, reporting and supervision (ss 27-30 of the HUD Act, ss 28-35 of the *Public Corporations Act*) and consequences for misconduct including removal of directors for breaching the HUD Act (s 18 *Public Corporations Act*) and liability for specified misconduct for officers.
- 20 68. The oversight and likely consequences of contravention of the HUD Act are far more significant than in other statutory schemes such as those discussed by the High Court in *ABC v Redmore*<sup>25</sup> and *ANZ Banking Group v University of Adelaide*.<sup>26</sup> Yet in each of those cases the Court concluded that the intended sanction for the contravention would be a sanction on the Authority and its officers as a result of supervision of its conduct. Further, (unlike this case) the statutory requirement in each case was a requirement which was specific to the entry into the contract.<sup>27</sup>
69. Section 11 of the *Public Corporations Act* should not be construed as permitting a public authority to contend that it is not bound by a contract because it overlooked or erred in its approach to a matter relevant to the decision to enter into a contract.
- 30 70. Further, DeBelle AJ erred in concluding that no consideration at all was given to prudent commercial principles and that the issue of whether the land should be sold by public tender was not considered. Section 11 does not prescribe a particular mode of sale nor does it prohibit accepting an offer resulting in an off market sale. Ultimately, s 11 will be satisfied if the vendor adopts a process to ensure it obtains good value for the property being sold in a way that is consistent with its functions.
71. ACP had made a proposal which involved the purchase and development of the Gillman land for a price and in a manner which was advantageous having regard to all of the information before the decision maker.

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<sup>24</sup> (1990) 96 ALR 739 at 748-749

<sup>25</sup> (1989) 166 CLR 454 at 459-460

<sup>26</sup> (1953) 39 SASR 387

<sup>27</sup> In each case ministerial approval was required.

72. The choice for the decision maker was to reject the ACP offer and risk losing it in the hope that a better offer may be made at a public tender or to accept the ACP offer. Such decisions are commonly made by vendors.
73. The information before the decision maker confirmed that the offer represented good value as well as meeting or exceeding all relevant policy objectives. There was no failure to have regard to prudent commercial principles and there was an evident justification for the decision having regard to the advice that the ACP proposal was “a good value offer”.
74. In these circumstances, acceptance of the ACP proposal was entirely reasonable.
- 10 75. Debelle AJ’s conclusion that there was no consideration of the merits of engaging in a competitive marketing and sales process was not open on the evidence. The relative pros and cons of the decision were analysed in both Cabinet submissions. Further the Cabinet papers should not have been treated as a statement of reasons [FCR 14]. There was no basis to conclude that the issue had not been considered [FCR 81]. Further any such failure would not have rendered the decision or contract invalid.
- 20 76. Further Debelle AJ erred in repeatedly approaching the matter on the basis that the late and general expressions of interest by the Appellants and another party were offers to purchase the land [FCR 189] and [FCR 214]. To the contrary, the majority correctly found (and there is no appeal against this finding) that these were not offers and that they were expressions of interest of the most general nature accurately referred to in the Cabinet submissions [FCR 69].
77. The matters raised in the Appellants’ Submissions at [118] extend beyond the stated ground of appeal which relies on a contravention of s 11 of the *Public Corporations Act*.
78. There was no evidence that the sale of the land to ACP was at anything less than market value. The ACP offer substantially exceeded the previous valuations over the vast majority of the same land.<sup>28</sup>
- 30 79. The evidence in the Gillman Master Plan Report dated 15 November 2013 was that the market for industrial land in South Australia had been “subdued” since the GFC.<sup>29</sup> The Authority did not consider that there was any need to update valuations in those circumstances. It had discussed the need for updated valuations with the expert valuer.<sup>30</sup> The Authority was very familiar with the land and its value as a result of the ongoing compulsory acquisition of the Council’s moiety interest over

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<sup>28</sup> P1A p883

<sup>29</sup> See e.g. P1 p776, transcript Rollinson evidence 384.10-30

<sup>30</sup> Rollinson transcript 384.20-30

most of the land and its detailed financial analysis as a result of its intended development of the land.

80. Further, the Authority conducted and provided to the Cabinet its own analysis of sales' evidence of other comparable land which it concluded supported the value inherent in the ACP offer of \$30 per square metre.<sup>31</sup> The Authority would be expected to have its own expertise and not be required to engage external commercial agents or valuers especially in regard to this land with which it was so familiar.
- 10 81. The Appellants rely at (2) of [118] of their written submissions on the advice from the Authority to reject the ACP proposal as at 21 November 2013, but that advice had been superseded by subsequent advice which referred to the ACP proposal as a good value offer.
82. Further at (3) of [118] of the Appellants' Submissions they rely on "*the fact that the interest of the appellants and other third parties in the land was ignored.*" This so called fact does not bear scrutiny. As found by the majority at [FCR 69], Cabinet was made aware of the other interest in the land by the express reference in the Cabinet submission dated 2 December 2013. Further, at the 25 November 2013 Board meeting there was discussion about previous and potential interest in the land.
- 20 83. The previous expressions of interest were of the most general nature and, as set out at [76] above, Debelle AJ erred in treating them as offers. None of these expressions of interest contained any suggestion that they would fulfil the strategic objectives for the development of the land.
84. As to (4) of [118] of the Appellants' Submissions, the minute was referred to by the trial Judge at [TR 160] but there is no evidence or finding that this minute was before Cabinet [FCR 209]. The trial Judge did not refer to this minute in his findings as to unreasonableness: footnote 1 at [FCR 67]. Debelle AJ appears not to have relied upon the minute in finding that the decision was unreasonable at [FCR 349ff]. The majority considered, correctly it is submitted, that the minute has no status: footnote 1 at [FCR 67].

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## **Part VII: Notice of Contention**

### ***Ground 1***

85. ACP adopts the submissions of the first and second respondents in support of grounds 2 to 5 of their Notice of Contention.

