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## BRIEFING PAPER ON ADVANTAGE PROPERTY AGREEMENTS For Board meeting 2 June 2015

*Received*

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### THE REPLACEMENT OF SOLTICE WITH ADVANTAGE AS THE PREFERRED DEVELOPER AND PURCHASER

You have instructed us that pursuant to section 62 of the ALRA and the implied activity reflected in the ALRA such as section 61 and 67(b), you have a duty to actively pursue the economic development of the ALALC, including the property of the ALALC.

Since 2014, the Board unanimously resolved to sell all the Awabakal lands and ALALC has (through Richard Green as the responsible agent of the Board) scouted for potential development partners or purchasers. The essential objective, confirmed by the Board on 8 April 2016<sup>1</sup>, is to convert uneconomic (ie poorly zoned bushland) into an income producing property portfolio with a number of community properties providing community benefits. Some of the property portfolio is designed to be more community housing and some of the property is hoped to be available to members at a subsidised rate under a community benefit scheme provided for in the ALRA.

#### Selection of property proposals: Board resolutions of 8 April 2016

On 8 April 2016, the Board resolved to enter into the Soltice proposed arrangements after a review of the proposals then available and which have been considered.

On the commerciality of the offer, the Board relied upon on Tony Galli from Ray White on matters pertaining to the value on the lands and their proposed uses, the report of Able Consulting Pty Ltd and its own sources and valuations received from time to time.

KNL identified a particular primary concern in respect of the documents, being the formula for the reduction of price and ultimately the ability to 'walk away' from the deal entirely, if the targets had not been met. Walking away also came with the potential for Soltice to take ownership of James Street and thereby transfer the risk to the planning process to the ALALC.

<sup>1</sup> 8 April Minutes record: "Jaye has asked if what we are doing is giving up all our land?, It was agreed that there can be no progress unless the land, currently in the form of bushland, is not able to "exchanged" in return for other land, or an income-producing property portfolio. Also discussed was that arrangements that allowed for flexibility to "exchange" current land in its bushland form into property developed to the needs of the community such as rehab centres, medical centres or aged care homes. "

We were instructed to, and did make inquiries regarding the commercial outcomes of the putative clause. We have come to the belief that not only would the 1,500 houses be difficult to achieve, but would certainly not be achieved within the time frame. Estimates varied between Soltice ultimately acquiring the land for between \$7-9m, rather than the illusion of \$30m. Indeed, there was an incentive for Soltice deliberately make a zoning application that would fail, acquire the land cheaply and re-apply properly.

When pressed on these matters Soltice would not execute an acceptable agreement that would commit them to firm up the \$30m figure.

### **The 6 May decision to reject Soltice and proceed with work to present to a community meeting**

At Board Meeting of 6 May 2016, the Board resolved to reject Soltice and to proceed with preparing for a community consideration of the development and/or sale of the lands. The resolutions were in the following form:

#### **Resolution 1:**

That owing to a failure to come to terms with the Soltice Group Entities, that the Soltice proposal be rejected.

#### **Resolution 2:**

That the community meeting go ahead on the basis of establishing a collaboration to improve the economic value of the land such parties as agree with the terms of the community.

This is understood to mean that the Board resolved to create a 'model' of template form of development proposals that would identify the community objectives. That model would be based on significant pre-planning work being undertaken that include a range of scenarios of advantage to the LALC. That model would then be used to attract investors, purchasers and developers.

### **The Pre-Planning work, master plan and model templates**

KNL was tasked to scope out the nature of the work necessary for obtaining community and NSWALC Division 4A approval for the 'model' development of land. The objective you have instructed us was to review and present the major strategies and options for such developments. The work would involve undertaking the management of planning work as to what the various options that were available.

