ACT INTEGRITY COMMISSION

Special Report – Sale of Block 30, Section 34, Dickson

August 2022

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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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23 August 2022

Ms Joy Burch
MLA Speaker
Legislative Assembly
Canberra ACT 2601

Madam Speaker,

The Auditor-General's Report No. 3 of 2018: *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson* was presented to the Speaker of the Legislative Assembly for the ACT on 21 February 2018 and tabled in the Assembly on 22 February 2018. The land in question was purchased by the Canberra Tradesman's Union Club in a transaction that involved the purchase by the Territory of property owned by Tradies, the proceeds of which provided the consideration paid by Tradies for Block 30. In due course the Auditor-General's Report came to the Standing Committee on Public Accounts for examination.

On 21 May 2020, the Committee tabled its Inquiry Report on that of the Auditor-General. The Committee recommended that the ACT Integrity Commission investigate the ACT Government's sale of Block 30, Section 34 Dickson to the Canberra Tradesman's Union Club.

This Special Report for the Legislative Assembly, comprising the Commission's consideration of the corruption complaint in respect of the transaction, is provided pursuant to s 206 of the Act.

The Hon Michael F Adams QC
Commissioner

Executive Summary

[This summary is not to be read as part of the Report]

1. In 2012 the Territory Government offered for sale a car park as a development site in Dickson (Block 30), adjacent to the Tradies Club. The sale was managed by the Economic Development Directorate ("**EDD**") through the Land Development Agency ("**LDA**").

2. The ACT Cabinet had decided that the car park should be sold by way of public tender. In the result, the only bidders were Tradies Club and a company owned by Woolworths. Tradies proposed a development comprising 130 residential apartments, 1,240m^2 of ground floor commercial space and a two-level basement for public and private parking. The tender price offered by Tradies was $2.2 million (excluding GST). Woolworths proposed a 1,250m^2 Dan Murphy's store, 440m^2 for three other retail spaces and two levels of basement car parking and a tender price of $1.6 million (excluding GST).

3. After lengthy and complicated negotiations, a contract for the sale of Block 30 to Tradies was entered into for the price of $3.18 million. In a separate but linked transaction, the Territory agreed to pay Tradies $3.55 million and $45,000 for two parcels of land owned by Tradies (in the Report referred to as the "Downer site"). The $415,000 price difference between the sale price of Block 30 ($3.18M) and the purchase price of the Downer site ($3.595m) was to be paid by the Territory to Tradies on settlement of the Downer site transaction. This was completed on 15 December 2014. Contracts were exchanged on the same day for Tradie's purchase of Block 30.

4. The Block 30 sale was complicated from the beginning by the requirement that settlement (and submission of planning approval) could not occur before the later of two events – either two years had elapsed from the date of the contract or a certificate of occupancy was issued for separate works underway on an adjacent property being developed by Coles. The purpose of this requirement was to ensure the continued availability of public parking. This time has not yet expired, with the result that Block 30 has not yet been transferred to Tradies.

5. The nature of the Block 30 sale transaction, and the circumstances in which it came about, were examined by the former Auditor-General. Her findings were documented in a report tabled in the Legislative Assembly in February 2018, and contained a number of criticisms of the process and, by implication, of relevant officials. The Legislative Assembly's Standing

Committee on Public Accounts ("**Committee**") then examined the issue, and subsequently tabled its inquiry report in May 2020. It also criticised the transaction and the manner in which it occurred. Two members of the Committee recommended that the matter be referred to the Integrity Commission for investigation.

6. The Commission's role is unique in the Territory; it performs a different function to the Auditor-General, and parliamentary Committees. Its primary function, as an independent agency, is to investigate and expose "corrupt conduct" as defined by the *Integrity Commission Act 2018* ("**Act**"). The Commission is entrusted with certain compulsory powers to enable it to do so. This report contains discussion of the Commission's role and approach, the definition of "corrupt conduct", and the application of the Act to members of the Legislative Assembly, including Ministers.

7. The Committee's referral was accepted by the Commission as a corruption complaint. The Commission is then required by the Act to assess the complaint to decide if it should be investigated, dismissed or referred to another entity. To commence an investigation, the Commission must form a reasonable suspicion on the evidence before it that the conduct under assessment may constitute corrupt conduct.

8. In this matter the Commission is satisfied that the legal threshold for investigation was not met. The Commission is further of the view that many of the criticisms made by the Auditor-General and the Committee were not justified. Accordingly, the investigation was discontinued.

9. Because the sale of Block 30 has been the subject of detailed public reports that attracted significant public attention, the Commission considers it is in the public interest that its analysis of the evidence be recorded and published in a Special Report. This Report explains the Commission's findings and its reasons for differing from – and in some respects contradicting – those of the former Auditor-General and the Committee.

10. In short, the Commission found that the land sale process itself was adequate and complied with all necessary legal requirements. While there was an inappropriate lack of documentation surrounding some aspects of the transaction, there was sufficient material to enable the Commission to confidently conclude that there was no reasonable suspicion of corrupt conduct on any person's behalf. There was also no basis for a reasonable suspicion of political interference in the transaction.

11. A key element in the Commission's assessment is the finding that inappropriate reliance was placed by both the Auditor-General and the Committee on an independent valuation of $3.18 million for Block 30 that was obtained by the EDD in November 2012. The EDD obtained this valuation in an endeavour to set a reserve price for the land sale.

12. The Commission's view is that there was misapprehension of the true significance of this valuation, which was accepted at face value by both the former Auditor-General and the Committee. Neither the valuation nor their reports took account of the significant risks that would be faced by a purchaser of Block 30 arising from the very substantial delay in development that was part of the deal. This would almost certainly substantially shrink the market interest in Block 30. An added general consideration is that there are inevitable inherent and multiple uncertainties involved in attempting to value a development site. There were, as well, several significant problematic issues with the valuation method itself.

13. The reliability of the estimate should also have been assessed in light of the number of bids (only two) and the actual prices offered (much lower).

14. It followed that the many findings of the former Auditor-General and the Committee that depended to any significant extent on the reliability of the initial estimate of market value were necessarily distorted and, thus, questionable. This is often what facts do to hypotheses. The Territory officials, on the other hand, plainly understood the significance of the tender outcome.

15. The two bids for Block 30 were assessed against specified, weighted criteria by an Evaluation Team. It comprised four members, including three Territory officials and an independent Chair with extensive property industry experience, and it was briefed by a Probity Officer. The Evaluation Team recommended Tradies' bid as preferred. Whilst some criticisms of the transparency of the evaluation process were rightly made by the Auditor-General, the grounds for the evaluation against the criteria were clear enough to exclude any suspicion of improper conduct.

16. The major differences between the Tradies' bid and the Woolworths' bid, as assessed by the Evaluation Team, were the development concept viewed in light of the Dickson Centre Master Plan (a substantial mixed development proposed by Tradies, against a liquor store and a few shops proposed by Woolworths) and the tender price ($2.2m proposed by Tradies as against $1.6m proposed by Woolworths). On no reasonable view could Woolworths' bid

be regarded as superior. Nor was there any legal or other basis for terminating the sale process or negotiations at that stage.

17. The conventional complications of constructing a mixed commercial building on an essentially green fields site subject to complex planning requirements inevitably gave rise to complicated negotiations between the Territory and Tradies. In several respects the ultimate contract for the sale of Block 30 differed from that envisaged in the Request for Tender. The contractual negotiations were substantially conducted by the ACT Government Solicitor, who considered that the contract was compliant with regulatory requirements for a transaction of this nature.

18. The Auditor-General and the Committee expressed strong doubts about the probity and legitimacy of the variations between the Tender requirements and the contractual provisions. In part, their assessment was based on the finding that (very costly) parking requirements had been reduced, when they had not. They also overstated the significance of some of the contractual variations. The former Auditor-General and the Committee in her wake also relied upon highly contestable legal advice from the Australian Government Solicitor.

19. In the result the Commission's criticism of the process for the sale of Block 30 rises no higher than accepting that reasons for key Territory steps and decisions ought to have been better documented. There was no material that could reasonably give rise to any real doubt about the legal probity of the contracts. Nor did the evidence give rise to any reasonable suspicion of wrongdoing or corrupt conduct.

20. Another major focal point of concern for the former Auditor-General and the Committee was the propriety of the Territory purchase of the Downer site. That purchase, in effect, permitted Tradies to offset its purchase of Block 30 with the proceeds. The RFT did not (for obvious reasons) specify the mode by which a tenderer might finance its bid. Although what happened might be regarded as a "land swap", there is nothing in principle unusual about a purchaser of one property selling another to finance the purchase. Again, there is room for legitimate criticism of a lack of documentation of the public purpose served by the Downer site purchase. However, the prior history and the evidence of the officials provided an adequate explanation that dispelled any reasonable suspicion of corrupt conduct.

21. Lastly, there were suggestions that the Chief Minister had personally become involved or otherwise attempted to influence the process in favour of Tradies. There was no evidence before the Commission that he was involved or sought to be involved in the negotiations at

any point, let alone that he sought to influence any material decisions except, at the outset, the decision to sell the land by open competitive process.

22. Having reached these conclusions, it was incumbent upon the Commission to discontinue the matter, on the basis that it was satisfied on reasonable grounds that the corruption report did not justify investigation, in accordance with s 71(2) of the Act.

Introduction

1. The Auditor-General's Report No. 3 of 2018: *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson* was presented to the Speaker of the Legislative Assembly for the ACT on 21 February 2018 and tabled in the Assembly on 22 February 2018. (It should be noted that the Auditor-General responsible for this Report has since left office. All references to the Auditor-General in this Special Report are to the former Auditor-General.) The land in question (referred to in this Report as "**Block 30**") was purchased by the Canberra Tradesman's Union Club ("**Tradies**") in a transaction that involved the purchase by the Territory of property (the "**Downer site**") owned by Tradies, the proceeds of which provided the consideration paid by Tradies for Block 30 (referred to, though not strictly correctly, as a "land swap"). In due course the Auditor-General's Report came to the Standing Committee on Public Accounts ("**the Committee**") for examination. On 21 May 2020, the Committee tabled its Inquiry Report (the "**Committee's Report**") on that of the Auditor-General. On 22 May 2020, the then Chair of the Committee brought to the Commission's attention Recommendation 10 of the Committee's Report –

   > Some members of the Committee recommend that the ACT Integrity Commission investigate the ACT Government's sale of Block 30, Section 34 Dickson to the Canberra Tradesman's Union Club (the Tradies).

   The Chair informed the Commission that, whilst the recommendation was not unanimous, she and her colleague, Ms Nicole Lawder MLA believed that the matters raised in the Auditor-General's report and the Committee's inquiry warranted reference to the Commission as a corruption complaint taking the concerns raised in the Committee's report as specific grounds of the complaint.

2. The following outline provides some context for this matter and is taken from the Committee's Report. The facts set out are, for all practical purposes, not contentious. Block 30 was a car park adjacent to Tradies in Dickson, which it had unsuccessfully sought to purchase in 2010. The Territory government decided in September 2012 to put Block 30 to market via a Request for Tender ("**RFT**") process to be undertaken by the Economic Development Directorate ("**EDD**") through the Land Development Agency ("**LDA**"). (For convenience, unless it is necessary to distinguish between the two entities, this report regards the active agency as the LDA.) MMJ Real Estate ("**MMJ**") was engaged to provide a valuation of the Block, which was provided on 5 November 2012, setting a value for reserve price purposes of $3.18 million. This was adopted by EDD for the purpose of the tender.

3. The RFT was advertised in the *Canberra Times* and, though some 20 parties expressed interest, only two tenders were submitted: one from Tradies offering $2.2 million; and one from Fabcot Pty Ltd, a subsidiary of Woolworths Limited, offering $1.6 million. After an evaluation process, in December 2012 Tradies was identified as the preferred tenderer. EDD then attempted to negotiate a better price than Tradies offered, having regard to the valuation. Complicated negotiations took place over the next two years, ultimately resulting in a transaction in which Tradies agreed to pay the Territory $3.18 million for Block 30 and the Territory agreed to pay the Tradies $3.55 million and $45,000 for land owned by Tradies (Block 6 and Block 25, in this Report referred to as the "**Downer site**"). The leftover cash of $414,000 paid to Tradies was the difference in price arising from the land exchange and while the sale occurred on 15 December 2014, settlement is yet to occur on Block 30.

4. It is convenient to consider the transaction in two phases. The first phase commenced with Tradies being identified as the preferred tenderer, covers the ensuing negotiations undertaken on behalf of the Government by Mr Greg Ellis, then Director, Sustainable Land Strategy with EDD and Mr Richard Drummond, then Project Manager, and ended when the then stage of negotiations and financial terms of the agreement were approved by Mr David Dawes, then Director-General of the EDD and Chief Executive Officer of the Land Development Agency ("**LDA**"). The negotiations had involved the relinquishment by the Territory of a number of the conditions of the RFT and Tradies meeting the consideration by selling the Downer site to the Territory and receiving as "change" $414,000, reflecting the difference in price. The second phase commenced with the lawyers on each side negotiating the transaction to finality, also varying terms of the proposed contract, with Mr Dawes being the final decision-maker on behalf of the Territory.

5. The Committee's Report identifies in its Executive Summary a number of matters which demonstrated, in the Committee's view, that "the conduct of the sale departed from good practice in a number of ways". It appears that the most significant of the problems identified by the Committee were: the difference between the terms of the ultimate transaction and those offered in the RFT; the lack of transparency in respect of the changes, of which the other tenderer (it was said) should have been informed; the sale becoming, in effect, a direct sale, which was contrary to the Cabinet decision to send the land to tender; doubt about value arising from the variation in terms, including a "land swap" which had (it was said) been specifically ruled out at Cabinet level; the substantial risk that, in the result the Territory "relinquished considerable financial value" to Tradies; and there was a high risk that EDD

had sold Block 30 in breach of relevant provisions of the *Planning and Development Act 2007*.

6. The Committee's Report refers to a number of associated issues which, without ascribing any order of seriousness but numbered for ease of reference, are as follows. **Firstly**, the Committee noted that the ACT Government Solicitor ("**ACTGS**") had not been made aware of the outcome of the first phase of negotiations (as set out in a "discussion paper" dated December 2012), naming Mr Ellis and Mr Dawes as having responsibility in this regard. The Committee concluded that this "negates statements made, particularly by Mr Dawes, that the presence of ACTGS probity officers assured probity…[and] also claims by both of those officers that they followed due process in the conduct of the sale". **Secondly**, some members considered that there appeared to be "significant contradictions" between the Chief Minister's evidence and that of other witnesses about the extent to which Mr Barr, at that time Minister for Economic Development and now Chief Minister and Treasurer, was involved in decision-making, considering that this "goes to the question of whether, and if so to what degree, political influence was applied, and the degree to which a Minister of government was responsible for decisions which appear, in the account provided by the Auditor-General, to be questionable". **Thirdly**, the Committee found there were contradictions between the evidence of Mr Dawes, Mr Clint Peters, former Director, Sales and Marketing, LDA and Ms Julia Forner, former Senior Manager, Sales, LDA which "create doubt about the responsibilities of, and formal relationships between, actors involved in the sale of Block 30". **Fourthly**, the Committee considered that there were contradictions between the evidence of Mr Ellis about the effect of legal advice and the account in the Auditor-General's advice as to "whether, and to what degree, the terms of the sale of Block 30 departed from the terms of the RFT" and questioned his candour about his responsibility for material departures from the RFT. **Fifthly**, the Committee considered that the effect of the "land swap" was to vary significantly the terms of the RFT, contrary to the obligations of the Government as tenderer. **Sixthly**, the "impartiality of the process" was compromised because "certain elements of the ACT public service appeared to support Tradies' attempts to acquire Block 30 by arguing against a competitive process in the Cabinet Brief which accompanied Tradies' third application for acquisition of Block 30 by direct sale in 2011…[and also being] involved in tender negotiations in 2012-13". More generally, the Committee points to what are described as "links between Tradies, the CMFEU and the ACT Labor party" which "further discourages a view of the sale of Block 30 as a normal commercial transaction". Also, some members

considered "that there appear to be inconsistencies in evidence about the extent to which Mr Barr…was involved in decision-making".