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<sup>31</sup> P1A p883

86. Further, ACP makes the following submission in relation to the approach of Debelle AJ to the Contracting Delegation to Cabinet which appears at [FCR 255-268].
87. It is submitted that Debelle AJ erred in concluding that the delegation and TI8 was intended to apply only to contracts that involve payment and expenditure of monies [FCR 266]. That conclusion is inconsistent with the definition of “incurs expenditure” set out by him at [FCR 261]. The application of the definition should not be restricted by the ordinary meaning of the defined term.<sup>32</sup>
- 10 88. When the definition of ‘incurs expenditure’ is given its full effect, it is evident that the delegation applies to an outflow of resources embodying economic benefits including a disposal of assets. Debelle AJ’s reasoning on this point at [FCR 262] reads in a limitation which is not contained in the definition. Further, the distinction that is drawn at [FCR 262] is illusory. The transfer of an asset in exchange for another asset may be characterised as a sale as readily as it may be characterised as a purchase. Further, there is no apparent reason why the delegation would apply to the disposal of an asset in return for consideration of another asset but not to the disposal of the same asset for cash consideration.

***Authority of the Chief Executive Officer to enter into a binding contract – Ground 2.1***

- 20 89. As submitted above, the contracting power is vested in the Authority and not the Board. The power conferred on the Board to delegate the powers conferred on the Authority to a body or person did not confine the power of the Authority to contract by its Chief Executive.
90. The HUD Act did not require a decision to enter into a contract to be made by any particular person or officer. The power under s 21 was conferred on the Authority. The Authority had all of the powers of a natural person.
- 30 91. The nature of the position occupied by the Chief Executive of the Authority meant that he could enter into a binding contract to sell the land: *Coogee Esplanade Surf Motel Pty Ltd v Commonwealth of Australia*.<sup>33</sup> Hutley JA observed in *Coogee*, a case where the Commonwealth denied that a contract was made with its authority, that:

*“It is to misunderstand the whole position to approach the problem in terms of delegation. All that the appellant had to do was prove that the transaction was one with which the Department was concerned, which it did, and that the officer with whom it purported to contract was an officer of that Department purportedly acting on Departmental business.”*

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<sup>32</sup> *Ship ‘Shin Kobe Maru’ v Empire Shipping Co Inc.* (1994) 181 CLR 404 at 419

<sup>33</sup> (1976) 50 ALR 363 at p379 and 383 referred to by Sneddon at [3.15]

92. Further, the Chief Executive was authorised to bind the Authority expressly or impliedly. That implication arises from his office and the conduct of the Authority and its Board in this case. The clear inference is that the Authority proceeded on the basis that its officers would execute the contract if Cabinet accepted the proposal, having considered the Authority's advice that the proposal represented good value and that the issue of acceptance of the proposal turned on whole of government considerations.
93. Alternatively, the Chief Executive had ostensible authority. The State and the Authority have accepted that the transaction binds them. The issue of authority is and should be an issue only between the parties to the contract [FCR 93].
94. ACP submits that Debelle AJ incorrectly found at [FCR 306] that the nature and circumstances of the transaction were such as to put ACP on inquiry as to who had authority to sell the land. ACP was aware of the Cabinet approval and that the Premier was executing the contract in addition to the Chief Executive by his power of attorney. In all of these circumstances there was nothing to put ACP on inquiry as to power to enter into the contract.
95. Further, if ACP had been shown the Property Delegation, as suggested by the trial Judge at [TR 456] and by Debelle AJ at [FCR 306-307], it would have revealed that the Chief Executive had delegated authority to execute such a contract with the approval of the Minister. Parties would be reluctant to deal with the State if there were a requirement to look behind what appears on its face to be a validly executed contract. In those circumstances it would be impossible to deal with the State with any certainty.

***Implied Ratification of the Deed by the State and the Authority – Ground 2.2***

96. The State (including the Authority) has expressly by pleading and submission adopted the transaction as its own.
97. Alternatively it has at least impliedly adopted the transaction. The relevant test is an objective test, not subjective.<sup>34</sup> The observation by the trial Judge at [TR 450] and by Debelle AJ at [FCR 301] that the State did not assert that it had ratified the transaction is therefore not to the point.
98. Debelle AJ says at [FCR 302] that there was no appeal regarding ratification but it was expressly raised on the appeal by ground 12 of the Third Respondent's Notice of Alternative Contentions dated 10 February 2015.
99. The issue is whether objectively the conduct is such that approval of the transaction must be imputed regardless of whether or not there has been a subjective

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<sup>34</sup> *Lamshed v Lamshed* (1951) 84 CLR 91, 101, Dal Pont, Law of Agency, Second edition 2008 [5.28]



ratification.<sup>35</sup> Where a principal sues on such an agreement or **defends proceedings on the basis of the validity of the transaction** ratification is implicit.<sup>36</sup>

100. Further, since the trial Judge delivered his judgement, the Option has been exercised and the parties are subject to the land sale contract. The State also defends the validity of that contract.

*No Failure to Comply with s 11 – Ground 3*

101. ACP's submissions regarding this issue are set out above in its submissions in response to ground 5 of Part VI of the Appellants' Submissions [104ff].

**Part VIII: Time estimate**

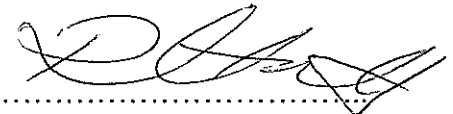
10 102. ACP estimates that 3 hours will be required to present its argument.

Dated: 22 January 2016

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<sup>35</sup> Dal Pont *ibid*

<sup>36</sup> Dal Pont at [5.29] referring to *Celthene Pty Ltd v WKJ Hauliers Pty Ltd* [1981] 1 NSWLR 606 at 615

## Part 3—Performance and scope of corporation's operations

### 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.

### 12—Corporation's charter

- (1) A charter must be prepared for a public corporation by its Minister and the Treasurer after consultation with the corporation.
- (2) The charter must deal with the following matters:
  - (a) the nature and scope of the commercial operations to be undertaken, including—
    - (i) the nature and scope of any investment activities;
    - (ii) the nature and scope of any operations or transactions outside the State;
    - (iii) the nature and scope of any operations or transactions that may be undertaken by subsidiaries of the corporation, by other companies or entities associated with the corporation or pursuant to a trust scheme or a partnership or other scheme or arrangement for sharing of profits, co-operation or joint venture with another person; and
  - (b) the nature and scope of any non-commercial operations to be undertaken and the arrangements for their costing and funding; and
  - (c) all requirements of the corporation's Minister or the Treasurer as to—
    - (i) the corporation's obligations to report on its operations;
    - (ii) the form and contents of the corporation's accounts and financial statements;
    - (iii) any accounting, internal auditing or financial systems or practices to be established or observed by the corporation;
    - (iv) the setting of fees or charges, the acquisition or disposal of capital or assets or the borrowing or lending of money.
- (3) The charter may—
  - (a) limit the functions or powers of the corporation; and
  - (b) deal with any other matter not specifically referred to in subsection (2).
- (4) The charter may not extend the functions or powers of the corporation as provided by the corporation's incorporating Act and any other Act.