The comprehensive nature of the work which ALALC was intending was discussed with Richard Green as including, reports and analysis assessing:

- Bio Banking options;
- Zoning as affected by Bush fire propensity/risk;
- Potential Dwelling lot sizes;
- Animal traffic corridor and restrictions on development;
- Trees – nature of them and whether can be removed – e.g. red gums etc
- Topography issues: their limitations on the use and opportunities provided;
- Flood-prone corner of land;
- Valuations including valuations that look at it from a development potential point of view;
- General feasibility study;

- Look at NSW Government's (Draft) Hunter Plan – potential changes thereunder;
- Effect of proposed transport connection;
- Impact of potential government urban release near Wallsend;
- Commercial uses available; and,
- Look at State Significant Development planning option instead of Lake Macquarie Council;

### **Pre-planning, Planning towards DA**

You have instructed us that your additional objective that the pre-planning and preparatory work will give you the basis for ultimately, to even apply for a DA yourself. The basic re-zoning cost is about \$800,000 to \$1,000,000 alone. We obtained estimates and we cannot see how this will cost less than \$5m with quotes at \$250K per lot. In the immediate term, the first level pre-planning is itself expensive with estimates from Tony Galli being at \$300,000 - 400,000.

**Important note:** In view of the substantial work required, we attach therefore a 'confirmation of variation of retainer and engagement' to confirm your instructions to us. We have included the same security provisions as appear in our client services agreement in the event of non-payment. Whether we manage the work or it done by someone else, the security applies. Again, as we have repeated in respect of issues that may bring us into dispute because of our need to protect fees and liabilities incurred on your behalf, we recommend that you consult with an independent law firm. You have used Nicholas Dan and Ian Sheriff and they are readily accessible to you. NSWALC is also available.

### **The Approach to Advantage**

Richard Green approached Advantage for advice on the Soltice agreement, with particular reference to the concern regarding the purchase price targets. Richard reported that Advantage had provided some advice to him from time to time regarding the potentials for re-zoning and property development. Advantage had a focus to bring indigenous-run enterprises (originally in the form of franchises) to the development. That is, to allow for shops that would be owned by ALALC to conduct proven-success commercial franchises owned/operated by ALALC people. Advantage had €1billion Guarantee from Grossman, a German Engineering Company towards the financing of Solar Projects on Indigenous Lands.

Advantage formed a joint venture company with United Land Councils, being United First Peoples Syndications Ltd. It sought to provide the support to the objectives of United Land Councils to overcome the disadvantages faced by LALCs and other indigenous corporations.

Richard asked if Advantage could match or improve upon the Soltice proposal. Advantage offered to "step in the shoes" of Soltice, remove the offending price formula and proceed instead to working with ALALC with a form of proposal that included increasing the land the subject of the agreement. That is, pressing and maximising claims and ALAs. The 'head line' of the Advantage deal is that the \$30m is fixed. It is not subject to targets being achieved.

### **The potential substitution of Advantage**

We turned our concern as to why someone would pay well-over, and if not more than twice the market value, for the properties. In the case of Soltice, it appeared that this was potentially because the price was unlikely to ever be paid, but instead a 'bating' tactic. In the case of Advantage, they

take most of the risks of the outcome of the zoning/development approval. If they fail to achieve the maximum development outcome, that does not reduce the price you receive.

Advantage represents that its preparedness to pay \$30m includes a number of factors: (a) it wants a model 'syndication' to 'show case' to other LALCs; (b) it wants to 'show case' the development syndication to the Governments interested in affordable housing grants/concessions and other initiatives; (c) it is confident that it can achieve a Ministerial buy-in for surrounding land (section 36AAA ALRA agreements and the like); and (d) it is confident of the future re-zoning potential for the land from a State Government level that will by-pass current Local Government restrictions, above and beyond SSD.

We examined the financial capacity of Advantage. It represents itself not as an investor in its own right, but a "syndicator" of investors. We can confirm Advantage, or more precisely the people behind it, has/ve been involved in significant property investments. Its' investors are significant; mostly international but many domestic. We met with one investor who committed \$10m for 20% of Advantage's share, which would be the first capital used. It has investors who have acquired hotel and apartment complexes over the last 5 years and can see no reason to doubt their capacity to deliver syndicating a consortium of investors to finance the ALALC development proposed. We can and intend to dig deeper into the financial capability in the course of the approval process.

#### **Basic outline**

In accordance with your instructions, we outline only the key issues:

#### **A "work in progress" to modify through the Approval Process**

You have instructed us that generally speaking, we do not have to "worry too much" about the final form of agreements until such time as the final terms of approval of the NSWALC are known. You have asked us to modify the agreements as we need going forward. These will be modified by further the agreements as we go forward. This also means that our advice to you will be piecemeal as the relevant issues arise.

