IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A29 of 2015

BETWEEN

ACQUISTA INVESTMENTS PTY LTD

First Applicant

VEOLIA ENVIRONMENTAL SERVICES (AUST) PTY LTD

Second Applicant

and

THE URBAN RENEWAL AUTHORITY

First Respondent

THE STATE OF SOUTH AUSTRALIA

Second Respondent

ADELAIDE CAPTIAL PARTNERS PTY LTD

Third Respondent

AMENDED **FIRST AND SECOND RESPONDENTS' SUBMISSIONS**

Filed by:
Crown Solicitor's Office
Level 9, 45 Pirie Street
ADELAIDE SA 5000
Solicitor for the First and Second Respondents

Ref: Sarah Mitchell
Telephone: (08) 8207 1831
Facsimile: (08) 8207 1724
Email: sarah.mitchell@sa.gov.au
Date: 22 January 2016

Ref: 152875

Part I: Certification

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

Part II: Issues

2. On 2 December 2013, the South Australian Cabinet approved the Urban Renewal Authority (**URA**), the First Respondent, and the Premier, on behalf of the State of South Australia, the Second Respondent (**State**), entering into an off market transaction with Adelaide Capital Partners Pty Ltd (**ACP**), the Third Respondent, by which ACP would be granted three options to purchase up to 407ha of land at Gillman (**Gillman land**). Subsequently, the URA, the Premier and ACP executed a deed, dated 13 December 2013 (**Deed**), granting ACP options to purchase the Gillman land. The First and Second Respondents will be referred to collectively as the State in this Submission.

3. By these proceedings, Acquista Investments Pty Ltd, the First Appellant, and Veolia Environmental Services (Aust) Pty Ltd, the Second Appellant (jointly conducting a business trading as Integrated Waste Services (**IWS**)), who were not parties to the Deed, seek to invalidate the Deed and restrain the parties from giving effect to its terms. In support of the relief sought, IWS contend that Cabinet was not authorised to make the decision to approve entry into the Deed and that the decision was legally unreasonable.

4. The following issues arise on the appeal and State's notice of contention:[1]

    1. Does IWS, as a third party to the Deed, lack standing to invalidate the Deed and restrain the parties from giving effect to its terms?
    2. Is the power conferred on the URA to enter contracts implicitly limited, either by a requirement of (a) legal reasonableness or (b) a requirement that the Board must authorise entry into contracts, such that the Deed is amenable to judicial review on one of the grounds pursued by the Appellants?
    3. If the power conferred on the URA to contract is limited in one of the respects identified by the Appellants, does a breach of the implied limitations in entering into the Deed render the Deed invalid?
    4. If the power conferred on the URA to contract is limited, and a breach of the limitation would render the Deed invalid, was the Deed entered into (a) in breach of the requirement of legal reasonableness or (b) without obtaining the prior authorisation of the Board, or its delegate, pursuant to (i) the Property Delegation, (ii) the Contracting Delegation or (iii) the Ad Hoc Delegation?
    5. If the power conferred on the URA to contract was breached so as to otherwise render the Deed invalid, does the Deed having been executed by the Premier pursuant to the executive power of the State, nonetheless continue to validly bind the State?

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

5. Consideration has been given to the question whether notice pursuant to s78B of the *Judiciary Act 1903* should be given with the conclusion that this is not necessary.

Part IV: Facts

6. The facts relevant to this application are as follows:

    6.1. The Gillman land is situated in the suburbs of Gillman and Dry Creek in the greater Adelaide Metropolitan area (Full Court (**FC**), [62]). It is undeveloped and will require substantial filling (FC, [133]). Most of the Gillman land is identified in the "30 Year Plan for Greater Adelaide" as an existing key industry area (FC, [62]). The Gillman land had been owned by the State for more than 30 years during which time the URA had fielded inquiries from potential purchasers (FC, [78]).

    6.2. On 18 June 2013, ACP wrote to the Premier regarding a proposal to purchase the Gillman land for the purpose of developing an oil and gas services hub (FC, [13], [61]). On 29 August 2013, a more formal proposal was provided. ACP proposed to "develop the Gillman land into an international standard industrial development and estimated economic

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[1] The issues arising on the appeal and the notices of contention are dealt with together in this submission. The State makes no submission in relation to the contentions raised by the Third Respondent that the Chief Executive had express, implied or ostensible authority to bind the URA, or that the State has ratified the Deed by its conduct in the present litigation. The State's position on these issues reflects only the fact that the State did not raise these issues below. The State should not be taken to doubt the correctness of the submissions put by ACP on these issues.

benefits to the South Australian economy of over $2 billion" (FC, [61]). The proposal was to promote and reinforce South Australia as a "gateway for global oil and gas companies with interests in developing Australia's significant oil and gas reserves" (FC, [70]). ACP stated in clear terms that it would not participate in an open competitive bidding process (FC, [80]).

6.3. Cabinet considered the proposal on two occasions. On 23 September 2013, Cabinet authorised the URA to negotiate directly with ACP (FC, [65]). Between 29 October and 13 November 2013, the URA and ACP negotiated the terms of the Deed by which the URA and the State would grant ACP options to purchase up to 407ha of the Gillman land (FC, [110], [171]-[172]).

6.4. In November 2013, the Board of the URA (**Board**) considered the proposal. On 21 November 2013, the Board recommended that the proposal be rejected on grounds that it did not allow for market testing of the value of the Gillman land and gave rise to probity concerns (FC, [67]-[68]). On 25 November 2013, the Minister for Housing and Urban Development (**Minister**) addressed the Board and asked it to further consider the matter and provide advice (FC, [199]). On 29 November 2013, having considered the matters put by the Minister, the Board resolved that the proposal represented good value and that "ultimately this will be a policy decision of Cabinet" (FC, [78]).

6.5. In November 2013, other parties, including the Appellants, expressed interest in the Gillman land, but not in terms that contributed to the State's strategic priorities in any comparable way to the proposal of ACP (FC, [13], [69]).

6.6. On the second occasion on which Cabinet considered the proposal, Cabinet had been presented with a submission signed by the Premier and the Minister that explained the risks and benefits of proceeding with the transaction (FC, [31], [213]). On 2 December 2013 Cabinet approved entry into the Deed (FC, [10], [30]). On 11 December 2013 the Chief Executive, who held a power of attorney on behalf of the URA, executed the Deed on behalf of the URA (FC, [30], [34]). On 11 or 12 December 2013, the Premier executed the Deed on behalf of the State (FC, [221]).

7. The State agrees with the factual background as set out in Part V of the Appellants' Submissions, except in the following respects:

7.1. The Appellants say[2] that the decision to enter into the Deed was made without the URA having obtained any current valuations of the land. However, the URA did have access to two detailed valuations that had been prepared for a compulsory acquisition process in 2010 in relation to a substantial portion of the Gillman land (FC, [78]).

7.2. The Appellants say[3] that the decision to enter into the Deed was made without consideration being given to the interest that had been shown in the Gillman land by third parties, including the Appellants. That is incorrect. The Cabinet submission of 2 December 2013 shows that Cabinet was aware of other interest in the Gillman land (FC, [69], [77]). Further, as the majority of the Full Court noted, although the Cabinet submissions reveal those matters that were known to Cabinet in deciding to approve entry into the Deed, it is not known what additional matters may have been discussed by Cabinet in its deliberations on the matter (FC, [81]).

7.3. The Appellants say[4] that the decision to enter into the Deed was made in circumstances where the Board had recommended to the Minister that ACP's proposal be rejected and the Gillman land be offered to the market for sale in a transparent and open manner. However, subsequent to that Board resolution, the Board resolved to advise the Minister that the offer represented good value "based on independent valuation advice and comparable market evidence." That resolution superseded the earlier one (FC, [68], [78]).

7.4. The Appellants say[5] that prior to entry into the Deed the Appellants had expressed interest in purchasing the Gillman land. While there had been an "expression of interest" by the Appellants prior to entry into the Deed it was not comparable to the detailed proposal of ACP (FC, [13]).

7.5. The Appellants assert[6] that representatives of the URA were acting at the direction of the Premier (or his Office). This is incorrect and there is no evidence to support the assertion.

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2 Appellants' submissions [16(c)].
3 Appellants' submissions [16(e)].
4 Appellants' submissions [16(f)].
5 Appellants' submissions [17].

7.6. The Appellants say[7] that the draft and final Cabinet submissions did not refer to the Board's resolution of 21 November 2013 to advise to reject ACP's proposal. The subsequent Board resolution, to advise the Minister that the offer represented good value "based on independent valuation advice and comparable market evidence" superseded the earlier one (FC, [68], [78]). In addition, the Treasury and Finance Costing Comment, which was attached to the 2 December 2013 Cabinet submission, clearly refers the to the Board's earlier resolution. (FC [67]). Read as a whole the Cabinet submission and Costing Comment include reference to the Board's earlier resolution. As noted above at [7.2], it is not known what additional matters may have been discussed by Cabinet in its deliberations on the matter.

10 7.7. The Appellants say[8] that there is no evidence that the Treasury and Finance Minute dated 29 November 2013 was brought to the attention of Cabinet. The State refers again to [7.2] above..

7.8. The Appellants say[9] that the form of the Deed executed was *materially* different from that which was before Cabinet on 2 December 2013. This assertion is not accepted. The Full Court found that there were *some* differences between the draft that was before Cabinet and the final that was executed and that the Cabinet submission noted that refinement of documentation was continuing (FC [35]).

Part V: Legislation

8. In addition to the *Public Corporations Act* 1993 (SA) (**PC Act**), the State will refer to the *Housing and Urban Development (Administrative Arrangements) Act* 1995 (SA) (**HUD Act**) and the *Housing and Urban Development*
20 *(Administrative Arrangements) (Urban Renewal Authority) Regulations 2012* (SA) (**HUD Regulations**).

