

Special Report – Rural Land West of Canberra

October 2023

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concerning Rural Land West of Canberra.*

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Acknowledgement of Country

We acknowledge the Ngunnawal people as traditional custodians of the ACT and recognise any other people or families with connection to the lands of the ACT and region. We acknowledge and respect their continuing culture and the contribution they make to the life of this city and region.

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26 October 2023

Ms. Joy Burch
MLA Speaker
Legislative Assembly
Canberra ACT 2601

Madam Speaker,

The Auditor-General's Report No. 8 of 2018: *Assembly of Rural Land West of Canberra* was presented to the Speaker of the Legislative Assembly for the ACT on 29 June 2018 and tabled in the Assembly on 31 July 2018. The report considered the processes under which the ACT Land Development Agency had acquired nine rural properties against the requirements set out in the *Planning and Development (Land Acquisition Policy Framework) Direction 2014 (No 1)* over the period June 2014 to June 2017.

The Auditor-General's Report came to the ACT Legislative Assembly's Standing Committee on Public Accounts and a report following the *Inquiry into Auditor-General Report No 8 of 2018: Assembly of Rural Land West of Canberra* was presented to the Legislative Assembly on 27 August 2020.

On the 31 August 2020, Vicki Dunne MLA and Nicole Lawder MLA made a corruption complaint to the ACT Integrity Commission on the basis that they believed that the matters raised in the Auditor-General's report and subsequent investigation warranted reference to the Commission.

This Special Report for the Legislative Assembly, comprising the Commission's consideration of the corruption complaint in respect of the acquisitions, is provided pursuant to s 206 of the *Integrity Commission Act 2018* (ACT).



The Hon Michael F Adams KC
Commissioner

Introduction

1. This special report is prepared pursuant to s.206 of the *Integrity Commission Act 2018* (“**the Act**”) in response to a corruption complaint made to the ACT Integrity Commission (“**Commission**”) on 31 August 2020. On that date Vicki Dunne MLA and Nicole Lawder MLA (“**complainants**”) referred to the Commission a report of the ACT Legislative Assembly’s Standing Committee on Public Accounts (“**PAC**”) following that *Committee’s Inquiry into Auditor-General Report No 8 of 2018: Assembly of Rural Land West of Canberra* (“**PAC report**”). The PAC report had been presented to the Legislative Assembly on 27 August 2020. As suggested by the title of the PAC report, the ACT Auditor-General had previously prepared *Report No 8 of 2018: Assembly of Rural Land West of Canberra* (“**Auditor-General’s report**”), which in turn had been presented to the Speaker of the Assembly on 29 June 2018 and tabled in the Assembly on 31 July 2018. (All references to the Auditor-General are to the person who formerly held that office and not to the current Auditor- General.)
2. The Auditor-General’s report considered the processes under which the ACT Land Development Agency (“**LDA**”) had acquired nine rural properties against the requirements set out in the *Planning and Development (Land Acquisition Policy Framework) Direction 2014 (No 1)* (“**the Framework**”) over the period June 2014 to June 2017.
3. In their letter to the Commission the complainants, Ms. Dunne and Ms. Lawder (who had respectively been the Chair and a Member of the PAC at the time of its inquiry, though they did not purport to make their complaint to the Commission in those capacities), described the PAC report as having traversed “many areas that touch on the integrity of public administration: failure to adhere to established policies and legislative instruments, acting without the explicit authority of Cabinet, the very questionable decisions to divide one of the leases purchased and allow part of it to pass into private hands, the poor administration of invoices and the unusual relationship between the Land Development Agency and Colliers International”.

4. Ms. Dunne and Ms. Lawder referred to recommendation 6 of the PAC report, namely:

Some members of the Committee recommended that the ACT Integrity Commission investigate the matters considered in Auditor-General Report No 8 of 2018: Assembly of rural land west of Canberra and the Standing Committee on Public Accounts inquiry into the Auditor-General's report.

5. While they observed that this recommendation was not unanimous, they believed that the matters raised in the Auditor-General's report and the PAC investigation warranted reference to the Commission and invited the Commission to regard the concerns (generally) raised in the PAC report as specific grounds of the complaint.

Role of the inquiry bodies

6. It is instructive at this point to describe the different roles of the respective inquiry bodies.

Auditor-General

7. The statutory functions of the Auditor-General are described in s.10 of the Auditor-General Act 1996:

10 Functions

- (1) In addition to the functions given to the Auditor-General by this Act, the Auditor-General has the following functions:
 - (a) to promote public accountability in the public administration of the Territory;
 - (b) to audit annual financial statements of the Territory, directorates and territory authorities under the Financial Management Act;
 - (c) to audit the accounts and records in relation to any person, body or thing ascertained in accordance with the regulations;
 - (d) to conduct performance audits in relation to any person, body or thing ascertained in accordance with the regulations;
 - (e) any function given to the Auditor-General by or under any other law of the Territory;
 - (f) to do anything incidental or conducive to any of the Auditor-General's functions.

Standing Committee on Public Accounts

8. In relation to the PAC, at its meeting of 13 December 2016 the Legislative Assembly resolved to create:

"A Standing Committee on Public Accounts to:

- i. examine:
 - A. the accounts of the receipts and expenditure of the Australian Capital Territory and its authorities; and
 - B. all reports of the Auditor-General which have been presented to the Assembly;
- ii. report to the Assembly any items or matters in those accounts, statements and reports, or any circumstances connected with them, to which the Committee is of the opinion that the attention of the Assembly should be directed; and
- iii. inquire into any question in connection with the public accounts which is referred to it by the Assembly and to report to the Assembly on that question."

On 26 October 2017 the Legislative Assembly resolved to amend: "Insert after (a)(A), the words:

(AA) matters relating to market and regulatory reform (excluding Access Canberra), public sector management, taxation and revenue." [sic]¹

Integrity Commission

9. Section 9 of the Act defines the meaning of "corrupt conduct" –

9 (1) For this Act, **corrupt conduct** is conduct –
that could –

- (i) constitute a criminal offence; or
- (ii) constitute a serious disciplinary offence; or
- (iii) constitute reasonable grounds for dismissing, dispensing with the services of, or otherwise terminating the services of, a public official;

and that is any of the following:

¹ Recovered from: <https://www.parliament.act.gov.au/parliamentary-business/in-committees/previous-assemblies/standing-committees-ninth-assembly/standing-committee-on-public-accounts#tab1000903-3id>

- (i) conduct by a public official that constitutes the exercise of the public official's functions as a public official in a way that is not honest or is not impartial;
- (ii) conduct by a public official or former public official that –
 - (A) constitutes a breach of public trust; or
 - (B) constitutes the misuse of information or material acquired by the official in the course of performing their official functions, whether or not the misuse is for the benefit of the official or another person;
- (iii) conduct that adversely affects, either directly or indirectly the honest or impartial exercise of functions by a public official or a public sector entity;
- (iv) conduct that –
 - (A) adversely affects, either directly or indirectly the exercise of official functions by a public official or public sector entity; and
 - (B) would constitute, if proved, an offence against a provision of the Criminal Code, chapter 3 (Theft, fraud, bribery and related offences);
- (v) conduct that involves any of the following:
 - ...
 - (C) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage;
 - ...