The role of the Commission

7. The Commission decided that it should regard the Committee's Report as a "corruption complaint" under Division 3.1.1 of the *Integrity Commission Act* (2018) ("**the Act**", to which all statutory references are made unless otherwise indicated) and deal with it accordingly.

8. As an independent agency, the Commission is bound to act in accordance with the Act. Amongst other things, the Act prescribes the matters which the Commission is empowered to investigate. Leaving aside those matters which the Commission investigates of its own motion, the process engaging the Commission's investigative functions commences when (under s 57) a person makes a corruption complaint (here the referral by the Committee), or a mandatory corruption notification is made under s 62 or s 63. Collectively, these are known as 'corruption reports' (per s 69).

9. Section 70 requires corruption reports to be dismissed, referred to another entity or investigated. This requires an examination of the material supplied and any other relevant material that the Commission gathers in its assessment process. In some cases, a "preliminary inquiry" pursuant to s 86 (which permits the exercise of certain coercive powers under ss 89 and 90) may be undertaken for this purpose. Section 71(2) requires a corruption report to be dismissed if the Commission is "satisfied on reasonable grounds that the corruption report does not justify investigation". "Reasonable grounds" may include a number of circumstances, including a determination that further dealing with the corruption report is not justified (per s 71(3)(k)).

10. The Commission is only empowered (under s 100) to conduct an investigation on receipt of a corruption report where the Commission "suspects on reasonable grounds that the conduct in the corruption report may constitute corrupt conduct". "Corrupt conduct" is defined as follows –

> 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:

(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.)

11. 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".

12. Commission of a criminal offence requires no explanation; it should be noted however that, although in strict law even trivial offences would satisfy this criterion, the conduct would also have to fall within s 9(1)(b), which involves serious impropriety of one kind or another. The matters that could constitute a serious disciplinary offence or reasonable grounds for dismissal obviously fall into a wide compass that might well, though not necessarily would, involve moral turpitude. Incompetence in undertaking important tasks or disregard, whether calculated or careless, of standards of work or behaviour, whether because of inability or deliberate defiance, even perhaps for what are believed to be good reasons, would likely justify dismissal or termination of services. There is no bright line and each case is a matter of fact and degree. The additional required factors listed in s 9(1)(b) demonstrate that, to be characterised as corrupt, the impugned conduct must, in effect, also involve an abuse of public trust. It is difficult to think of a case that would satisfy one of the specified factors in this paragraph that would not involve significant moral turpitude. In the present case, the Auditor-General's Report, explicitly or implicitly, suggests there was significant departure from appropriate standards of procedural probity or what should have been understood by a competent official of the relevant legal and administrative requirements; to these matters, the Committee added suggestions that the officials were influenced by political considerations and exhibited a lack of appropriate impartiality. All these matters are capable of raising the possibility of the commission of corrupt conduct (and, no doubt, prompted the reference to the Commission).

13. Whether conduct of a public official who is a Minister (hence, necessarily a Member of the Assembly) could, strictly, amount to a disciplinary offence or justify dismissal or termination of services as provided in s 9(1)(ii) and (iii) is susceptible to doubt, since that language seems to reflect the situation of an employed public official rather than one who is elected. This (strict) interpretation would mean that the possibility of the commission of a criminal offence is an essential ingredient of the statutory notion of corrupt conduct, so far as a Minister (or, for that matter, a Member of the Legislative Assembly) is concerned. A "criminal

offence" is not restricted to the *Criminal Code Act 2002* but comprehends, by virtue of sub s 9(3), any offence under the common law, which includes the law of Parliament. It follows that any intentional falsehood, for example, made to the Standing Committee on Public Accounts would satisfy the first requirement of the definition of corrupt conduct as being the common law offence of contempt of Parliament and likely one of the requirements in s 9(1)(b), for example, a breach of public trust or adversely affecting the honest or impartial exercise of the functions of a public official. (A significant obstacle, that may well preclude an investigation based upon such an allegation, is Parliamentary privilege. It has not, however, been necessary to consider this issue for present purposes.) The result of applying the strict interpretation is that conduct that would be corrupt if committed by a public servant would not be corrupt if committed by, say, a Minister, unless it also happened to be a criminal offence. This would appear to cut across the purpose of the legislation. Section 139 of the *Legislation Act* 2001 provides that, in "working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation". Applying a purposive approach would allow s 9(1)(a)(ii) and (ii) to be interpreted as applying to Ministers as if they were public officials (which, by virtue of the definition of "public official" in s 12(1) of the Act, they are) and, therefore, as if they were subject to the same the disciplinary regime. As will become clear, however, it is not necessary for present purposes to determine this issue.

14. The crucial prerequisite for undertaking an investigation in the present instance – as a practical matter, for the purpose of enabling the Commission to exercise its coercive investigative powers – is that the evidence for conduct that is impugned, one way or another, in the reports of the Auditor-General and the Committee gives rise to a suspicion on reasonable grounds that corrupt conduct has been committed. The phrase "reasonable grounds to suspect" has been the subject of much judicial discussion, which it is not necessary to rehearse here. The formulation generally accepted as the most useful is that suspicion should be understood in its ordinary meaning as a state of conjecture or surmise where proof is lacking. Although the facts which can reasonably ground a suspicion may be quite insufficient to ground a belief, yet some factual basis for the suspicion must be shown. A reason to suspect that a fact exists must be something more than a reason to consider or look into the possibility of its existence. The circumstances must be sufficient to give rise, in the mind of a reasonable person, an actual apprehension that the relevant fact exists as distinct from being a mere possibility. Although the test is an objective one, reasonable minds could of course differ on whether, in any particular case, reasonable grounds for a suspicion

are present. Under the Act, the question is for the Commissioner to decide. The Commissioner, on initial assessment, may decide that the corruption report warrants investigation. However, this issue may be revisited at any time during the investigative process and must be revisited when the actual use of coercive investigatory powers is contemplated, to ensure that the statutory criteria for doing so justify their use. If the Commissioner concludes that there are no grounds to reasonably suspect the commission of corrupt conduct, the investigation must be discontinued and, in an appropriate case, where such a finding is justified, the corruption report should be dismissed.

15. As will be seen, in this instance there is a significant number of relevant circumstances, raising issues of some complexity, both factual and legal. To a substantial degree, the Committee referred to and relied on the evidence gathered and the opinions expressed by the Auditor-General as well as a number of documents it obtained and the evidence of witnesses who gave evidence before it. A number of criticisms asserting or implying incompetence and/or bad faith to a greater or lesser degree were levelled at the relevant officials by reference to a range of material. It is necessary to consider these imputations both individually and as a whole: one shortcoming may be inconsequential but a congeries of shortcomings altogether different. This required the Commission to examine closely the Reports of both the Auditor-General and the Committee to identify the analyses or findings that appeared prima facie to call into question the probity or propriety of the conduct of any of the relevant actors or transactions, consider the underlying evidence and reasoning that led to those findings and decide whether the facts, as identified or otherwise demonstrated, give rise to a reasonable suspicion of corrupt conduct. Detailed consideration has necessarily been required of each of the issues of fact and law that impinged on the legitimacy and legality of the impugned transactions and the questioned conduct that led to them.

16. In consequence, the analysis in this Special Report of the material relied on by the Committee in its Report (including that disclosed in the Report of the Auditor-General) to impugn the official conduct involved in this transaction may appear to undertake the task of critiquing those Reports. This is obviously not the Commission's legislative remit, as such. At the same time, where the Commission has formed a different view to that expressed (or implied) by the Auditor-General or the Committee in respect of a significant finding, it has considered it necessary to explain the reasoning that led to this outcome, bearing in mind the different responsibilities of the Commission on the one hand and the Auditor-General and Committee on the other. However, the Commission's detailed examination goes no further than that

which is necessary in order to give appropriate consideration to the corruption report constituted by the Committee's referral to the Commission and adequately explain the Commission's conclusion.

17. As will be seen, close examination of all the available material has failed to raise the requisite suspicion and, accordingly, further dealing with the corruption report constituted by the Committee's Report cannot be justified.

The role of the Auditor-General

18. Given the importance of the Auditor-General's report, it may be helpful to briefly describe the nature and purpose of a performance audit and associated performance audit report. Performance audits are conducted by the Audit Office under the *Auditor-General Act 1996*, which provides that a performance audit "means a review or examination of any aspect of the operations of … [an] entity". The objective of the audit, in accordance with the Standard on Assurance Engagements ASAE 3500 – Performance Engagements, is "to obtain reasonable assurance about an activity's performance against identified criteria" and state the conclusion, including the basis for the conclusion, in a written report. Thus, it is not the purpose of the performance audit and resulting report to provide an opinion on whether there was corrupt behaviour by any participants.

19. The purpose of the performance audit resulting in Report No 7 of 2016 was to provide an independent opinion to the Legislative Assembly on the effectiveness of Government's management of the disposition of Block 30 in 2014. This required examination of whether appropriate processes were in place for the acquisitions, whether those processes ensured a high standard of integrity and complied with legislative and regulatory requirements and whether the relevant officials acted in accordance with them. Key findings are set out, together with the evidentiary basis for them. Particular decisions were criticised for having been made without recourse to written policy considerations or explained (or sufficiently explained) in any documents. In that sense, the relevant officials (although only identified by role) were criticised as falling short of what might conveniently be described as procedural probity. At the same time, the former Auditor-General has pointed out (in response to the draft Special Report) that the candour of the relevant officials was never in issue, with the Audit Office focused on the system not individuals. At the time of the audit any concerns with respect to corrupt conduct amounting to possible criminal offences would have been referred to the Australian Federal Police, as distinct from inappropriate conduct or conduct

not in accordance with the public sector management principles and practices referred to in the report which, if it could constitute corrupt conduct within the meaning of the Act, would now be referred to the Commission.

20. As it happened, no findings of corrupt conduct, in the sense of criminal offences, were made. However, findings were made that were critical, directly or indirectly, of the conduct of relevant officials and the evidence that was considered to support those findings referred to in the Report and taken up by the Committee (although, as will be seen, the possible relevance of the relationship of Tradies and the Construction, Forestry, Mining and Energy Union ("**CFMEU**"), taken up by the Committee, was not touched on by the Auditor-General). As has been pointed out, the notion of "corrupt conduct" as it is defined in the Act comprehends conduct that might well not amount to a criminal offence but could nevertheless "constitute a serious disciplinary offence; or…reasonable grounds for dismissing, dispensing with the services of, or otherwise terminating the services of, a public official" and, if falling as well within the terms of s 9(1)(b), could amount to "corrupt conduct" within the Commission's remit. Not surprisingly, these issues were not, at least directly, under consideration in the present audit. However, findings as to compliance with the relevant standards can raise and, as it happened, did raise for consideration the issue whether the criteria for "corrupt conduct" were met and, thus, required consideration by the Commission in response to the referral by the Committee, which was in general terms.

The regulatory framework

21. The framework for government procurement in the Territory comprises the *Government Procurement Act 2001* (the "**Procurement Act**"), the *Government Procurement Regulation 2007* (the "**Procurement Regulation**") and, to some extent, the *Planning and Development Act 2007* (the "**Planning Act**"). The *Procurement Policy Circular PC06: Disposal of Assets* makes it clear that the disposal of vacant land is governed by the Planning Act and not by the Procurement Act. Accordingly, the Planning Act governed the sale of Block 30, whilst the Procurement Act the purchase of the Downer site. The Auditor-General accepted that the Procurement Act did not apply to the sale as originally proposed, but referred to it "for information on value for money principles", as stipulated in s 22A, which provides –

> 22A Procurement principle—value for money
>
> (1) A territory entity must pursue value for money in undertaking any procurement activity.

(2) Value for money means the best available procurement outcome.

(3) In pursuing value for money, the entity must have regard to the following:

(a) probity and ethical behaviour;

(b) management of risk;

(c) open and effective competition;

(d) optimising whole of life costs;

(e) anything else prescribed by regulation.

22. Section 238 of the Planning Act allows the LDA "to grant a lease by auction, ballot or direct sale" but, by virtue of s 240, this cannot occur for category (A) of prescribed leases, unless the lease is granted in accordance with the criteria prescribed in the regulations and the Executive (ie the Chief Minister or any two Ministers, *vide* s 253 of the *Legislation Act 2001*). Furthermore, it also cannot occur for category (B) of prescribed leases unless the lease is granted in accordance with the criteria prescribed in the regulations and the Minister approves the grant. Section 240(1)(d) permits direct sales for leases prescribed by the regulations. Regulation 130 of the *Planning and Development Regulation 2008* (the "**regulation**" or "**reg**"), which deals with "direct sales not requiring approval", referencing s 240(1)(d) provides (so much as is relevant) –

(1) The direct sale of the following leases is prescribed:

(a) …

(b) a lease of land (the new lease) if—

(i) a lease of the land was offered by tender but not sold; and

(ii) the new lease includes conditions materially similar to the conditions of the lease offered by tender, other than any conditions relevant only to the tender process;

…

Here, the variations that were negotiated during the process leading to the ultimate contract raised the question whether the condition exempting the transaction from the direct sale prohibition was satisfied or, alternatively, the conditions in the ultimate lease were not materially similar to that offered by the tender. It is important to appreciate that the question posed by the regulation is not whether the terms of the *tender* changed but whether the terms of the *lease* offered by the tender did. Of crucial importance is that the regulatory issue is the significance of the conditions in the "new lease" as compared to those of the lease offered in the tender. Accordingly, changes in the tender or contract conditions that do not vary the conditions of the lease are immaterial, though of course, they might be important for other

reasons. This may be decisive here, since the tender did not itself offer a specimen lease and provision of it was explicitly refused until the preferred tender was identified. (It should be noted, however, that despite the refusal the Specimen Lease was in fact distributed to the potential tenderers before the RFT was closed. Whether this effectively amounted to a *pro tanto* modification of the RFT terms is a complicated legal question which, fortunately perhaps, does not need to be determined but it raises an additional complication in the consideration of the possible application of the regulation.) The question of material similarity is plainly one of fact and degree and highly dependent on the circumstances of each case. It must be understood in the regulatory context, namely the distinction between a competitive process of divestment, on the one hand, and identifying a single putative purchaser, on the other. Thus, even where there is a facially significant change, the conditions will likely remain *relevantly* similar if the competitive character of the process as identified by the lease offered by the tender and that ultimately negotiated is substantially maintained. A mere enumeration of the change or changes will not suffice: the changes in the leases must be evaluated or weighted in light of the transaction as a whole and the impact they might have in the market context in which the transaction is being or has been undertaken. In practical terms, this means a decision whether changes were or were not *materially* similar that does not deal with the relevant meaning of materiality and its application to the particular context of the transaction omits a factor that is critical to its validity. Moreover, dealing with the market context requires relevant experience and expertise, without the assistance of which an opinion is of little or no weight. (In an email cited below, the ACTGS warned the EDD about the possible attitude of the Auditor-General to putative changes to the transaction but, of course, this does not by any means enunciate any relevant legal test.)