Part VI: Argument on appeal and notices of contention

Standing of IWS

9. The majority did not determine whether the Appellants had standing beyond observing that "there appears much to be said for the view that if the Appellants had no legitimate right, interest or expectation in respect of the Land, then it follows that they had no standing".[10] Justice Debelle held that the Appellants did have standing, their special interest being comprised of a "real commercial interest" in the relief sought in that, if such relief were obtained, the contract would be "set aside and they, along with others, will be in a position to enter into negotiations with the authority to acquire an interest in the land".[11] That "real commercial interest" consisted of the
30 Appellants' interest in acquiring the Gillman land to use it for their business operations.[12] In the URA contracting with ACP the Appellants were denied "the opportunity to engage in a competitive process to seek to purchase the land".[13] The trial Judge held similarly.[14]

10. The principles relevant to determining the circumstances in which a plaintiff will have standing to prevent the violation of a public right are well settled. If no private right is infringed, then a plaintiff may nonetheless have standing to sue if it has a sufficient interest in the subject matter of the action.[15] In *Australian Conservation Foundation v Commonwealth*, Chief Justice Gibbs said that:[16]

> A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.

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6 Appellants' submissions [31] and [38].
7 Appellants' submissions [48] and [50].
8 Appellants' submissions [49].
9 Appellants' submissions [54].
10 *Acquista* (2015) 123 SASR 147, [104] (Vanstone and Lovell JJ).
11 *Acquista* (2015) 123 SASR 147, [231-[232].
12 *Acquista* (2015) 123 SASR 147, [231], [232] (Debelle AJ).
13 *Acquista* (2015) 123 SASR 147, [231] (Debelle AJ).
14 *Acquista* [2014] SASC 206, [243].
15 *Kuczborski v Queensland* (2014) 254 CLR 51, [175], [177] (Crennan, Kiefel, Gageler and Keane JJ).
16 (1980) 146 CLR 493, 530; *Kuczborski v Queensland* (2014) 254 CLR 51, [177] (Crennan, Kiefel, Gageler and Keane JJ).

11. Whether a plaintiff's interests are sufficiently affected to attract standing gives rise to questions of fact and degree. Questions of immediacy and directness of the effect on the plaintiff's interests are relevant to the inquiry.[17]

12. Importantly:

> The power to declare a law to be invalid is confined by the boundaries of judicial power. In *Robinson v Western Australian Museum*, Mason J said that the requirement as to standing to invoke the exercise of judicial power:
>
> > "reflects a natural reluctance on the part of the courts to exercise jurisdiction otherwise than at the instance of a person who has an interest in the subject matter of the litigation in conformity with the philosophy that it is for the courts to decide actual controversies between parties, not academic or hypothetical questions."
>
> The established requirements as to standing ensure that the work of the courts remains focused upon the determination of rights, duties, liabilities and obligations as the most concrete and specific expression of the law in its practical operation, rather than the writing of essays of essentially academic interest. To recognise that a person has a sufficient interest to seek the exercise of judicial power where that exercise is apt to affect "the legal situation of persons subject to the jurisdiction of the court" serves to maintain the ordinary characteristics of judicial power.[18]

13. In this case the Deed is binding only on the parties to it. The setting aside of the Deed will have no effect on the legal rights of the Appellants.

14. Justice Debelle relied upon *Aussie Airlines Pty Ltd v Australian Airlines Ltd* and *Edwards v Santos Ltd.*[19] But the interests in *Aussie Airlines Pty Ltd v Australian Airlines Ltd* and *Edwards v Santos Ltd* that supported standing in those cases were markedly different from this case. In *Aussie Airlines*, if the appellant was a "new entrant to the domestic aviation industry" the head lessee was *obliged* to grant to them a sublease. In *Edwards v Santos* the petroleum defendants were *obliged* under the 2001 Indigenous Land Use Agreement (**ILUA**) to negotiate the terms of a new ILUA with the plaintiff, the content of which would be affected by the resolution of the plaintiff's contention that the Minister was not empowered to grant to the petroleum defendants a production license on the land subject to their native title claim which provided the very reason to enter the 2001 ILUA and its successor.

15. Here the power to contract was not conditioned by any obligation of a similar nature. The URA was and is under no obligation to negotiate with the Appellants as to the sale of the land. The setting aside of the Deed will not confer on the Appellants a right to purchase the Gillman land and nor will it confer on them a right to negotiate with the State about the purchase of the land.[20] Here the Appellants can point to nothing other than their commercially motivated desire to have access to the land that is the subject of the Deed. At its highest, it can be said that the setting aside of the Deed merely gives rise to a potential future opportunity for the Appellants to negotiate for the purchase of the land. That "is a foundation resting on contingencies which, if they did occur, could occur in a variety of factual circumstances".[21] That is not an interest that is secured or in any way advanced or determined by the exercise of judicial power to grant the relief sought in this case.

16. The contingent nature of the Appellants' interest in purchasing the Gillman land also arises from the nature of the commercial opportunity that the Gillman land presents. As noted by the trial Judge, the interest of the Appellants is to act in "conjunction with a substantial developer to purchase the land".

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17 *Kuczborski v Queensland* (2014) 254 CLR 51, [182] (Crennan, Kiefel, Gageler and Keane JJ); *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 530-531 (Gibbs CJ), 547-548 (Mason J); *Onus v Alcoa*(1981) 149 CLR 27, 35-6 (Gibbs J), 41-42 (Stephen J), 44 (Murphy J), 49-50 (Aickin J), 60-61 (Wilson J), 75-6 (Brennan J); *Argos Pty Ltd v Minister for the Environment and Sustainable Development* (2014) 254 CLR 394, [37] (French CJ and Keane J), [62] (Hayne and Bell JJ), [76] (Gageler J). Although *Argos* concerned the application of the person aggrieved test under the *Administrative Decisions (Judicial Review) Act 1975*, the principles espoused are relevant by analogy.

18 *Kuczborski v Queensland* (2014) 254 CLR 51, [183]-[184] (Crennan, Kiefel, Gageler and Keane JJ). *(footnotes omitted).*

19 *Acquista* (2015) 123 SASR 147, [231] (Debelle AJ).*Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406; *Edwards v Santos Ltd* (2011) 242 CLR 421.

20 This case can be distinguished from challenges to the outcome of a tender process in which the effect of setting aside the decision may require, as a matter of law or practical necessity, the decision-maker to reconsider the merits of the tender bids afresh; *Hunter Bros v Brisbane City Council* (1984) 1 Qd R 328.

21 *Kuczborski v Queensland* (2014) 254 CLR 51, [19] (French CJ).

There was no evidence before the Court that the Appellants had established a relevant commercial relationship with a "substantial developer" to enable it to exploit the commercial opportunity as presented. Accordingly, the capacity of the Appellants to take up the opportunity (in stark contrast to the integrated business model established by ACP) is unknown. What is clear is that the setting aside of the Deed will inflict very significant damage on one of the Appellants' primary competitors, ResourceCo Pty Ltd (which owns a 50 percent share in ACP). However, this is not an interest on which the Appellants are entitled to rely in support of standing.[22]

17. The decision of *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*,[23] referred to by the trial Judge[24] is distinguishable. In *Bateman's Bay* this Court held that the plaintiff, who was in the business of providing life insurance to Aboriginal people, had standing to seek declarations that the proposal that the Aboriginal Land Council would commence offering similar contracts would be beyond the scope of its statutory powers and sought an injunction to restrain such conduct. No analogy can be drawn with the present case. It would have been a very different matter for the Court in *Bateman's Bay* to have held that the plaintiff in that case had standing to challenge the validity of particular insurance contracts entered into by the Land Council. No such declarations were sought or granted. Accordingly, the analogy to the present case breaks down.

18. For these reasons, the State contends that the Appellants lack standing to challenge the validity of the Deed.

Amenability to Review

19. The accepted role of the Australian courts in undertaking judicial review of administrative action is to declare and enforce the law which determines the limits and governs the exercise of powers possessed by executive government.[25] This role is fundamental to the maintenance of the rule of law and enjoys constitutional protection at both state and federal levels.[26] It follows that where a challenge is brought to the exercise of a statutory power, the question of amenability must begin with a process of statutory construction to discern what justiciable limits the legislature has imposed upon the exercise of the power in question.

20. The Appellants contend that the power conferred on the URA to contract is limited in two relevant respects: first, it is said, the power may only be exercised where it is legally reasonable to enter the contact in question, having regard to prudent commercial principles; second, it is said, the power to contract is only enlivened by a decision of the URA Board, or its delegate, granting provisional approval to the contract in question. For the reasons that follow, the State does not accept that the power conferred on the URA to contract is limited in these respects, such that the exercise of power is not amenable to judicial review on the grounds pursued by the Appellants.

21. The relevant power in the present case is that conferred on the URA by s21(1)(f) of the HUD Act "to enter into any kind of contract or arrangement". It was pursuant to this power that the Chief Executive of the URA executed the Deed with ACP on 11 December 2013, under power of attorney granted to him by the Board.[27] The power to enter into contracts, together with other powers conferred by s21(1), such as the powers to "sue and be sued", "borrow" and "invest" money, and "acquire, hold, deal with and dispose of real and personal property", may be regarded as amplifications of the general conferral on the URA of "all the powers of a natural person" by s8 of the HUD Act.

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[22] *Argos Pty Ltd v Minister for the Environment and Sustainable Development* (2014) 254 CLR 394, [34] (French CJ & Keane J), citing *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, 702, *Dewes v Fitch* [1920] 2 Ch 159, 181, *Lindner v Murdock's Garage* (1950) 83 CLR 628, 634, 649.

[23] (1998) 194 CLR 247.

[24] *Acquista v Urban Renewal Authority* [2014] SASC 206, [490].