- (5) The corporation's Minister and the Treasurer must, after consultation with the corporation, review the charter at the end of each financial year.
- (6) The corporation's Minister and the Treasurer may, after consultation with the corporation, amend the charter at any time.
- (7) The charter or any amendment to the charter comes into force and is binding on the corporation on a day specified in the charter or amendment (but without affecting any contractual obligations previously incurred by the corporation).
- (8) On the charter or an amendment to the charter coming into force, the corporation's Minister must—
  - (a) within six sitting days, cause a copy of the charter, or the charter in its amended form, to be laid before both Houses of Parliament; and
  - (b) within 14 days (unless such a copy is sooner laid before both Houses of Parliament under paragraph (a)), cause a copy of the charter, or the charter in its amended form, to be presented to the Economic and Finance Committee of the Parliament.

### **13—Performance statements**

- (1) The corporation's Minister and the Treasurer must, when preparing the charter for a public corporation, also prepare, after consultation with the corporation, a performance statement setting the various performance targets that the corporation is to pursue in the coming financial year or other period specified in the statement and dealing with such other matters as the Minister and the Treasurer consider appropriate.
- (2) The corporation's Minister and the Treasurer must, after consultation with the corporation, review the performance statement when reviewing the corporation's charter.
- (3) The corporation's Minister and the Treasurer may, after consultation with the corporation, amend the performance statement at any time.

## **Part 4—Duties and liabilities of board and directors**

### **14—General management duties of board**

- (1) The board of a public corporation is responsible to its Minister for overseeing the operations of the corporation and its subsidiaries with the goal of—
  - (a) securing continuing improvements of performance; and
  - (b) protecting the long term viability of the corporation and the Crown's financial interests in the corporation.
- (2) Without limiting the effect of subsection (1), the board must for that purpose ensure as far as practicable—
  - (a) that appropriate strategic and business plans and targets are established that are consistent with the corporation's charter and performance statement; and
  - (b) that the corporation and its subsidiaries have appropriate management structures and systems for monitoring management performance against plans and targets and that corrective action is taken when necessary; and

- (c) that appropriate systems and practices are established for management and financial planning and control, including systems and practices for the maintenance of accurate and comprehensive records of all transactions, assets and liabilities and physical and human resources of the corporation and its subsidiaries; and
- (d) that all such plans, targets, structures, systems and practices are regularly reviewed and revised as necessary to address changing circumstances and reflect best current commercial practices; and
- (e) that the corporation and its subsidiaries operate within the limits imposed by the corporation's incorporating Act and charter and comply with the requirements imposed by or under this or any other Act or law; and
- (f) that the corporation and its subsidiaries observe high standards of corporate and business ethics; and
- (g) that the corporation's Minister receives regular reports on the performance of the corporation and its subsidiaries and on the initiatives of the board; and
- (h) that the corporation's Minister is advised, as soon as practicable, of any material development that affects the financial or operating capacity of the corporation or any of its subsidiaries or gives rise to an expectation that the corporation or any of its subsidiaries may not be able to meet its debts as and when they fall due; and
- (i) that all information furnished to the corporation's Minister by the corporation or any of its subsidiaries is accurate and comprehensive.

#### **15—Directors' duties of care etc**

- (1) A director of a public corporation must at all times exercise a reasonable degree of care and diligence in the performance of his or her functions, and (without limiting the effect of the foregoing) for that purpose—
  - (a) must take reasonable steps to inform himself or herself about the corporation and its subsidiaries, their businesses and activities and the circumstances in which they operate; and
  - (b) must take reasonable steps through the processes of the board to obtain sufficient information and advice about all matters to be decided by the board or pursuant to a delegation to enable him or her to make conscientious and informed decisions; and
  - (c) must exercise an active discretion with respect to all matters to be decided by the board or pursuant to a delegation.
- (2) A director is not bound to give continuous attention to the affairs of the corporation but is required to exercise reasonable diligence in attendance at and preparation for board meetings.
- (3) In determining the degree of care and diligence required to be exercised by a director, regard must be had to the skills, knowledge or acumen possessed by the director and to the degree of risk involved in any particular circumstances.

- (4) If a director of a public corporation is culpably negligent in the performance of his or her functions, the director is guilty of an offence.  
Penalty: Division 4 fine.
- (5) A director is not culpably negligent for the purposes of subsection (4) unless the court is satisfied the director's conduct fell sufficiently short of the standards required under this Act of the director to warrant the imposition of a criminal sanction.
- (6) A director of a public corporation does not commit any breach of duty under this section by acting in accordance with a direction or requirement of the Minister or the Treasurer under this Act.

#### **16—Director's duty to act honestly**

- (1) A director of a public corporation must at all times act honestly in the performance of the functions of his or her office, whether within or outside the State.  
Penalty: Division 4 fine or division 4 imprisonment, or both.
- (2) Subsection (1) does not apply to conduct that is merely of a trivial character and does not result in significant detriment to the public interest.

#### **17—Transactions with directors or associates of directors**

- (1) Neither a director of a public corporation nor an associate of a director of a public corporation may, without the approval of the corporation's Minister, be directly or indirectly involved in a transaction with the corporation or a subsidiary of the corporation.
- (2) A person will be treated as being indirectly involved in a transaction for the purposes of subsection (1)—
  - (a) if the person initiates, promotes or takes any part in negotiations or steps leading to the making of the transaction with a view to that person or an associate of that person gaining some financial or other benefit (whether immediately or at a time after the making of the transaction); and
  - (b) despite the fact that neither that person nor an agent, nominee or trustee of that person becomes a party to the transaction.
- (3) Subsection (1) does not apply—
  - (a) to—
    - (i) the receipt by the corporation or a subsidiary of the corporation of deposits of money or investments;
    - (ii) the provision of loans or other financial accommodation by the corporation or a subsidiary of the corporation for domestic or non-commercial purposes;
    - (iii) the provision of accident, health, life, property damage or income protection insurance or insurance against other risks (excluding credit or financial risks) by the corporation or a subsidiary of the corporation;
    - (iv) the provision of services (other than financial or insurance services) by the corporation or a subsidiary of the corporation,

in the ordinary course of its ordinary business and on ordinary commercial terms; or