For subsection (1)(a) it does not matter if –

- (a) proceedings or action in relation to the conduct can no longer be taken;
- ...

(3) In this section:

criminal offence means a criminal offence under the law of the Territory or under any other law relevant to the conduct in question.

...

serious disciplinary offence includes –

- (a) any serious misconduct; or
- (b) any other matter that constitutes or may constitute grounds for –
 - (i) termination action under any law; or
 - (ii) a significant employment penalty.

(Original emphasis.)

Also defined in the Act, but presently irrelevant, are **serious misconduct**, **serious corrupt conduct** and **systemic corrupt conduct**. Section 12(1)(ii) defines **public official** as including “a member of the Legislative Assembly”.

10. The functions of the Commission as set out in s 23 of the Act are:

23 Functions of Commission

- (1) The functions of the Commission are to—
 - (a) investigate conduct that is alleged to be corrupt conduct; and
 - (b) refer suspected instances of criminality or wrongdoing to the appropriate authority for further investigation and action; and
 - (c) prevent corruption, including by—
 - (i) researching corrupt practices; and
 - (ii) mitigating the risks of corruption; and
 - (d) publish information about investigations conducted by the Commission, including lessons learned; and
 - (e) provide education programs about the operation of this Act and the Commission, including providing advice, training and education services to—
 - (i) the Legislative Assembly and the public sector to increase capacity to prevent corrupt conduct; and
 - (ii) people who are required to report corrupt conduct under this Act; and
 - (iii) the community about the detrimental effects of corruption on public administration and ways in which to assist in preventing corrupt conduct; and
 - (f) foster public confidence in the Legislative Assembly and public sector.
- (2) In exercising its functions, the Commission must priorities' the investigation and exposure of corrupt conduct which the Commission considers may constitute serious corrupt conduct or systemic corrupt conduct.
- (3) Subsection (2) does not restrict the Commission's discretion to decide to investigate any matter that the commission considers may constitute corrupt conduct.
- (4) In exercising its functions, the Commission must take into account the responsibility and role other public sector entities have in the prevention of corrupt conduct.
- (5) In this section:

public sector—see the *Public Sector Management Act 1994*, dictionary.

11. All three entities have the power to call witnesses. The Auditor-General and the Integrity Commissioner may require witnesses to answer questions under oath; PAC proceedings are subject to parliamentary privilege.
12. The Auditor-General and PAC both examined documents and took evidence from a range of individuals, including significant personnel from the LDA and its successor entities, personnel from valuation companies and the former owners of the parcels of land subject to their respective inquiries. The activities which are the subject of these inquiries occurred in some cases over eight years ago. It is to be expected that the recollections of some individuals about events and conversations that took place so long time ago are very likely to now be incomplete or unreliable. It is also difficult to reliably ascertain whether further documentation not already obtained was brought into existence or, if it was, whether it can now be found. It is fair to note, however, that there is no evidence that suggests that the potential existence of such documentation is likely to be significant for present purposes.

Chronology of events

13. A chronology of relevant events is conveniently summarised in the following table extracted from the PAC report:

21 March 2014	The LDA Board holds its annual Planning Day, to which the State Chief Executive of Colliers International ACT and a colleague are invited and attend.
1 May 2014	The LDA Board considers a report on long-term greenfield land supply in the ACT, prepared by the former Deputy Chief Executive Officer of the LDA; the Deputy CEO notes greenfield land supply as 'a primary area of concern' at the planning day; the Board recommends that 'this information be provided to the Strategic Board and the Urban Development Sub-Committee of Cabinet'.
14 May 2014	A paper entitled Future Greenfield Land Supply, prepared by former Deputy Chief Executive Officer of the LDA, is presented to the ACT Government Strategic Board.
27 May 2014	At the request of the ACT Strategic Board (and consistent with the LDA Board's request) a paper provided to Strategic Board, is presented to and considered by Cabinet, which agrees 'not to endorse the strategy outlined in the submission' but asks that 'a further submission be brought forward in 2015'.
June 2014	Coleman Pty Ltd, a subsidiary of Doma Group, buys Canberra Equestrian Centre (Blocks 400 and 433).

5 September 2014	Colliers International provides an unsolicited “project consolidation” letter to the LDA, proposing that the LDA consider acquiring Canberra Equestrian Centre, Riverview, Fairvale, the National Equestrian Centre, and Milapuru.
25 September 2014	The LDA Board decides not to pursue the acquisition of Riverview (Block 14).
November 2014	Consolo Pty Ltd approaches LDA about potential sale of Huntly.
11 December 2014	The LDA Board considers a paper entitled District of Stromlo Acquisitions Strategy Paper, dated November 2014, prepared by Colliers International and agrees to pursue the purchase of Milapuru, Fairvale and the National Equestrian Centre.
23 December 2014	Colliers International invoices the LDA for the paper entitled Stromlo Future Urban Land Study, provided to the LDA on a date unknown.
28 May 2015	The Land Development Agency Board approves the purchase of Lands End for \$3 million.
19 June 2015	The Chief Minister and Treasurer approves the purchase of Milapuru for \$7 million.
30 June 2015	Settlement takes place for Lands End.
31 July 2015	Settlement takes place for Milapuru.
24 September 2015	The LDA Board considers a follow-up paper and a further paper provided by the former Deputy CEO of the LDA, now the Principal of Elton Consulting; the Land Development Agency Board approves the purchase of part of the former property of Fairvale for \$3.1 million.
24 November 2015	Settlement takes place for Fairvale.
12 January 2016	The Chief Minister and Treasurer approves the purchase of Huntly for \$10 million.
8 April 2016	Settlement takes place for Huntly.
14 July 2016	Wintergarden passed in at auction, after which the LDA negotiates to buy the property.
19 July 2016	The Land Development Agency Board approves the purchase of Wintergarden for \$4 million.
30 August 2016	Settlement takes place for Wintergarden.
30 March 2017	The Land Development Agency Board approves the purchase of The Vines for \$2.2 million and Wagtail Park (12 ha) for \$1.6 million.
27 April 2017	The Land Development Agency Board approves the purchase of Pine Ridge for \$4.6 million.
1 May 2017	The Chief Minister and Treasurer approves the purchase of Winslade for \$7.5 million.