23. For completeness it should be noted that the Planning Act allows consideration of a direct sale of land for commercial purposes where the applicant can demonstrate compliance with statutory eligibility criteria for a lease of contiguous land or leased land and provide evidence that the sale would achieve one or more specific grant objectives under the Planning Act. These include benefiting the economy of the ACT or region, contributing to the environment, introducing new skills, technology or services in the ACT or facilitating the achievement of a major policy objective. At the time of the tender, the eligibility of direct sale applications was processed by the Direct Sale Team, comprising officers from a number of Territory government agencies including Economic Development, Treasury and the EDD which would then make a recommendation to Government if the application qualified.

Management

24. The sale process, including the RFT and subsequent negotiations, was coordinated by the Chief Minister, Treasury and Economic Development Directorate ("**CMTEDD**") through its Economic Development stream headed by the Director-General, Economic Development (the "**Director-General**"). EDD, with the ACTGS, developed the RFT documents, managed the tender process and led the subsequent negotiations with Tradies, resulting in the exchange of contracts in December 2014. Responsibility for overseeing the process to finalisation was transferred to the Environment, Planning and Sustainable Development Directorate (the "**EPSDD**") in 2017. The former Land Development Agency (LDA) was a Territory government agency within CMTEDD. On 1 July 2017 its functions were transferred to two new authorities: the City Renewal Authority to focus on transforming the Civic and Northbourne Avenue corridor; and the Suburban Land Agency dedicated to developing new suburbs. The EPSDD was also given responsibility for undertaking the delivery of due diligence activities previously undertaken by the LDA.

Tradies Club

25. Part of the context, certainly from the Committee's point of view (reflected in the summary of relevant points for consideration set out above) was the relationship of Tradies with the CFMEU and, in turn, the relationship of that union with the Australian Labor Party (ALP) of which Mr Barr, when he became Chief Minister, was the Parliamentary leader. Tradies is a company limited by guarantee, with one of its purposes being, as provided in its Constitution, "to provide financial support at the Club's discretion to the CFMEU". Mr Robert Docker, the CEO of Tradies, told the Committee that the "core object" of the Club, as made clear in its Constitution, is to support the CFMEU, indeed, this "is why we exist". That there is a relationship between trade unions, such as the CFMEU, with the labour movement in general and the ALP in particular is neither controversial nor in any degree improper. However, the relationship no doubt explains the questions asked in the Committee hearings of Mr Barr about whether this played any part in the decisions made by Government in the course of the transaction under review. Thus, the Chair asked him whether there was any sensitivity from his point of view, or from Cabinet's, about Block 30 because of its location and the interest in it of an organisation affiliated with the ALP. Mr Barr responded that "there was sensitivity to the extent that Cabinet considered and rejected a direct sale and sought and

made very clear, through a documented decision…that the market should be tested and there should be an expression of interest process". The Chair asked Mr Barr –

> Was the alternative process put in place because the Tradies wanted access to that site or was it put in place because it was the right time to put that block up for sale? A. The block was part of the land release program. It was part of the Dickson Master Plan…that had concluded by that stage. It was obviously ultimately tied to the discussions for the land release, which I think had already then occurred, for the site to…[its] the north [ie the Coles site].

Mr Docker emphasised to the Committee that "Tradies has no special access to any side of government and, certainly on my watch, never has". Mr Stephen Brennan, Tradies' Chief Financial Officer at the time, who was responsible for the negotiations on behalf of the Club, told the Committee that there was no special access by Tradies to members of the Government during the negotiations, nor did they otherwise have the benefit of special treatment. He said that his communications during negotiations were with the responsible directorate staff, sometimes joined by valuers.

26. According to Mr Brennan, Tradies' Club had been on the site for some 50 years prior to the tender. Indeed, it owned most of the land in the block, which included a number of businesses. He pointed out that the Club's premises were rather old and the site needed to be redeveloped, so that the car park on Block 30, adjacent to the Club, became critical to future plans. Tradies thus had a substantial interest in consolidating its holdings by acquiring the car park, upon which (as stated in its tender) it already relied heavily for use by Club patrons. One of the risks that gave rise to concern was a developer acquiring the site and adversely affecting its business by an inappropriate development which could have a serious detrimental impact on the Club's accessibility, visibility and economic viability. Not surprisingly, Tradies had been involved in the consultations on the development of the Dickson Centre Master Plan.

The path to tender

27. In January, August and November 2010, Tradies made direct sale applications for Block 30. The first application, made under the contiguous land provisions of the Planning Act, was determined not to meet the key eligibility requirements as provided in s 240(2). The second application was also rejected, in large part since it involved re-housing the senior citizens club too closely, as the Planning Department thought, to gaming facilities. The third application proposed the direct sale of Block 30 at market value in accordance with the

Planning Act with a partial set-off by swapping Block 25 (the former Downer Club site) which would be available for public housing (and, in the event, was part of the ultimate transaction). The EDD submitted –

> While Treasury has proposed a competitive process, this would more than likely jeopardise a number of key benefits and opportunities which are features of the Dickson Centre Master Plan. Additionally, the acquisition of the former Downer Club site as part of the proposal provides considerable opportunity for affordable housing and delivery of improved social outcomes for the community.
>
> Any perceived financial advantage from the suggested competitive process would need to be balanced by the potential for delay or constraints to implementing the Dickson Master Plan, in particular should the Dickson Tradies not be the successful bidder.

28. Cabinet did not accept this submission, deciding, on 24 October 2011, that Block 30 was to be auctioned in the 2011-12 financial year and requesting further advice on the proposed development and lease conditions underpinning the sale. As Mr Barr explained in his evidence to the Committee, in substance, direct sales were an exception to the general practice, with most government land sales being effected through a competitive process. Mr Richard Drummond (then EDD Project Manager as a consultant, not a public servant, but included, for simplicity, in the references to "officials"), advised LDA Marketing on 26 July 2012 that the "responsible minister" (Mr Barr) had called "a halt to this process" until further site investigations were complete and that it was "unlikely" the site would come to market in the 2012 calendar year. At this time, therefore, it appears the Government was not pressing to put Block 30 to tender that year. However, by 22 August 2012, in a follow-up email, Mr Drummond informed the Marketing Project Manager (amongst others) that the sale was "back on the agenda", envisaging release of the RFT on 8 September, with the tender to close on 2 November 2012. In his evidence to the Committee, Mr Ellis' recollection was that there was a problem within the Planning Authority as to finalising the processes concerning the site risks, which it was necessary to put in place for the tender to progress, but that this was resolved by placing those risks on the purchaser (as the terms of the RFT ultimately reflected). On 11 September 2012 a further submission was made by the EDD to Cabinet providing additional information and seeking approval for the sale by tender. It seems obvious that the substance of this information, most likely the submission itself, had been provided to Cabinet or, at least, the Minister some days before as the matter was due to be decided by Cabinet on 8 September, for which the advertisement of the RFT was already prepared.

29. Mr Ellis gave evidence to the Committee to the effect that he was the recipient of frequent enquiries from the Minister's office about how the matter was proceeding. He believed that the government wished to ensure that the tender was opened before the commencement of the caretaker period preceding the October 2012 election and assumed that this was to permit Tradies to participate in the competitive process to acquire Block 30, against the risk that a change of government might result in the sale not proceeding.

30. Though out of chronological order, it is convenient at this point to deal with Mr Ellis' evidence on the question of political influence during the period following identification of Tradies as the preferred tenderer and the efforts directed to obtaining Tradies' agreement to pay the reserve price of $3.18 million. Mr Ellis told the Auditor-General that there was no actual interference in the process by the Government but that the responsible officials were concerned about not reaching an agreement with the Tradies because of a perception about the political context. He said –

> There was no problem with us – we were doing everything we could to get the best price we possibly could…but, I mean, we don't have to be naive here. I mean, it was clear that the government wanted the Tradies to win. So, if it turned out that the commercial process – I mean…they only knocked back the direct sale because of the optics of it. I mean, they – in telling us to get on with a – a commercial process, they still wanted the Tradies there, yeah. …

Mr Ellis was asked how did he know "clearly the government wanted the Tradies to win". His response was, "I mean, the reality was that the Tradies were close allies of the…Government and the Labor Party...I was aware that the Tradies had meetings – had had meetings with the Government". He was unable to say that they related to the tender but added, "I know that…the head of the Tradies, was very confident that he had the Government on side". He said it "was common knowledge that…the union running the Tradies, were allies of the government and that they hoped…they'd win. But in terms of what you probably want to know is that, I mean, there's no evidence to prove – or that I'm aware of – even in terms of meetings, phone calls, anything like that, which would say the Government exerted pressure or in some way". In the end, he said, "Well, I think it was just – it's a belief, but it's based on, you know, what is understood to be the political climate. There were – the government had allies and it had enemies. Woolworths were certainly no friend of the government".

31. The Auditor-General stated that the Audit Office found no evidence to substantiate Mr Ellis' belief about the Government's attitude to the Tradies' acquisition. The question was also broached by members of the Committee during Mr Ellis' evidence. It was quite clear that his

opinion was little more than speculation on his part; he was actually unaware of any communications from anyone in government about any desired outcome; it was just what "everyone knew". It is only fair to note that Mr Barr informed the Auditor-General neither he nor, to his knowledge, other members of the Government subscribed to the views expressed by Mr Ellis (as set out above) and at no time did the Government signal a preference for the Tradies to be the successful tenderer to Territory officials either formally or informally. Mr Barr also emphasised and reiterated the Government's intentions for the sale, which were to maximise value through an open and contestable process. (This matter is taken up again later in the Special Report.) Some members of the Committee questioned why this was among the last acts of the Government before the beginning of the caretaker period. In this respect, the Committee's Report opined that the "[links] between the Tradies, the CFMEU and the ACT Labor Party are relevant to this question [noting …the] primary financial purpose of the Tradies is to support the CFMEU … [which] provides political donations to and is affiliated with the Australian Labor Party". The Committee considered "that these relationships exist further discourages a view of the sale of Block 30 as a normal commercial transaction". The implicit suggestion that the relevant officials were or might reasonably be thought to have been influenced in making any of the relevant decisions because of the relationship between Tradies, the CFMEU, the ALP and the Government is a grave accusation which, if true, would almost certainly amount to an impropriety capable of constituting corrupt conduct. In fact, it is contrary to the evidence. Indeed, the suggestion that this was other than "a normal commercial transaction" is (as discussed below) also not sustainable.

32. Moreover, there is no evidence of any kind that the links referred to played any role in the decision to sell Block 30, which was consistent with the Dickson Centre Master Plan, or the terms of the transaction. Indeed, the evidence is all the other way. The implicit alternative, to have refused to sell because of Tradies' links with the CFMEU, would have been grossly improper.

33. For the present, it is sufficient to note that there is no evidence that indicates that any political consideration, let alone interference, was brought to bear in the process at any stage, whilst there is a deal of evidence that justifies the inference that the opposite was the case.

The invitation to tender

34. Cabinet approval to the sale of Block 30 by tender, given on 11 September 2012, stipulated a number of key requirements designed, as the Auditor-General noted, "to ensure appropriate use and development of the land in accordance with the Dickson Centre Master Plan". These requirements were –

    (i) sale by a fully transparent tender open to all interested parties;

    (ii) the successful tenderer being precluded from commencing construction until after the redevelopment of the carpark situated at Block 21 Section 30 was complete;

    (iii) settlement 21 days from the later of two years from the date of the contract or the issue of a certificate of occupancy for Block 21, (ie the adjacent carpark) and, if not issued within four years of the date of the contract, either party could terminate the contract;

    (iv) the successful tenderer to provide a temporary traffic management plan and short-term car parking strategy to demonstrate how the 'lost' public car parking on Block [30] would be provided whilst it is being redeveloped; and

    (v) the contract being contingent on the parties entering into a Project Delivery Agreement intended to assure the successful tenderer meets its obligations to develop Block [30] in accordance with the Dickson Centre Master Plan.

    (These conditions, although in some respects in a somewhat more rigorous form, were in due course, incorporated in the RFT. As will be seen, the contract ultimately agreed omitted a number of the RFT conditions and varied others, which gives rise to the question whether it complied with the Cabinet authorisation.)

35. In accordance with Mr Drummond's timetable, the RFT had been advertised on 8 September 2012 with a closing date of 15 November 2012, obviously in anticipation of a timely Cabinet approval which, as it happened, was delayed (not for any significant reason, almost certainly pressure of business) for a few days. The tender closing date was later extended to 26 November 2012. An additional issue was the omission to advertise the RFT nationally in the *Australian Financial Review* (the "***AFR***"), as had been intended by the EDD. The RFT documentation was available through the website of either the LDA or the EDD and advertised in the *Canberra Times*.

36. Some details may be important to note. Mr Ellis told the Auditor-General that he could not recall the circumstances associated with the advertising. He explained that the agency had many advertisements in respect of other sale processes then underway. He did not think he had made, and could not recall making, a decision not to advertise in the *AFR*. He later provided more information. He said that, in the lead-up to the caretaker period prior to the 2012 election, which commenced sometime in mid-September 2012, Cabinet had been

meeting more than once a week and the decision to give the final approval to the sale of Block 30 was scheduled for Thursday 6 September 2012. The advertisement in the real estate section of the *Canberra Times* could be scheduled for the Saturday of 8 September 2012, just two days after the scheduled Cabinet decision but if, for some reason, the decision was not made on that date, the advertisement could be withdrawn in time. This was not possible with the *AFR* as, being a national paper, its advertising was locked down a few days in advance and advertisements could not be withdrawn at the last minute. He said he believed it was still "intended at that stage to go with the *AFR* as well, not because we thought doing so was especially efficacious in advertising terms but just because that is what you were expected to do". Information was received on the preceding Thursday that Cabinet was going to reschedule its consideration of the sale for the following Tuesday, 11 September and LDA Sales was requested to withdraw the advertisement and reschedule it. However, this did not occur. Mr Ellis only discovered this on 10 September, when he was informed of inquiries by interested parties. He acknowledged that appearance of the advertisement was embarrassing, given that it preceded Cabinet's consideration of the final RFT. Either late on Tuesday 11 September or early on Wednesday 12 September, the LDA "pressed the send button issuing notices about the Block 30 sale to its extensive network of agents and advertised the sale on its website". As inquiries had "already begun coming in pretty quickly and from interstate as well … and with all the electronic means available to us we just thought advertising the *AFR* was a bit of a waste of time, and more especially, money".

37. Mr Ellis explained his reasons for thinking that advertising in the *AFR* "was not decisive". These included the prevailing market conditions, the media release by Tradies shortly after the advertisement of the EFT and before the tender closed, which noted its intentions for the Block and its concern about the prospect of it being developed by someone other than itself, the effect of the lengthy embargo on development increasing risk and the particular advantage to Tradies of having obtained a planning decision to allow them to build to the northern boundary of their existing block. He also referred to the contemporaneous advertisement of the RFT for the nearby Block 21, which attracted no more expressions of interest than did the RFT for Block 30. The Audit Office noted this information but commented that it "did not test the assumptions underpinning the advice or the effect they may have on the responses to the RFT". However, it is difficult to see what tests might have produced informative results. Overall, Mr Ellis' explanation appears to be both reasonable and sensible.

