

Special Report – Suburban Land Agency Land Sales

October 2022

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This publication should be attributed as:

Special Report – Suburban Land Agency Land Sales,
ACT Integrity Commission, Canberra ACT.

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Acknowledgement of Country

The ACT Integrity Commission acknowledges the Ngunnawal people as the traditional owners and custodians of the Canberra region. We pay our respects to Elders past, present, and emerging and extend our respects to all Aboriginal and Torres Strait Islander people.

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17 October 2022

Ms Joy Burch
MLA Speaker
Legislative Assembly
Canberra ACT 2601

Madam Speaker,

In accordance with section 213 of the *Integrity Commission Act 2018* (“**Act**”) I have pleasure in giving you this Special Report of the ACT Integrity Commission (“**Commission**”).

In December 2020 the Commission was notified by way of a mandatory report from the Suburban Land Agency (“**SLA**”) that it had received a small number of complaints about the processes used by SLA for the sale of residential lots in a number of locations around Canberra. Although the Commission has determined that no reasonable suspicion of corruption arises, examination of the issues raised by the complaints identified several significant matters that are potential corruption risks. This Special Report is published pursuant to s 206 of the Act to explain the issues as the Commission saw them and pursuant to its more general educative function.

May I draw to your attention the provision of paragraph 213(1)(b) of the Act requiring you to present a copy of the Special Report to the Assembly on the next sitting day after it is given to you.

Yours sincerely

The Hon Michael F Adams QC
Commissioner



About Integrity Commission Special Reports

- i. The ACT Integrity Commission ("**Commission**") is established under the *Integrity Commission Act 2018* ("**Act**"). The functions of the Commission are defined in Part 2 of the Act to include investigating conduct that is alleged to be corrupt conduct, referring suspected instances of criminality or wrongdoing to appropriate authorities, preventing corruption through research and risk mitigation, and publishing information about corruption investigations, including lessons learned. In exercising its functions, the Commission is required to prioritise investigation of corrupt conduct which the Commission considers may constitute serious or systemic corrupt conduct.
- ii. Part 3 of the Act describes the process for dealing with corruption reports. If the Commission receives a report – whether by way of a corruption complaint by an individual or as a mandatory notification from a public sector entity – the Commission must either dismiss the report, refer it to another entity or investigate it. In deciding whether to investigate a matter the Commission may undertake a preliminary inquiry but, if the Commission is satisfied on reasonable grounds that the report does not justify investigation, the Commission must dismiss the report.
- iii. Part 4 of the Act provides that the Commission may, at any time, prepare a special report for the Legislative Assembly on any matter relating to the exercise of the Commission's functions, including administrative and general policy matters. Pursuant to s 212, if the Commission is preparing a special report that relates to a person or a public sector entity, the Commission must give a copy of the proposed report to the person or entity, allowing at least 6 weeks for the recipient to provide comments. If the Commission receives comments, it must consider them and may either include them as an attachment to the report and/or amend the report if satisfied that it is appropriate to do so.
- iv. The Commission must publish a special report on its website as soon as practicable after giving the report to the Speaker of the Legislative Assembly. If a special report makes a finding of serious or systemic corrupt conduct in relation to an ACT public sector entity, the Minister responsible for the entity must prepare a written response to the report and present it to the Assembly or give it to the Speaker.

Introduction

1. In December 2020 the Commission was notified by way of a mandatory report from the Suburban Land Agency (“**SLA**”) that it had received a small number of complaints about the processes used by SLA for the sale of residential lots in a number of locations around Canberra. Although the Commission has determined that no reasonable suspicion of corruption arises, examination of the issues raised by the complaints has identified several significant matters that are potential corruption risks which the SLA needs to address. This Special Report is published to explain the issues as the Commission saw them and pursuant to its more general educative function, pursuant to s 206 of the *Integrity Commission Act 2018* (“**Act**”).
2. The triggering complaints concerned the “book-to-buy” release process for residential lots in Throsby, and, in somewhat different terms but covering the same problem in substance, about the land release of lots in Whitlam. The complaints were referred to the Commission by the Chief Executive Officer (“**CEO**”) of the SLA and the Director-General of Environment, Planning and Sustainable Development Directorate (“**EPSDD**”). After examining the complaints in light of information gathered by the Commission, it was decided that the complaints did not warrant investigation. Essentially this was because, even accepting that successful registrants had acted improperly, the evidence did not raise the reasonable suspicion that the Agency or the Sales Agent was involved. When the SLA CEO and the Director-General of EPSDD were informed of this decision, it seemed apt to bring their attention to the need to consider whether the “book to buy” process was appropriate for these releases and the need to consider apparent shortcomings in its documentation.
3. A response was initially sought from the EPSDD Director-General about the Commission’s concerns. He in turn, with the Commission’s permission, referred the request to the SLA CEO on the basis that the matter related to operational processes conducted by the SLA in respect of which the EPSDD had no direct oversight. In due course, the SLA CEO provided the Commission with a response, which was considered in preparing this Special Report.
4. In line with the Commission’s obligations under s 212 of the *Integrity Commission Act 2018* (to give a proposed report to a person or public sector entity to whom the report or