[25] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-36 (Brennan J); *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272 (Brennan CJ, Toohey, McHugh & Gummow JJ).

[26] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [31] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby & Hayne JJ); *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 580-581 [96]-[100] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ).

[27] An alternative source of power is that conferred by s21(1)(b), to "acquire, hold, deal with and dispose of real and personal property". In the State's submission, nothing turns on whether the relevant power is identified as that conferred by sub-paragraph (b) or (f).

The power to contract is not conditioned by a requirement of legal reasonableness

22. For the three reasons set out below, no implication arises to the effect that the power of the URA to contract is conditioned by a requirement of legal reasonableness. First, it is apparent that the power to contract, read in light of s8, is intended to be analogous to the broad and flexible power enjoyed by natural persons to contract. It may be inferred from the conferral of power in those terms that the legislature did not intend the power to be constrained by various limitations that are generally taken to impliedly condition the exercise of statutory powers. To take an obvious example, there is no warrant to imply that the URA must afford procedural fairness to third parties whose rights might be affected before the URA enters into a contract.[28] The State submits that the drawing of an implication, that the power to contract is conditioned by a requirement of legal reasonableness, would be inconsistent with the grant of power by way of analogy to those enjoyed by natural persons for the simple reason that the power of a natural person is not so conditioned.

23. Second, it becomes clear that the implication is not available when consideration is given to the nature of the power conferred. In *Kioa v West* Justice Mason (as he then was) held, with respect to procedural fairness, that it was not every exercise of administrative power to which the doctrines attached, but only in circumstances where "the making of administrative decisions … affect[s] rights, interests and legitimate expectations".[29] In this regard, an important distinction must be drawn between those statutory powers which are unilateral or coercive in nature (for example, powers to revoke licenses, refuse visas or compulsorily acquire land), and those powers, such as the power to contract or deal with property, which are voluntary and consensual. The exercise of the former (coercive) kind of powers take their force and effect from the conferring statute and procedural fairness obligations are implied. The exercise of a power to contract is different. Whilst the capacity to contract is conferred by statute, the contract entered into does not have any discernable legal effect in the relevant sense, because the contract takes its binding force, not from a unilateral act on the part of the executive, but from the mutual consent of the parties enforceable under the general law.[30] It follows that, despite the strength of the general presumption that procedural fairness obligations attach to the exercise of statutory powers, that presumption does not extend to the exercise of a power that does not affect rights or interests in the relevant sense. By parity of reasoning, and as held by the majority, the statutory presumption of reasonableness does not impliedly condition the exercise of the capacity of the URA to contract.[31]

24. Third, the conclusion that the power to contract is not conditioned by a requirement of legal reasonableness is reinforced when regard is had to the inherently poly-centric nature of the commercial decision making that the URA (or its delegate) is called upon to undertake. Pursuant to r6(1) of the HUD Regulations, the functions of the URA include: to promote the development of land and housing for urban renewal purposes (r6(1)(a)); to facilitate public and private sector investment in the development of the State; to manage land with a view to reducing social disadvantage (r6(1)(c)); to promote Government policies, strategies and objectives with a view to supporting sustainable, desirable and affordable housing and infrastructure (r6(1)(g)); to support development that promotes growth in employment and the economy (r6(1)(l)); and, to carry out other functions conferred by the Minister

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28 *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164, 170-173 (Davies & Einfeld JJ); *Federal Airports Corporation v Makucha Developments Pty Ltd* (1993) 115 ALR 679, 695 (Davies J); *Khuu & Lee Pty Ltd v Corporation of the City of Adelaide* (2011) 110 SASR 235, 236 [1] (Sulan J), 239-240 [17]-[19] (Vanstone J), 244 [40] (Peek J).

29 *Kioa v West* (1985) 159 CLR 550, 582, 584; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 336-338 (Mason CJ).

30 *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164, 170-173 (Davies & Einfeld JJ); *Griffith University v Tang* (2005) 221 CLR 99, 107 [11] (Gleeson CJ), 128-129 [80]-[82] (Gummow, Callinan & Heydon JJ); *JJ Richards & Sons Pty Ltd v Bowen Shire Council* [2008] 2 Qd R 342, 347 [21]-[22] (Keane & Fraser JJA, & Fryberg J); *Crown Proceedings Act 1992*, s5.

31 FC, [89]-[104]. Declaratory relief was awarded in *State of Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121 (Tadgell, Ormiston & Eames JJ) for a breach of procedural fairness in the exercise of a non-statutory power. However, that case is of no assistance to the resolution of the present appeal because the Court in *Master Builders* considered the question of breach of procedural fairness without analysing procedural fairness as a limitation on power. In *MBA Land Holdings Pty Ltd v Gunghalin Development Authority* (2000) 206 FLR 120 Higgins J considered that powers analogous to those conferred on the URA were limited by doctrines of procedural fairness and unreasonableness. To this extent, the State contends, with respect, that the decision in *Gunghalin* was wrongly decided.

(r6(1)(r)). Regulation 9 provides, amongst other things that the URA should so far as is reasonably practicable ensure that its activities are co-ordinated with the activities of other public authorities and conducive to the enhancement of the physical or social development objectives of the Government. Section 11 of the PC Act provides that the URA must "perform its commercial operations in accordance with prudent commercial principles". The State contends that, whether or not a particular contract entered into in pursuit of these many and varied objectives can be said to be legally reasonable is not an inquiry that is susceptible to judicial determination.

25. The present case is illustrative. As the majority noted, the decision to enter the Deed concerned, at least, the following issues: the strategic importance of the land to the State; employment consequences for the Northern suburbs of Adelaide; the promotion of certain industries in the State; consequences for general revenue; the drawback that transaction was not to go to market; and, competition issues. The decision was complex, multifactorial and policy based. The majority were correct to hold that there are no objective criteria against which the Court is able to measure whether the decision was reasonable or commercially prudent in terms of the State's long-term economic, industrial and employment objectives.[32]

26. The State does not contend that the exercise of the statutory power to contract is immune from review on grounds of reasonableness by virtue of Cabinet's role in the decision making process. Rather, non-amenability stems from the fact that there is no objective legal standard that can be applied by which the Court might assess whether the weighing process miscarried.[33] To invite a court to sit in judgment of the legal reasonableness of such a decision would be to invite a form of merits review. The propriety of entering into the Deed is a matter for the judgment of the Auditor-General, the Parliament and ultimately South Australian electors. Considerations of these kinds support a construction that neither legal reasonableness, nor prudent commercial principles (s11 of the PC Act), provide a measure by which the power conferred on the URA to contract is constrained.

<u>The power to contract is not conditioned by a requirement of prior Board approval</u>

27. The challenge brought by the Appellants concerning the absence of authority is misconceived because it proceeds on an erroneous assumption that the power of the URA to enter a contract must be enlivened by the Board, or its delegate, making a prior decision to authorise entry into the contract. There is no statutory basis for this assertion. As noted above, s8 of the HUD Act confers on the URA all the powers of a natural person and s21(1)(f) specifically confers on the URA the capacity to enter into any contract. The capacity to contract is granted in a bare and unqualified form; there is certainly no express requirement that the Board must make a preliminary decision prior to the URA entering into a contract.

28. As to whether an implication is available to support the Appellants' contention that the Board must make a preliminary decision authorising the exercise of the URA's contractual capacity, it is noteworthy that the Appellants do not attempt to identify the basis for such an implication. Several features of the HUD Act speak strongly against such an implication:

    28.1. By contrast to the governance arrangements of other statutory corporations that hold significant assets (such as councils established under the *Local Government Act 1999* (SA)) the corporate status of the URA is distinct from its Board. Sections 21(1)(b), 22 and 23 of the HUD Act make plain that the property of the URA is vested in the body corporate, not the Board. Therefore, the starting point for an implication that the assets of the URA can only be dealt with following the making of a decision by the Board is absent.

    28.2. Section 16 of the HUD Act sets out the general management duties of the Board. The role of the Board envisaged by the HUD Act is "overseeing the operations" of the URA "with the goal of … securing continuing improvements in performance and … protecting the long term viability of the

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[32] FC, [87].

[33] *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170, 219 (Mason J); *Council of Civil Services Unions v Minister for the Civil Service* [1985] 1 AC 374, 411 (Diplock LJ); *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 278-279 (Bowen CJ), 280 (Sheppard J agreeing); *Blyth District Hospital Inc v SA Health Commission* (1988) 49 SASR 501, 509 (King CJ); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 37 (Brennan J); *Mercury Ltd v Electricity Corporation* [1994] 1 WLR 521, 529 (Lord Templeman on behalf of the Privy Council); see also, 526-528; *Xenophon v South Australia* (2000) 78 SASR 251, 263 [59] (Bleby J), 256 [18] (Lander J).

statutory corporation". Subsection (2) emphasises the oversight role by specifying that the Board must ensure as far as practicable, amongst other things, that: "appropriate strategic and operational plans and targets are established" (s16(2)(a)); the URA has "appropriate management structures and systems for monitoring management performance… and that corrective action is taken when necessary" (s16(2)(b)); and, that "plans, targets, structures, systems and practices are regularly reviewed and revised as necessary" (s16(2)(d)). Whilst the HUD Act does not preclude the Board from considering the merits of a particular transaction (the Board is described as a "governing body" in s8(2)(b) of the HUD Act), it does not contemplate that the Board will routinely make decisions concerning the acquisition, holding and disposal of particular assets.

28.3. Section 17 of the HUD Act makes provision for the appointment of staff to the URA, which includes the Chief Executive, not by the Board, but rather by the Minister.

28.4. Section 19 empowers the Board to delegate functions or powers conferred on the Board, *or* the statutory corporation. The capacity of the Board to delegate functions conferred on the statutory corporation is consistent with the oversight role of the Board. Under this power, the Board can delegate the contractual powers conferred on the URA to particular office holders.