38. Mr Dawes told the Auditor-General, in substance, that print press advertising is only one available means of attracting national interest in sales processes and advertising through electronic channels (website, contact lists etc) is increasingly the most efficient and effective method. These methods were adopted by the EDD in advertising the tender. He pointed to the interest from about 20 bodies (both local and national) in the tender process. He was confident that advertising in the *AFR* would not have generated any greater interest in the tender.

39. The Auditor-General commented that the Audit Office could not verify the assertion as to the use of electronic methods having been used to advertise the RFT because documentation and record-keeping was lacking, though conceding that there was evidence indicating the availability of the RFT on one or other of the agencies' websites. The lack of records is no doubt a legitimate criticism (and it should be noted that the Audit Office did not question the evidence of the officials on the point). There does not appear to be any reasonable basis for not accepting their evidence, especially in light of the inherent likelihood that electronic communication was used. It must also be seen in the context of the lengthy delay since the events in question occurred.

40. Mr Docker told the Auditor-General that Tradies' "long experience in commercial real estate matters on a national level indicates national exposure is not compromised by limiting advertising of the RFT to only local media". He observed that most national commercial real estate companies are represented in Canberra and national commercial real estate companies access national media news/advertising clipping services daily.

41. There is no good reason for doubting these opinions about the insignificance of the omission to advertise in the *AFR*. The reason proposed for not doing so (perhaps reconstructed in part by Mr Ellis rather than an actually complete recollection) makes good sense. That this "potentially limited the competitiveness of the sale process" and raised questions as to whether "the relevant markets were properly informed and tested" was a hypothetical possibility. Its real significance, however, appears to be adequately disposed of by the evidence to which reference has been made. This is not to say that, in the interests of a patently competitive process, all hoops that can conveniently be jumped through should be jumped through, if only to avoid later second-guessing. But, here, the doubts expressed in the Committee that the advertising might not have been sufficient to ensure genuine competition were unfounded. More importantly for present purposes, the omission to advertise in the *AFR* does not suggest a lack of probity of any kind.

The MMJ valuation

Overview

42. As mentioned, on the instructions of the EDD, a valuation of Block 30 (as it became) as at 10 October 2012 was produced by MMJ Real Estate ("**MMJ**") and provided on 5 November 2012. It assessed Block 30 as worth $3.18m, not including GST. This was the first valuation obtained by the government; a second followed from Colliers. The Auditor-General engaged Capital Valuers to review both valuations. The purpose of the MMJ valuation was described as "Market Value for Tender Reserve Purposes". For reasons that will become clear, it is important to note that, typically, the reserve price is the minimum amount that the vendor should be prepared to accept. However, the terms of the valuation report did not suggest that it reflected a "reserve" value as distinct from ordinary market value.

43. The MMJ valuation was made on the basis of conventional assumptions in such cases, including that it had not been made as a planner, architect or quantity surveyor. These limits are important since, as the block was, for practical purposes, a greenfields site, its real value lay in the potential for development and a tenderer would need to factor in, as a risk (amongst other things), not only the costs associated with obtaining this expertise but also the impact of any such expert assessment on a proposed development. Whether that expert assessment was much the same as or differed significantly different from the assumptions made by the valuer was, of course, unknown but necessarily introduced additional uncertainty as to the weight to be attributed to the valuation. An obvious parameter of considerable significance was, of course, the stipulated delay of at least two years in the commencement of development. MMJ noted that the "nominated start date may exceed beyond 3 years [sic] but for the purpose of this report we have adopted a standard settlement period [of 30 days after contract] to derive an indicative figure as at the valuation date in consideration of a 10% deposit". (The logic of this reasoning is unclear since the deposit was payable on exchange of contracts and depended on the agreed price. Predicting that price meant that it was essential to take into account the likely effects on value of the delayed settlement; the delay could not logically justify not doing so. However this may be, the important point is that no account was taken for valuation purposes of the uncertain but very substantial delay before any development could commence and the obvious risks that this inevitably entailed.) The nominated, arbitrarily selected assumed start date of construction was June 2013, with completion in September 2014. ("Arbitrarily" is used here in the sense that no analysis was undertaken of the – admittedly highly uncertain and difficult to measure

– various factors that needed to be satisfied before commencement, such as finalisation of the planning process for the Coles site and the length of the build on that site to the point of the grant of the Certificate of Occupancy). It is regrettable, and significantly reduced the utility of the valuation, that there was no indication of the potential effect on the calculations of the significance of the delay, and the likelihood that the assumption as to commencement could be (as indeed it was) wildly optimistic, and that this must necessarily both adversely affect the market's likely interest in, and the value to be attributed to, the block.

44. The primary method adopted by MMJ was that of direct comparison, which seeks to attribute a value to the site under consideration by examining the course of sales of comparative properties. This is the most widely accepted method of determining market value. Of course, the significance to be given to the comparisons must depend on the degree to which the properties selected are truly comparable and the extent of the concomitant adjustments that need to be made to take the differences into account. For the reasons explained below, this problem was a very significant one in the present case. The utility of the valuation was limited by the absence of any explanation of its likely impact on the level of confidence which should fairly be attributed to the ultimate figure.

45. Another (though less widely) accepted approach, at least as a check upon the valuation derived from direct comparison, is to use the hypothetical development method. This, essentially, involves the hypothetical erection of a building on the site corresponding to its highest and best use, capitalising the anticipated net return and treating the balance as the value of the site. It hardly needs to be pointed out that what this return might be would vary from developer to developer. All these issues involve many estimates, with the accumulation of even small variations to the variables capable of having a considerable impact on the outcome. These problems are multiplied if the hypothetical development is not to be carried out within a reasonably short time, which was the case here. It is important to note that this is essentially a method used to enable ascertainment of the *highest price* a developer could pay for the property to achieve their selected rate of return in light of the particular circumstances of the project. It is a conceptual leap to regard this as equivalent to market value. The valuation does not explain how the fundamentally different concept of value utilised by the hypothetical development can be a useful check in the present case of the concept reflected by the direct comparative method.

46. In light of the purpose of the valuation being to set the tender reserve market value and, thus, the *lowest* acceptable price to the vendor, whilst the hypothetical development value is the

highest price a developer could be expected to pay, it is, furthermore, difficult to understand how each (supposedly independent) method produced an *identical* valuation. This problem is examined further in due course.

47. (For completeness, it is noted that the Tender Evaluation Report incorrectly described assumptions contained in the MMJ valuation. In particular, it stated that MMJ had valued the land at $3.18 million exclusive of GST "based on a settlement due in 2015 and a requirement to provide 139 replacement car parks". In fact, however, the delayed settlement was expressly *not* taken into account and the number of replacement car parks was stipulated at 154. It is not clear why the Tender Evaluation Report included these misstatements.)

48. The problems mentioned above with the valuation are not touched on by the Auditor General, whose analysis and criticisms involve an uncritical acceptance of the MMJ valuation as establishing the standard against which the notion of value for money should be measured and the extent to which, it was suggested, this was not achieved. This is, perhaps, not surprising, given the focus of the Auditor-General's examination on process rather than substance. However, the Committee's critical approach to the issue of value necessarily required examination of the reliability of the valuation and its actual utility for this purpose. Such an examination did not occur. That the relevant officials considered themselves to be (at least to the extent later explained) bound by the valuation is not surprising, but they were engaged in a process altogether different to that being undertaken by subsequent critics.

Conceptual issues with valuations

49. In its report, MMJ described its "Basis of Valuation" as follows –

> In arriving at our assessment of the current market value of the site in its entirety, we have relied primarily on the Direct Comparison Approach, analysed on a rate per unit site and [Gross Floor Area] for the commercial component. In determining the assessed rate, we have had regard to the sales evidence detailed in … this report …
>
> We have also utilised the Hypothetical Development Approach as a secondary method based on the suggested residential scheme. Under this scenario, in arriving at our assessment of the likely "As If Complete" Gross Realisation, we have utilised the Direct Comparison Approach analysed on a rate per a unit on average as a guide without formal building plans. In determining an appropriate direct comparison rate, we have had regard to other developments, scale of the hypothetical development and location of the dwellings, together with the prevailing market conditions.
>
> In undertaking the hypothetical development approach, we have relied on both the traditional approach utilising a target profit and risk factor and cash flow analysis utilising a target Internal Rate of Return (IRR).

(The IRR represents the annual average rate of return from the investment. It measures returns from both periodic income and from capital growth at the end of the cash flow period. Thus, it is defined as the rate of return that equates the present value of the expected future cash flows to the initial capital invested. It may be described as being loosely analogous to an annual effective compound rate of return, though more accurately it reflects the constant year on year return. It is understood that a "target" IRR is one that is greater than the discount rate that meets the investment hurdle. If, for example, the hurdle rate of return for an investor is 9%, any IRR in excess of 9% will favour acquisition, whilst less would suggest no acquisition. The difficulty, of course, is to attempt a realistic estimation of this number for the relevant market of investors, made more difficult when the commencement of returns is out of the investor's control and may well be years away.)

50. The valuation made it clear that –

> The Value, 'As If Complete' assessed herein is the Market Value of the proposed improvements as detailed in the report on the assumption that all construction had been satisfactorily completed in all respects at the date of this report. The valuation reflects the Valuer's view of the market conditions existing at the date of the report and *does not purport to predict the market conditions and the value at the actual completion of the improvements because of the time lag*. Accordingly, the 'As If Complete' valuation must be confirmed by a further inspection by the Valuer, initiated and instructed by the lender [sic] on completion of improvements… (Emphasis added.)

51. Thus (as already mentioned), no allowance was made for future risks even though it is obvious that such risks would necessarily be taken into account by any prospective purchaser. (It is interesting to note that, as it happened, according to Capital Valuers in advice to the Audit Office, in the period from November 2012 to December 2014, the median residential unit price in Canberra rose 2.7% but building costs rose by 6.1%, with a review of development sites sales being inconclusive.)

52. The MMJ valuation defined "market value" as –

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

This definition has been agreed by the International Valuation Standards Committee and adopted by the Australian Property Institute. However, it is not to be understood in the ordinary vernacular sense. The notion of the state of mind of a seller or buyer is necessarily an artificial construction that attempts to identify the elements of a transaction posited as occurring. Certainly, the value is estimated to reflect a transaction that ignores the possibility of any extrinsic influences on the parties other than the economic as described in the report

(hence “arms length”). But the outcome is an estimation resulting from a synthesis of the assumptions and assessments *made by the valuer* and attributed to hypothetical buyers and sellers (or, in other words, “the market”).

53. It seems obvious that the more uncertain the data and the wider the range of their applicable significance, the less reliable will be the ultimate calculation as an indication, not only of market value, but also of likely price in the event. In principle, whether in fact real world parties would utilise the same data and weigh it in the same way to the exclusion of other considerations is unknowable and capable only of loose prediction. Accordingly, the “market value” does not represent or even purport to represent the approach to the value of the property that a putative bidder is actually likely to have, let alone the price that the bidder would actually offer.

54. Where a site has already been developed to its “highest and best” use, and is producing a return, assessing its present market value is a far simpler undertaking than where the site must be valued as a development yet to occur. Information about a comparative developed site may be assumed to be highly relevant to an actual interested party and would certainly have a direct influence, no doubt with other factors, on the price such a person might be disposed to agree to pay, allowing a closer relationship to be surmised between the market value and likely price. However, again, the actual buyer could well – to an unknowable extent – be influenced by idiosyncratic factors that are incommensurable and thus necessarily left out of account when considering market value.

55. The uncertainties about cost and future commercial realities attending valuation of an undeveloped site were rendered in the present case far more complicated, and hence much more doubtful of accurate calculation, by the structural delay imposed by the RFT, which required settlement delay of at least two years (and potentially much more) from the date of contract. This is because settlement needed to await the later of that date and the date of issue of a Certificate of Occupancy of the redevelopment on the adjoining block, over which the buyer of Block 30 could have little information and no control. (In his evidence, Mr Brennan, said that, whilst the negotiations with the LDA were proceeding, the Coles site was in a development application (“**DA**”) process predicted to take maybe six months and the build probably two years. However, there were considerable delays, involving litigation, and as it happened, the DA was still under consideration in December 2018.) The substantial delay imposed by the RFT would necessarily affect both the hypothetical buyer’s and the hypothetical seller’s (ie, the market’s) assessment of both the outgoings and likely returns

when the building became open for business as well as the costs associated with construction. It is axiomatic that increased future risk must adversely affect present value. Furthermore, the risks increase with the cost of the project, hence affecting the calculation of returns for the "highest and best use". In calculating market value by use of the direct comparison method, the particular character of the property must be brought into account. This includes not only its physical attributes and location but also any legal restrictions applying to its use. (As will be seen, no adjustment for this major feature was made in this context.) The latter elements would, for obvious reasons, affect its attractiveness in the market. Although it seems reasonable to have omitted taking delay into account for the purpose of valuation (for which, as it happened, no explanation was given but, almost certainly, because the cost implications were incapable of reasonable estimation), and reference has already been made to lack of any indication of the potential impact of this factor on the reliability of the valuation (even in general terms as an adverse factor), it is regrettable that no reference at all was made to the inevitable negative impact on value. (It may be this was because the valuation was going to an expert audience which would necessarily appreciate this point: with respect, neither the Auditor-General nor the Committee possessed this expertise.)

56. The term "Market Value" as used in the MMJ valuation is thus an artificial construction and not to be understood in its vernacular sense. In the particular circumstances here, the price that an actual purchaser would likely offer in the real world – in other words, what the LDA could reasonably expect to be offered – would inevitably represent a significant discount to the MMJ valuation. This is so even on the assumption that, accepting its articulated limitations, it was a reasonably reliable assessment of so-called "present market value". The inherent and substantial uncertainty attending the valuation becomes particularly evident when the various assumptions adopted by MMJ are considered in detail.

Assumptions relied upon by MMJ

57. MMJ's instructions, taking into account the Dickson Master Plan, Draft Variation 311, documents provided, and the 'Intended Design and Development Outcomes 2012' planning document (discussed below) led to the adoption of the following scenario –

    For the ground floor: the mix of restaurants/bars with retailing space, utilising a ratio of 50% between the two types of accommodation as basis for the car parking generation calculations. Of the adopted notional building footprint of 2,170 m² (drawn from a notional 'developable footprint' of

2,430 m²,[1] which in turn was drawn from an approximate site size of 5,282 m²), the lettable area, after accounting for floor efficiencies, would be approximately 1,845 m². (Note: Colliers, which provided a subsequent valuation for the EDD – discussed below – was of the opinion that this was too high, once allowance had been made for the residential lobby, lifts, waste, access to basement etc, and estimated the GFA at 1,400 m², a significant reduction.)

For the upper levels: a full residential scenario, excluding offices (as not being the highest and best use) from the second level up, which allowed for 108 units (of varying sizes) to be built, adopting a rate of 100 m² per unit at a rate per unit site of $25,000 per unit. (However, Colliers in a later valuation obtained by the EDD estimated a figure of $45,000 for each of 108 units; further details are below).

For the retail component: $221 per m².

For the parking: as already noted, MMJ understood from discussion with the EPSDD that replacement parking of 154 spaces in addition to any new parking required for the development was necessary. MMJ assumed that under then applicable planning requirements that applied to the "best and highest" development, 139 spaces would also be required to serve the ground floor retail area (assuming the particular retail spread adopted in the MMJ scenario), and 152 spaces for the residential area (assuming the particular mix of apartments adopted in the MMJ scenario), making a total of 445 spaces. Assuming a basement to the entirety of the site, two full levels and one part level would be required. The required area was calculated at 30m² per space, allowing for efficiencies.