part of it relates), the EPSDD Director-General, SLA CEO and Directors of the book-to-buy Sales Agent company were all provided with an opportunity to provide comments on this Special Report prior to publication. Comments received from all three entities have all been accepted by the Commission and, where relevant, have been incorporated into the text of this final Special Report. As a first example, the SLA CEO noted that the book to buy land release in Throsby totalled 1,978 registrations. The total number of complaints referred to the Commission was indeed small, namely three, representing less than 0.2% of registrations.

The “book-to-buy” process

5. (The following discussion uses the Throsby sales as a useful example.) Throsby was a residential land development planned and managed by the SLA to accommodate approximately one thousand residential and high-density blocks. On 7 August 2020, the SLA announced that the final Throsby blocks would be sold by a non-government agent (the “Sales Agent”, selected via a tender process), through an online “book to buy” process. The process was governed by the *Agency’s Book to Buy Sales Conditions* (“**Conditions**”) and *Book to Buy Sales Conditions – Put and Call Option*, published on the SLA’s website. (The SLA has now advised the Commission that only a limited number of prequalified builders had the choice to enter into a put and call agreement; all other participants entered into a standard contract for sale.) The first provision in the Conditions is presently relevant, of which the first section concerns registration, which is required for all participants in the sale. The online form required the names of all persons or companies “to be included in a First Grant Contract” if the application for a block were successful and one were selected. The named parties would “be included as a buyer” in the Contract. Following registration, a “Block Selection Appointment” would be provided and was essential to enable selection of a block. Each registrant was required to provide proof of identification to the Sales Agent. Details of the blocks available were listed on the Sales Agent’s website and the registrants advised to make a list in preference order before the Block Selection Appointment in case the block they wanted was not available. Block Selection Appointments were to be offered to registrants in the order in which they registered. Selection of no more than two blocks could then occur. Of particular relevance are the points that each registrant could only acquire up to two blocks and there was no provision in the Conditions (as distinct from the contract – see below) that prohibited on-sale of the selected block or blocks at any time. A successful registrant who won an

appointment and selected a block could withdraw from the process at any time before contracts were exchanged. Furthermore, should they withdraw, they were to have no legal right to transfer their appointment or selection to a third party. This could only be effectually done after contracts were exchanged, at which time they would have a legal interest in the block, subject of course to completing the purchase. There was no condition that suggested a putative registrant must be a “genuine” purchaser in the sense that they must have the intention ultimately to complete any contract into which they entered and there is no legal reason why they could not always have had the intention, once contracts were exchanged, to sell their contractual rights to a third party.

6. The SLA has now advised the Commission that, although not mentioned in the Conditions, the standard contract for sale did not permit the transfer of the contract to another buyer (post-exchange but pre-settlement), unless there was express permission granted under extenuating circumstances, there were no transfers of this kind recorded for the Throsby book-to-buy process, and the process of seeking Ministerial Consent to transfer a lease (post-settlement) is administered by EPSDD under the *Planning and Development Act 2007*. Absent the term prohibiting transfer without permission, a purchaser would have the legal right to transfer their (equitable) interest acquired following exchange. For obvious reasons, the exclusionary term that would be contained in the contract should have been exposed in the Conditions.