28.5. Finally, it is noteworthy that by contrast to the conferral of the capacity to contract in s21(1)(f) of the HUD Act, other capacities conferred by s21 are expressly conditioned by the granting of prior approvals. For example, s21(1)(d), read together with subs(4), provide that the URA may only borrow money with the prior approval of the Minister and the concurrence of the Treasurer.

29. The statutory context precludes any implication that the Board, or its delegate, must decide to authorise entry into the Deed, before the power conferred by s21(1)(f) may be exercised. That power was exercised by the Chief Executive executing the Deed pursuant to power of attorney. It may be the case that, as a matter of good internal governance, significant contracts above a certain value ought to be approved by the Board (or, as in this case, its delegate). However, there is no basis to convert a normative predisposition into a statutory precondition to the exercise of a power analogous to that of a natural person.

Conclusion on amenability

30. For the above reasons, the power to enter into contracts conferred on the URA may relevantly be described as a "bare capacity".[34] Importantly, however, that phrase cannot be used in any absolute sense. The fact that the power to contract has been conferred by analogy to the powers of a natural person does not have the effect of excluding limitations on the exercise of that power regarding improper purpose, fraud and bad faith.

31. It follows that entry into the Deed is not amenable to review on the grounds pursued by the Appellants not because the Deed or the decision by Cabinet to approve entry into the Deed enjoys any form of immunity from judicial scrutiny, but rather by virtue of the breadth of the contracting power, properly construed, that is conferred on the URA.

32. Finally, the State submits that consideration of whether or not the Deed has a "public element, flavour or character" distracts attention from the proper analysis.[35] Given the strictures imposed on the proper

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[34] *Griffith University v Tang* (2005) 221 CLR 99, 129 [82] (Gummow, Callinan & Heydon JJ).

[35] In recent decades the role of the courts in the United Kingdom in undertaking judicial review has shifted away from an inquiry focused on the limits of power within which the executive may act (that is an inquiry focused on jurisdictional error), to an inquiry about whether an exercise of power constitutes an abuse of power (that is, at least in some instances, a form of merits review). It should be noted that the notion of "abuse of power" adopted in that context is different to that referred to by Justice Brennan in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 which underpins the notion of legal unreasonableness, as recently discussed in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332. These developments, attributed in part to the incorporation of European human rights standards in the United Kingdom, have seen an expansion in both the scope and intensity of judicial review. As a consequence, in the United Kingdom, it has become necessary to fashion a limitation on review by reference to a "public element, flavour or character" test: *Council of Civil Services Unions v Minister for the Civil Service* [1985] 1 AC 374, 399 (Fraser LJ), 407 (Scarman LJ), 411 (Diplock LJ), 417 (Roskill LJ); *R v North & East Devon Health Authority; ex parte Coughlan* [2001] QB 213, 243-246, 251 (Woolf MR on behalf of the Court of Appeal); *Hampshire County Council v Beer* [2004] 1 WLR 233, discussed in *Khuu & Lee Pty Ltd v*

bounds of judicial review arising from the separation of powers, as articulated in *Quin* and confirmed in *Kirk*, the explanation of judicial review into the merits of administrative decision-making is inappropriate in the Australian context, with the consequence that the limiting "public flavour" test has no role to play.[36]

Consequence of Breach of Implied Limitation on Power

33. If, contrary to the submission advanced by the State concerning amenability, the Court considers that the power conferred on the URA to contract is limited in one of the respects identified by the Appellants, a question then arises whether a breach of the implied requirement would render the contract invalid. Determination of this issue turns on the proper construction of the statutory power.

34. The Trial Judge held that although entry into the Deed had been authorised pursuant to the Property Delegation, entry into the Deed was legally unreasonable and done in breach of s11 of the PC Act. Nonetheless, the Trial Judge accepted the submission put on behalf of the State that a breach of this kind made in entering into the Deed would not undermine the validity of the Deed. The majority upheld the reasoning of the Trial Judge in this respect.[37] Justice Debelle, in dissent, and in reliance on the dissenting judgment of Justice Kirby in the decision of the New South Wales Court of Appeal *Australian Broadcasting Corporation v Redmore Pty Ltd*, concluded that a breach of legal unreasonableness and s11 of the PC Act would have the effect of invalidating the Deed.[38] For the reasons that follow, the State contends that the approach adopted by the majority was correct.

35. Applying the principles enunciated in *Project Blue Sky v Australian Broadcasting Authority* ***(Blue Sky)***,[39] *Australian Broadcasting Corporation v Redmore Pty Ltd* ***(Redmore)***,[40] and more recently in *Gnych v Polish Club Ltd* ***(Polish Club)***,[41] the first thing to note about the obligation imposed by s11 of the PC Act is that, it is not expressed in terms of a limitation on the power conferred on the URA pursuant to s21 of the HUD Act. Further, as noted by the majority, the focus of s11 of the PC Act is not on individual transactions. Rather, s11 of the PC Act imposes a general obligation on the URA as to how to conduct its operations. Of greater significance to the proper construction of the URA's contracting power are the practical consequences that would result if a breach of an implied reasonableness requirement resulted in invalidity of contracts.[42] The concepts contained in s11 of the PC Act, "prudent commercial principles" and "level of profit consistent with its functions", are uncertain in their content. This uncertainty is heightened when the limitation on power contended for by the Appellants is not simply a breach of s11 of the PC Act, but a requirement to act legally reasonably understood in the context of s11 of the PC Act. A construction of the statutory scheme which resulted in the invalidity of contracts entered into in breach of that requirement, would make the validity of commercial arrangements entered into by the URA turn on contestable judgments based on information which parties dealing with the URA may generally be taken not to have access to. As the majority held:

Corporation of the City of Adelaide (2011) 110 SASR 235, 240-242 [20]-[26] (Vanstone J) (different labels are adopted for this test by the various authorities cited in the Appellants' Submissions); D Oliver, "Is ultra vires the basis of judicial review?" [1987] *Public Law* 543; B Selway, "The principle behind common law judicial review of administrative action - the search continues" (2002) 30 *Federal Law Review* 217, 222-226.

36 *Re Minister for Immigration & Multicultural & Indigenous Affairs; ex parte Lam* (2003) 214 CLR 1, 23-25 [71]-[77] (McHugh & Gummow JJ), 48 (Callinan J); *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 580-581 [96]-[100] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ); B Selway, "The principle behind common law judicial review of administrative action - the search continues" (2002) 30 *Federal Law Review* 217, 226-237; S Gageler, "The underpinnings of judicial review of administrative action: common law or constitution?" (2000) 28 *Federal Law Review* 303, 309; S Gageler, "The legitimate scope of judicial review" (2001) 21 *Australian Bar Review* 279, 279-280.

37 FC, [40]-[56].

38 FC, [244]; (1987) 11 NSWLR 621, 629.

39 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 389-392 [91]-[96] (McHugh, Gummow, Kirby & Hayne JJ).

40 *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454, 457 (Mason CJ, Deane & Gaudron JJ).

41 (2015) 89 ALJR 658. See also, *Australia & New Zealand Banking Group Ltd v University of Adelaide* (1993) 59 SASR 587, 597 (Perry J), N Seddon, *Government Contracts* (5th ed, 2014), 460-469 [8.18]-[8.22].

42 As noted by the majority (FC, [48]), the express object of the *Liquor Act 2007* (NSW) to provide for a "practical" regulatory system was considered relevant in *Gnych*.

> It would be entirely unsatisfactory if the validity of a particular transaction depended on an evaluative judgment of a court long after a transaction was completed... Such uncertainty would make transacting with a public corporation commercially unviable.

36. Further, the State contends, by a similar reasoning process, that a breach of the implied limitation that the Board, or its delegate, must authorise a contract does not undermine the validity of a Deed subsequently entered into. Again, the reasoning from *Blue Sky* and *Redmore* regarding the impracticality of the result of invalidity applies with equal force to a failure to obtain prior approval as it does to a breach of a reasonableness requirement. Just as a party seeking to transact with the URA will be unable to sensibly assess whether the URA has applied prudent commercial principles, a party will be unable to assess whether a preliminary decision has been taken by the Board or its delegate to approve the transaction. Proof of such a decision may, depending on the URA's internal processes, require consideration of amongst other documents: Board papers and minutes; the terms of instruments of delegation and other relevant internal policies and procedures; whether or not a particular delegate holds a particular office or position to which a function has been delegated; and, whether or not the delegation has been revoked. Information regarding these matters is not publicly available. It cannot reasonably be expected that a party that seeks to deal with the URA will interrogate these matters before entering into a transaction.

37. The majority contrasted the statutory schemes considered in *Redmore* and *Polish Club*. In *Redmore*, the High Court held that a breach of a requirement that the Australian Broadcasting Corporation must not enter into a contract in excess of $500,000 without obtaining prior ministerial approval did not have the consequence of invalidating the contract in question. In *Polish Club*, the Court held that breach of a statutory requirement that a liquor license holder must not lease premises without obtaining the approval of the Independent Liquor and Gaming Authority would not have the effect of invalidating the lease. In each of these cases the criteria by which to discern whether a statutory breach had occurred was expressly stated and the criteria by which to assess whether a breach had occurred was, by contrast to the HUD Act and PC Act, easy to ascertain. In the present case, the absence of express requirements, compliance with which may be readily ascertainable, speaks overwhelmingly against a construction that a breach is intended to have an invalidating effect.