- (ab) to the employment of a person under a contract of service with the corporation or a subsidiary of the corporation or to a transaction that is ancillary or incidental to such employment; or
  - (b) to transactions of a prescribed class.
- (4) If a transaction is made with a public corporation or a subsidiary of a public corporation in contravention of subsection (1), the transaction is liable to be avoided by the corporation or by the corporation's Minister.
- (5) A transaction may not be avoided under subsection (4) if a person has acquired an interest in property the subject of the transaction in good faith for valuable consideration and without notice of the contravention.
- (6) A director of a public corporation must not counsel, procure, induce or be in any way (whether by act or omission or directly or indirectly) knowingly concerned in, or party to, a contravention of subsection (1).

Penalty:

If an intention to deceive or defraud is proved—Division 4 fine or division 4 imprisonment, or both.

In any other case—Division 6 fine.

### **18—Directors' and associates' interests in corporation or subsidiary**

- (1) Neither a director of a public corporation nor an associate of a director of a public corporation may, without the approval of the corporation's Minister—
- (a) have or acquire a beneficial interest in shares in, debentures of or managed investment schemes of the corporation or any subsidiary of the corporation; or
  - (b) have or hold or acquire (whether alone or with another person or persons) a right or option in respect of the acquisition or disposal of shares in, debentures of or interests in managed investment schemes of the corporation or any of its subsidiaries; or
  - (c) be a party to, or entitled to a benefit under, a contract under which a person has a right to call for or make delivery of shares in, debentures of or interests in managed investment schemes of the corporation or any of its subsidiaries.
- (2) A director of a public corporation must not counsel, procure, induce or be in any way (whether by act or omission or directly or indirectly) knowingly concerned in, or party to, a contravention of subsection (1).

Penalty:

If an intention to deceive or defraud is proved—Division 4 fine or division 4 imprisonment, or both.

In any other case—Division 6 fine.

## 19—Conflict of interest

- (1) A director of a public corporation who has a direct or indirect personal or pecuniary interest in a matter decided or under consideration by the board—
  - (a) must, as soon as reasonably practicable, disclose in writing to the board full and accurate details of the interest; and
  - (b) must not take part in any discussion by the board relating to that matter; and
  - (c) must not vote in relation to that matter; and
  - (d) must be absent from the meeting room when any such discussion or voting is taking place.

Penalty: Division 4 fine.

- (2) If a director makes a disclosure of interest and complies with the other requirements of subsection (1) in respect of a proposed contract—
  - (a) the contract is not liable to be avoided by the corporation; and
  - (b) the director is not liable to account to the corporation for profits derived from the contract.
- (3) If a director fails to make a disclosure of interest or fails to comply with any other requirement of subsection (1) in respect of a proposed contract, the contract is liable to be avoided by the corporation or by the corporation's Minister.
- (4) A contract may not be avoided under subsection (3) if a person has acquired an interest in property the subject of the contract in good faith for valuable consideration and without notice of the contravention.
- (5) Where a director of a public corporation has or acquires a personal or pecuniary interest, or is or becomes the holder of an office, such that it is reasonably foreseeable that a conflict might arise with his or her duties as a director of the corporation, the director must, as soon as reasonably practicable, disclose in writing to the board of the corporation full and accurate details of the interest or office.

Penalty: Division 4 fine.

- (6) A disclosure under this section must be recorded in the minutes of the board and reported to the corporation's Minister.
- (7) If, in the opinion of the corporation's Minister, a particular interest or office of a director is of such significance that the holding of the interest or office is not consistent with the proper discharge of the duties of the director, the Minister may require the director either to divest himself or herself of the interest or office or to resign from the board (and non-compliance with the requirement constitutes misconduct and hence a ground for removal of the director from the board).
- (8) Without limiting the effect of this section, a director will be taken to have an interest in a matter for the purposes of this section if an associate of the director has an interest in the matter.
- (9) This section does not apply in relation to a matter in which a director has an interest while the director remains unaware that he or she has an interest in the matter, but in any proceedings against the director the burden will lie on the director to prove that he or she was not, at the material time, aware of his or her interest.

## 20—Removal of director

Non-compliance by a director of a public corporation with a duty imposed by this Act constitutes a ground for removal of the director from office in accordance with the provisions of the corporation's incorporating Act.

## 21—Civil liability if director or former director contravenes this Part

- (1) If a person who is a director or former director of a public corporation is convicted of an offence for a contravention of this Part (other than an offence consisting of culpable negligence), the court by which the person is convicted may, in addition to imposing a penalty, order the convicted person to pay to the corporation—
  - (a) if the court is satisfied that the person or any other person made a profit as a result of the contravention—an amount equal to the profit; and
  - (b) if the court is satisfied that the corporation or a subsidiary of the corporation suffered loss or damage as a result of the contravention—compensation for the loss or damage.
- (2) If a person who is a director or former director of a public corporation is guilty of a contravention of this Part for which a criminal penalty is fixed (other than a contravention consisting of culpable negligence), the corporation or the corporation's Minister may (whether or not proceedings have been brought for the offence) recover from the person by action in a court of competent jurisdiction—
  - (a) if the person or any other person made a profit as a result of the contravention—an amount equal to the profit; and
  - (b) if the corporation or a subsidiary of the corporation suffered loss or damage as a result of the contravention—compensation for the loss or damage.

## 22—Immunity for directors

- (1) Subject to this Act, no civil liability attaches to a director of a public corporation for an act or omission in the performance or discharge, or purported performance or discharge, of the director's functions or duties.
- (2) An action that would, but for subsection (1), lie against the director lies instead against the corporation.
- (3) This section does not prejudice rights of action of the Crown or the corporation in respect of an act or omission not in good faith.

## Part 5—Subsidiaries and indirect or joint operations

### 23—Formation etc of subsidiary companies

- (1) A public corporation must not, without the approval of the Treasurer—
  - (a) form a subsidiary company; or
  - (b) acquire, or enter into any arrangement under which it will at a future time or would on the happening of some contingency hold, relevant interests in shares in a company such that the company becomes a subsidiary of the corporation.