30 June 2017	Settlement takes place for Winslade.
12 September 2017	Settlement takes place for Pine Ridge.
1 June 2018	Settlement takes place for Wagtail Park.
27 June 2018	Settlement takes place for The Vines.

Audit and PAC findings and conclusions

14. In submitting her report to the Legislative Assembly, the Auditor-General made a number of recommendations in relation to improvement in practises of the relevant development authority. The PAC subsequently considered the Auditor-General's report, making a range of further recommendations. As it happened, by the time the Auditor-General's report was published, the ACT Government had already moved to disband the LDA, announcing on 8 March 2017 that it would create two new entities: the City Renewal Authority to lead and manage major projects and associated land purchases and sales in the city area; and the Suburban Land Agency to deliver new greenfield residential estates and affordable housing. Those entities commenced operation on 1 July 2017 and the LDA ceased to exist.
15. To provide a context for the deliberations of the Commission in this matter, as the complainants purported to put the whole of the 2020 PAC report before the Commission, it is relevant to record both the 2018 recommendations of the Auditor-General and the PAC's subsequent findings.

Auditor-General's recommendations

RECOMMENDATION 1 INSTRUCTING AND RECEIVING VALUATIONS

While the Suburban Land Agency was not the subject of this audit, since 1 July 2017 the Suburban Land Agency has had responsibility for activities considered in this audit that were previously those of the former Land Development Agency. Recommendations are therefore made to the Suburban Land Agency.

The Suburban Land Agency should:

instruct valuers fully and in writing; clearly differentiate, in Territory records and verbal briefings, when a valuation is based on a letter or on a comprehensive valuation report; document clearly the salient aspects of professional standards such as ANZVGN 1 that have

been addressed by a valuer (e.g. purpose, basis, methodology, Territory Plan uses) and bring this to the attention of decision makers relying on that valuation; and routinely test the application of valuation guidance.

RECOMMENDATION 2 FOLLOWING MINISTERIAL DIRECTIONS AND CABINET DECISIONS

While the Suburban Land Agency was not the subject of this audit, since 1 July 2017 the Suburban Land Agency has had responsibility for activities considered in this audit that were previously those of the former Land Development Agency. Recommendations are therefore made to the Suburban Land Agency.

The Suburban Land Agency should:

implement a process to verify that, for the purchase of any property, any directions given by the Minister and in Cabinet decisions are implemented in accordance with any approved framework;

align internal guidance material and operating procedures so that these are consistent with any direction or policy the Government makes publicly available; document compliance; and routinely test the application of guidance and operating procedures.

RECOMMENDATION 3 ENGAGING AND MANAGING AGENTS AND ADVISORS

While the Suburban Land Agency was not the subject of this audit, since 1 July 2017 the Suburban Land Agency has had responsibility for activities considered in this audit that were previously those of the former Land Development Agency. Recommendations are therefore made to the Suburban Land Agency.

The Suburban Land Agency should:

formally engage agents and advisors through documented procurement and contracting arrangements; and manage and monitor their activities through appropriately documented contract management arrangements. Records of a quality that provides transparency for these activities should be maintained.

RECOMMENDATION 4 PROBITY IN SELECTING AGENTS, CONTRACTORS AND CONSULTANTS

While the Suburban Land Agency was not the subject of this audit, since 1 July 2017 the Suburban Land Agency has had responsibility for activities considered in this audit that were previously those of the former Land Development Agency. Recommendations are therefore made to the Suburban Land Agency.

The Suburban Land Agency should:

Document reasons for proposing to engage an agent, contractor or consultant and have this agreed and approved; monitor the implementation of contracts and authorise in writing reasons for any departure from the agreed contract; and give particular attention to scrutinising and authorising in writing any contractual terms, such as terms for the payment of an agent, that are a departure from standard terms.

RECOMMENDATION 5 PROBITY AWARENESS

While the Suburban Land Agency was not the subject of this audit, since 1 July 2017 the Suburban Land Agency has had responsibility for activities considered in this audit that were previously those of the former Land Development Agency. Recommendations are therefore made to the Suburban Land Agency. The Suburban Land Agency should provide training and guidance to its staff on identifying and managing probity. This should be part of induction training and be refreshed annually.

RECOMMENDATION 6 LAND MANAGEMENT AGREEMENTS

While the Suburban Land Agency was not the subject of this audit, since 1 July 2017 the Suburban Land Agency has had responsibility for activities considered in this audit that were previously those of the former Land Development Agency. Recommendations are therefore made to the Suburban Land Agency.

The Suburban Land Agency should work with the Conservator of Flora and Fauna to:

Finalise Land Management Agreements for rural leasehold land purchased by the former Land Development Agency by December 2018 but preferably sooner;

identify why Land Management Agreements for all the properties purchased in the Western Edge were not developed in a timely manner and identify options to prevent this in the future; and

execute Land Management Agreements for all future rural land purchases within six months of transfer unless there are exceptional circumstances and these are documented.

RECOMMENDATION 7 BUSHFIRE OPERATIONS PLAN OBLIGATIONS

While the Suburban Land Agency was not the subject of this audit, since 1 July 2017 the Suburban Land Agency has had responsibility for activities considered in this audit that were previously those of the former Land Development Agency. Recommendations are therefore made to the Suburban Land Agency. The Suburban Land Agency should align licensing and subleasing arrangements with responsibilities in its fire management Bushfire Operations Plans or vice versa.

RECOMMENDATION 8 PLANNING AND CONTRACTING LAND MANAGEMENT

While the Suburban Land Agency was not the subject of this audit, since 1 July 2017 the Suburban Land Agency has had responsibility for activities considered in this audit that were previously those of the former Land Development Agency. Recommendations are therefore made to the Suburban Land Agency.

The Suburban Land Agency should:

Undertake a strategic analysis of options for the daily management of purchased rural properties including considering use and ongoing management at a larger scale; implement the preferred option; and execute contracts for the management of all rural land purchases managed on its behalf.

RECOMMENDATION 9 FUTURE URBAN FORM OPTIONS

The Chief Planning Executive should undertake a planning study, to define the long-term future urban form and identify the Territory's future development fronts to guide the update of the ACT Planning Strategy (2012).

16. The Auditor-General also, appropriately, gave an opportunity for a response to her recommendations, which are reported as follows:

Response from entities

In accordance with section 18 of the *Auditor-General Act 1996*, the Auditor-General provided a copy of the draft proposed report and final proposed report to the Chief Executive Officer of the Suburban Land Agency, the former Chief Executive Officer and Board members of the Land Development Agency, and the Director-General of the Environment, Planning and Sustainable Development Directorate (the Chief Planning Executive). They were offered the opportunity to provide a statement for consideration for inclusion in the Summary Chapter. Other persons who the Auditor-General considered to have a direct interest in the report were also provided extracts of the draft proposed report and final proposed report. The Suburban Land Agency provided comments for inclusion in the Summary Chapter.