38. The principle in *Redmore* might be considered, in some respects, to establish an analogy to the indoor management rule applicable to statutory corporations.[43] In a public law setting a statute ought to be interpreted such that a party may be taken to be aware of the extent of powers conferred by statute, but not internal decision-making regarding the exercise of those powers. Following the analogy, the above interpretation is consistent with an assumption that ACP ought to have been aware of the powers possessed by the URA. An inspection of the HUD Act would have demonstrated to ACP that the URA possesses the power to contract (s21(1)(f)). The Chief Executive exercised that capacity by power of attorney which was available on a public register. However, ACP ought not have been required to acquaint itself with what procedures were in place to comply with implied requirements to obtain prior approval to transact. Those are matters of indoor management.

39. Finally, there is no need to visit the consequence of a breach of internal rules of these kinds on an innocent independent party entering into a transaction with government. Rather, the URA is accountable for non-compliance with internal rules to the Board, the Auditor-General, and in more serious cases, the Minister and the Parliament.[44] With respect, contrary to the analysis of *Turquand's* case by the Trial Judge,[45] the analogy with the indoor management rule is sound; the equivalent of the corporate constitution (which delimits the scope of a corporation's powers and is publicly available) for a statutory authority is its constituting statute.

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[43] *Royal British Bank v Turquand* (1856) 6 EL & BL 327, 332 (Jervis CJ). With respect, contrary to the analysis of *Turquand's* case by the Trial Judge [454]-[457], the analogy with the indoor management rule is sound; the equivalent of the corporate constitution (which delimits the scope of a corporation's powers and is publicly available) for a statutory authority is its constituting statute.

[44] *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454, 459 (Mason CJ, Deane & Gaudron JJ); *Australia & New Zealand Banking Group Ltd v University of Adelaide* (1993) 59 SASR 587, 598 (Perry J); Hon C Sumner MP (Attorney-General), *Hansard – Legislative Council*, 25 March 1993, 1731; HUD Act, ss 9, 27, 34.

[45] Trial Judge, [454]-[457].

Grounds of Review

40. If the Court finds that the power to contract under s21(1)(f) of the HUD Act is conditioned by a requirement that (a) the Board authorise entry into a contract prior to its execution or (b) contracts that meet a standard of legal reasonableness derived from s11 of the PC Act, then the State submits that (a) entry into the Deed was authorised by a delegate of the URA, and (b) entry into the Deed satisfied the condition of reasonableness derived from s11 of the PC Act.

Unreasonableness and s11 of the PC Act

41. In *Minister for Immigration and Citizenship v Li* it was held that, "unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification".[46] The scope of review is limited to circumstances in which jurisdictional error can be demonstrated because the decision-maker has exceeded the "decisional freedom" vested in them by statute. There are practical difficulties in demonstrating error in circumstances where the repository of the power is an administrator and considerations of policy properly inform the exercise of the power.[47]

42. The proposition that the decision of Cabinet to approve entry into the Deed was "unreasonable" in the legal sense cannot be sustained once the obligation imposed under s11 of the PC Act is properly construed. Moreover, the State submits that Cabinet was armed with the necessary information so as to render its decision legally reasonable and not one that is properly characterised as irrational or capricious.

43. Justice Debelle's conclusion on unreasonableness rested on the following premises: (a) Cabinet failed to consider whether it might be better to place the Gillman land on the market for sale by competitive process rather than accept the ACP offer;[48] (b) the absence of up-to-date valuations of the land; and (c) the Cabinet submissions did not: (i) analyse whether the advantages of the land were such that it would be better to sell the land by competitive process;[49] (ii) examine the extent to which others might be interested in the land;[50] (iii) address whether appropriately experienced real estate agents had been consulted;[51] (iv) explore the *bona fides* of ACP's stated position that it would not engage in a tender process;[52] and (v) did not include a specific reference to the interest expressed in November 2013 by IWS and E & A Ltd.[53]

44. The Appellants' contention, largely consistent with the judgment of Debelle AJ, is, in effect, that applying s11(1) of the PC Act to the disposal of the Gillman land as contemplated by the Deed *required*: (i) the decision-maker explore "the merits and likely results of engaging in a competitive marketing and sale process" and that the failure by Cabinet to do so amounted to a breach of s11(1) of the PC Act with the result that the decision was unreasonable;[54] (ii) that "the desire" on the part of the Cabinet to take into account "policy and other extraneous factors" did not relieve it of the obligation to act in conformance with s11(1) of the PC Act;[55] (iii) that to the extent that such "policy and other extraneous factors" were relevant they fell to be considered in the context of determining how "to sell the land so as to achieve both an adherence to prudent commercial principles and a maximisation of those policy and other extraneous factors";[56] and (iv) the decision to enter the deed was unreasonable because of the reliance upon historical valuations; of the Board's advice on 21 November 2013 to reject the ACP proposal (despite the subsequent approval of the Board superseding this advice); the interest of other interested parties was ignored (despite other interests being noted in the Cabinet submission), and that Treasury advised the Treasurer not to proceed with the proposal.[57]

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46 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 367 [76] (Hayne, Kiefel & Bell JJ).
47 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 350 [28] (French CJ), 365 [72], 367 [76] (Hayne, Kiefel & Bell JJ), 375 [105], 376 [108], [110], 377-378 [113] (Gageler J).
48 *Acquista* (2015) 123 SASR 147, [359], [360], [364], [368] (Debelle AJ).
49 *Acquista* (2015) 123 SASR 147, [360], [364], [368] (Debelle AJ).
50 *Acquista* (2015) 123 SASR 147, [360], [365], [368] (Debelle AJ).
51 *Acquista* (2015) 123 SASR 147, [360], [364], [365], [368] (Debelle AJ).
52 *Acquista* (2015) 123 SASR 147, [362] (Debelle AJ).
53 *Acquista* (2015) 123 SASR 147, [365]-[366] (Debelle AJ).
54 Appellants' Submissions, [111]-[115].
55 Appellants' Submissions, [116].
56 Appellants' Submissions, [117].
57 Appellants' Submissions, [118].

45. The starting point is the construction of s11 of the PC Act.[58] The trial judge held that s11(1) imposes two separate, but related, obligations.[59] All members of the Full Court similarly concluded.[60] That construction is not challenged by the Appellants. Each obligation must be discharged in a manner consistent with the functions of the corporation. The State embraces this construction.[61] Thus, s11(1) of the PC Act imposes standards stated at a high level of abstraction to be met in the course of discharging the functions conferred on the URA by r6 of the HUD Regulations. More particularly, the first obligation under s11 – to perform its commercial operations in accordance with "prudent commercial principles" – is not an obligation capable of being reduced to simple or absolute terms appropriated from economic discourse. For example, it cannot be the case that "prudent commercial principles" is to be construed so as to impose an obligation on the URA to make a financial profit on every transaction. This is because the obligation must be read in the context of the statutory function being pursued, which may call for the expenditure of monies in the pursuit of social goods that cannot be reduced to evaluative criteria such as "profit" or "loss". That is not to deny that the ordinary natural meaning of both "prudent" (careful, judicious, wise) and "commercial" (returns, profit, gains) are reduced to empty epithets. Rather, the fulfilment of the statutory objectives of prudence and commerciality need to be discerned by reference to the nature of the function being pursued.

46. Nor is it the case that the content of "prudent commercial principles" is to be derived from principles applicable to the compulsory acquisition of land, which was the approach adopted by Debelle AJ.[62] The project given expression in the Deed was not concerned with the simple disposal (or acquisition) of land. The project was focused on the development of an industrial hub and required the establishment of infrastructure to secure economic and social advantages for a region north of Adelaide. In this context, the adoption of principles applicable to the simple acquisition or disposal of land is inapposite. The better view is that the content of "prudent commercial principles" must be discerned on a case by case basis by reference to the function being pursued.

47. Thus the content of "prudent commercial principles" will vary from operation to operation, transaction to transaction. Compliance with the obligation imposed can only be determined by identifying the function or functions pursued in undertaking the commercial operation (assuming the particular operation/transaction can be considered in isolation of operations more generally). An evaluative judgment is called for, indicative of a broad area of decisional freedom. This must necessarily be so. To describe the task involved as a weighing exercise[63] involving the balancing of the advantages of applying a particular commercial principle with the disadvantages of not doing so, is overly simplistic. It ignores the complexity of the task required of the decision-maker and, in particular, the obligation to undertake operations the success of which in many respects is not amenable to accurate forecasting or measurement, but rather the exercise of judgment taking into account all relevant (many competing) factors. Thus the commercial prudence of some transactions may only be properly assessed from a long-term, planning perspective. A point not lost on the majority.[64] Therefore, a transaction, or part of a transaction, considered in isolation may involve short or medium term commercial risks, yet when considered from a strategic vantage point may align in a commercially prudent manner with the long-term needs of the State.

48. The functions conferred on the URA that contemplate a deviation from a purely commercial approach include, "to … promote the development of land and housing in the public interest" (r6(1)(a)), "to encourage, facilitate and support … 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" (r6(1)(b)); "to acquire, hold, manage … land … with a view to reducing social disadvantage within the community through urban renewal, including … by promoting … an increase in the supply

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58 Section 11 of the PCA is picked up and applied to the URA by the HUD Regulations, r8.

59 *Acquista* [2014] SASC 206, [466].

60 *Acquista* (2015) 123 SASR 147, [44] (Vanstone and Lovell JJ), [353] (Debelle AJ).

61 The trial judge also held that the obligation contained in s11 of the PCA attaches to individual transactions as did Debelle AJ;[61] This is accepted.

62 *Acquista* (2015) 123 SASR 147, [356] (Debelle AJ) relying on *Spencer v Commonwealth* (1906) 5 CLR 418, 441 (Isaacs J).

63 *Acquista* (2015) 123 SASR 147, [353] (Debelle AJ).

64 *Acquista* (2015) 123 SASR 147, [53] (Vanstone and Lovell JJ).

of affordable housing" (r6(1)(c)), "to undertake … planning … with a view to supporting sustainable, desirable and affordable housing and infrastructure" (r6(1)(g)); and "to support development that promotes growth in employment and the economy" (r6(1)(l)).