Advantage are aware of the Division 4A process and that any 'land dealing' agreements are to be considered 'works in progress' that are intended to be varied as they progress through the approval process. This is considered a virtue because it will result in a more exacting ultimate proposal and produce a time-line for those aspects that are to be done in phases. The important proviso here is that they insist that this approval process is undertaken co-operatively and in good faith. We proceed therefore in this "work in progress" footing. More agreements will be needed as to how the approval process will progress to ensure the best outcome.

#### **The Structure of the Advantage Deal**

The Structure:

- (1) For the purposes of ALALC, the briefing paper on 5 April regarding the structure applies;
- (2) For the purposes of Advantage's structure:
  - (i) The NZ syndication company has been created as the holding company and it is a trustee of a NZ Trust.

- (ii) For the purposes of operating in Australia, GST credits etc, NZ syndications has appointed Aust Syndications as its agent and attorney. This means that NZ is primarily the entity you are dealing with, but any dealings with the Australian entity binds the NZ entity.

We refer to the 5 April briefing and add that if there is a greater level of active management by Awabakal by virtue of the greater joint/co-operative arrangement with Advantage in the development(s) approved, the discussion regarding section 52(5) needs to be re-visited. How your interests in the Unit Trust will be categorised will ultimately depend on how much you want to take benefits in the form of active management participation.

It would be financially imprudent to spend resources on examining all the possible permutations on this or any other holding vehicle structure until such time that we know what the community will ultimately prefer.

The community may want to take cash and use that cash to purchase their own property portfolio completely rather than participate in any development whatsoever. In such case, the Unit Trust will not go forth in the final form going to the NSWALC approval process. If it goes the other way – towards greater management participation in the development - then the case for the structure being in the form an unincorporated joint venture instead of the Trust is stronger. This is one area 'flagged' for the work that KNL will oversee as we undergo the Division 4A process.

We also understand that there are changes "in the offing" to the ALRA. Those changes will further support the move towards LALCs conducting active business enterprises by allowing a wider choice of vehicles. Should these changes occur, then other business vehicles may be more suitable, such as Limited Liability Partnerships. There is an understanding with Advantage that until the approval process is complete, we can substitute the most suitable holding vehicle legally permissible at the time.

Many more agreements will be necessary if the community prefers greater development participation instead of a straight sale with only limited proceeds being in kind (i.e. in the form of housing). We flag that you may be protected by requiring security from Advantage; a form of agreement that allows for hypothecation so that you can access cash against Advantages' security etc. We flag again that there will be a need to consider a variety of conditions; whether in the form of covenants or other instruments before exchanging land for units; as well as mechanisms to restrict any dealings that the vehicle holding the development will have (see April 5 briefing paper).

#### **The on-going agreements: separate and/or together**

As discussed in the 5 April briefing paper, numerous subsequent agreements will be required. The Advantage proposal contemplates a co-operative on-going relationship, with numerous agreements being entered into to cover the detail on matters as their importance arises.

The agreements that need to be worked out in progressing the deal (or a form of deal) through the approval process will be in two categories:

1. Those agreements that are part of the 'land dealing' such as what rights and obligations you achieve and undertake with Advantage as part of the sale and development of your lands;
2. Those agreements where you ask for work to be done to assist you for your purposes in progressing your interests;

It is because Division 4A of the ALRA is different from the ordinary law of the land that this distinction is so important. Advantage, and any other developer, want legal certainty so that its risks can be measured. There is a risk that some, or even all, of the deal that is finally approval will be a different kind than that which it agrees to invest in. Advantage agrees to risk expenditure up to a point. It will not pay for the work you ask it do where such work can be used for your benefit in the future, including with better targeting of alternative developers. The work you asked Knightsbridge to do, and which Advantage commits to undertake (instead or in large part) is of this second category.

### **The types separate work required**

Separate agreements will need to be entered into in relation to all the work that will need to be done in making:

#### **(1) The optimal preferences of the community known and reflected in the model scenarios plan document;**

For example:

A critical feature to obtaining maximum re-zoning benefit is dealing with the densely-treed areas which would, unless dealt with cause wastage of vast amounts of land by virtue to the fire zoning restrictions.

If a medical centre, attached to a University is placed in the middle, that will have a dramatic positive effect.

There are numerous examples that have been discussed. Where is the community housing proposed to be built?; what effect will that have on zoning laws?; on the market values of surrounding houses? Where is the community benefit housing scheme housing to be built?