Suburban Land Agency response

Application of the Land Acquisition Policy Framework

Application of the Planning and Development (Land Acquisition Policy Framework) Direction 2014 No 1 (the Framework) was central to the audit findings. As noted in the Report, there are multiple possible interpretations of the Framework. In assessing this matter, the ACT Audit Office sought advice from the Australian Government Solicitor, while in response to the views expressed in the draft proposed Report, the Suburban Land Agency sought advice from the ACT Government

Solicitor's Office. As noted in the Report, the Suburban Land Agency understands, based on available information, that the former Land Development Agency (LDA) and its Board interpreted the Framework with what was considered a reasonable degree of subjectivity, consistent with the exercise of the former LDA's function under the Planning and Development Act 2007 and its annual Statements of Intent.

Land Management Agreements

Section 286 of the *Planning and Development Act 2007* provides that the interest holder must enter into a Land Management Agreement within six months, and that the Planning and Land Authority may extend that date. Such an extension was granted by the Planning and Land Authority for the preparation of Land Management Agreements. The former LDA, and subsequently the Suburban Land Agency, therefore acted in accordance with the legislation.

Audit Findings and Recommendations

The majority of the findings in the Report raise similar issues to those identified in the 2016 Performance Audit Report on Certain Land Development Agency acquisitions and largely relate to issues that have their origins almost four years ago. It was acknowledged prior to

commencement of the audit process that the arrangements that prevailed at the time the acquisitions were made could have been improved.

The operating environment and governance arrangements applying to land development within the ACT have changed significantly since that time. Responses to a majority of the Report's findings and recommendations are effectively already in place.

Most of the findings, which principally relate to improving governance, have already been addressed by the Suburban Land Agency. In some cases, the new arrangements have been in place for more than 12 months. This includes a stronger focus on probity in the engagement and management of consultants and valuers, new valuation processes and comprehensive new governance arrangements, including improved documentation and records management processes, training for all staff including on probity, and additional reporting requirements. The Suburban Land Agency will continue to review options to strengthen processes and governance arrangements.

PAC findings and conclusions

17. Turning to the PAC report findings (paragraph numbers below are taken from the PAC report):

FINDING 1

8.5 The Committee finds that the Land Development Agency did not adhere to established planning policies in its assembly of rural land west of Canberra.

FINDING 2

8.10 The Committee finds that the Land Development Agency did not follow all tests required under the Land Acquisition Policy Framework in assembling rural land west of Canberra.

FINDING 3

8.13 The Committee finds that the Board of the Land Development Agency (the LDA) was not familiar with legislation with which the LDA was obliged to comply and did not seek to make all reasonable efforts to inform itself about such legislation and its implications.

FINDING 4

8.18 The Committee finds that the Land Development Agency proceeded with acquisitions of rural properties to the west of Canberra without the explicit authorisation of Cabinet.

FINDING 5

8.22 The Committee finds that the Land Development Agency's approach to the acquisition of Fairvale was highly unusual and contrary to its policy.

FINDING 6

8.26 The Committee finds that Colliers International had a considerable degree of access to the LDA, and the LDA accepted and then followed Colliers' advice with respect to the acquisition of rural land west of Canberra unreservedly.

FINDING 7

8.34 The Committee finds that the Land Development Agency did not meet its public interest and profit imperatives equally, resulting in poor practice.

FINDING 8

8.45 Some members of the Committee find that the Chief Minister and Treasurer, Mr. Andrew Barr MLA, then the Minister for Economic Development and Minister responsible for the Land Development Agency, was on two occasions involved in the approval of the acquisition of rural leases during this period but there is no evidence before the Committee to suggest that he considered whether the Land Development Agency's acquisition of rural leases to the west of Canberra was consistent with existing ACT Government policy or in alignment with the Land Acquisition Policy Framework.

In connection with finding 8 a footnote in the PAC recorded:

Ms. Cody MLA and Ms. Cheyne MLA requested that the report show they dissent from this finding. While there is no evidence to suggest that the Chief Minister reviewed these, there is equally no evidence to suggest that he did not review these. The Committee never posed the question to the Chief Minister. Ms. Cody MLA and Ms. Cheyne MLA cannot support a finding which has no basis.

18. For the sake of completeness, those findings should also be read in conjunction with the Committee's following conclusions:

8.46 The report of the Auditor-General into the Assembly of Rural Land West of Canberra dwells [sic] with a number of acquisitions over a four-year period. According to the Auditor-General's assessment against criteria none of these acquisitions fully followed the test laid down in the Framework.

8.47 It is clear to the Committee that some of these acquisitions were made to facilitate essential infrastructure. This includes The Vines, Pine Ridge and Wintergarden. For the most part the Committee considers that these acquisitions were straight forward and met the Territory's need to augment infrastructure.

8.48 Other land: Milapuru, and Fairvale, were acquired directly as part of a strategy to obtain land for future residential purposes and stems directly from an unsolicited proposal from Colliers International. This strategy never obtained explicit authorisation from Cabinet. It is the Committee's view that these purchases did not obtain appropriate authorisation.² On top of this, the strategy was never completed partly because some of the land is not for sale and partly

² In a corrigendum to the Auditor-General's report it was noted: "At its meeting on 11 December 2014 the former Land Development Agency Board considered the District of Stromlo Acquisition Strategy paper ... and agreed that the former Land Development Agency should pursue the purchase of three properties identified in the strategy; Milapuru, Fairvale and the National Equestrian Centre. This decision is a marker of the commencement of purchases to the west of Canberra (eight properties in the Western Edge Study area in the Districts of Stromlo and Belconnen, and one property (Wintergarden) north of Molonglo Valley in the District of Belconnen"

because the LDA inexplicably³ gave up the option of acquiring the whole of the property known as Fairvale. Also, the division of Fairvale into two parcels shows inconsistent treatment of parcels of land. The Committee was told of two other occasions when division was broached and immediately dismissed.

8.49 There is a third category: land that was highlighted in the ACT Planning Strategy 2012 and subsequently as urban capable to the north of Stromlo. This seems to have been of interest simply because it became available. Huntly was the first of this land to be acquired. Once this had entered the LDA's portfolio it could be argued that it made sense to acquire Winslade, as it linked the extensive holdings at Huntly with the new acquisitions in Stromlo. There was no strategy to these acquisitions and no explicit authorisation from Cabinet.

8.50 Throughout this inquiry the Committee was struck by the lack of proper processes that accompanied the decision-making around these purchases. Further, the initial failure to ensure the proper management of such large rural holdings shows poor administration.