The complaints

7. The online registration process opened at precisely 12:30pm on 1 September 2020 and blocks were allocated to the first one hundred and sixty registrants in less than 20 seconds. Complaints were made (to various quarters) by three registrants who did not succeed in obtaining a selection appointment. Their complaints are summarised below.
8. Mr Jones (a pseudonym, used to maintain privacy) wrote to the Chief Minister to complain about what he described as a “recent Land Release scam” in the suburb of Throsby. Mr Jones said he had registered his interest in securing a block in Throsby. Following the sale, he received an email from the Sales Agent on behalf of the SLA that “due to overwhelming response, all 160 sales appointments have been filled”. He contacted the Sales Agent later that day to check if any blocks were available for sale “over the counter”. He was told that a number of builders had managed to secure multiple sale appointments and his contact details would be passed on. The following day he was contacted by a

builder who said they were successful in securing multiple sale appointments and offered to “sell” one to Mr Jones for \$5,000 and a further \$5,000 was payable to the Sales Agent as the referring agent. Mr Jones said that the builder had told him that he had 40 of his staff on the registration day booking on his behalf. The ensuing discussion about how Mr Jones and his partner could be substituted for the successful applicant gave Mr Jones the impression that was not a legal process. This led Mr Jones to infer that the “whole process of web registrations is rigged” by the Sales Agent, with only a small proportion of “genuine buyers” able to access blocks.

9. In preparing this Special Report the Commission provided the Sales Agent with an opportunity to respond to this complaint. The Director of the Sales Agent company stated: “at no point did the sale agent provide the contact details of an unsuccessful registrant to a successful registrant, for them to ‘offer to sell’ a block selection to the unsuccessful registrant ... The agent strongly refutes that any portion of the process was rigged.”
10. Shortly afterwards, a Mr Smith (again, a pseudonym to preserve privacy) emailed officials in the SLA with a similar complaint to the effect that builders were offering land for sale based on one of their agents having obtained an appointment and offering to obtain ministerial approval to substitute Mr Smith as the appointment holder subject to a payment of \$10,000 to \$13,000 and a construction agreement. Mr Smith did not disclose the source of his information. The Commission notes that notwithstanding Mr Smith did not disclose the source of his information, the SLA took appropriate action by referring the matter to the appropriate area of the Territory, namely EPSDD.
11. Mr Smith had claimed that his registration, which took three seconds to complete, took over 20 seconds to register in the system. The SLA CEO was informed by the Sales Agent that this could be due to a number of reasons, including the heavy traffic on the site in the lead up to the registrations opening. Although the registration may have taken three seconds to complete, the 20 seconds refers to the time taken for the entry to reach the database, taking into consideration the number of other users registering at the same time. In addition, internet speed and connection quality may have also had an impact.
12. A third person also made a complaint that the process was rigged but did not make complaints about the involvement of builders.

Response of SLA

13. The SLA requested the Sales Agent's IT specialist and its Sales Agent to audit the company's registration system for anomalies. The information obtained from the Sales Agent was as follows –

- (a) The Throsby release was run on an automated release mechanism which opened at precisely 12:30pm on 1 September 2020. There was no human intervention in opening up the registration page. The server that the system ran on was synchronised to an international time server and was accurate to the second.
- (b) Microsoft's QL server was used as the database back-end and it was configured to time-stamp each entry as it occurred. Entries were also given a sequential ID in the order in which they hit the database.
- (c) The web server logged all requests and ran on Microsoft Internet Information Services. As soon as a request was received by the server it was written to the database in the order in which the requests were received at the server.
- (d) The first entry into the database occurred at 2020-09-0112:30:04.353. This would appear to reflect that entries were manually entered by registrants, as any automated system would have made the first entry within a millisecond of opening up.
- (e) There were multiple hits on the (locked) site leading up to 12:30pm, implying that there were many people watching and refreshing the site. The number of hits increased in intensity as the time approached 12:30pm, which once again would imply human interaction.
- (f) The system sent automated email responses once a registration was received. These were sent via an internal mail server and they were time-stamped and logged on the SLA system as well. The outgoing email time-stamps closely aligned with the time-stamp in the database of when the entry was received. This indicated that the autonomous registration



system ran according to its intended programming to register appointment allocation in sequential order of entries.

14. The CEO conveyed this information to the complainants on 28 October 2020.
15. The Commission's relevant expert has considered the explanation and confirmed that automated release systems are commonly used by e-commerce websites, such as ticket sales, and are often paired with web server log systems such as Microsoft SQL. It is understood that such systems are not easily manipulated by an administrator and the process described by the Sales Agent would be unlikely to pose a risk of possible corrupt conduct.

