

Session 1: Local Government Property Landscape, Governance and Probity

Presenters: Michael Dowling & Shaun Burmester



Russell Kennedy
Lawyers

Overview

Looking at how good governance and high standards of probity shape good decision making in the local government property space

Focus on four key areas:

- Section 114 of the *Local Government Act 2020* (**2020 Act**)
- Delegations
- Probity considerations
- Specific road issue [section 59 of the *Transfer of Land Act 1958* (**1958 Act**)]

What are we hoping to get out of today?

Key questions

- Does Council have the legal authority to deal with the Property?
- Are there any legislative processes or steps that Council needs to comply with?
- Are there any relevant internal procedures or policies to consider?
What do they say?
- Are the right people (Council officers, authorised delegates, executive team, committees, Councillors) being involved at the right time?
- Are there any overarching governance or probity matters that affect the proposed dealing?

Section 114, 2020 Act

Three basic requirements:

1. Notice [section 114(2)(a)]
2. Community engagement [section 114(2)(b)]
3. Valuation [section 114(2)(c)]

114 Restriction on power to sell or exchange land

- (1) Except where section 116 applies, if a Council sells or exchanges any land it must comply with this section.
- (2) Before selling or exchanging the land, the Council must—
 - (a) at least 4 weeks prior to selling or exchanging the land, **publish notice of intention** to do so—
 - (i) on the Council's Internet site; and
 - (ii) in any other manner prescribed by the regulations for the purposes of this subsection; and
 - (b) undertake a **community engagement process** in accordance with its **community engagement policy**; and
 - (c) obtain from a person who holds the qualifications or experience specified under section 13DA(2) of the *Valuation of Land Act 1960* a **valuation of the land** which is made not more than 6 months prior to the sale or exchange.

Section 114, 2020 Act (continued)

Local Government Best Practice Guideline for the Sale, Exchange & Transfer of Land (2009)

- Based on the 1989 Act
- Somewhat dated
- Not reflect 2020 Act provisions

However, general principles still apply:

- Public notice should be informative and (where applicable) indicate Council's genuine openness to responses
- Sale by public process still represents best practice
- Must be in the best interests of the community/financial and non-financial
- All sales/exchanges should occur at not less than market value unless exceptional circumstances apply
- Property should be appropriately zoned
- Still provides useful guidance in respect of public notices, valuations, probity issues and the like

Section 114, 2020 Act *(continued)*

Public notice

Minimum requirements of the 2020 Act are relatively low threshold

- 4 weeks' prior notice on Council's website (and any future prescribed methods)

Requirements of public notice go beyond this:

- Provide sufficient information to the public to enable ratepayers to understand the land being dealt with, the proposed process, and any consultation offered
- Contents of the public notice
- Timing of the public notice

Section 114, 2020 Act *(continued)*

Community engagement

- Council's Community Engagement Policy
- General nature of the policy
- Influential report of the Office of the Victorian Auditor-General
- Different levels of community engagement depending upon the nature of the decision
- Other legal obligations:
 - according procedural fairness
 - complying with the rules of natural justice

Section 114, 2020 Act *(continued)*

Valuations

- No statutory obligation to sell for at least market value
- Obligation to explain if selling for less than market value
- Complying with the Best Practice Guideline on instructions to the valuer
- Possible need for two valuations if selling subject to development obligations

Section 114, 2020 Act (continued)

What are the risks if not followed?

- Invalidate property transactions/leave open to challenge
- *Bycon Pty Ltd v Moira Shire Council* [1998] VSC 25 – failure to comply with (then) section 189 of the 1989 Act invalidated sale
- *No 2 Pitt Street Pty Ltd v Wodonga Rural City Council (No 4)* [1999] 3 VR 349 – misdescription of land invalidated public notice
- *Pulitano Pastoral Pty Ltd v Mansfield Shire Council* [2017] VSC 421 – even in the absence of statutory requirements around decision making, Council still has legal obligations

Section 114, 2020 Act (*continued*)

Wrap up

- Strict compliance with requirements of section 114 essential
- Council should consider any other factors relevant to public notices/community consultation
- Be guided by the *Best Practice Guidelines*/ its principles
- Consider other relevant legislative provisions/processes –
e.g. section 223 1989 Act for the sale of a discontinued road

Delegations

Power of Council to delegate

- Council decision making begins with resolutions by Council or a delegated committee
- General power under section 11 2020 Act (Council to CEO) and section 47 (CEO to Council staff)
- Council can still delegate under other Acts (for example, section 188 of *Planning and Environment Act 1987* (Vic))
- Previous 1989 Act delegations repealed 1 September 2020

Delegations (*continued*)

Role of delegates

- Decision made by a delegate is a Council resolution
- Delegate makes decision (does not act at the direction of Council and is the decision maker)
- Subject to same legal obligations – e.g. accord procedural fairness/comply with rules of natural justice

Delegations (*continued*)

Delegations in Property matters

- No restriction on section 114 2020 Act vs section 223 1989 Act
- Decisions to initiate public consultation, issue public notices, sell Council land, and signed documents, can all be made at delegate level
- In practice, most decisions to sell are still made at Council meetings
- Delegations are usually carefully defined
- Striking the right balance between efficiency v transparency
- Comply with all relevant policies/procedures/common law obligations
- Avoid use of self-executing resolutions

Delegations (*continued*)

Using delegations effectively and correctly

- Review delegations before transactions are initiated or decisions made
- Check that the decision-making power is within the scope of the delegated authority
- Identify when decisions need to be made/check processes for such decisions
- Documentary evidence of such decisions

Improper decision-making risks void or voidable transactions

Probity

- Highest standards of probity, public accountability and transparency council decision-making required
- Need to manage conflicts of interest and establish protocols for dealing with such conflicts
- Consider probity issues at the outset
- Consider appointment of probity consultant and/or probity auditor

Example, section 59 of the *Transfer of Land Act 1958*

Example:

- Use of section 59 application/convenient mechanism to register titles in council's name
- Land Use Victoria tidy up project for road titles in electronic conveyancing
- Query if all roads are *Road Management Act 2004 (2004 Act)* roads – eg public highways?
- If not and Council's ownership is likely to be challenged, seek further advice

Section 59 of the *Transfer of Land Act 1958* (continued)

Lessons in how to address this section 59 issue:

- Check the legal authority to deal with the land. If unclear, seek advice
- Decision should be fully informed – eg supported by appropriate reports/briefings/further information. Where evidence is insufficient, more information should be sought
- If delegate is unsure of power to act, seek further advice
- Consider who is impacted – eg private individuals
- Challenge of Council's limited resources
- Try to mitigate risk

Conclusion

- Be conscious of the reforms introduced by section 114 of the 2020 Act and the practical implications for how you do things
- Take advantage of the flexibility in community engagement processes and delegation of powers offered by the 2020 Act
- Make sure appropriate delegations are in place, that proper processes are being observed, and that the required people are making the appropriate decisions
- Be conscious of addressing probity considerations in council property transactions
- Watch out for council road titles resulting from a section 59 application; check that it is a 2004 Act road (eg, a public highway); and seek further advice if that is in doubt and/or Council's title is likely to be challenged

Disclaimer

The information contained in these presentations is intended as general commentary and should not be regarded as legal advice.

Should you require specific advice on the topics or areas discussed please contact the presenter directly.

Questions and Contacts



Michael Dowling
Special Counsel
(03) 9609 1555
mdowling@rk.com.au



Shaun Burmester
Senior Associate
(03) 9609 1540
sburmester@rk.com.au