8.51 In addition, the Committee is concerned about the lack of proper processing of an invoice for \$298,0452. The Committee does not believe that all the facts have been presented regarding this payment.

8.52 Considered together the failure to comply with the Framework, the lack of policy direction, poor communication and inconsistent treatment of vendors, failure as a land manager, and failures in processing invoices point to significant probity risks and maladministration. This, taken together, suggests that some of these acquisitions would benefit from further investigations by the ACT's Integrity Commission.

19. The purpose of setting out this history of findings and recommendations is not to suggest that there is a pattern of conduct, or indeed attention or inattention to oversight entities' findings, that should enliven the functions of the Commission. Rather, it is intended to show that the events in question have been amply scrutinised on more than one occasion by bodies with adequate power and proper capability to probe the policies and processes of public officials and those with whom they have contact. To the extent that the recommendations apply to the successor bodies to the LDA, it is apparent that those bodies have considered and accepted the recommendations.

Conduct for the Commission to consider

20. In exercising its functions, as noted above, the Commission must prioritise the investigation and exposure of corrupt conduct which the Commission considers may constitute serious corrupt conduct or systemic corrupt conduct. This does not restrict the Commission's discretion to decide to investigate (or not to investigate) any matter

³ This characterisation of the reason for not purchasing the whole of Fairvale seems inappropriate, given the extensive evidence from the relevant parties that explains how the proposal unfolded.

that it considers may constitute corrupt conduct. A significant threshold before an investigation can be commenced is the determination that there are reasonable grounds for suspecting the commission of corrupt conduct as defined in the Act. Further, in exercising its functions, the Commission must take into account the responsibility and role other public sector entities have in the prevention of corrupt conduct. Of course, it is not the role of the Auditor-General or the PAC to *investigate* corrupt conduct as such, but their roles of inquiry and promoting public accountability nevertheless form an important part of the fabric of *prevention* of such conduct.

21. In that regard the Commission notes –

- i. The entity at the center of the audit and parliamentary inquiries (the LDA) no longer exists and the relevant personnel are no longer public officials. While the Act makes it clear that these factors are not a bar to the Commission exercising its functions, they remain relevant.
- ii. Notwithstanding legitimate concerns about want of Cabinet or other approval, the PAC appears to have accepted that some of the land purchases were appropriately made to facilitate essential infrastructure, the Auditor-General notes some land purchases were at least in line with a Stromlo Acquisition Strategy, and some purchase negotiations commenced somewhat serendipitously.
- iii. PAC's recommendations were not unanimous and some members felt some conclusions had no basis.

22. It is not necessary or, in the present case, desirable for the Commission to address every finding, recommendation and/or concern of the Auditor-General or PAC and the Commission does not intend to do so. The circumstances described in considerable detail in the reports of those two entities, however, justifies the Commission's focus on three issues, namely –

- *The involvement of a single real estate services company official⁴ (Mr. Powderly of Colliers International) in the early stages of the procurement process.*

This is potentially relevant as it suggests that preferential treatment may have been given to Colliers, which subsequently gained a financial benefit from that treatment.

⁴ Minor edit as requested by Colliers International

- *The process by which the LDA purchased part, but not all, of one particular parcel of land (Fairvale).*

This is potentially relevant as it may be said that either the former owner of the property was given preferential treatment through allowing her land to be sub-divided when others were told this was not permissible and/or because that person or the third party purchaser of the other portion of the land made gained an inappropriate financial benefit as a result.⁵ There were also issues about whether an appropriate independent valuation had been obtained.

- *Compliance with the Planning and Development (Land Acquisition Policy Framework) Direction 2014 (No 1) (the “Framework”).*

There was extensive discussion concerning the interpretation of the Framework, particularly by the Auditor-General, largely adopted by the Committee. The views of the Auditor-General and the differing opinions of the government agencies (Economic Development Directorate (“**EDD**”) Suburban Land Agency (“**SLA**”), and Treasury) are adequately set out and it is not the role of the Commission to adjudicate between them. It is fair to comment, however, that the Framework does not have the precision, though it has the status, of a legal instrument and much can legitimately be said for each side of the debate. Because of the potential significance for other transactions, a fundamental issue concerning the character of valuations required to be obtained by the Framework needs clarification. This issue is discussed below.

23. In short, the Commission's conclusion on those matters is that, while the processes of the LDA left much to be desired in terms of appropriate documentation of key elements of the transactions and not always appearing to comply with the Government's own procurement framework, neither of the two areas of concern raises a reasonable suspicion of corrupt conduct. The Auditor-General and PAC have identified many areas that suggest inadequate attention to detail and good practice by the LDA, including by its Board and senior officers, and perhaps even a failure to ensure that the primacy of Cabinet's deliberative processes was observed. Those

⁵ Mr Powderly's evidence as to involvement is set out at [26]. Colliers International suggested this observation should be reworded to state: “The LDA / ACT Government needs to consider that if a Service provider comes to the Government with strategic advice, should they engage that party to assist, or go out to the panel of service providers and engage others”. This is a reasonable point, but the Report does not require amendment.

matters may well have been instrumental in inducing the dissolution of the LDA, but in the Commission's view, taken at the highest, they do not demonstrate dishonesty, partiality, breach of public trust, fraud or obtaining personal advantage, which are the hallmarks of corrupt conduct.

Reasons

24. The planned city of Canberra was famously conceived after an international design competition and its 100 plus years of development to date have been an ongoing exercise in implementing the founders' vision. It is not the place of this report to examine the vicissitudes of governmental arrangements for the establishment of the national capital or the patterns of the weather that have long been such a strong feature of this region. It is relevant, however, that the relatively constrained 'bush capital' was deliberately sited in a location designed to capture the flow of water from surrounding mountain ranges, but inadvertently also sited in the direct path of bushfires that would come to ravage it on a regular basis.
25. The city has expanded well beyond the geographical and population forecasts of its originators. It is not surprising that, for the purposes of safe and amenable town planning, various authorities over the years have been charged by government with the responsibility of identifying, and various real estate companies have been involved in the sale and purchase of, appropriate parcels of land for residential and other development. In the case of the fire-prone western edge of the national capital this has involved a delicate exercise of balancing maintenance of the unspoiled quality of the natural environment—the bushland, the rivers and the native fauna—with the needs of the fast-growing urban population. These and related issues have been the subject of wide-ranging and more or less continuous public controversy and debate since the creation of the Territory.

Colliers attendance at the March 2014 planning day.