- (4) This section does not affect any liability that the corporation would have apart from this section to pay rates to a council.

### 30—Dividends

- (1) A public corporation must, before the end of each financial year, recommend by writing to the Treasurer, that the corporation pay a specified dividend, or not pay any dividend, for that financial year, as the corporation considers appropriate.
- (2) The Treasurer may, after consultation with the corporation's Minister, by notice in writing to the corporation—
- (a) approve a recommendation of the corporation under subsection (1); or
  - (b) determine that a dividend specified by the Treasurer be paid, or that no dividend be paid,
- as the Treasurer considers appropriate.
- (3) The corporation must, if so required by the Treasurer by notice in writing to the corporation at any time during a financial year, recommend by writing to the Treasurer that a specified interim dividend or specified interim dividends be paid by the corporation for that financial year, or that no such dividend or dividends be paid by the corporation, as the corporation considers appropriate.
- (4) The Treasurer may, after consultation with the corporation's Minister, by notice in writing to the corporation—
- (a) approve a recommendation of the corporation under subsection (3); or
  - (b) determine that an interim dividend or interim dividends specified by the Treasurer be paid, or that no interim dividend be paid,
- as the Treasurer considers appropriate.
- (5) Where the Treasurer approves a recommendation or determines under this section that a dividend or interim dividend or dividends be paid by the corporation, the dividend or interim dividend or dividends must be paid by the corporation to the Treasurer for the credit of the Consolidated Account in the manner and at the time or times determined by the Treasurer after consultation with the corporation.
- (6) A recommendation under this section must be made by the board of the corporation and may not be made by any person or committee pursuant to a delegation.

### 31—Internal audits and audit committee

- (1) A public corporation must, unless exempted by the Treasurer, establish and maintain effective internal auditing of its operations and the operations of its subsidiaries.
- (2) A public corporation must, unless exempted by the Treasurer, establish an audit committee.
- (3) The audit committee will comprise—
- (a) the board of the corporation, or such members of the board, as the board may from time to time determine; and
  - (b) such other person or persons as the board may from time to time appoint, but may not include the chief executive officer of the corporation.

- (4) The functions of a corporation's audit committee include—
- (a) the reviewing of annual financial statements prior to their approval by the board to ensure that the statements provide a true and fair view of the state of affairs of the corporation and its subsidiaries; and
  - (b) liaising with external auditors on all matters concerning the conduct and outcome of annual audits of the corporation and its subsidiaries; and
  - (c) regular reviewing of the adequacy of the accounting, internal auditing, reporting and other financial management systems and practices of the corporation and its subsidiaries.

### 32—Accounts and external audit

- (1) A public corporation must cause proper accounts to be kept of its financial affairs and financial statements to be prepared in respect of each financial year.
- (2) Unless exempted by the Treasurer, the corporation must include in its financial statements the financial statements of its subsidiaries on a consolidated basis.
- (3) The accounts and financial statements must comply with—
  - (a) the requirements of the Treasurer contained in the corporation's charter; and
  - (b) any applicable instructions of the Treasurer issued under the *Public Finance and Audit Act 1987*.
- (4) The Auditor-General may at any time, and must in respect of each financial year, audit the accounts and financial statements of the corporation.

### 33—Annual reports

- (1) A public corporation must, within three months after the end of each financial year, deliver to its Minister a report on the operations of the corporation and its subsidiaries during that financial year.
- (2) The report must—
  - (a) incorporate the audited accounts and financial statements of the corporation and each subsidiary (if any) of the corporation for the financial year; and
  - (b) incorporate the corporation's charter as in force for that financial year; and
  - (c) set out any approval or exemption given or determination made by its Minister or the Treasurer under this Act or the corporation's incorporating Act in respect of the corporation or any of its subsidiaries during that financial year or that has effect in respect of that financial year; and
  - (d) set out any disclosure made during that financial year by a director of the corporation or a subsidiary of the corporation of an interest in a matter decided or under consideration by the board of the corporation or subsidiary; and
  - (e) contain the prescribed information relating to the remuneration of executives of the corporation and executives of its subsidiaries; and
  - (f) contain any other information required by or under the provisions of this or any other Act.

- (3) The Minister must cause a copy of the report to be laid before both Houses of Parliament within 12 sitting days after his or her receipt of the report.

### **34—Remuneration of corporation's directors**

Except with the approval of the corporation's Minister, a director of a public corporation is not entitled to any remuneration (in addition to the remuneration determined by the Governor) for or in connection with—

- (a) membership of the board of the corporation; or
- (b) membership of the board of any subsidiary of the corporation; or
- (c) any appointment made by or at the direction of the board of the corporation or any subsidiary of the corporation.

### **35—Minister to be consulted as to appointment or removal of chief executive officer**

The board of a public corporation must not appoint or remove a person as chief executive officer of the corporation unless it has first consulted the corporation's Minister.

### **36—Delegation**

- (1) The board of a public corporation may delegate any of its powers or functions.
- (2) A power or function delegated under this section may, if the instrument of delegation so provides, be further delegated.
- (3) A delegation—
  - (a) may be made subject to conditions and limitations specified in the instrument of delegation; and
  - (b) is revocable at will and does not derogate from the power of the delegator to act in any matter.
- (4) A delegate must not act in any matter pursuant to the delegation in which the delegate has a direct or indirect pecuniary or personal interest.  
Penalty: Division 4 fine.
- (5) If a delegate makes a contract in contravention of subsection (4), the contract is liable to be avoided by the corporation or by the corporation's Minister.
- (6) A contract may not be avoided under subsection (5) if a person has acquired an interest in property the subject of the contract in good faith for valuable consideration and without notice of the contravention.
- (7) If a person is convicted of an offence for a contravention of subsection (4), the court by which the person is convicted may, in addition to imposing a penalty, order the convicted person to pay to the corporation—
  - (a) if the court is satisfied that the person or any other person made a profit as a result of the contravention—an amount equal to the profit;
  - (b) if the court is satisfied that the corporation suffered loss or damage as a result of the contravention—compensation for the loss or damage.