The construction costs could only be compared on a hypothetical basis, considering that there was no design available for the development that might ultimately occur, leaving out of consideration the uncertainties of the market in at least two, and likely significantly more, years. Accepting the numbers yielded were as informative as could be obtained, after making all necessary adjustments for likely variations and uncertainties, the ultimate figures must be treated as significantly uncertain.

For the structure, finishes and building areas: these, as specified, were "indicative" only.

The direct comparison approach to valuation

58. MMJ's 'direct comparison approach' involved, in essence, assessing Block 30 against apparently similar properties, and generating a 'rate per unit site' for the residential component, and a rate based on GFA for the commercial component.

[1] It is noted, however, that on one occasion in the MMJ valuation, the building footprint is described as '2,430 square metres' (page 10). For the purposes of this Special Report, that reference is assumed to be a typographical error.

59. To that end, a number of recent site sales were detailed. However, as the limited commentary attached to each showed, these sites differed markedly to a significant extent from Block 30 (thus requiring adjustments to be factored in).

60. The comparison commenced with a summary of the prevailing real conditions at the time. The Canberra Residential Overview included statistical information on population growth, wage levels, median house and unit prices by region, sales volumes, and the residential rental market. The "Outlook" noted the market for residential dwellings was dependent on the speed of release of new land and the availability of old stock being reissued to the market, with steady levels of buyer activity in the affordable price range and a slowdown in the more expensive range. The rental market was seen as continuing its ongoing strength. The prices for one and two bedroom units within the Inner North market were given, with a suggestion of a potential softening were job security within the public sector to be adversely affected by an incoming Coalition government, if that occurred.

61. The Canberra Commercial Overview noted that, until the second half of 2008, that market had enjoyed very buoyant conditions and, whilst the onset of the Global Financial Crisis had significantly detrimentally affected the general national trend, in Canberra it had remained relatively resilient. The underlying fundamentals of the ACT economy were thought to have "remained sound…in comparison to the national averages", partly due to the "high proportion of high-paid public service departments" (sic). The prime market was doing well although secondary stock was experiencing a softening in yields and extended vacancy periods. It was noted that the Canberra office market was dominated by government tenants, which occupied some 60% of total office space. According to MMJ, the statistics of new office space coming onto the market between 2009 to late 2011 and the stock with a strong likelihood of being developed over the next five years, "outline[d] uncertain times ahead for the commercial market in Canberra due to increased supply and white-collar employment growth decreasing". Detailed figures were given of vacancy rates as at July 2012 and by precinct as at January 2012, together with predicted supply for 2011 and 2013. The outlook was positive for A grade buildings, and future growth "in the short term is not expected as a result of an over-supply…[but] long term once the balance is returned to the market growth is expected for prime assets and a stabilisation of secondary buildings but this is not expected within the next two years".

62. The Retail Market Overview noted that it was under pressure and likely to remain so until investors' confidence, seen as highly dependent upon what happened in the global economy,

was restored. Indicative investment yields were specified ranging from 6.5% to 10%, depending on the obvious factors, most importantly competition within the trade area. MMJ considered investment yields would remain stable for blue-chip investment grade assets with some softening in yields for secondary grade properties. Prospects for the longer term were for a moderation in capital growth with prime retail assets expected to continue to be stable performers. Overall, it was thought that, though retail property continued to be an attractive investment, the market "has entered a period of uncertainty given recent volatility in world financial markets…[and, though there] has been no evidence to date that recent financial market volatility and changes to loan to value ratios have had a significant impact on property yields…anecdotal evidence indicates that a weakening of demand and softening in yields is a strong possibility".

63. So far as Dickson was concerned, MMJ noted several new developments and opined that the impending Master Plan "[gave] scope to the rejuvenation of the Dickson Group Centre as a predominant retail and living precinct of the Inner Northern Suburban area of Canberra".

64. The valuation report then considered examples of comparative properties. For residential comparison purposes, it gave brief details of multi-unit development site sales; one in Harrison, two in Belconnen and two in Wright. The report's "residential conclusion" was –

- The sales provide locations ranging from town centres to greenfield suburbs within approximately 10 kilometres of the CBD. The site sales indicate a unit rate range of $24,468 to $49,554 with maximum allowable dwellings ranging from 56 to 240.
- For the purpose of this report we have adopted a rate range of $22,000 to $28,000 per unit site. Our rates are reflective of the market evidence available, location, softening in values, pre sales, scale of development and market sentiment.
- We have also taken into account the cost to replace the parking already on site, construction of a public park and parking generated in a basement structure.

65. Commercial/retail sites in Forrest, Barton and Kingston were referenced with the following conclusion –

> The commercial site sales provide GFA sales rates of $221 to $863 per square metre, depending on location, size, general attributes and allowable GFA. Due to the popular group centre location of the subject site, we consider it would be well sought after in the public market if new retail space was made available. As such we have adopted a rate range of $200 to $250 per square metre of GFA which takes into account the cost to replace the parking already on site, construction [of] a public park and parking generated in a basement structure.

The differentiating features taken into account were identified as cost of replacement parking, construction of the park and (as it is understood) the necessity for construction of basement

parking. It may be assumed that, as well, the differences in "location, size, general attributes and allowable GFA" between each of the comparative sites and Block 30 were factored in but the analysis is opaque and may merely have been regarded as implicit in the different rate ranges. This is not intended as a criticism but, rather, as a demonstration of the point that this "direct comparison approach" is far less direct than its language implies and necessarily contained, in the circumstances here, a very significant level of subjective estimation.

66. Sales of units in four large developments of residential units were analysed –

> From review of the evidence and making assumptions [as] to the quality of the improvements but with no clarity on development mix we have adopted an average sale price of $442,000 per unit for the purpose of this report. As part of this assumption we have considered a mix of one, two and three bedroom units will be built similar to competing developments.

The retail sales evidence comprised six developments. The conclusion was –

> From review of the evidence and making assumptions [as] to the quality of the finished product, we have adopted a sales rate circa $6,500 per square metre assuming on average 100 square metres per tenancy for the purpose of this report.

The residual value of the car park was assessed at $3,120 per annum per car space. This particular figure was reached through a hypothetical development feasibility analysis by reference to car parks in other metropolitan cities. This was on the basis that at that point there had not been, to MMJ's knowledge, an open market transaction of that nature in Canberra. As such, a direct comparison approach was not possible for assessing the car park's value.

67. In providing a rationale for its direct comparison analysis in respect of the residential component, MMJ reiterated that it had proceeded on an assumption of 108 units as being the maximum that could be 'yielded' from the site, and from that calculated a rate range of $22,000 to $28,000 per unit. (The term 'rate range' is not defined in the MMJ valuation, but does not appear to be a term of art.) From that, MMJ adopted $25,000 as the applicable value/rate per unit. MMJ then calculated a value range of $2,376,000 to $3,024,000 for the collective units, from which $2,700,000 was adopted by MMJ as the value of the combined residential component, on the basis of it "being in line with the evidence investigated, requirements for basement car parking, costs adopted, replacement parking, the need to construct a public park and current market parameters". Capital Valuers commented that

"the value [input] of…$25,000/unit [was] applied after deducting an allowance for the requirement to replace the existing car parking (an unknown cost) and undertake the works estimated by Indesco to cost $650,000 (ex GST)…[which was] not a normal way to show such an approach and there are no workings in the MMJ that indicate what allowance was made for these costs". This comment mistakenly omits to mention that the allowance for the deductions included the requirements for basement car parking as well as replacement car parking. It will be evident that the same observation made in respect of the commercial/retail calculations as to the very substantial component of subjective estimation applies also in this area.

68. For the retail component, a direct comparison rate range value of $200/m^2 to $250/m^2 was applied to the ground level retail space. From that range, $225/m^2 was selected by MMJ as the applicable rate/value for Block 30's ground floor. That rate was then applied to an *adopted* site yield (ie 'building footprint') of approximately 2,170m^2. However, reliance on this notional building footprint for the direct comparison was inherently problematic as it did not take into account MMJ's earlier conclusion that only part of that area would be usable as retail space. In particular, it ignored the earlier calculation that of the 2,170m^2 there was only "1,845m^2 of *Lettable Area* to reflect floor efficiencies" (emphasis added) as the maximum available. Thus, when calculating the overall value, MMJ proceeded on the basis of an overstated variable, which in turn inflated the calculation of the available return. This resulted in a value range of $434,000 to $542,500, from which $480,000 was adopted by MMJ as "being in line with the evidence investigated, requirements for basement car parking, required replacement parking, requirements to construct a public park to be handed back to the Territory, costs adopted and current market parameters". Applying the *lettable area* figure of 1,845m^2 would have resulted in a range of $369,000 to $461,250, and, by parallel calculation an adopted figure of $415,215, being significantly less than the MMJ adopted value. Significantly, Colliers was of the opinion that the GFA of the ground floor space would be the considerably smaller amount of 1,400m^2 "after allowing for residential foyer, lifts, waste, basement access etc". (The Colliers calculated yield of $400/m^2 did not take into account allowances for the costs specified by MMJ, which were accounted for at a later stage and thus cannot be used as a direct comparison.) Applying Colliers' GFA figure the resulting assessment would be a rate range between $280,000 and $350,000, with an adopted valuation result of $315,000 (assuming a median figure as MMJ did), comprising a value $165,000 lower than MMJ's estimate. (For completeness, it is also noted the Capital Valuers made an equivalent comment about the value input of $225/m^2 as it did for the $25,000/unit

calculation (referred to immediately above in [67]). That comment suffers from the same issues adverted to there.)

69. As the next stage of its direct comparison analysis, MMJ added each calculated/estimated component (respectively $2,700,000 and $480,000) and reached an adopted value of "say… $3,180,000". MMJ explained –

> The adopted figure [in respect of each] is supported by the evidence but it is at the lower end of the range as a result of the need to replace some 154 car spaces in a basement parking structure and development of a public park to be handed back to the Territory has added to the overall cost of the development.

However, the relevant figures for these (in effect) discounts were not disclosed by MMJ, nor how the park and car spaces were related to the lower part of the range. As it was, the figure of $3,180,000 was put forward by MMJ as representing, on supposedly empirical grounds, the value of Block 30.

70. The importance of taking into account the particular features of the site for valuation purposes has already been mentioned. As Mr Ellis told the Audit Office, the ACT Planning and Land Authority ("**ACTPLA**") intended to put a road between the Tradies' existing site and Block 30, which would put a severe limit (ie reduction) on the building envelope. Mr Dawes explained to the Committee that he thought that one of the reasons why there were probably only two bidders is that setback requirements would have been required if, for example, Block 30 had been developed by another developer. This was because there would need to be setbacks between that development and the Tradies' club. The issue of setback was, for obvious reasons, significant from a development and, hence, valuation point of view. The issue was raised before the deadline for tenders closed by Tradies, who brought to the EDD's attention the fact that the Layout Plan (Attachment B to the RFT) showed a 3m distance from the kerb to the site boundary, whilst Rule 15 of Draft Variation 311 specified a minimum 5m setback from the boundary to the building line, and Rule 11 Setback stated that buildings were to be built to the front boundary. It was pointed out that "the Intended Design and Development Outcomes are unclear", which seems rather an understatement. This led to the reasonable question, "What is the required setback of buildings from the kerb and property boundary?" to which the response was, "All setbacks have to be consistent with the Territory Plan. For the reasons noted above, queries on provisions in the draft code would be best made to ACTPLA". This uncertainty was, it seems, never clarified, for all its evident importance and the Tradies' (and any other potential tenderer) needed to make its own best guess as to how

ACTPLA would decide the question. The MMJ valuation did not deal with this issue or, for that matter, all the other uncertainties inherent in the RFT as it was drafted. It seems that MMJ (not unreasonably) took the approach that planning questions were outside its expertise. But, for any potential bidder, they would have been important to any serious consideration of the tender. Aside from their obvious importance when analysing comparative sales, in dealing with value and the significance of the actual bids received, these factors (amongst others) necessarily qualified the practical utility of the valuation for the very purpose for which it was obtained, namely, to set a reserve price for the tender.

The hypothetical development approach to valuation

71. In addition to its asserted "evidence based" assessment of Block 30's value, MMJ also adopted what was described as a "hypothetical development scenario" as a "check method" to justify the conclusion of $3.18m.

72. The principal components of the 'hypothetical development' were:

- acquisition costs;
- professional fees;
- construction costs; (including advising the bidder to obtain a Quantity Surveyor's report because of the impact of variation in construction costs on the profit margin and, in turn the residual land value);
- statutory fees and contributions;
- land-holding costs;
- selling costs;
- interest charges (based on an assumption of 100% debt funding, with an interest rate adopted on a "nominal basis assuming a senior debt facility only");
- finance charges;
- hurdle rates (comprising a *Profit and Risk Factor*, which reflected the "target developer's margin representing a percentage of total development costs (net of selling costs)", and the *Internal Rate of Return*, which was utilised in the discounted cashflow approach and represented the target developer's margin (or discount rate) on cash flow that included financing costs but excluded interest);
- Gross Realization, which was explained as representing "the GST Inclusive sales revenue for the complete units and GST exclusive for the commercial buildings … [and, noting] that there [were] a large number of key variables involved in achieving sale prices into the future". MMJ went on to state "[we] draw your attention to this fact [and as] such, we stress that our estimate of Gross Realisation 'As If Complete' represents current values as at the date of valuation";

- that no escalation rate was incorporated into the cashflow for either development costs or sales revenues. Rather, the adopted costs and revenues were said to reflect market levels as at the date of valuation; and
- GST implications (with commentary about what had been included in the cashflow on a GST inclusive basis, reference to input tax credits, and explanation about the role of stamp duty in relation to GST).

The assessment of potential sales revenue

73. The total "As If Complete" Gross Realisation was calculated by reference to various (hypothetical) components of a future development on Block 30. In essence, the Gross Realisation figure represented how much a developer could make from the development, but not accounting for cost of construction incurred along the way.

74. The first component considered was the 'hypothetical retail scheme' for the ground floor, which was assessed as being able to generate $11,992,500 exclusive of GST in sales. This figure was derived following 'notional calculations' drawn from a Direct Comparison Rate. Curiously, on this occasion MMJ treated the relevant floor space as comprising a lettable area of 1,845m^2, and did not rely on the larger 2,170m^2 figure used for the direct comparison approach. No explanation is given for this discrepancy. MMJ then proceeded on the assumption that the area would be sold off in about 100m^2 tenancies. MMJ then cited a range of 'direct comparison rates', described as reflective of '$/GFA', of $6,000 to $7,000. (From what follows in the MMJ report, it is inferred that what was intended to be conveyed was that the range was $6,000-$7,000 *per square metre*, and that the reference to 'GFA' was a typographical error). No explanation or other justification is given for these figures, and they do not appear elsewhere in the MMJ report. From that apparently arbitrary range, $6,500 per square metre was selected by MMJ as the appropriate estimate of sales revenue (presumably because it was simply midway between the two limits it had set). No real explanation was provided in support of this conclusion, other than that MMJ considered that the adopted sales rate was "supported by the evidence detailed in this report for new developments". That revenue rate was then applied to the lettable area (of $1,845m^2), which produced an overall calculation of $11,992,500. (For completeness it is worth repeating, and as noted above, that Colliers considered that the lettable area was significantly less – at 1,400m^2. Even if one accepted the capital value rate estimated by MMJ, this would realise only $9,100,000 exclusive of GST, a difference of $2,892,500, with obvious knock-on effects).