Going through the pre-planning and planning options, feasibility analysis including topographical surveys etc etc, will be a lengthy and expensive process.

These are matters that you want done for your benefit. These are not in Advantage's best interests. Its best interests are to maximise its profit from the most highly densely populated residential dwelling use of the land that can be achieved. You are in effect offering them your preferred position which they or to accept or not. If they don't accept, you are to offer it to others.

#### **(2) The proposal that goes to NSWALC for assessment by the Expert Panel**

We can expect from the experience to date in relation to unsolicited "advice" from the NSWALC, that a rigorous (if not "nit picky") approach will be applied to any proposal by the ALALC. The sheer size of the project alone will likely require a comprehensive analysis by an expert panel. The work necessary to maximise the chances of success of the application to NSWALC to Awabakal's objectives is not the kind of work that Purchasers's would need to do.

In addition, other examples of the work that you want done for ALALC's own processes include the work you cause to have done towards giving you more information, better options and better opportunity to negotiate with Government, future land claims etc is work that you want done irrespective of the land dealing. The work you are negotiating with Advantage to do will be work in this later second category.

It is a matter for you to decide whether you want to directly commission that certain work be done. It is certainly within your power under section 52 of the ALRA. KNL recommends that you use independent professionals. You have instructed us that Tony Galli can help manage that process for you if you want, and that was his purpose in attending the Board meetings. You also mentioned Gary Dowling.

From the perspective of external critique of your governance process, the more independent people you use, the better. Transparency of process is also a feature that will be taken into account by NSWALC in deciding on any approval application. You must therefore balance the extra cost involved in finding a new independent professional to re-educate them on your priorities with the benefits of a fresh perspective, and better objective transparency. Likewise, and more bluntly, Saun Gordon will not be encumbered by the need of evidence or logic before publicly proclaiming the process is corrupt. Faced with that likelihood, the more 'arms-length' the process is, and appears to be, the better. It is a false economy to be faced with NSWALC panel asking for another feasibility study simply because there is a discomfort about lack of objective input.

If you think that you can negotiate a relationship where you can effectively shift these expenses to Advantage or any other developer, that is all good and well. But do not assume that you can "bundle up" work you want done with the property deal, just because you ask Advantage to do it or arrange it to be done. No doubt Advantage, as anyone else, would be keen to maintain your pleasure. However, you have to be clear that these costs are running on your account and you will be liable to pay for them. It is no different from engaging professionals to do the Aboriginal cultural/heritage assessment – these people will be paid by you. The work may also assist the application process in Division 4A, but it is not part of the property deal itself. There is no financial immunity from non-payment.

#### **A cheaper "middle ground" option**

Another option for your consideration to reduce your exposure and limit the amount of planning work you take on. As you recall the Sunshine Group had a solid proposal for the \$12.6m. We are confident that we can work with them to overcome the concern about 'cherry picking'. What you could do is allow Sunshine to acquire and develop the 5 parcels, and you have Advantage assist you with the other surrounding parcels. In this way, you could "free load" of the work done by Sunshine's planners for their purposes, to modify what you want for your purposes. Through the Sunshine group planners, you would be better able to compare and contrast the work you want and its pricing.

#### **The process for selecting the appropriate building company**

Richard Green has reviewed a number of building companies offering modular building products. He is reviewing the work of companies that are potentially to be the product supplier to Advantage and form part of the Advantage companies under a process that will conclude by 30 June as agreed. The front-runner, pending approval from Richard Green on your behalf is Composite Building Industries from Hong Kong.

## **CONCLUSION – ACTION ITEMS REQUESTED**

Please:

1. Confirm by resolution that Advantage is to replace Solstice.
2. Confirm by resolution that the agreements should be executed or if not what changes you want done. We are operating on the basis that unless told otherwise, you confirm the approach and assumptions we are making in these briefing papers.
3. Request that Advantage attend a board meeting to give a presentation of their proposal as they see it going forward and give indication of preliminary priorities that you would want worked into the proposal and ultimately in the subsequent agreements.

Attached:

- Draft Call Option Agreement
- Draft Collaboration Agreement
- Draft nominee trust agreement for shareholding
- Confirmation of variation of retainer and engagement agreement
- Corporate documents concerning Advantage and nominee agreement