## 7—Advisory committees etc

- (1) The Minister must establish—
  - (a) a housing and urban development industry advisory committee; and
  - (b) a residents and consumers advisory committee,to provide advice on matters relevant to this Act, the Minister, the Department, a statutory corporation or SAHT.
- (2) The Minister may establish other committees and subcommittees.
- (3) The procedures to be observed in relation to the conduct of the business of a committee will be—
  - (a) as determined by the Minister;
  - (b) insofar as the procedure is not determined under paragraph (a)—as determined by the relevant committee.

## Part 3—Statutory corporations

### Division 1—Formation of statutory corporations

#### 8—Formation of bodies

- (1) The Governor may, by regulation, establish—
  - (a) a statutory corporation under this Act;
  - (b) a subsidiary of a statutory corporation under this Act.<sup>1</sup>
- (2) Regulations establishing a statutory corporation—
  - (a) must name the body; and
  - (b) must provide for the constitution of a board of management as the body's governing body; and
  - (c) must specify the functions of the body; and
  - (d) may limit the powers of the body; and
  - (e) may specify procedures that will be followed in the event of a proposal to dissolve the body; and
  - (f) may make other provisions (not inconsistent with this Act) that in the opinion of the Governor are necessary or expedient for the purposes of the body.
- (3) A statutory corporation—
  - (a) is a body corporate; and
  - (b) subject to a limitation imposed by or under an Act, has all the powers of a natural person together with the powers specifically conferred on it by or under this Act or other Acts.
- (4) The Governor may, by regulation—
  - (a) alter the name of a statutory corporation; or

- (b) vary the constitution of the board of management of a statutory corporation;  
or
  - (c) alter the functions of a statutory corporation; or
  - (d) alter or limit the powers of a statutory corporation; or
  - (e) make other provisions (not inconsistent with this Act) that in the opinion of the Governor are necessary or expedient for the purposes of the statutory corporation.
- (5) The Governor may, by regulation—
- (a) dissolve a body established under this section; and
  - (b) transfer the assets, rights and liabilities of a body dissolved under this provision (either as a whole or in separate parcels specified by regulation)—
    - (i) to the Minister; or
    - (ii) to another statutory corporation; or
    - (iii) to SAHT; or
    - (iv) to the Crown, or to another agent or instrumentality of the Crown (not established under this Act); or
    - (v) with the agreement with the person or body—to a person or body that is not an agent or instrumentality of the Crown; and
  - (c) make other provisions that in the opinion of the Governor are necessary or expedient in connection with the dissolution of the body.
- (6) However, if a regulation is in force under paragraph (e) of subsection (2) in respect of the statutory corporation, a statutory corporation must not be dissolved unless the Governor is satisfied that any relevant procedure prescribed under that paragraph has been followed.
- (7) If a regulation establishing a statutory corporation under this section is disallowed by either House of Parliament, the assets, rights and liabilities of the statutory corporation become assets, rights and liabilities of the Minister.

**Note—**

- 1 A subsidiary will also be a statutory corporation for the purposes of this Act.

## **Division 2—Ministerial control**

### **9—Ministerial control**

A statutory corporation is subject to the control and direction of the Minister.

## **Division 3—Boards**

### **10—Appointment of boards of statutory corporations**

- (1) A member of a board is appointed by the Governor on conditions determined by the Governor and for a term, not exceeding three years, determined by the Governor and, at the expiration of the term of appointment, is eligible for reappointment.
- (2) The Governor must appoint a member of a board as the board's presiding member.

- (4) Each member present at a meeting of a board has one vote on a question arising for decision and, if the votes are equal, the member presiding at the meeting has a second or casting vote.
- (5) A resolution of a board—
  - (a) of which prior notice was given to members of the board in accordance with procedures determined by the board; and
  - (b) in which at least the majority of members of the board expressed their concurrence in writing,will be taken to be a decision of the board made at a meeting of the board.
- (6) A board must have accurate minutes kept of its proceedings.
- (7) Subject to this Act, a board may determine its own procedures.

## **16—General management duties of board**

- (1) The board of a statutory corporation is responsible to the Minister for overseeing the operations of the statutory corporation (and any subsidiary) with the goal of—
  - (a) securing continuing improvements in performance; and
  - (b) protecting the long term viability of the statutory corporation and the Crown's financial and other interests in the statutory corporation.
- (2) Without limiting the effect of subsection (1), the board must for that purpose ensure as far as practicable—
  - (a) that appropriate strategic and operational plans and targets are established; and
  - (b) that the statutory corporation (and any subsidiary) have appropriate management structures and systems for monitoring management performance against plans and targets and that corrective action is taken when necessary; and
  - (c) that appropriate systems and practices are established for management and financial planning and control, including systems and practices for the maintenance of accurate and comprehensive records of all transactions, assets and liabilities and physical and human resources of the statutory corporation (and any subsidiary); and
  - (d) that all such plans, targets, structures, systems and practices are regularly reviewed and revised as necessary to address changing circumstances and reflect best current commercial practices; and
  - (e) that the Minister receives regular reports on the performance of the statutory corporation (and any subsidiary), and on the initiatives of the board; and
  - (f) that the Minister is advised, as soon as practicable, of any material development that affects the financial or operating capacity of the statutory corporation (or any subsidiary) or gives rise to an expectation that the corporation (or any subsidiary) may not be able to meet its debts as and when they fall due.

- (b) if the instrument of delegation so provides, may be further delegated by the delegate; and
- (c) is revocable at will and does not prevent the board from acting itself in a matter.

## **Division 6—Operational, property and financial matters**

### **20—Common seal**

A statutory corporation must have a common seal and if a document appears to bear the common seal of the statutory corporation, it will be presumed in the absence of proof to the contrary that the common seal of the statutory corporation was properly affixed to the document.

### **21—Specific powers**

- (1) Without limiting another provision of this Act, but subject to a limitation or condition imposed by the Minister in relation to the statutory corporation, a statutory corporation may—
  - (a) sue and be sued;
  - (b) acquire, hold, deal with and dispose of real and personal property (or an interest in real or personal property), and grant or hold a lease or licence;
  - (c) with the approval of the Minister or as authorised by regulation—acquire, hold, deal with and dispose of shares in, or securities issued by, another body corporate, or participate in the formation of another body;
  - (d) with the approval of the Minister or as authorised by regulation—borrow money and obtain other forms of financial accommodation;
  - (e) establish and operate ADI accounts and invest money;
  - (f) enter into any kind of contract or arrangement;
  - (g) exercise other powers conferred by regulation;
  - (h) exercise other powers that are necessary, expedient or incidental to the functions of the statutory corporation.
- (2) A statutory corporation must not establish a trust scheme or a partnership or other scheme or arrangement for sharing of profits or joint venture with another person or undertake an operation or transaction pursuant to such a scheme or arrangement.
- (3) However, subsection (2) does not apply if—
  - (a) the statutory corporation is acting with the approval of the Minister; or
  - (b) the other party to the scheme or arrangement is another statutory corporation or SAHT; or
  - (c) a regulation provides that subsection (2) does not apply to the statutory corporation.
- (4) The Minister must obtain the concurrence of the Treasurer before giving an approval under subsection (1)(d).