Discussion

16. As mentioned, the Commission determined that the information conveyed in the corruption reports did not justify investigation and thus that they must be dismissed under s 71 of the Act. In essence, there was no basis for a reasonable suspicion that the registration system was rigged to give any advantage to the successful registrants, who were free to negotiate with third parties if they wished to do so. (If the accounts of these communications were accurate, it does appear that these registrants were not being truthful about the process in what they said to the complainants, but this is not a matter for the Commission.)
17. Nevertheless, it seems clear that gaming by bidders of the book-to-buy system as it was configured is a real risk to the integrity of the process. Although a registrant (or group of registrants) can only obtain one appointment and only select one or two blocks and must, if obtaining an appointment, provide evidence of identification, any number of registrants could be acting as agents for a third party and, thus, enable that undisclosed third party to bypass the requirement intended to ensure the widest number of putative purchasers are able to participate. There are reasonable grounds for thinking it likely that this may have happened in relation to the Throsby land release and thus undermined its integrity, with adverse consequences for those participants who had acted in good faith, and for the reputation of the process.
18. The information provided by the complainants does not give rise to a reasonable suspicion that employees of the Sales Agent or the SLA gave advice or assistance to third parties

to enable the process to be bypassed (which could amount to improper conduct, particularly if done for reward), and there is no other evidence that suggests this occurred.

19. On the other hand, if the Sales Agent had become aware, following the process, that multiple applications had, in effect, been made by one entity through a number of agents, it should have taken steps to inform the SLA. Consideration would then have had to be given to whether the selections should be permitted to proceed. These possibilities are mentioned as arising on the allegations in the complaints and not to suggest there is evidence of a lack of probity that would justify action by the Commission. However, the process needs to be examined, and adjusted if necessary, to provide reasonable assurance that this kind of problem will not arise in the future.
20. In responses to the Commission's proposed Special Report, the Sales Agent advised, and the SLA confirmed, it only became aware that multiple registrations may have been made through a potentially linked entity after the event, at which point it was raised the SLA and the book-to-buy process was examined and subsequently significantly altered to ensure duplicate or related parties could not register and that the registration names could not be substituted on sale contracts.
21. The third parties who may have used the system in the way described do not fall within the ambit of the Commission's jurisdiction. Depending on the importance, from a policy point of view, of the limitation of one or two purchases to each registrant, consideration should be given to requiring disclosure of any arrangement, formal or informal, that implies an obligation, once contracts were exchanged, to transfer the benefit of the contract to a third party. A false denial of such an arrangement would likely render the person liable to prosecution under s 326 or 327 of the *Criminal Code 2002* (ACT). The contractual template might also benefit from some redrafting to warn registrants of the necessity to avoid implicit or explicit deceit. (The Commission noted that the *Book to Buy Sales Conditions – Put and Call Option* document was in several respects unsatisfactorily drafted and unnecessarily obscure. The Commission recommended that should be reconsidered by the ACT Government Solicitor and is pleased to note SLA's advice that it has now sought the view of the ACT Government Solicitor in respect of the matter to identify learnings and areas for improvement.)
22. Leaving aside this issue, it seems difficult to justify a process that depends on the sophistication of an individual's computer access and the accident of intensity of usage

and other environmental happenstances where the priority is to give participants equal opportunity of responding to the release and equal odds of success. The Commission suggested perhaps consideration could have been given to a ballot process instead, speculating that, while this could raise the parallel problem of numbers of applicants, even a very much larger group could have been manageable with an appropriate and relatively simple programme, involving little or no human intervention.

Response of SLA to draft Report

23. Taking the last-mentioned point (about a ballot process) first, the CEO has advised the Commission that, at the relevant time, it considered the book-to-buy process was appropriate based on a range of factors, which included—

- a. The SLA had a large number of blocks available as ‘inventory’ for purchase over the counter (as of 1 July 2020 SLA had 462 blocks available, including 94 blocks in Whitlam available through Display Village builder partners).
- b. There was low demand for single residential blocks, as evidenced by sales rates in the first half of 2020. SLA would usually expect around 40 exchanges per month. Exchange rates for single residential blocks between January and July 2020 (excluding affordable housing releases and the first release in Whitlam to the public) was just 24 per month or 40% below average.
- c. Sales enquiries through SLA’s agent for the release in Throsby were low compared to other releases.
- d. Independent market analysis from a range of experts, including major commercial banks, economists, real estate agents and housing market commentators were all indicating a softer housing market in the second half of 2020.
- e. With so much unsold stock on hand and a softer market predicted, it was considered that a ballot would not markedly improve the number of sales or equity of the release process.
- f. The impact of the COVID-19 pandemic resulted in SLA suspending public events, including in-person auctions and ballots. The pandemic also resulted in resourcing pressures, with staff needing to adapt to an often challenging work and home

environment. Staff wellbeing was at the forefront of the minds of the SLA's Board and Executive Team.