26. Mr. Powderly explained in his evidence to the PAC how he came to be present at a strategic LDA planning day in 2014. There is no reason to doubt the veracity of this evidence and the Committee (justifiably) did not seek to contest it. To that end it is worthwhile setting out Mr. Powderly's evidence in some detail:

“Colliers International is fairly well known to the ACT government. We have provided our research for the former LDA, the planning authority and the Suburban Land Agency for the past 25 years into the residential market in Canberra. So we have certainly got a good handle on and great knowledge of that sector of the marketplace, which is why we have been involved in some of the conversations with this acquisition strategy.

...

Because of our involvement with providing the ACT government with a fair bit of the research into the markets which has formulated land release for many years, we were invited to a planning session that was put on by the then ACTPLA and the then LDA to talk about Molonglo and the future densities and how Molonglo would be developed. I attended that with one of my colleagues.

Effectively, the conversation went around the fact that we were running out of land and that by about 2030 we would be pretty much short of broadacre land to develop. There was a conversation about how we increase the densities in Molonglo, add more medium density in there and so on.

We left that meeting with the pretty clear view that the amount of suburban residential land had a finite supply and that, as a result of a lot of the environmental impacts there, we were going to run out of land at some point in the future. From my perspective and from my colleague’s perspective, we thought that that would be a bit of a shame. So we did a bit of a snapshot of what land was available within the ACT and across the border that could be future development land. We looked as far as Jerrabomberra north, just outside of Canberra, to where the current development is happening out near Holt, and looked at all the land down south, because a lot of that land had been cleared of vegetation through the bushfires, which is why Molonglo was being developed.”

We came up with a parcel of land which was the land through Stromlo as probably one of the better areas to focus on. We set out in our strategy report a whole lot of reasons why. One was obviously that we were developing Molonglo. We had infrastructure to the front door of that land with Hindmarsh Drive pretty much terminating the front of it. The land had been reasonably cleared from the bushfires: a lot of the native vegetation, grasslands and so on. And obviously it was more to the south of Canberra, which enabled south Canberrans to have a choice of land, which they currently do not, with Gungahlin in the north. So we saw it as a good parcel of land. We wrote up a strategy report. If you have not read it—it is quite comprehensive; there are a whole lot of attachments—

...

Effectively, the paper sets out an acquisition strategy for the Land Development Agency. It goes through the parcels that have been identified. It includes copies of the crown leases. It tells us who owns them, how long they have owned them for and what the potential may be on that land for the government in terms of future opportunity, knowing, of course, that ... [n]ot all the land is developable; you have to lose some land for river corridors and so on. I went through and did a bit of a hypothetical analysis of what that revenue might look like for the Territory if they owned the land as opposed to a private developer. Then it made some recommendations around the sorts of values that these parcels might be worth if you wanted to buy them in a marketplace. It talked about the strategy, how it would be done. Then we left it in the capable hands of government to think about it.

...

It is not the first time we have done this. We have actually made recommendations to the ACT government in previous years to acquire parcels of land that have been strategic to the Territory. We acted for the Territory to buy Crace. We bought that for \$30-odd million from the Commonwealth, did the zoning, did a bit of work and sold it for \$90-odd million to a joint venture, and the Territory did extremely well over that. We acquired part of section 63 from the Commonwealth, acted for the ACT government in that process and then sold it for \$90-odd million dollars at an auction in 2017.

Glenloch: we have purchased a lot of properties. All I am saying is that it was not a unique thing. It seems to be that everybody thinks this is a unique thing for the Territory to be looking at strategically acquiring land, but it has been going on for—through former parts of government.

We presented it, as I said, and then there were conversations that happened after that as people got their heads around what that meant and how the government would go through that process.

...

Under our Colliers' contract with the LDA, for which I can give you the contract number and the reference number, which started in 2013, we respond to the LDA's request every three years to submit our fee proposals and our services that we can provide to the LDA. They range from doing evaluation services to selling properties, acting for them in acquiring properties, marketing services; it is a full schedule of fees. Those are submitted through the probity part of government. We are written to and told that we are appointed to provide those services as and when we are asked to. There cannot be a conflict when I am acting for the LDA in accordance with my own contract and get paid in accordance with my set of standard fees that have been agreed through the procurement part of government, I do not understand how there is a conflict. I am acting in the interest of government to acquire land as per a strategy.

[THE CHAIR: But it has been put to the committee that the paper that you presented to the LDA was unsolicited.]

Correct.

[THE CHAIR: Would it be within the suite of the terms and the suite of payments that you would be paid for unsolicited work?]

There are two steps there. Firstly, we provided the strategy report for the government to consider whether they would adopt it. When the government decided, or when the LDA decided, to proceed with it, we provided them the same strategy report with the fact that we were then going to act for them and included in it how we would be remunerated. That was provided as a hard copy to the LDA. It clearly stipulated, "In accordance with our current contract with you, we'll help you in these negotiations and we'll be paid in accordance with the standard fees." So, when they decided to proceed, that would be submitted to them. That is how we were remunerated.

Colliers, like all real estate companies, have to comply with SOX, which is Sarbanes-Oxley compliance. We cannot generate an invoice for a fee unless we have a contract. We produced all that information and we then provided an invoice on 15 December for the work that we had done on a number of those acquisitions. We very clearly met our audit requirements and obviously the LDA's requirements, because they had all the documentation and they paid the invoice.

...

The reason that we had these contracts with the LDA is that we were doing so much work. There was so much happening with the LDA and every single time you had to go and quote for a job; it became just a nightmare. So they set these contracts up for three-year periods. You provided your fee proposals and you just did the work. Sometimes you lost money on them and sometimes you did well, but that was with the standard fees that we agreed to at the time. So, from my perspective I do not know what internally existed within government. It was clearly articulated that we were to go out and deal and acquire some of these properties, and we did.⁶

27. The Committee's concern was that the LDA appeared to rely "unreservedly" on subsequent advice provided by Colliers. Whether it was appropriate to rely on the advice depends, fundamentally, on whether the advice was reliable and useful. It was not directed to lay persons but to an expert committee well able to make that judgment. As was pointed out by the former members of the LDA Board, its members had a great deal of experience in dealing with the issues of land supply in the Territory and the commercial factors applying to such acquisitions were well understood. The Board "regularly held discussions with Ministers, industry representatives, and LDA and EDD staff on the Territory's future land supply ..." Board members had "extensive expertise and professional qualifications in public law, engineering, economics, business, town planning architecture, land valuations and public administration". It should be concluded that, in accordance with their responsibilities and the expectations of government in appointing them, the members were required to, and did, bring their own experience and judgment to bear on the Colliers report. Whilst, on its face, it might have been prudent for the LDA to seek additional (whether it be alternative, competing or corroborating) advice from other real estate consultants, this was a judgment call it was well qualified (indeed, required) to make; it was far from essential that it should obtain any additional advice and certainly not suggestive of a lack of probity, let alone corrupt conduct.