## 22—Property to be held on behalf of Crown

A statutory corporation holds its property on behalf of the Crown.

## 23—Transfer of property etc

- (1) The Minister may with the concurrence of the Treasurer, by notice in the Gazette—
  - (a) transfer an asset, right or liability of the Minister to a statutory corporation or to SAHT;
  - (b) transfer an asset, right or liability of a statutory corporation—
    - (i) to the Minister; or
    - (ii) to another statutory corporation; or
    - (iii) to SAHT; or
    - (iv) to the Crown, or to another agent or instrumentality of the Crown (not established under this Act); or
    - (v) in prescribed circumstances, subject to prescribed conditions (if any), and with the agreement of the person or body—to a person or body that is not an agent or instrumentality of the Crown.
- (2) A notice under subsection (1) may make other provisions that in the opinion of the Minister are necessary or expedient in connection with the relevant transfer.
- (3) However, the Minister must not act under subsection (1)(b) if to do so would contravene an express agreement entered into by the Minister that limits the Minister's powers in relation to the statutory corporation.

## 24—Securities

- (1) A statutory corporation may, with the approval of the Minister—
  - (a) grant a mortgage or charge over an asset of the statutory corporation; or
  - (b) enter into a contract of guarantee or indemnity; or
  - (c) issue debentures or promissory notes that are charged over the assets of the statutory corporation generally, or over specified assets of the statutory corporation; or
  - (d) issue inscribed debenture stock in accordance with a scheme prescribed by the regulations.
- (2) The Minister must obtain the concurrence of the Treasurer before giving an approval under subsection (1).
- (3) A liability of a statutory corporation incurred with the concurrence of the Treasurer is guaranteed by the Treasurer.

## 25—Tax and other liabilities

- (1) The Treasurer may require a statutory corporation to pay all or specified rates, duties, taxes and imposts, and to assume other liabilities and duties (either generally or of a specified kind), as would apply under the law of the State if the statutory corporation were a public company.



- (6) If the Minister receives an amount from a statutory corporation under this section, the Minister may, in consultation with the Treasurer—
  - (a) allocate that amount, or a part of that amount, in a manner determined by the Minister; or
  - (b) pay that amount, or a part of that amount, for the credit of the Consolidated Account.
- (7) A recommendation under this section must be made by the board of the statutory corporation and may not be made by a person or committee pursuant to a delegation.
- (8) This section applies to a statutory corporation that is required to comply with this section by the Minister in consultation with the Treasurer.

## **27—Audit and accounts**

- (1) A statutory corporation must, unless exempted by the Minister after consultation with the Treasurer, establish and maintain effective internal auditing of its operations.
- (2) A statutory corporation must keep proper accounting records in relation to its financial affairs, and must have annual statements of accounts prepared in respect of each financial year.
- (3) The accounting records and statements of accounts must comply with any applicable instructions of the Treasurer under section 41 of the *Public Finance and Audit Act 1987*.
- (4) The Auditor-General may at any time audit the accounts of a statutory corporation and must audit the annual statement of accounts.

## **Division 7—Performance and reporting obligations**

### **28—Objectives**

- (1) The Minister may, after consultation with a statutory corporation, prepare a statement setting various objectives, targets or goals that the statutory corporation is to pursue over the period specified in the statement and dealing with such other matters as the Minister considers appropriate.
- (2) The statutory corporation must review the statement whenever it is necessary to do so on account of a direction of the Minister under this Act, and in any event at least once in every twelve month period.
- (3) The Minister may, after consultation with a statutory corporation, amend a statement issued in relation to that statutory corporation at any time.
- (4) The Minister must consult with the Treasurer if the statutory corporation is to be set financial objectives, targets or goals.

### **29—Provision of information and reports to the Minister**

- (1) A statutory corporation must, at the request of the Minister, furnish the Minister with such information or records in the possession or control of the statutory corporation as the Minister may require in such manner and form as the Minister may require.

- (2) If a record in the possession or control of a statutory corporation is furnished to the Minister under this section, the Minister may make, retain and deal with copies of the record as the Minister thinks fit.
- (3) If a statutory corporation considers that information or record furnished under this section contains matters that should be treated for any reason as confidential, the statutory corporation may advise the Minister of that opinion giving the reason for the opinion, and the Minister may, subject to subsection (4), act on that advice as the Minister thinks fit.
- (4) If the Minister is satisfied on the basis of the statutory corporation's advice under subsection (3) that the statutory corporation owes a duty of confidence in respect of a matter, the Minister must ensure the observance of that duty in respect of the matter, but this subsection does not prevent the Minister from disclosing the matter as required in the proper performance of ministerial functions or duties.

### **30—Annual report**

- (1) A statutory corporation must, on or before 30 September in each year, prepare and present to the Minister a report on the operations of the statutory corporation during the financial year that ended on the preceding 30 June.
- (2) The report must incorporate the audited accounts and financial statements of the statutory corporation.
- (3) The Minister must, within 12 sitting days after receiving a report under this section, have copies of the report laid before both Houses of Parliament.

## **Part 4—Miscellaneous**

### **31—Acquisition of land**

A statutory corporation may, with the consent of the Minister, acquire land for a purpose associated with the performance of its functions under and in accordance with the *Land Acquisition Act 1969*.

### **32—Power to enter land**

- (1) A person authorised in writing by the Minister to do so may enter land and conduct a survey, valuation, test or examination that the Minister considers necessary or expedient for the purposes of this Act.
- (2) A person must not enter land under this section unless the person has given reasonable notice of his or her intention to do so to the occupier of the land.
- (3) A person must not, without reasonable excuse, hinder a person in the exercise of a power under this section.  
Penalty: Division 6 fine.
- (4) This section does not limit a power conferred by or under an agreement or mortgage, or by or under another Act or law.