75. The total "As If Complete" Gross Realisation for the hypothetical 'car park component' was considered in relation to a *portion* of the anticipated car spaces. In particular, it focused on the mandated replacement car parks (154) and those anticipated for use by retail customers of the ground floor (139) only – ie that available for use by the public – being a total of 293 spaces. MMJ stated that this part of the hypothetical assessment did not consider car spaces that would be created for residents of any future apartment block (estimated at 152 in total), "as they are linked to the individual accommodations". The sales revenue for these two categories of car parks was assessed at being a "rounded value" of $2,100,000 exclusive of GST. That figure was drawn from notional calculations that commenced with the fully occupied "current passing income", which were then discounted by a vacancy factor of 30%, and outgoings per space were also deducted, to reach a "net income" amount of $248,678. Capitalisation rates between 11.75% and 12.25% were then applied to the net income, which produced a "capitalised value" range of $2,116,412 to $2,030,028. From that a (rounded) hypothetical capital value of $2,100,000 was selected by MMJ. And, according to MMJ, this, in turn, represented what was said to be a capital value rate of $13,636 per space, which was considered "reasonable for the Canberra market with no proven performance of sold car park developments". Concerningly, however, this capital value rate, was actually calculated (as the arithmetic shows) on the basis of 154 car spaces only, and does not take into account the 139 spaces assumed as required to serve the ground floor retail area. Taking those spaces into account would result in a capital value rate of $5,343 per space.

76. For the hypothetical "residential component", in the absence of plans, MMJ adopted an assumption of a total of 108 units, in line with the calculations for the Direct Comparison Approach (being, in essence, the maximum yield of apartments, having regard to the size of the site and the building height restrictions). MMJ also adopted an "average rate" (ie sales rate) of $442,000 per unit "after considering competing developments, suitable development mix and current market sentiment". The adopted Total Gross Realisation under this head was stated to be $88,400,000, however, it was overstated by an order of almost two. Had the basic mathematical calculations been done (or transcribed) correctly – and using the breakdown provided by MMJ – the total gross realisation for the residential component would have resulted in the (correct) figure of $47,736,000.

77. This latter figure was, curiously, included in the 'summary' of calculations then cited by MMJ. In that context, the Gross Realisation (GST exclusive) for the entirety of the hypothetical development was $61,828,500. This comprised retail ($11,992,500), a portion of the car parking ($2,100,000) and residential apartments ($47,736,000).

Calculating the hypothetical costs

78. MMJ then turned to the question of the costs of the entire hypothetical development. It used *Rawlinson's Australian Construction Handbook 2012* and a review of costings for similar projects in arriving at the "adopted construction cost" of $41,335,350 inclusive of GST, which included a 5% contingency factor. It warned that "these costings require verification by a Quantity Surveyor and the figures noted are purely indicative as part of our check method to valuation". No workings are included to support that estimated cost. Professional/Consultant fees were assessed at 1% of construction, arriving at $375,776. This was said to be considered "reasonable considering the size, diversity and scale of the development". Again, no workings are included to demonstrate how that figure was arrived at, and it does not seem to reconcile arithmetically with the other figures cited by MMJ. Contributions and charges were estimated at $71,000 for lodgement/approval fees, and landholding costs at $190,423 on an annual amount of $90,000. Again, no workings were shown to support these figures. Selling expenses (including agent's commission and marketing costs) totalled $2,080,835. Again, no workings were shown to justify these estimates. In respect of target hurdle rates, a Target Profit and Risk Factor of 25.0% and Target Internal Rate of Return of 32.0% were adopted, having regard to the following "key considerations": overall scale of the development; accommodation mix; competitive builders' market; and the prevailing market conditions. Financing costs, assuming an interest rate of 8.25%, were said to amount to $2,973,601 plus an establishment fee of $105,161. These figures were baldly stated without any explanation, including how the base figure to which the 8.25% was applied was selected.

79. There was some dispute, as between the various valuers, about how the cost of constructing the car park should be treated and assessed. Capital Valuers' assessment of the development cost of construction of the car spaces was $36,000 per car space "estimated and consistent with development studies undertaken around the relevant time", which led to a total cost of $5,544,000 for 154 spaces. However, when comparing their work to MMJ's, Capital Valuers appears to have incorrectly regarded the MMJ figure of $2,100,000 as a net sum of excess over cost – referring to it as the "completed value". Whereas, as stated above, the MMJ figure represented the capital value of gross revenue to be derived from the spaces (and only *some* of the spaces) and did not take into account construction costs. The Capital Valuers characterisation of this aspect of the MMJ valuation as representing an "excess" of cost over value is thus based on the mistaken assumption that the cost of the parking spaces were not taken into account at all by MMJ. The fact is that the costs of car parking were taken into account, but it is not known, from the MMJ Valuation Report, at what rate. There

is, however, evidence of MMJ's costing in its advice to the Evaluation Team, as mentioned above, which noted in the Tender Evaluation report –

> …MMJ Real Estate values the reduction to 84 spaces in requirement for car parking at around $500,000 and to 100 car parks at around $350,000.

This reveals a cost of approximately $7,100 per space, thus a total cost for 154 spaces of $1,093,400. The divergence of views appears particularly acute in relation to the requirement to construct 154 replacement car spaces. If Capital Valuers' cost estimate of $36,000 per car space to develop were accepted, it follows that MMJ's calculation of the total cost of the 154 car spaces was understated by $4,450,600. Colliers' estimate of the cost of constructing 154 spaces (at $30,000 per space) was $4,620,000. Either of these estimates, if applied, would significantly increase the estimated development costs. And, furthermore, if the profit and risk margin remained at 25% (explained below), that would in turn very significantly reduce the land value (and bring it well below the amount estimated by MMJ in its hypothetical development value approach). It is not necessary for present purposes to perform the calculations, nor to reach a conclusion as to which valuation should be preferred. Each valuer has a high reputation for expertise and reliability. The differences here highlighted are obvious and the real possibility of other variations cannot be disregarded. The example of the car space costing – no doubt complicated by the need to place them in an underground basement – is sufficient to highlight the considerable caution with which the valuations needed to be addressed.

Timing and the impact on hypothetical development

80. In respect of project timing, the MMJ valuation assumed the hypothetical sale of Block 30 in the open market, with construction completed (as noted above) in September 2014, and a sales period that finished in March 2015. The MMJ report repeated the earlier warning about the tentativeness of these times, and in particular, that the "adopted construction period or sales period *maybe* [sic] pushed out thereby increasing holding costs and subsequently reducing the land value" (emphasis added). The closing date of the tender was 26 November 2012. Before contracts were exchanged, and the 10% deposit paid, the bids would need to be evaluated, in all likelihood taking perhaps a month – as in fact occurred: the Evaluation Team report was signed off on 20 December 2012 – then negotiations with the best bidder to the point of an agreed contract would be required, a period impossible to predict but likely to be lengthy. As it happened, contracts were not exchanged until 15 December 2014, a year and a half after the MMJ "indicative" start date for construction. Because of the minimum

two years gap imposed by the RFT, it followed that construction could not commence *at the earliest* before 15 December 2016. For every day, therefore, that construction was delayed beyond the MMJ indicative date, the holding costs (alone, and ignoring other factors) increase and must reduce the land value. It also increased the uncertainties of every other input. This is to ignore the effect on value of the calculation of the risks attending delay by a putative bidder.

Calculating the overall value of land for a hypothetical development

81. In its report, MMJ then consolidated the various assessments it made in the "hypothetical development approach" to reach a determination as to the underlying value of Block 30. The valuation calculation applied was (as set out in the body of the MMJ report) –

Gross Realisation		**$61,828,500**
less Selling Expenses		($2,080,503)
Net Realisation		**$59,747,997**
less GST on Sales		($4,116,438)
Net Project Revenue		**$55,631,559**
less Profit & Risk	@ 25.00%	($11,169,466)
Net Realisation after Profit & Risk		**$44,462,093**
Deduct Development costs		
Construction Costs	$41,335,350	
Professional Fees	$375,776	
Contributions & Charges	$71,000	
Holding Costs	$190,423	
Loan Establishment Fee	$105,161	
Add Back GST Input	($3,993,117)	$38,084,593
		$6,377,500
Deduct Interest		$2,973,601
Acquisition Costs		$223,900
Adopted Residual Value		**$3,180,000**

The "Net Realisation after Profit and Risk" of $44,462,093 was the same figure that was the calculated "Total Costs (after GST reclaimed)", which was itself calculated by adding the "Land Purchase Cost" of $3,180,000 to "Acquisition Cost" (also described as the 'Land Transaction Cost') of $223,900 and "Interest" of $2,973,601 to all the other above identified (inset) costs. It is to be anticipated, therefore, as the primary input of "Gross Realisation" already included the amount of $3,180,000 (because it was expressly included in the "Net Realization after Profit and Risk"), when all other costs were deducted, that sum would remain as residue. In short it was inserted at the beginning and, unsurprisingly, when

everything else was deducted, it was left at the end. It was therefore not the *result* of the calculations in any meaningful sense. The "Residual Land Value" was defined as "the maximum purchase price for the land whilst achieving the target development margin". The "Development Margin" was defined as "profit divided by total development costs (net of selling and leasing costs)". The amount of $11,169,466, described as "Profit and risk" of 25%, is described in the body of the Report as "the target developer's margin representing a percentage of total development costs (net of selling costs)". In the "Performance Indicators" table appended to the MMJ Report, the "Residual Land Value" was calculated at $3,182,891.

82. No data are cited to support the specification of the 25% profit and risk margin. It is difficult to avoid the suspicion that this margin was selected in order to produce by arithmetic the residual land value of $3.18 million. The derivation of a value by the insertion into the calculation of the amount already produced by the direct comparison method substantially undermines the utility of the hypothetical development method as a check. Had the valuation simply been to the effect (following the relevant development calculations) that a developer with a target margin of 25% could bid no more than $3.18 million for the site, this would have been unobjectionable. Of course, whether any developer exercising reasonable commercial caution would likely be prepared to make a bid on this (apparently, in the circumstances, rather inflated) basis is necessarily speculative but, if some grounds were provided, the valuer could be justified in proffering such an opinion, which could be seen as providing limited support for the $3.18 million derived from the direct comparison method – limited because, of course, if accepted it would indicate the *maximum* likely price able to be obtained rather than a *reserve* (or minimum) price. In actuality, however, the approach apparently adopted by MMJ was to commence with the margin and derive the maximum price whereas, in actuality, it seems that the price was the starting point from which the margin was derived. The fact that the two methods of calculation had identical outcomes demonstrates, without more, that they could not have been independently calculated. The identical outcomes cannot be coincidental and is all the more problematic because, apart from being differently calculated using different data, they were (as already mentioned) conceptually fundamentally different. This seriously undermines the utility of the adopted method as a check.

The utility of the MMJ valuation

83. As mentioned, the notions of a "willing buyer" and a "willing seller" are artificial constructs as the notional actors whose price decision is what is sought to be predicted. In the real world, even if a prospective buyer or seller were to consider all the factors brought into account by

the valuer and weigh them in the same way (an extremely unlikely scenario), the predicted price would only actually be chosen if no other factors were considered to be significant, an inevitable but essentially incommensurable possibility. In the real world, buyers and sellers act on the basis of their own particular and, to a greater or lesser extent, unique commercial and financial interests, which obviously cannot be brought into account by a third party, such as a valuer. An example here is that Woolworths only wanted the site for a liquor store and three shops; the value to it of Block 30 was inevitably a reflection of that reality. Woolworths might have hypothetically agreed that, having regard only to the matters to which the valuer referred, a reasonable price was $3.18 million but, though no doubt interesting, this was not the value the site represented to it. Similarly, in the case of Tradies, the site's principal attraction was its being adjacent to the Club. The MMJ valuation assumed the purchaser would develop the site to its "highest and best use", but this clearly reflected a range of possibilities, which might not, as it happened, reflect the purpose for which a real world prospective bidder wanted the site. In short, the connexion between the synthesis of the hypothetical measures selected by MMJ for its valuation, and the calculations likely to be made and regarded as decisive by real buyers and sellers (to a greater or lesser extent unknown and unpredictable), is tenuous to say the least. Even where a site has been developed and income streams and outgoings are known, which would enable calculation of a reasonably accurate capital value, significant uncertainties remain inherent in the nature of the market itself. Here, the stipulated delay in construction does not simply have financial consequences, but also impacts the commercial context in which a tender is likely made, increasing risk in a way that was substantial but essentially unpredictable. This must inevitably adversely affect the price that a tenderer would be willing to pay, but of which no account was taken in the MMJ valuation.

84. Valuation is thus to be understood as an exercise of judgment, balancing imprecise data from various sources only comparable within varying penumbra against future expectations in which small variations can give rise to uncertain and significant consequences. It is an exercise necessarily conducted without accurate information as to what the actual buyers or sellers in the pool might consider determinative. Hence, it is a prediction only of what "should" be the price if buyers and sellers brought into account *only* the limited range factors selected by the valuer and gave them the same significance. This will never, in fact, be the case and, in the instant example, was not ever able to be the case, if only because MMJ (for good reason) specifically excluded matters of manifest relevance. Leaving aside the particular issues to which reference has been made, the general uncertainties to which

attention has been drawn are neither new nor surprising. The valuation of land and buildings involves matters of judgment as to which opinions even of experts notoriously vary. There is no scientific exactitude in such valuations, which are as hypothetical as the hypothetical seller and buyer they assume. It necessarily follows that there is no such thing as a "correct" value for a given piece of land. This is not a criticism of the valuation, which adopted a conventional approach to a complex problem. However, an understanding of the limits of reliability is essential to appreciating the significance that can usefully be attributed to the ultimate result.

85. The data used and the reasoning applied by MMJ have been set out in considerable (and, perhaps, tedious) detail in this Special Report to demonstrate the (inevitably) wide extent of indicative estimations at almost every inflection point in the process. Virtually every significant step required an "adoption" of one figure amongst others which were also reasonably available, each adoption necessarily arbitrary (merely reflecting the mid-point) and multiplying rather than merely adding to the scope of uncertain probability. Even if MMJ had relied only upon the direct comparison approach to reach the figure of $3.18m, the weight that could legitimately be placed on that valuation for the purpose of predicting a realistic price and, in hindsight, assessing the reasonableness of the price achieved was necessarily significantly qualified, in light of the highly uncertain character of much of the data upon which it relied.

86. Seen in this light, the precision of the ultimate fixed sum is, of course, illusory. Moreover, that the prices actually offered in the result would be significantly less than the value estimated by MMJ was to be expected, indeed, virtually inevitable. It follows in the circumstances of this case that, by far, the most useful indicator of actual market interest and actual value were the offers actually made. Although this is to anticipate the chronology of events, it should be acknowledged at this point that, in the result, Tradies agreed to pay the $3.18 million asking price. However, this was part of an overall transaction that included the sale to the Territory of its Downer site (involving a leaseback with a substantial rent holiday) and a number of variations to the contractual conditions (these aspects are discussed in this Special Report due course). The final price remained a material indicator of value, subject to these (significant) qualifications, but the initial offers should fairly be regarded in the circumstances as highly significant. The important point is that there are no bright lines and all the data should be taken into account in arriving at a sensible conclusion.