49. In the context of this case the question is whether, having regard to those functions which the entry into the Deed would advance and the extent to which it would do so, did the entry into the Deed and the consequent foregoing of "exploring the merits and likely results of engaging in a competitive marketing and sale process" amount to a failure on the part of the URA to perform its commercial operations in accordance with prudent commercial principles consistent with its functions.

50. The appellant conflates the concept of maximisation of return on the sale price of the land with the performance of commercial operations in accordance with prudent commercial principles. That may be appropriate if one were to disregard the injunction that prudent commercial principles need be consistent with the functions of the public corporation. In introducing his treatment of this issue Debelle AJ does the same, characterising the effect of s11(1) of the PC Act as qualifying the powers contained in s21 of the HUD Act[65] and the relevant commercial operation as the sale of land.[66] Nowhere in his treatment does his Honour consider the interaction between s11(1) of the PC Act and the functions of the URA as set out in the HUD Regulations as required by s11(1).[67]

51. With respect, Debelle AJ's mischaracterisation of the commercial operation[68] infects the entirety of his Honour's treatment of the application of s11(1) of the PC Act to the commercial operations under consideration. In the light of his characterisation, his Honour, having regard to the characteristics of the prudent vendor and to the URA's Marketing and Pricing Policy, concludes that "the decision whether to sell by competitive process or accept an unsolicited offer will only be made after first examining the merits and likely results of either process. If that is not so, the Authority would not be discharging its obligations under s11".[69] This ignores the broader context of the proposal and the contribution that the proposal stands to make to the URA performing its statutory functions.

52. In any event, assuming an obligation arises out of s11(1) of the PC Act which *requires* that the decision-maker *consider* the merits and likely results of engaging in a competitive marketing and sale process, that obligation was satisfied in this case. Both the September and December Cabinet submissions were directed to this very issue. The assessment of the risk of not proceeding in a competitive manner, as discussed in the Cabinet submissions, directly addressed this issue. Consideration of the value of the land and the benefits of selling the land by competitive process were also addressed.

53. In light of the foregoing, the State does not accept either the conceptual or the factual premises underlying the reasoning of Debelle AJ. Conceptually, the suggestion that the appropriate focus of Cabinet ought to have been one principally concerned with the simple disposal of land should be rejected. This project is directed to the achievement of much broader economic and social policy objectives. Factually, the finding that the decision-maker did not consider the benefits of proceeding to market the land in a competitive manner as an alternative to accepting the ACP proposal is incorrect for the reasons identified above.

54. While the decision-maker did not have a detailed understanding of the nature and extent of alternative potential purchasers and developers of the land, the mere fact that there were potential third parties interested in the land did not undermine the rationality of the decision to proceed with the ACP proposal in circumstances where there was nothing before the decision-maker to suggest that the third parties proposed to develop the land in a manner that would contribute to the State's long term industrial, economic and social interests in a manner that was comparable to the ACP proposal.

55. With respect to the valuations, there were two detailed valuations with respect to two thirds of the Gillman land were referred to in the Cabinet submissions. There was nothing to suggest that the valuations were no longer reliable or that the valuations could not be extrapolated to the portion of the

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65 *Acquista* (2015) 123 SASR 147, [351] (Debelle AJ).
66 *Acquista* (2015) 123 SASR 147, [355] (Debelle AJ).
67 HUD Regulations, r6.
68 *Acquista* (2015) 123 SASR 147, [355] (Debelle AJ).
69 *Acquista* (2015) 123 SASR 147, [357] (Debelle AJ).

land that was not the subject of the valuations. To the extent that the decision-maker may have had any concerns about the relevance or reliability of the valuations, the decision-maker was entitled to rely on the confirmation by the Board in November 2013 that the price offered by ACP was good value.

56. The valuation of the Gillman land discussed in the Cabinet submissions provided a proper basis on which the decision-maker was able to compare the merits of accepting the ACP proposal against proceeding with the sale of the land on a competitive basis. The valuation information, together with the expected contribution that the ACP proposal would make to Government policies, provided a basis on which the decision-maker could conclude that it was more beneficial to proceed with the ACP proposal.

10 57. The adequacy of the decision does not turn on whether or not the decision-maker obtained independent valuation advice. The decision-maker was provided with detailed advice in the form of Cabinet submissions totalling 114 pages. These Cabinet submissions incorporated advice from a range of specialist government agencies, including the URA (and, the Board), the Department of Treasury and Finance, and the Department for Manufacturing, Innovation, Trade, Resources and Energy. There was nothing about the circumstances of the proposal that suggested that it was inappropriate for the decision-maker to rely on advice from government agencies in relation to the transaction.

58. Moreover, it is wrong to consider Cabinet's taking into account of what is described as "policy and other extraneous factors" as an exercise of Cabinet's desire.[70] That overlooks the controlling effect of the statutory functions of the URA. It was not a matter of desire, but obligation. The policy and
20 extraneous factors were not extraneous at all. It is incorrect to frame the task in terms of "policy and other extraneous factors" falling to be considered in the context of determining how "to sell the land so as to achieve both an adherence to prudent commercial principles and a maximisation of those policy and other extraneous factors".[71] Section 11(1) does not require the performance of commercial operations in a manner that would "achieve *both* an adherence to prudent commercial principles and a maximisation of those policy and other extraneous factors". It contemplates a reduction in, or modification of, prudent commercial principles on a transaction by transaction basis where their application would be inconsistent with the corporation's functions.

Entry into the Deed was Reasonable

59. Although there was no public tender process, the Deed, and the decision to enter the Deed, were
30 not made in breach of s11 of the PC Act, in disregard of prudent commercial principles or in a manner that was unreasonable in circumstances where the material available to the decision-maker disclosed the following:

59.1. ACP had told the State that its investors would not participate in a generic tender process. This was stated unambiguously in ACP's initial letter of proposal dated 18 June 2013[72] a copy of which was included in the formal proposal dated 29 August 2013[73] which was the subject of, and attached to, the September submission.[74]

59.2. Approximately two thirds of the Gillman land had been the subject of two detailed, independent, valuations conducted for the purpose of a compulsory acquisition process in 2010, the higher of which had valued the land, on a per square metre basis, at half the price offered by ACP.

40 59.3. The December submission referred to the "significant financial modelling" undertaken for legal proceedings in relation to land falling Gillman land, which was identified by the Treasury comment as being "two-thirds" of the total land.[75]

59.4. There was nothing to suggest that the Gillman land had significantly appreciated or depreciated in price since the detailed valuations were obtained.

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70 Appellants' Submissions, [116].
71 Appellants' Submissions, [117].
72 *Acquista* (2015) 123 SASR 147, [154] - [155].
73 *Acquista* (2015) 123 SASR 147, [158].
74 *Acquista* (2015) 123 SASR 147, [162].
75 *Acquista* (2015) 123 SASR 147, [68], Exhibit P1A, 984, 996 [7].

59.5. There was nothing to suggest that value of the portion of the Gillman land that had not been the subject of detailed valuations was greater than the two thirds of the Gillman land that was the subject of the valuations.

59.6. Upon exercising the first option under the Deed, ACP would agree to buy 150 ha of the Gillman land for $45M, which was "broadly equivalent to the present value of all future development returns and within the range of independent valuations for all [407ha] of the land being between $19 million and $59 million."[76] The Board had advised that the price offered by ACP "represented a good value offer, based on independent valuation advice and comparable market evidence."[77]

59.7. Although third party interest had been expressed in the Gillman land, there was nothing to suggest that the third parties intended to develop the Gillman land in a manner that contributed to the State's long terms strategic needs in a manner comparable to the ACP proposal.[78]

59.8. The ACP proposal promoted the State's industrial, economic and social policies by: facilitating private sector development of the Gillman land consistent with the State's objectives for the land; removal of financial risk associated with State development of the land; promotion of a cluster of service companies that will support the mining industry; and, attraction of service companies with local labour requirements that will promote job growth.[79]

60. The December Cabinet submission provided a rational and reasoned basis for the assessment provided within it. It put the relevant issues in a logical and well-reasoned manner before the decision-maker for critical evaluation. Applying the test in *Li*, it cannot be said that the Cabinet's decision to agree to the transaction lacked "an evident and intelligible justification". The majority were correct in their conclusion that the decision was not unreasonable.[80]

Authority to enter the Deed

61. On 26 August 2013, the Chair of the Board executed an instrument on behalf of the Board delegating the functions and powers "in the manner and to the extent ... set out in the ... Delegation and Authorisation Schedule and Delegation and Authorisation Guidelines" (**Standing Delegation**). The Delegation and Authorisation Schedule (**Schedule**) consists of a series of tables by which particular office holders are listed as delegates against various functions. The Delegation and Authorisation Guidelines (**Guidelines**) is a descriptive document the purpose of which is to provide clarity about the operation of the Schedule.

Property Delegation

62. The majority of the Full Court accepted the State's contention that the Board had delegated authority to approve entry into the Deed to the Minister pursuant to the Property Delegation, and confirmed the conclusion reached by the Trial Judge that the Minister had provided authorisation to enter the Deed collectively with his Cabinet colleagues on 2 December 2013.