Acquisition of Fairvale

28. There were significant discussions in the ACT about rural leases in the late 1990s and early 2000s. These discussions led to the ACT Government making 99-year

⁶ PAC Transcript of proceedings 20-11-2019 Extracted from pages 238-241

<https://www.hansard.act.gov.au/hansard/2017/comms/pac41a.pdf>

leases available to almost all rural lease holders, adopting a policy which protected rural leases from other uses and discouraged the division of rural leases into smaller parcels of land. Put simply, the policy discouraged any subdivision of rural land in the ACT.

29. Testimony was given to PAC by the former owner of Fairvale, the former LDA CEO, Mr. David Dawes, and the ultimate purchaser of part of the Fairvale property, Mr. Steven Flannery, who was also a real estate company director who had been asked by the former owner of the land to value the property.
30. It appears from transcripts that the timing of the approaches to the former owner about purchase of her land, by Colliers on behalf of LDA and by Mr. Flannery on his own behalf, was in large part coincidental. Again, it is instructive to repeat the former owner's demonstrably candid evidence to PAC here in some detail:

"I decided, for a couple of reasons, that I could not keep killing myself on the place. My children did not want the property and I had a bit of a problem with the only employee that I had. I thought that maybe I should sell it. I thought, "How am I going to do this?" I chose some valuers to see what it was worth and how I would do this. I had three valuations—called three people in. At that stage the only people that knew that I was even contemplating selling were those three valuers, my husband, my two kids, a good friend and my brother in Sydney—and the employee, who was horrified. Nobody knew, but I went ahead and thought, "How do I do this? How do you actually sell a property like this?"

When I chose an agent, which I did very early, on 2 July, I chose an agent because it would be on an expression of interest basis, not an auction. I did not want a clearing sale. I chose that agent because another agent had said, "We had no idea this sort of quality place existed. I can sell it to the Chinese." I said, "No way." I chose a local agent from Yass and signed an agreement with him that he would be the sales agent.

At the time we were approached by Colliers, initially. We had a marketing plan. Photographs had not been taken. There were no advertisements out. We thought we needed a building inspection. All of this had been planned for weeks later, but the agent was contacted by Colliers and PRD realty for a meeting. All of the photographs and all the rest of it suddenly became defunct. As soon as I knew that there was an interest from the ACT government, I was absolutely horrified. I thought, "I can't sell it anywhere else because some other nice farmer that's passionate about the land may want to have some sort of succession plan for his children. The property is obviously going to be resumed and it's going to be kerbed and guttered. So let's get rid of it as fast as we can."

[THE CHAIR: You were, independent of anything that was going on in government, planning to divest yourself of the property, and you started that process?]

Yes.

[THE CHAIR: During that process, in the early stages, your agent was contacted by Colliers?]

He was contacted by Anthony Harris, who apparently is PRD realty, and Paul Powderly. He was rung on 28 July. My agent rang me on the night of 28 July and said, "People have rung. They have an interest in the property. I'm having a meeting with them tomorrow. We'll see how that turns out."

They contacted him up-front. They knew he was the agent because one of the other valuers, David Nolan from Webster Nolan in Sydney, had been the second valuer that I had called in. He came in on the 15th of the 6th, I think. He is the person that said he was going to sell it to the Chinese. He was blown away by the place and said he had no idea there was such a quality place in Canberra. I looked at his marketing plan and thought, "I don't want to sell to the Chinese." He was in Sydney and it was all going to be complicated. I let him know that I was not going to put him on as sales agent.

I subsequently put on Col Medway at Landmark Harcourts, I think they are called—

My assumption is that the only way that anyone from Colliers, PRD realty or anybody could have known about this would have been because he talked to somebody, and they jumped in. I understand that the ACT government did not want to purchase any properties that went on to the open market. We had not even put ours on the market; nobody knew. They wanted to jump in earlier. We were subsequently told by Paul Powderly, at a meeting on the 4th [of August] in the Colliers office, that ... David Dawes and he had an interest in buying the property—there was a strategic interest—and that the government would offer 10 per cent over market price to purchase the property up-front so that it did not go to auction and so that they were not on the open market. He also said I could stay there for as long as I wanted. It would cost something like \$1 per year to stay there. But it was important that this was done before the property went to auction, expression of interest or whatever else.

...

I had three valuations. ... I thought, "Just for my own personal thing, maybe I need a fourth valuer, because I need to get this right. If I am going to accept something, I need to know what is fair and reasonable." So I contacted a few rural people in the ACT that I know quite well and said, "Who did you use? You sold that property. What did you do?" It is hard in the ACT to get somebody that even knows how to open and close a rural gate. Two people said to me that the director of Knight Frank [Mr. Flannery] had been and valued their place. They thought he was very good. He obviously knew his way around a rural block. I thought, "That sounds okay," from two people whom I trusted. So I rang him and asked him some time—quite a bit later—could he please come and give me a valuation.

...

t]he director of Knight Frank came in a personal capacity to value the place on the 31st of the 7th ... I did not even tell him that there had been any expression of interest. He did not know ... I did not mention anything."

[THE CHAIR: [The director of Knight Frank] came and gave you a valuation. The evidence indicates that very soon after that he came to you and made an offer that he was interested in purchasing the block himself, but he did not want all of it. Is that the case?]

That is the case. He did a very thorough valuation, the same as David Nolan had done. He said he would have a report to me in a few days. He then came back, I think the following day, rang and said, "Can I come and talk to you?" He asked me did I really want to sell this place and it was absolutely wonderful, blah, blah, blah. I still at that time did not tell him that there had been interest or contact from the government or Colliers. He asked me a pile of questions. I burst into tears. It does not matter.

He then asked—I think it was about the 2nd of the 8th—could he come and see me again and he said that he was interested. I said, "Well, we have a problem because, actually, the government has expressed an interest." I think it was about the 4th or something that he said that he really wanted to buy a portion of the property. I said, "I do not think that is even possible; you cannot subdivide ACT rural blocks." He said, "If there was some way of doing it, would I be happy to." I said something to the effect, "Well, I don't know how on earth you'd do that, number one. Number two, I need this place sold and it sounds like there's an offer from the government." He needed to contact Col Medway about this because I didn't do anything without an agent being involved.

Yes, it was a few days later he came back to me, talked me through, asked me if the deal was the same—whatever the deal was—but if it could be subdivided and he could buy a portion, would that be acceptable to me. Yes, that is how it worked, I think.

...

I said, "Well, I wouldn't know how on earth you would ever be able to do that." He said, if he asked some questions and if it worked, would I be happy to? I said, "On the condition that it does not hold up the sale of this place. The problem is if it gets complicated." At this stage, I was pretty stressed about the whole thing. I needed out. Once I knew the government was going to kerb and gutter it, I did not want anything to complicate things. A fair bit of conversation went backwards and forwards. In subsequent times David Dawes contacted me and said, "Everything is going to be fine. It will all go through all the same. The price will be the same. It's pretty simple." It was not. This sounds silly, and people have asked me before, but why did I allow the place to be sold in two separate sections and cause all this chaos?