### **33—Satisfaction of Treasurer's guarantee**

A liability of the Treasurer arising by virtue of a guarantee under this Act is to be paid out of the Consolidated Account (which is appropriated to the necessary extent).

## 6—Functions of URA

- (1) The functions of URA are as follows:
- (a) to initiate, undertake, support and promote the development of land and housing in the public interest, particularly for urban renewal purposes, including by—
    - (i) acquiring, assembling and using land and other assets in strategic locations, including in areas identified for urban renewal; and
    - (ii) promoting public support for urban renewal by working with the South Australian Housing Trust (SAHT), community groups and other bodies in the development of land and housing; and
    - (iii) undertaking preliminary works (including remediation of land) to prepare land for development and other functions such as planning and co-ordination for the purposes of such development;
  - (b) to encourage, facilitate and support public and private sector investment and participation in the development of the State, including by performing its functions to facilitate development that is attractive to potential investors;
  - (c) to acquire, hold, manage, lease and dispose of land, improvements and property, including land and housing formerly held under the *South Australian Housing Trust Act 1995* transferred to the URA, particularly with a view to—
    - (i) reducing social disadvantage within the community through urban renewal, including the renewal of public housing by promoting, facilitating or undertaking—
      - (A) the creation of a mixture of public and private housing in particular locations; and
      - (B) an increase in the supply of affordable housing and community housing; and
    - (ii) managing projects involving the development of land and housing, including for urban renewal purposes (on its own behalf or on behalf of other agencies or instrumentalities of the Crown); and
    - (iii) managing the orderly development of areas through the management and release of land, including areas of undeveloped or under developed land, as appropriate; and
    - (iv) holding land and other property to be made available, as appropriate, for commercial, industrial, residential or other purposes;
  - (d) to act as a landlord in relation to public housing and for this purpose the functions of the URA include the functions that are the same as the functions of SAHT in Part 2 Division 1 of the *South Australian Housing Trust Act 1995* (but nothing in this paragraph prevents URA from delegating any such function to SAHT);
  - (e) to give advice to the Government on issues related to housing and urban development in the State;

- (f) to liaise with State and Commonwealth agencies, local government bodies, developers and owners of land and community groups in relation to housing and urban development;
- (g) to undertake and facilitate planning, including detailed precinct master planning, sequencing and feasibility proposals and the promotion of Government policies, strategies and objectives with a view to supporting sustainable, desirable and affordable housing and infrastructure, particularly in areas identified for urban renewal and redevelopment;
- (h) to promote and facilitate a high level of co-operation between, and work with, relevant industry and community groups, and other relevant persons or bodies, to develop and implement policies and strategies that encourage excellence in the design, planning and delivery of housing and urban development;
- (i) to co-ordinate, in collaboration with State and Commonwealth agencies, local government bodies and developers, the integration and timing of development and infrastructure in the State, particularly in areas identified for urban renewal purposes;
- (j) to negotiate and enter into contracts for the payment of contributions towards, and costs associated with, the development of land and the provision of housing and infrastructure;
- (k) to negotiate with local government bodies in relation to the vesting of public infrastructure in the care, control and management of those bodies;
- (l) to carry out its functions to support development that promotes growth in employment and the economy;
- (m) in relation to public housing, to develop and implement policies, procedures and systems for measuring performance with respect to efficient and effective management and maintenance of public housing by the URA, SAHT and any other housing authority or government body that holds public housing, including by promoting and facilitating the timely transfer of public housing between the URA, SAHT and any other housing authority or government body that holds public housing;
- (n) to carry out the functions formerly carried out by the Land Management Corporation established under the (revoked) *Public Corporations (Land Management Corporation) Regulations 1997*;
- (o) to support the undertaking of development that is consistent with achieving its other functions and the outcomes that apply under this regulation, including by participating in the scheme established by section 37 of the *Development Act 1993* (to the extent prescribed by regulations under that section);
- (p) to manage the Crown's interests in various joint ventures and land development projects identified by the Minister for the purposes of this regulation;
- (q) to manage the sale of surplus government land on behalf of other agencies or instrumentalities of the Crown, and to advise on any proposal to sell such land;
- (r) to carry out other functions conferred on URA by the Minister.

- (2) URA may carry out its functions alone, or in a trust scheme, partnership, joint venture, or any other scheme or arrangement for the sharing of profits established in accordance with the Act (and section 21(2) of the Act does not apply to URA).

### **7—Specific powers of URA**

In addition to the powers conferred on a statutory corporation by or under the Act, URA may, in accordance with the Act—

- (a) acquire, hold, deal with and dispose of land and other assets for the purpose of carrying out URA's functions; and
- (b) raise capital, borrow money and obtain other forms of financial accommodation; and
- (c) transfer an asset, right or liability to the Minister or another body; and
- (d) engage persons as agents or consultants, and enter into other forms of contract for the provision of services; and
- (e) make use of the services, facilities or staff of a private sector body; and
- (f) provide advisory, consultative, managerial, support or other forms of service, within the areas of URA's expertise, to other persons or bodies involved in the finance sector; and
- (g) in relation to acting as a landlord in relation to public housing, exercise any power that is the same as a power of SAHT in Part 2 Division 1 of the *South Australian Housing Trust Act 1995* (but nothing in this paragraph prevents URA from delegating any such power to SAHT).

### **8—Application of provisions of *Public Corporations Act 1993* to URA**

Sections 8 to 10 and Part 3 of the *Public Corporations Act 1993* apply to URA.

### **9—Associated matters**

URA should, so far as is reasonably practicable, ensure that its activities are—

- (a) co-ordinated with the activities of other public authorities; and
- (b) consistent with the planning of a desirable physical and social environment; and
- (c) conducive to the enhancement of the physical or social development objectives of the Government.

## Legislative history

### Notes

- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).

### Revocation of regulations

The *Housing and Urban Development (Administrative Arrangements) (Urban Renewal Authority) Regulations 2012* were revoked by Sch 1 cl 1 of the *Urban Renewal Regulations 2014* on 18.9.2014.

### Principal regulations

Year	No	Reference	Commencement
2012	9	<i>Gazette 23.2.2012 p852</i>	1.3.2012: r 2