63. Paragraph [6.4.1] of the Guideline provided that:

> This delegation allows delegates to **approve and execute** contracts for the disposal of land owned by [the URA] It should be noted that where the contract sale price is over [$4.4m] the [URA] 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 [the URA] (through the Chief Executive) as it is the registered proprietor of the land. (emphasis added)

64. The first column of the table in the Schedule relating to property delegations provides that various URA officers hold "Delegation to **execute** a contract concerning the disposal of Land" (emphasis added), within the limits provided for by the table. The first row in the table delegates authority to

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[76] Exhibit P1A, 992, recommendation 3 and 4.
[77] *Acquista* (2015) 123 SASR 147, [68].
[78] Exhibit P1A, 984-985.
[79] Exhibit P1A, 977-979, 982.
[80] *Acquista* (2015) 123 SASR 147, [12]-[13] (Vanstone and Lovell JJ).

the Chief Executive of the URA with respect to contracts concerning the disposal of land, "Over $4,400,000 million (with Ministerial approval)".[81]

65. The effect of the Guideline and the Schedule read together is clear. For contracts concerning the disposal of land in excess of $4.4M the Minister must approve the contract and the Chief Executive is authorised to execute. That is precisely what occurred: on 2 December 2013, the Minister (with the Premier) signed the Cabinet submission recommending approval to enter the Deed, the Minister approved the Deed together with his Cabinet colleagues at the meeting on 2 December 2013; and, on 13 December 2013, the Chief Executive executed the contract.

66. Drawing upon the reasoning of Debelle AJ in dissent, the Appellants make the following objections to the above analysis:

66.1. first, the Cabinet had no authority to approve the URA to enter into negotiations in relation to the project. In this regard, the URA had first to authorise a negotiation prior to any delegated authority being exercised; and

66.2. second, there was no evidence that the Minister approved entry into the Deed as was required by step (3) of the Property Delegation.

67. With respect, the reasoning of Debelle AJ in dissent was flawed for the following reasons. First, it is accepted that the Board of the URA did not at any time make an independent decision to approve entry into the Deed. It was not required to. Having made the Property Delegation, the question to be resolved is whether the Minister approved entry into a Deed for the sale of land in excess of $4.4m. The terms of the Property Delegation do not specify or in any way require a four-step procedural requirement that has been read-in to the instrument by Debelle AJ as a set of procedural pre-conditions on the exercise of the power delegated. There is no warrant for reading-in those procedural requirements into the delegation instrument at all. The approach to the construction of the instrument by Debelle AJ is, with respect, erroneous. Justice Debelle's approach to construction exceeds the principle that an instrument of delegation that has the potential to adversely affect rights of individuals should not be construed loosely.[82] Section 19 of the HUD Act confers a broad power to delegate functions or powers. The Property Delegation satisfies the requirements of the HUD Act. The broader purpose of the Property Delegation is to ensure that the relevant Minister, as representative of the Crown (the beneficial owner of the land),[83] is kept apprised of "significant" sales of land. The $4.4m limit identifies the threshold demarcating "significant" from routine transactions. So understood, there was no reason for Debelle AJ to read-in to the instrument procedural requirements that are not otherwise imposed on the URA under the HUD Act and not mandated by the power of delegation in s19 of that Act.

68. Second, it is accepted that on its proper construction the Property Delegation required the Minister to approve entry into the Deed. That conclusion has received assent at all stages below.[84] The question is whether that requirement was satisfied. Both the majority in the Full Court and the Trial Judge were correct to hold that there was a clear factual basis for inferring the Minister approved entry into the Deed. The basis for that inference is set out above.

69. Third, even if there was an implied obligation imposed on the Minister to approve the Deed itself (which is denied), the approval of the essential terms of the transaction identified in the Cabinet submission in December 2013 (which included a draft Deed) was more than capable of meeting any such obligation, even though there were some variations made to the draft Deed prior to execution. The power of execution delegated to the Chief Executive required the Minister to approve "the disposal of land" over $4.4.m. Even if the requirement of [6.4.1] is construed as requiring the approval

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[81] In most of the delegations contained in the first column of the property delegation table the delegation to approve and to execute is conferred on the same person. However, the Guidelines draw an exception in the case of contracts in excess of $4M, which is reflected by the words "with Ministerial approval" in parentheses.

[82] See *Perpetual Trustee Co (Canberra) v Lewis* (1994) 119 FLR 38, 45 (Miles CJ) citing *O'Reilly v Commissioners of the State Bank of Victoria* (1983) 153 CLR 1, 12 (Gibbs CJ).

[83] HUD Act s22.

[84] *Acquista Investments Pty Ltd v Urban Renewal Authority* [2014] SASC 206, [393]-[394] (Blue J); *Acquista* (2015) 123 SASR 147, [31] (Vanstone and Lovell JJ), [271] (Debelle AJ).

of "land sale contract", the "Agreed Terms" to be included in that contract formed part of the draft Deed attached to the Cabinet submission. The delegation instrument did not impose any further limitation by way of procedural pre-conditions on the Chief Executive prior to execution so as to require the finalized Deed to be in the possession of the Minister prior to the Minister's approval.

Contracting Delegation

70. Having concluded that entry into the Deed was authorised pursuant to the Property Delegation, it was unnecessary for the majority of the Full Court to consider the State's alternative contention that entry into the Deed was also authorised pursuant to the Contracting Delegation.

71. Paragraph [6.1.1] of the Guidelines, read together with the Schedule, provide that Cabinet is authorised "to approve the entering into of contracts ... as defined in Treasurer's Instruction 8 Financial Authorisations" to a value of more than $11M. Paragraph [8.5.5] of Treasurer's Instruction 8 defines "contracts" to mean "an arrangement ... whereby a public authority commits to or **incurs expenditure**" (emphasis added). Paragraph [8.5.6] gives the phrase "incurs expenditure" an extended meaning which is not limited to the making of monetary payments. The notion of "expenditure" extends to "an outflow ... of resources embodying economic benefits... [including] the payment of cash, **transfer of assets**, provision of services..." (emphasis added). Applying the extended definition of "incurs expenditure" in Treasurer's Instruction 8, it follows that the delegation to Cabinet is to approve entering into of contracts whether the contract involves the outflow of cash, or assets, or a combination of cash and assets, to a value of more than $11M.

72. It is not in dispute that the Deed was a contract involving the outflow of an asset worth more than $11M. Therefore, the State contends that Cabinet was authorised to approve entry into the Deed.

73. In dissent, Debelle AJ rejected reliance upon the Contracting Delegation by confining the application of Treasurer's Instruction 8 (**TI 8**) to outflows of "public money" only and held that it was therefore inapplicable to the sale of Crown land.[85] That conclusion followed from his Honour's construction of the scope and objectives of TI 8 identified in [8.1] and [8.2] of TI 8[86] and then reading down the reference to "transfer of assets" in the definition of "incurs expenditure" in [8.5.6] to exclude the transfer of land pursuant to a land sale contract.[87]

74. It is accepted that the terms of [8.1] and [8.2] of TI 8 apply to expenditures in the form of payments of public monies. However, there is no textual, contextual or purposive justification for confining the definition of "incurs expenditure" in [8.5.6] of TI 8 to expenditures of money only. Not only is such an interpretation inconsistent with the express terms of the Instruction, from a purposive perspective, there is no apparent reason why TI 8, promulgated pursuant to the *Public Finance and Audit Act 1987*, should only require Cabinet authorisation for contracts involving monetary expenditure, but not the outflow of other significant State assets. Rather, the evident purpose of TI 8 is to require Cabinet approval for any contract with a value exceeding $11M, whether involving expenditure in the literal sense, or in the extended sense provided for in [8.5.6] of the Instruction.

75. Indeed, his Honour acknowledged that the words "transfer of assets" had to be given some work to do lest their inclusion in the definition of "incurs expenditure" be rendered entirely otiose. Accordingly, his Honour reasoned that TI 8 applied to a transfer of assets (including land) as consideration for the purchase of goods and services by contract, but not a contract for the sale of land. If his Honour is right in holding that a transfer of assets, including land, is contemplated by the definition of "incurs expenditure" in [8.5.6] and extends to transfers of land as consideration for contracts, it is difficult to accept that [8.5.6] does not extend to a transfer of land in consideration for entry into the Deed. There is no substantive difference or policy rationale pointing up any substantive difference between the transfer of an asset in consideration for the receipt of another asset and the transfer of an asset for cash. In both cases, the rationale is the

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85 *Acquista* (2015) 123 SASR 147, [257]-[259], [262]-[268] (Debelle AJ).
86 *Acquista* (2015) 123 SASR 147, [258]-[259] (Debelle AJ).
87 *Acquista* (2015) 123 SASR 147, [262] (Debelle AJ).

same, there is an outflow of assets for consideration. That being so, and the terms of TI 8 being unambiguous, the confined operation given to [8.5.6] of TI 8 by Debelle AJ's ought to be rejected.

76. The consequence of rejecting Debelle AJ's construction of TI 8 is that the terms of the Contracting delegation conferred upon the Cabinet the authority to approve the entry into the Deed. It is accepted that the resolution of Cabinet on 2 December 2013 evidences Cabinet's approval of entry into the Deed.

77. In the alternative, the URA and the State submit that the terms of the Contracting Delegation do not of themselves seek to pick up and apply the entirety of TI 8 as a limitation on the power to approve entry into the Deed. Rather, the terms of [6.1.1] of the Delegation Guidelines clarify that the delegation instrument did no more than pick up and apply the definition of "contract" in TI 8, which by its definition in [8.5.5] of TI 8, picked up the definition of "incurs expenditure" in [8.5.6]. That plain reading of the Contracting delegation produces the result that the Cabinet was the delegate with the authority to approve entry into a Deed for the sale of land in excess of $11m.

Ad hoc Delegation

78. As with the Contracting delegation, having concluded that the entry into the Deed had been authorised pursuant to the Property Delegation, it was unnecessary for the majority of the Full Court to consider the State's further alternative contention that entry into the Deed was also authorised pursuant to an ad hoc delegation made by resolution of the URA Board on 29 November 2013.

79. The resolution makes it plain that the decision to approve entry into the Deed "will be a policy decision of Cabinet". The resolution names a body (Cabinet) and identifies the class of decision (whether to proceed with the ACP proposal). The terms of the resolution are therefore sufficient to meet the description of a delegation under s19 of the HUD Act.