- g. The use of the book-to-buy process to make on-line bookings was considered a cost-effective way to facilitate over-the-counter sales without requiring the resources, effort and time of a ballot, during a period of observed low demand, a forecast weaker market and the uncertainty of the COVID-19 pandemic.

24. SLA also advised that it and its predecessor (the Land Development Agency) have a long history of conducting ballots and this was also considered at the time. However, due to the COVID-19 pandemic, SLA would have needed to establish a new virtual ballot system that had not been previously undertaken. The work required to establish such a process at the time did not appear to be justified due to prevailing market conditions and extensive market advice. SLA did not agree with the statement that releasing land by ballot is more manageable with an appropriate and "relatively simple programme". For a low level of interest, as expected at the time, a ballot would require substantially more resources, effort and time to prepare and run with appropriate checks and balances.

25. SLA further advised that, noting the change in market conditions – contrary to widespread market analysis and commentary in 2020 – SLA has implemented changes which allow prospective buyers to register their interest at any time during a specified window, thereby eliminating risk associated with IT equipment. The registrations are then selected using a ballot system, rather than on a 'first come, first served basis' such as Book to Buy. The process of block selection occurs at a subsequent stage.

26. The CEO has informed the Commission that no book to buy sales have been undertaken by the Agency since the date of the Commission's letter of 22 February 2022 and the Agency does not have any current plans to engage in a book to buy sales process. However, as this is a market-driven decision, this may change in future. The process has also been adjusted to regulate and verify bookings –

- The Agency has introduced a smart form. This form recognises duplicate entries of a person or entity looking to register for a block of land, based on matching data fields including name, date of birth, licence number and email address. Should a duplicate entry be identified, it is automatically removed from the process. Related party checks are also conducted by the SLA's legal advisers to further reduce the risk of duplicate entries or unfair advantage.

- Sales conditions for recent releases have included specific clauses relating to substituting or making additions of names to the first grant contract. This in effect means the person or entity registering for a block of land, must also be person or entity exchanging, and then ultimately settling on that block of land.
- In May 2021, as part of its continual review of statutory processes, EPSDD sought to clarify the way section 298 of the *Planning and Development Act 2007* (ACT) works (Ministerial Consent). The outcome of that review was that a person or entity can no longer transfer (sell) their interest in a block of land between the phase of exchange and settlement. To support and strengthen the integrity of that process, EPSDD now apply further rigor to the assessment of any valid application under section 298. In particular, they require stronger evidence to support the application, before the authority makes a determination. The Agency will continue to work with its legal service providers in producing robust conditions of sale and sales contract to ensure fair, equitable and transparent documentation. This will include a review of the relevant sales documents for single residential land releases.
- The SLA notes the requirement to issue Crown leases only to buyers named in the sale contracts, and the requirements for obtaining ACTPLA consent to a transfer of a Crown lease under section 298 of the *Planning and Development Act 2007* (in respect of a Crown lease that has been issued), places limitations on the ability of a buyer to “game” the system in the way suggested by the complainants.

27. In light of the Commission’ observations, and as part of continuous improvement, the SLA also intends to carry out an independent review of the single residential land sales process. This will be a risk and control review to:

- confirm the suitability of the process for its intended purpose;
- ensure it is sound and robust; and
- identify any further adjustments, controls or risk mitigants which could be adopted in future to ensure that the kinds of problems which have been identified do not occur.



28. The SLA also indicated that it would be happy to engage with the Commission in the review as well as in developing any further proposed process improvements. Discussions have already taken place to move this proposal forward.

Conclusion

29. The Commission welcomes these developments. However, it appears that they may not be sufficient to deal with the issue of a principal silently using a number of agents to secure multiple registrations. One possible and relatively simple option would be to require in the application an express confirmation that the applicant is not acting as an agent for another person or otherwise to identify their principal, and include in the purchase contract an express confirmation by an intending purchaser that they (either as principal or agent) had not lodged more than one application for registration, making this an essential term of the contract (which would then permit the SLA to repudiate the contract if it became apparent that more than one such application was in fact lodged).

30. In sum, having regard to all the circumstances the Commission has concluded that further dealing with the corruption report is not justified and so has dismissed the matter. Since initially preparing this Special Report the Commission has been pleased to engage with the SLA on the scope of the proposed review, so far as integrity issues are concerned. Of course, wider issues of efficient administration are not for the Commission to consider or advise on.