87. As well as prices offered being well below reserve, that only two bids were received demonstrated the very limited market interest in the site. Furthermore, the two bids were by no means random – rather they stemmed from idiosyncratic local concerns. As noted above, one of the bidders was Tradies, whose interest was directly related to and instigated by its ownership of adjacent properties; the other was Woolworths, also the owner of adjacent property, which proposed a very low risk development of a liquor store constituting far less than the assumed "best and highest use". It would usually be expected that the unattractive aspects of a proposed transaction might be overcome by lowering the price offered on the basis that it would be worth something and a profit could still be made. But the MMJ valuation made no allowance for the most unattractive aspects in the reserve price. On the other hand, the market was quite capable of assessing the risks and the consequential value in light of them, and there was nothing stopping any interested party from offering a price low enough to make acquisition worth its while. But this never happened except for the Tradies' and Woolworth's bids, which were low by comparison with the valuation. In short, Block 30 was not attractive at *any price* to any player in the general market who did not have a particular interest in the site. This possibility, it appears, did not occur to MMJ. The apparently disappointing outcome of the tender process seems to have been regarded as happenstance by those interrogating the propriety of the ultimate transaction, when it was actually a highly significant marker of true value. Disregard of significant facts will almost always lead to flawed outcomes, as not surprisingly occurred here. (Amongst other matters, the notion that a better outcome might have been achieved by putting the site out to tender again, rather make the adjustments negotiated by EDD and Tradies, represented the triumph of hope over experience.) Prospectively, the MMJ valuation was much higher than any price likely to be offered and hindsight confirmed this scepticism. Taking up the notion of "value for money", Block 30 was never nearly worth as much as $3.18 million (excluding GST).

88. This is not to suggest that valuations are not of use. They represent a rational, evidence-based attempt to inform an inherently uncertain future prediction in a dynamic space and provide useful data for sensible decision-making. But they cannot be approached as though there is such a thing as an "ideal" or even "real" value capable of calculation. In *every* case there will be variables of one kind or another that introduce major uncertainty and it is the market that ultimately determines actual value. It is, therefore, not merely advisable, but essential, not to dismiss other information of direct, persuasive relevance. In the present case that information comprised the actual bids made by sophisticated actors, together with (and this cannot be overemphasised) the complete lack of any other significant interest.

It would be naïve, of course, to ignore the likelihood that would-be buyers might be unlikely to bid high and it is thus sensible to approach their offers with a degree of caution. But, in the context of a tender process, where, unlike an open auction, the other bids are unknown, and submitted bids can be immediately accepted by the vendor, it would be reasonable to regard a genuine tenderer as close to the money. The bids here provided a reality check which subsequent inquiry about value should have taken seriously. Thus, it was a basic mistake (quite aside from the issues which have already been discussed) to approach the MMJ valuation as though it revealed the "real" (or "true") value, so that a sale at anything less was obtained at a discount or, more wrongly, at the cost of the Territory or, more wrongly still, that the responsible officials who accepted Tradies' ultimate offer were either incompetent or lacked impartiality or probity. This is important when weighing the significance of the variations of the initial tender conditions agreed to in the ultimate agreement. It follows that it is a fundamentally flawed approach (as well as practically impossible) to attempt to assess the legitimacy of the ultimate transaction by giving significant weight to the arithmetical consequences for the MMJ figure that might have resulted from each negotiated variation.

89. In summary, the inherent uncertainty attending the accumulation of judgment call on judgment call required no explanation to a careful audience. Both the relevance and disregard of delay was noted at the outset. Amongst other manifest problems (detailed above), disregarding the risks of substantial delay, the anomalously identical outcomes of the two supposedly independent valuation methods and the arithmetical artificiality of the hypothetical development valuation were patent on the face of the report and even more obvious was the judgment of the market. (As will appear in later discussion, the EDD accepted the valuation at face value for certain purposes and did not for others.) This resulted in much more being made of the MMJ valuation (not to mention the other valuations that came under notice) than was actually justified.

90. It appears that, for its part, Tradies had obtained a valuation from Knight Frank of $2.2 million (GST exclusive). This information appears in the Briefing note from Mr Ellis to Mr Dawes of 13 December 2013 but, despite its apparent relevance, was not referred to by either the Auditor-General or the Committee.

91. Mr Ellis told the Auditor-General that one of the issues with the MMJ valuation was that "the [ACTPLA plan] to put a road between the Tradies existing site and Block 30…put a severe limit on the building envelope…[but] the valuation did not factor in this limitation.

Hence, the valuation was always inflated. In other words, the land was never worth what the MMJ valuation said it was worth". Noting this information, the Auditor-General commented that the $3.18 million MMJ valuation continued to be the reserve price that the EDD sought to achieve. It was also the Auditor-General's view that, should Mr Ellis "have had reservations associated with the MMJ Real Estate valuation it was incumbent on…[him] to seek clarification and amendment from MMJ Real Estate on the valuation as necessary", observing that there was no evidence it occurred (and, almost certainly, it did not). There is no explanation for the proposed requirement that Mr Ellis was obliged to raise his reservations with MMJ. The implication that only one response was appropriate (being that Mr Ellis should have sought clarification from MMJ) does not have much to commend it. It treats the MMJ valuation as both an accurate starting point and a straitjacket and disregards the responsibility of the officials – Mr Ellis, in particular – to extract the best value practically possible, whilst satisfying the public interest considerations implicit in the Dickson Centre Master Plan. There were real risks from the Territory's point of view associated with asking for a revaluation. Leaving aside the requirements of procedural fairness, whether MMJ ought to have been approached was a matter about which Mr Ellis and, perhaps, other relevant officials should have been asked in the interests of obtaining information. Criticisms without explanations, especially in the absence of obvious inquiry, are not of much use. They are also inherently unfair. At all events, whether this enquiry to MMJ should have occurred was a matter for judgment and there is no evidence that Mr Ellis acted otherwise than conscientiously. The point of substance is whether Mr Ellis' view that the MMJ valuation was inflated was reasonably open. Plainly it was, even on the (limited) basis to which he pointed, and, in fact, it was correct. Put simply, in the circumstances, even if the ultimate transaction (the details of which are discussed below) be regarded as including a sale of Block 30 at an effective price below the MMJ valuation, this does not provide any evidence of lack of integrity or reasonable grounds for suspecting corrupt conduct.

The RFT

92. Mr Garrisson AM SC, the ACT Solicitor-General and Government Solicitor told the Committee that, in mid-2012, his office was instructed in the matter by the LDA, settled the RFT, and drafted contracts and other documents for the tender process.

93. The RFT stated that the Block (then numbered 20), with an approximate area of 5282m², was on currently unleased Territory land and used as a car park for approximately 154 car

spaces. It was a bitumen sealed corner site with a level contour that backed the Tradies club. As stated in the RFT, development on the site would be limited to six levels above ground with a maximum gross floor area of 14,000m². The site would have a developable footprint of 2430m², and an area of 1300m² was to be developed as a public park to be handed back to the Territory. In relation to car parking, the RFT adopted the language of the Cabinet requirement stipulated in its approval of the tender –

> 3 (f) The land has been identified by the Territory as a necessary source of short-term overflow car parking whilst the development of the adjoining Block 21…[by Coles] is being undertaken. For this reason, settlement of the Contract for Sale of the Land will not occur until the later of two years from the date of the Contract for Sale or until a Certificate of Occupancy has been issued following the redevelopment of Block 21….If a Certificate of Occupancy following the redevelopment of Block 21…has not been issued within four years of the date of the Contract for Sale, the successful tenderer and LDA will each have the opportunity to rescind the Contract for Sale.
>
> (g) Prior to redevelopment of the Land, the successful tenderer would be required to provide a temporary traffic management plan and *short-term car parking strategy* to demonstrate how the loss of the [public] car parking on the site would be provided while the block was being redeveloped. [Emphasis added.]

94. Clarification 1, issued on 5 October 2012, extended the closing date for the lodgement of Tenders to 15 November 2012 and varied the car parking provision very significantly in a way that was not required by the Cabinet approval –

> Respondents are required to [*permanently*] replace the existing car parking on the site and provide additional car parking generated by the proposed uses consistent with the Territory Plan.

Clarification 2 of 6 November 2012 pointed out –

> The minimum number of publicly–accessible car parking spaces on block 20 section 34 Dickson would have to comply with the Territory Plan. As the consultation report and recommendation for the government on DV311 are still being prepared by ESDD, all queries on DV311 and the code would be best directed to ACTPLA. EDD would support that a minimum of 84 spaces be available for public use.

Clarification 2 also stated –

> The onus will be upon the successful tenderer to provide a plan for how alternative car parking will be provided whilst the land is being redeveloped. The requirements for replacement car parking are likely to be captured in the Project Delivery Agreement but this will be negotiated with the successful tenderer based upon their proposal.

Clarification 4, issued prior to closure of the tender, dealt with the (interim) alternative parking –

> An interim car parking strategy is being prepared by the ACT Government which will be released after this RFT has closed and it is intended to meet displaced car parking during the development of both Block 21 Section 20 and Block 20 Section 34 Dickson. The cost of temporary car parking will be dealt with in relation to the sale of Block 21 Section 20 Dickson.

95. Accordingly, as at closure of the tender, the number of replacement car parking spaces actually required was uncertain, indeed, it was not a matter for the EDD to determine. As Clause 32 of the specimen Contract explained, the development on Block 21 was to include a public carpark, completion of which was a prerequisite to settlement of the Block 30 sale and commencement of any development on the site. The MMJ valuation report stated, "From enquiry with Design Policy - Strategic City Planning and Design at the EDD, the car parking on site will have to be replaced (154 spaces) in addition to any parking generation created by future development" but it did not indicate that, in fact, this issue was undecided. It seems that MMJ was so instructed or, at least, decided to make the most conservative assumption for the purpose of the valuation. Tenderers, however, were left to guess.

96. The *Planning and Development (Draft Variation No 311) Consultation Notice 2012* ("**DV 311**") required any development to retain the "existing level of car parking and [accommodate] onsite any additional demand for car parking that is generated by the development [and ensure] that car parking remains available for public access [and] complies with the Parking and Vehicular Access General Code in the Territory Plan". Mr Ellis explained to the Committee how the process concerning the car parking had developed –

> The Draft Variation 311—the Dickson Precinct Code, the Dickson Master Plan Variation—had yet to be approved. The existing policy was not confirmed. The policy regarding replacement car parks is quite explicit. It says that all of the car spaces have to be replaced. However, because the Planning Authority's Dickson Master Plan had removed 54 per cent of the available developable space for the block, the question of how that policy would be applied was unclear. There was an assumption within the development community, within the EDD and the LDA, that, of course, as the Planning Authority was getting rid of 54 per cent of the site… naturally, what it meant by replacing all the parking was to replace that parking which was still extant, which was 84 car spaces. That was a position that we put, as EDD, to the Planning Authority in their deliberations on this question, through their parking expert.

97. It is convenient to mention, at this point, that Tradies' bid proposed 84 replacement car spaces merely (and reasonably) reflected what was taken to be the likely requirement. More significantly perhaps, the Clarifications about the parking were issued before closure of the tender and thus not in response to Tradies' bid.

98. It does not appear that any interim car parking strategy was in fact released, although the Auditor-General noted that there was discussion between the EDD and Tradies about making some of its existing carparking publicly available, as part of a temporary parking strategy for Dickson while Block 30 and Block 21 were being developed. It is scarcely surprising that (as will be seen) the Tradies response in its bid to the assessment criteria in the RFT was "subject to satisfactory review of the Territory government car parking strategy referred to in the…[Clarification]".

99. Accordingly, as at the date of the valuation by MMJ, the closure of the tender and the consideration of the bids by the Tender Evaluation Team, the scale of replacement car-parking, both permanent as part of the development and interim whilst construction was underway was far from certain. (Indeed, the number used by the Team was 139, which seems to have reflected a traffic management plan that had been abandoned). As mentioned above, this was not the route taken by MMJ in dealing with the car-parking issue: it commenced with the elements of an assumed highest and best use development, subject to the Purpose Clause in the proposed Crown lease, and the results of applying the then current planning requirements to it, and then simply added the carparking spaces that it was informed would be lost by the use of Block 30 and required replacement in the ensuing development. It seems obvious that, whilst the development was underway on Block 30, that site could not be available for extra interim parking whilst, at the same time, the development itself could not be used because, of course, it was under construction. Thus, no replacement car-parking could be made available on site once development was commenced on Block 30 (there being no requirement that the development on the Coles site should replace the parking lost by the development of Block 30). An offer by Tradies to use its existing car-parking on another of its sites was therefore an apparent solution to this conundrum. Neither the Auditor-General nor the Committee dealt with this matter, though both made extensive comment on the car parking issue. Even the Tender Evaluation Committee proceeded on the basis of a number of replacement car parking spaces that was not specified in the RFT and the later Clarifications. Mr Ellis told the Committee that, despite the arguments supporting the replacement number of 84 spaces, on 23 June 2013 the Territory Plan ultimately provided that there was to be no change to the requirement of 154 spaces.

It is clear that at no point was the 154 car spaces actually varied and a lesser number was never agreed in any final sense.

100. The Auditor-General and the Committee each appear to have approached the questions both of value and negotiation essentially on the basis set out in the MMJ valuation. However, as has been demonstrated, the valuation did not reflect an actual estimated price, even on its own terms. Reliance on it without substantial qualification arising from its limitations for the purpose of considering whether the Territory was adequately compensated for the Block was thus highly problematic.

101. The RFT provided that the provisions of the proposed lease to be issued to the successful tenderer would reflect the Specimen Lease contained in an addendum. Addendum 1 stated, however –

> Tenderers should note that while the specimen lease comprises the essential terms and conditions under which the Authority may issue the Crown Lease, *it will not be endorsed by the Authority until the Prescribed Conditions have been approved, and the Territory and the Authority reserve the right to amend the terms and conditions before the Lease is signed.* [Emphasis added.]

Furthermore, in Clarification 2 of the RFT, the question, "When will the specimen form of the Crown Lease be provided?" was answered, "The specimen form of the Crown Lease will be released to the Preferred Tenderer after the RFT has closed". (By way of parenthesis, it will be seen, in later discussion, that the Auditor-General used the phrase "the specimen lease comprises the *essential terms and conditions* under which the Authority may issue the Crown Lease" (emphasis added) to obtain advice on the transaction from the Australian Government Solicitor (AGS). However, it is clear that this description was intended to apply to the Crown lease as ultimately drawn but not to the terms envisaged either in the RFT or in the specimen form to be provided after the RFT closed, which was still subject to the right of unilateral variation. The importance of this point will be made clear in due course.)

102. The requirement in cl 3(h)(iii) of the RFT as to provision of a public access easement for the "parkland" assumed the developer would be the Lessee of that site, whereas cl 3(j)(i) referencing the requirement of the proposed Project Delivery Agreement (the "**PDA**"), provided that "the successful tenderer, as part of its development application, must apply to surrender the Crown Lease and seek a regrant excising the park from the land", which implied the Territory's retention of ownership and, hence, thus, no need for any public access easement over the park. The PDA, accordingly, did not require an easement over the park.