I was guaranteed that it would all go through very quickly. It did not matter, the price would remain the same and it would be split, blah, blah, blah. It seemed to me, when I thought about it, that it would be a good idea if it was not going to cause a problem because, firstly, the director of Knight Frank was passionate about the place and the land and trees and he came from a farming family, which impressed me.

Secondly, I was the one that ran the place. I was the one that had to get rid of all the cattle, all the machines, clean everything up. He was interested in taking 35, I think, of my cows with young calves at foot—some of the young ones that could go on, so they were not going to have to be disposed of or killed. After 20-something years of doing embryo and AI programs and breeding a really quite lovely herd, that was impressive.

Thirdly, I was paranoid that, if the government did buy it, there are so many hoons that race up and down the Cotter Road and burn cars. I knew that old shearing shed that we nearly killed ourselves trying to save in the fire would go up like a packet of crackers when some idiots on the road came in and decided to light it or have a barbecue underneath it and I thought it might live a bit longer.

Fourthly, he wanted to purchase some of the machinery on the place, so it meant I did not have to try and find buyers for the backhoe and for a whole lot of stuff I had to personally sell; there

was a lot that he was happy to buy. I thought this could work out really well. I never wanted to have a clearing sale. They were the reasons I agreed to sell it in two parts. The most important one was that I had been guaranteed that the price would remain the same, the processes would be really simple and it could all go through quite quickly, and so I agreed to it.”⁷

31. According to testimony given by Mr. Flannery, he had a meeting on 7 August 2015 with Mr. Dawes during which he went through the proposal and declared his interest in acquiring part of the property. Mr. Flannery further testified that Mr. Dawes told him the proposal ‘would work if it was agreed “off market” and if all parties agreed ... that it could well be a win for all parties because the LDA did not want the property with improvements.’
32. On 24 August 2015, the LDA sought advice from the ACT Government Solicitor (“**ACTGS**”) whether the LDA could “acquire the desired part of the Block from the Crown lessee” and how long such a process would take. ACTGS responded to the LDA with a solution of the property being surrendered then re-granted. In testimony, the ACT Solicitor General, Mr. Peter Garrisson SC AO, told the Standing Committee this was the best way to achieve the outcome the parties desired and it was not, strictly speaking, a sub-division.
33. Again, there does not appear to be any reason to doubt the veracity of the evidence given by the various witnesses, either as to chronology or motives of the various parties. The Territory was interested in acquiring the land, it became aware the property was about to come onto the market, it decided to get in quickly and even pay a premium to secure the deal, but ultimately found itself dealing with a vendor passionate to ensure at least some of the land remained in private hands for rural farming purposes.
34. The Auditor-General and the Committee noted that permitting Fairvale to be subdivided appeared to be inconsistent with denying to another of the putative vendors his application to subdivide. This may be so, although the character of the refused application was not described in either report and the criticism appears to

⁷ PAC Transcript of proceedings 5-2-2020 Extracted from pages 283-289
<https://www.hansard.act.gov.au/hansard/2017/comms/pac43.pdf>

have relied on a broad characterisation of what was proposed, effectively precluding worthwhile comparison. Fairvale was to be split into only two blocks, in the context where the much larger block was to be acquired by government for ultimate residential use, which necessarily implied further subdivision. In short, except for the block obtained by Mr. Flannery, the land was not going to be retained for rural use – the principal reason for the non-subdivision policy. Thus, the policy does not appear to have been undermined by the Fairvale arrangement.

Value for money

35. One of the three tests specified by the Framework under the rubric “The Value for Money Principle” was test 5 was, namely, “The proposed purchase price for the site is consistent with the independent market valuation”. According to advice from the Australian Government Solicitor (“**AGS**”) obtained by the Audit Office (and, hence, not available to the relevant officials at the material time) –

The better view is that ‘the proposed purchase price is consistent with the independent market valuation’ requires that a relevant price accord with and not be significantly above or below the independent valuation.

...

We note that there is a well-developed legal framework within which market valuations occur. It appears that the Direction is contemplating a valuation which is undertaken within that framework and by a person appropriately qualified to apply it.

36. The Auditor-General cited, in respect of the meaning of market value, the Australia and New Zealand Valuation and Property Standards (2012) subsection 15.3.3, quoting the following passage (as to essential elements of the definition) –

the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arms’ length transaction after proper about marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion.

The AGS advice added that the process of valuing involved a consideration of the “highest and best use” to which a prospective purchaser might put the land, noting that the Australia Property Institute defines “highest and best use” as “the use of an asset that maximises its potential and that is physically possible, legally permissible and financially feasible”.

37. The Auditor General concluded, in effect, that what is legally permissible for the purpose of this factor is confined to the position as at the date of the valuation. This is, however, a gloss on the actual rule and misinterprets the well-established application of the notion of the “highest and best use”, which is not limited in that way and is directed, rather, to ensuring that the actual use of the land at the time of valuation does not control the market value. This is made clear by reference to the governing principle defining market value, which is the amount likely to be agreed between the hypothetical bargaining parties. Thus, where there are reasonable grounds for considering that, for example, advantageous planning changes might be made within a foreseeable time, a knowledgeable vendor is likely to value the land by reference to that possibility and adjust their price expectations accordingly; a knowledgeable purchaser is, of course, likely to do the same. It follows that the market valuation will necessarily reflect future possible developments, even those which are currently not permitted, naturally dependent on the likelihood of the advantageous variation occurring. This was the view correctly adopted by the SLA (and, indeed, quoted by the Auditor General in the report).
38. Mention has been made of the lack of an independent valuation. That this occurred is clear and, plainly enough, it represented a failure of compliance with the Framework. Nevertheless, the circumstances were such as to justify reliance as a practical outcome on the valuation that had been obtained, particularly considering the “green fields” nature of the site. No question of corrupt conduct arises in respect of this issue.
39. The Commission sees no utility in inquiring further into these three areas of focus.

Conclusion

40. Under the Act if the Commission receives a corruption report, it must either dismiss it, refer it to another entity or investigate it.⁸ It must dismiss it if satisfied on reasonable grounds that it does not justify investigation.⁹ Having regard to all the circumstances, for the reasons set out in this special report, the Commission therefore dismisses this

⁸ Act, s.70

⁹ Act, s.71(2)

corruption report on the basis that the subject matter has already been appropriately dealt with under other laws in force in the Territory and further dealing with it is not justified.

41. The persons identified in this special report are not the subject of any adverse comment or opinion.