Executive Power of the State

80. The Appellants do not contend that at common law the Premier does not possess power to bind the State in contract provided such contract is incidental to the ordinary and well-recognised functions of government.[88] However, adopting the reasoning of Debelle AJ, they contend that such power as is capable of application to the Gillman land has been abrogated by the HUD Act.[89] In particular, the Appellants embrace Debelle AJ's conclusion that the "detailed legislative scheme provided by the HUD Act is entirely inconsistent with the Premier exercising executive power to dispose of land held by the Authority".[90]

81. The Premier has authority across the whole field of ordinary functions of government.[91] That authority is derived from statute and convention.[92] The Premier advises the Governor on the formation of Government, appoints ministers, heads the Executive Council (which is responsible for advising the Governor), and determines the administrative arrangements in relation to the departments of State. The entry into commercial transactions exploiting the strategic assets of the State for the benefit of the people of the State falls within the ordinary functions of government.[93]

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88 *New South Wales v Bardolph* (1934) 52 CLR 455, 493 (Gavan Duffy J), 495-496 (Rich J), 502 (Starke J), 507, 515 (Dixon J), 517-518 (McTiernan J); *Tipperary Developments v Western Australia* (2009) 38 WAR 488, 493 (Wheeler JA), 511 (McClure JA), 552 (Newnes JA).

89 Appellants' Submissions, [99]-[103].

90 *Acquista* (2015) 123 SASR 147, [322] (Debelle AJ); Appellant's Written Submissions, [103].The trial Judge similarly concluded; *Acquista* [2014] SASC 206, [640].

91 *New South Wales v Bardolph* (1934) 52 CLR 455, 495 (Rich J), 507 (Dixon J); *A v C* (2015) 123 SASR 477, [31]-[37] (Kourakis CJ).

92 *A v C* (2015) 123 SASR 477, [25]-[37] (Kourakis CJ).

93 *New South Wales v Bardolph* (1934) 52 CLR 455, 493 (Gavan Duffy J), 495-496 (Rich J), 502 (Starke J), 507, 515 (Dixon J), 517-518 (McTiernan J); *Tipperary Developments v Western Australia* (2009) 38 WAR 488, 493 (Wheeler JA), 511 (McClure JA), 552 (Newnes JA).

82. Undoubtedly the power vested in the Executive and exercisable by the head of government may be abrogated or regulated by statute.[94] That said, courts will not readily infer an abrogation of executive power. Abrogation can only be effected either by express words, or by "necessary implication".[95] In this case, neither requirement is satisfied.

83. The prescriptive control of the URA and its predecessors in the performance of their functions concerning the sale of land by the HUD Act and its predecessors, does not have the necessary consequence that executive power vested in the Premier to bind the State in contract to the disposal of land held on behalf of the Crown is abrogated. Justice Debelle held to the contrary on the basis, in effect, that the HUD Act would be futile if the Executive could, despite the Act, dispose of land.[96] Such reasoning ignores the nature of the two repositories and their distinct functions. That the Crown may organise itself so as to relieve the ministry of the day to day responsibility for the development of Crown land by creating a statutory corporation to do so, and yet ultimately independently be capable of exploiting such land for the benefit of the State, should it so choose, is unsurprising. That two functionaries possess the same or a similar power, does not mean that each cannot possess the power. The mere existence of a statute establishing the URA to facilitate development is not sufficient to displace the executive power of the Crown to enter commercial transactions involving the disposal of land.

84. The HUD Act contains three indicators that the Executive power to contract with respect to the disposal of land held by the URA on behalf of the Crown remains unaffected. First, s22 of the HUD Act provides that "a statutory corporation holds its property on behalf of the Crown." The HUD Act does not provide that property is held by the statutory corporation independently of the Crown. The interests in the property are the Crown's interests. Second, s9 of the HUD Act makes it clear that the URA is subject to ministerial control. Third, s8(5) of the HUD Act empowers the Governor to, amongst other things, transfer assets of the State to the URA and transfer assets of the URA to the State or a Minister. Such a capacity denies any necessary implication that the Government, which holds the "beneficial title" to the URA land, cannot enter transactions concerning the disposal of strategic assets. What the scheme does do is establish a statutory corporation with specified functions and powers to facilitate the development of the State's assets. There is nothing inconsistent in the creation of a statutory corporation charged with responsibility for the exploitation of State assets, whilst reserving the power of the Executive Government to do the same. On the contrary, it is inherently unlikely that the Parliament intended, by the conferral of powers on the URA, to prevent the Executive from entering into transactions about the State's strategic use of its land assets. The majority was, with respect, correct in its conclusion.[97]

85. The trial Judge held that the role of the Minister for State Development under the Deed was circumscribed to assist in the promotion of the project to potential investors.[98] The trial Judge reasoned that in executing the Deed the Premier did not purport to sign as Premier, but rather as Minister for State Development, and he did not intend to bind the State to the substantive transaction with ACP.[99] With respect, this conclusion is wrong.

86. The facts disclose that ACP initially wrote to the Premier on 18 June 2013 with the proposal to develop the Gillman land.[100] The Premier referred the matter to the URA for advice.[101] The URA consulted with other government agencies.[102] The question of whether or not to accept the proposal was

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94 *Re Residential Tenancies Tribunal and Henderson; ex parte Defence Housing Authority* (1997) 190 CLR 410, 441 (Dawson, Toohey and Gaudron JJ).

95 *New South Wales v Bardolph* (1934) 52 CLR 455, 496 (Rich J); *Barton v Commonwealth* (1974) 131 CLR 477, 488 (Barwick CJ), 491 (Menzies & McTiernan JJ), 501 (Mason J), 508 (Jacobs J); *Ling v Commonwealth* (1994) 51 FCR 88, 92 (Gummow, Lee & Hill JJ); *Ruddock v Vardarlis* (2001) 110 FCR 491, 504 [40] (Black CJ), 514 [95] (Beaumont J), 540 [184] (French J).

96 *Acquista* (2015) 123 SASR 147, [323] (Debelle AJ).

97 *Acquista* (2015) 123 SASR 147, [37] (Vanstone and Lovell JJ).

98 *Acquista* [2014] SASC 206, [632].

99 *Acquista* [2014] SASC 206, [633].

100 *Acquista* (2015) 123 SASR 147, [61] (Vanstone & Lovell JJ).

101 *Acquista* (2015) 123 SASR 147, [61] (Vanstone & Lovell JJ).

102 Exhibit P1A, 577, 978.

considered twice by Cabinet.[103] On the second occasion, the Premier sponsored a Cabinet submission that recommend that the ACP offer be accepted.[104] The Gillman land is of great industrial significance to the State.[105] The proposal was considered to contribute to the State's industrial, economic, employment and social policies.[106] The proposal had significance from a whole of government perspective.[107] Cabinet approved the transaction on 2 December 2013.[108] The Premier signed the Deed on 12 or 13 December 2013.[109] Specific obligations were conferred under the Deed on the Minister for State Development, but nonetheless the Premier signed the Deed in the capacity of "the Minister for State Development and **the Premier for the State of South Australia**".[110] In all of the circumstances, the State contends that the execution of the Deed by the Premier must be understood to do more than commit the Minister for State Development to the relatively minor roles contemplated for him under the Deed. Rather, the execution of the Deed by the Premier reflected the fact that the transaction carried the highest imprimatur of the State. The manifest intention of the Premier was to bind the State to the underlying transaction. Importantly, clause 24 of the Deed provided that:

> Each party undertakes to, and to procure that all persons under its control, do all things necessary or desirable to effect the transactions contemplated by this Deed as expeditiously as possible, including executing, delivering or completing any form, document or instrument necessary or desirable to give effect to any of the transactions contemplated by this Deed.

87. The breadth of application of this clause is to be understood against clauses 7 and 11, indicating that the Premier's responsibilities exceed those in cls 5.4.2, 5.4.3 and 7.2.[111] The Premier contracted as both Minister for State Development and Premier binding the State and his role is not, contrary to the trial Judge's conclusion, simply "ancillary and residual".[112] A consequence[113] of the Premier executing the Deed as Premier and thus in his executive capacity is that the Deed binds the State independently of any defect in the URA's authority to execute the Deed.

88. The fact that the URA holds the title to the Gillman land does not cast doubt on the above contention in circumstances where it holds that title on behalf of the State, is subject to ministerial direction and the State retains the capacity to transfer that title as it sees fit. Moreover, it should be noted that the Deed itself does not effect a transfer of title in the land. There can, therefore, be no incongruity about the beneficial owner of the land committing to a transaction for a transfer of the land in the future.

Part VII: Time estimate

89. The First and Second Respondents estimate 3 hours will be required for the presentation of oral argument.

Dated 27 January 2016

M G Hinton QC
Solicitor-General
T: 08 8207 1616
F: 08 8207 2013
E: solicitor-general'schambers@sa.gov.au

M J Wait
Crown Solicitor's Office
T: 08 8207 1703
F: 08 8207 1724
E: michael.wait@sa.gov.au

D F O'Leary
Crown Solicitor's Office
T: 08 8207 1667
F: 08 8207 6161
E: damian.o'leary@sa.gov.au

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[103] Exhibit P1A, 572-611, 975-1048.
[104] Exhibit P1A, 975, 994.
[105] Exhibit P1A, 574. The
[106] Exhibit P1A, 575, 576, 578 [4], 977, 979.
[107] Exhibit P1A, 977-978 [2].
[108] Exhibit P1A, 994.
[109] Exhibit P1A, 1087.
[110] Exhibit P1A, 1087. (emphasis added).
[111] See also Exhibit P1A, 1056-1058, Recitals F, O and V.
[112] *Acquista* [2014] SASC 206, [634].
[113] The position advanced in Ground 5 of the Notice of Contention filed by the first and second respondents.