Clause 3(j)(iii) of the RFT provided that the PDA would require establishment of a pedestrian accessway from Badham Street to Dickson Place on Section 34 to the south of the building on Block 20 (ie, Coles' site), but not necessarily located on Block 30 (and thus, presumably, not foreshadowed in cl 3(h) in respect of the Specimen Lease) and the consent of the successful tenderer to a public access easement across it was part of that requirement. In the result, the Lessee was to create a park of 1,300m^2 and, by cl 3(g) of the Specimen Lease, to provide and maintain a public access easement over it. (As will be seen in due course, the ultimately agreed Specimen Lease forming part of the contract differed in some respects from this document.)

103. On one view, reg 130(1)(b) assumes the existence of a lease that forms part of the tender. For this purpose, the tender must be taken to be the offer made in the market. On this interpretation, there was no such lease since the Specimen Lease was to be made available to the preferred tenderer and not to the market after the tender had closed. The alternative and, perhaps more likely, interpretation is that para (b) could also refer to the conditions offered in the tender to be part of the Crown lease in due course. A difficulty with this interpretation is that the conditions stipulated in cl 3(h) of the RFT are part of a proposed *Specimen* Lease, not the Crown lease itself. It is thus a real question whether, as it happened, there is a comparator for the purposes of reg 130(1)(b). (This matter is discussed further below.)

104. The Specimen Lease, in its initial post RFT iteration, permitted the uses of: business agency; club; commercial accommodation use restricted to hotel; community use restricted to community activity centre; drink establishment; financial establishment; indoor entertainment facility; indoor recreation facility; office limited to a maximum combined gross floor area of 4,000 square metres and restricted to the first floor and above; parkland; public agency; residential use restricted to the first floor and above; and restaurant or shop. It also required not less than 1,300 square metres of parkland to be provided on the north-west corner of the land and at all times accessible to the public. All these uses, with the exception of hotel, office and residential use were restricted to the ground floor of the building and, in addition, only the following uses could be located on the ground floor of any building facing Badham Street and [name of laneway easement]: club; drink establishment; hotel; indoor entertainment facility; indoor recreation facility; restaurant; and shop (presumably a reflection of condition 3(h)(ii) requiring active frontages etc.). Clause 3(f) provided that the maximum gross floor area of all buildings on the land would be 14,000m². Clauses 3(a) and (b) required development on the land to be commenced within 24 months and completed within

36 months of the commencement of the Crown lease or the issue of a Certificate of Occupancy for Block 21 following redevelopment, whichever was later.

105. The proposed developments as stipulated in the terms of the Specimen Lease required a variation in the form of DV 311. If this did not happen, so that the "Purpose" clause of the Crown Lease was not in the same form as the Specimen Lease, each of the successful tenderer and the LDA would have the right to terminate the contract. The contract would contain a number of Prescribed Conditions, to be issued as an addendum. These were conventional and it is not necessary to detail them.

106. Amongst other things, the PDA required the development to comply with the Design Guidelines and obtain LDA approval for the design before submission to the Planning Authority. The establishment of a pedestrian accessway from Badham Street to Dickson Place with a minimum width of 11 metres and a park consistent with the *Intended Design and Development Outcomes* was required, together with consent to a public access easement across the accessway following its completion. Other than requiring the accessway to be situated to the south of the building on the block, its location was not specified; it was not necessary that it be located on Block 30. Requirements relating to its construction were specified but are not presently important. The successful tenderer was required to pay $1 million as security in respect of the obligations under the PDA but this amount would only be payable upon settlement and was not required to be lodged with the tender. (Arrangements could be made by bank guarantee or bond to avoid the need actually to deposit cash.)

107. The RFT specified a process for assessing tenders, which assigned particular weighting to important aspects of the tender: the bid price, demonstrated financial capacity to undertake the development, provision of a "schematic development plan…showing the floor plans, elevations and proposed uses, demonstrate compliance of the proposed development with the Dickson Centre Master Plan and estimated time frames for redevelopment of the site". Both elements and their weighting appear to be conventional. The details of the last three criteria would be included in the PDA.

108. The RFT also contained clauses expressed in wide terms that effectively excluded any liability arising from the conduct of the tender –

19 CONTRACTUAL OBLIGATIONS

(a) Neither the release of this RFT, nor the submission of any Tender, will create or evidence any contractual or other enforceable obligations or any other binding undertaking of any kind by LDA (including one that could give rise to any promissory estoppel, quantum meruit or on any other contractual, quasi contractual or restitutionary grounds or any rights with a similar legal or equitable basis) in relation to:

(i) the conduct of this RFT process; or
(ii) whether or not LDA in fact enters into a contract with the tenderer.

(b) The submission of a Tender buyer tenderer constitutes an irrevocable offer by the tenderer to acquire the Crown lease on the conditions set out in this RFT.

20 LDA'S RIGHTS

(a) LDA may at any time

(i) cancel, add to or amend the information, requirements, terms, procedures or processes set out in this RFT;
…
(ix) enter into negotiations with anyone or more tenderers, including but not limited to negotiations as to price;

(c) where this RFT provides that LDA "may" do a thing, it may do so in its absolute discretion, at any time and without having to notify any tenderer(s) or provide any reasons.

21 EXCLUSIONS OF LIABILITY

(a) Participation in any stage of this RFT process or in relation to any matter concerning the RFT process will be at each tenderer's sole risk, cost and expense. LDA will not be liable in any circumstances whatsoever for:

(i) any cost, expense, loss, claim or damage arising out of, or in connection with, any tenderer's participation in this RFT process including attending any briefing, the preparation and submission of a tender, participation in the presentation or interview, arranging and conducting a site visit or the preparation and negotiation of a contract;

(ii) any cost, expense, loss, claim or damage arising or resulting from the exercise of any of the LDA's rights referred to in this RFT;

(iii) any failure by LDA to inform tenderers of the exercise of any of LDA's rights under the RFT;

(b) the LDA will not be liable to any tenderer on the basis of any promissory estoppel, quantum meruit or on any other contractual, quasi contractual or restitutionary grounds or any rights with similar or equitable basis whatsoever or in negligence as a consequence of any matter or thing relating or incidental to a tenderers' participation in the RFT process, including, without limitation, instances where:

(i) LDA varies or terminates this RFT process already negotiations with the tenderer;
(ii) LDA decides not to proceed with or to change any aspect of the RFT;

(iii) LDA exercises or fails to exercise any of its rights under or in relation to this RFT;

…

22 NOTICE AND DISCLAIMER

…

(d) The LDA:

…

(vi) has no responsibility to inform tenderers of any matter arising or of which they become aware which may affect or qualify any information provided to tenderers in any way;

(vi) accepts no liability for any loss or damage suffered by any person as a result of that person or any other person placing any reliance on the contents of this RFT or any information provided to tenderers; and

(viii) assumes no duty of disclosure or fiduciary duty to any interested party.

109. As will be seen, the ultimate contract differed in a number of respects from the specimen contract with the RFT (although their actual significance is doubtful), none of which were disclosed to Woolworths, as the other tenderer. The significance of the changes and the omission to disclose them to Woolworths was potentially important to the propriety of the transaction. In considering that issue, the exclusion of liability clauses cited above are of critical importance.

110. In discussing the terms of the RFT, it is necessary to take into account that (as noted above) several "Clarifications" were issued that became part of the tender. These demonstrate some of the attendant complexities and uncertainties outstanding as at the time of its release –

Clarification Number Two

1. Addendum #1 issued on 5 October requires replacement of existing car parking on the site and DV311 refers to retaining existing level of car parking. Exactly what number of car spaces are required to be available for public use following development of the site?

The minimum number of publicly–accessible car parking spaces on block 20 section 34 Dickson would have to comply with the Territory Plan. As the consultation report and recommendation for the government on DV311 are still being prepared by ESDD, all queries on DV311 and the code would be best directed to ACTPLA. EDD would support that a minimum of 84 spaces be available for public use.

2. We understand that the Precinct Code requires the replacement of all existing on site car parking. Do the 154 replacement spaces have to be provided to the public on the same commercial/duration of stay terms or can these be set by the operator?

See above and terms for access and use for the replacement public car park is to be agreed with the Territory agency responsible for transport planning.

3. Given the importance of Block 20 parking for Club patronage, what interim parking arrangements will be required if Block 20 is to be developed?

The ACT Government will shortly announce an interim car parking strategy to provide alternate car parking options and parking sites whilst Block 21 Section 30 and Block 20 Section 34 Dickson are redeveloped.

4. Attachment B to the RFT is described as a layout plan is this the same document as the Site Constraints Map which is meant to comprise Attachment B to the RFT?

Yes.

5. Due to the delayed settlement period will you allow/authorise the buyer to deal with ACTPLA prior to completion of settlement?

EDD would have no objections to the buyer dealing with ACTPLA prior to completion of settlement.

6. What is the position with respect to the possible presence of asbestos contaminated soil on the site? What environmental studies have been undertaken to determine the suitability of the land for residential purposes? Will this information be tabled as an addenda prior to close of Tender?

Refer to the Indesco [Site Investigation Report].

7. The contract cover page refers to inclusive/exclusive but clause 25.1 says price is exclusive of GST. Please clarify.

The sale price is to be exclusive of GST. LDA would consider selling the site on the margin scheme if requested by the purchaser.

8. When will the specimen form of the Crown Lease be provided?

The specimen form of the Crown Lease will be released to the Preferred Tenderer after the RFT has closed.

9. The Precinct Plan illustrates the Park as if it were a deep rooted Park. This would conflict with the ability to accept a basement extending under the park (to the road reservation). Can we have written confirmation from TAMS that they will accept a basement extending under the park (to the road reservation), so that the park becomes a stratum block?

TAMS written confirmation is not available but it is envisaged that plantings in the park will not be deep rooted so as to allow a basement extending under the park.

10. Addendum #1 provides a copy of Draft Variation 311 which you have advised has interim effect. Does this mean that both the Current Territory Plan and draft variation 311 will need to be complied with?

Yes for the relevant period noted in the draft variation.

11. If Block 28 (Tradies Club) was redeveloped for residential apartments (consistent with Dickson master plan), what impact would this have on permitted building height for Block 20 to avoid overshadowing on Block 28?
The developer of Block 20 will need to address this in any development application submitted to ACTPLA.

12. Special Condition 36 states that the Buyer takes all risk on planning matters including possible changes to the Territory Plan. Does the development of Block 20 constitute a redevelopment for the purposes of Rule 2.1? If so, how does the restricted access laneway meet the requirements of the roadway pattern shown on figure 2 of DV311?

For the reasons noted earlier, queries on the draft precinct code would be best made to ACTPLA. However, the access laneway shown in Attachment B has been implemented to ensure access to the existing entrance of the Tradies Club is not unduly restricted.

13. The Layout Plan (Attachment B) shows a 3 metre distance from the kerb to the site boundary. Rule 15 of DV311 specifies a minimum 5 metre setback from the boundary to the building line. Rule 11 Setback states that buildings are to be built to the front boundary. The *Intended Design and Development Outcomes* [set out below at [127]] are unclear. What is the required setback of buildings from the kerb and property boundary?

All setbacks have to be consistent with the Territory Plan. For the reasons noted above, queries on provisions in the draft code would be best made to ACTPLA.

14. The RFT (section 3(h)) includes a number of uses which are not permitted under DV311 namely business agency, community activity centre, financial establishment and public agency. Please explain how this can be the case in light of DV311 having interim effect.

DV311 restricts uses at the ground floor along certain frontages, including Badham St, shown in the draft precinct code. Notwithstanding that the uses are restricted on these frontages, they are still permitted on the lease. This is not inconsistent with section 3(h).

15. The Land is located in section 34 which requires a mandatory 2 storey height limit (rule 29) except where the roadway pattern in DV311 is complied with. The *Intended Design and Development Guidelines* appear to have an inconsistent roadway pattern involving additional entries/exits from Badham and Dickson Streets.

Under the proposed precinct code in DV 311 development will continue to be limited to 2 storeys unless the new road identified in the precinct code is provided (see R29/ C29 of draft Dickson Group Centre Precinct Code in DV 311). The road identified in the RFT is not the one identified in the draft precinct code so will not affect the height limits. For the reasons noted above, queries on this matter would be best directed to ACTPLA.

16. Will clause 5.5 of the Project Delivery Agreement be deleted? If not what hourly rates will form the basis of charges for the approvals process.

Clause 5.5 will not be deleted. It has been included to allow LDA to recover its costs, including costs for any consultant fees, associated with endorsing subsequent development applications. LDA is unable to specify an hourly rate because the fee will be based upon cost recovery and will depend upon, for example, whether a consultant is engaged and what their costs are.

17. Item 5 of Schedule 2 of the Project Delivery Agreement suggests that the $1,000,000 in security will not be returned until the development is complete (not just the park). Is that correct?

Yes, the security will be released upon issue of the final Certificate of Occupancy, issue of the Compliance Certificate or issue of a report in accordance with Schedule 3, whichever is later.

18. Schedule 3 of the Project Delivery Agreement refers to Design Guidelines. Are these guidelines the *Intended Design and Development Outcomes* document or something different?

They are the *Intended Design and Development Outcomes*.

19. Is there an Environmental Management Plan for the Land? If not, will clauses 6 and 7 of Schedule 3 of the Project Delivery Agreement be deleted.

The owner of the Land will be required to prepare a EMP

20. Will the LDA agree to amending the definition of Compliance Date in the Project Delivery Agreement so as to allow extensions of the completion covenants to be factored in?
No. The owner of the Land can seek extensions to the completion covenants as required

21. The description of Developer's Works in the project Delivery Agreement table refers to a pedestrian right of way but Attachment B shows vehicle movements and differing widths. Are the description of works and that shown on Attachment B meant to be the same? How does this then fit in with the *Intended Design and Development Outcomes* which identify works in the urban open space but not shown on Attachment B?

The pedestrian right of way and the Attachment B are the same and are such that the right of way is to allow for both pedestrian and vehicle movements in a manner consistent with the *Intended Design and Development Outcomes.*

22. The RFT 3(g) states that there is to be no development without car parking being replaced. This is not identified in the Project Delivery Agreement as a requirement. How is it proposed to enforce this requirement? Will it be included in the Crown lease?

The onus will be upon the successful tenderer to provide a plan for how alternative car parking will be provided whilst the land is being redeveloped. The requirements for replacement car parking are likely to be captured in the Project Delivery Agreement but this will be negotiated with the successful tenderer based upon their proposal.

23. Please clarify the amount of deposit to be paid under the RFT?

10% of purchase price.

24. Is the proposed laneway on the southern side of Block 20 in addition to or in place of the proposed roadway illustrated in the Dickson Precinct Code?

Separate to the proposed roadway illustrated in the Code.

25. The proposed laneway appears to connect into the same unnamed arm of Dickson Place as the roadway proposed by the Dickson Precinct Code. Do the minimum dimensions presented on the General Arrangement Plan take into account requirements for an intersection between the laneway and roadway at this location? Has the need for traffic management at this location been considered and can you advise TAMS requirements in this regard?

Refer to the Indesco SIR report.

26 Who is responsible for the construction and maintenance of the proposed laneway?

The Owner of Block 20.

27. Is any additional traffic management likely to be required at the Badham Street/laneway intersection?

Refer to the Indesco SIR report

28. Will the successful tenderer for Block 20 be required to maintain existing access to the Tradies Club entrance off Block 20 open to the public at all times during any construction process?

This is a DA issue but it is intended that the pedestrian walkway immediately adjoining the Tradies Club at the southern boundary of the subject site will be required to be maintained at all times

29. Will the successful tenderers of Block 20 be permitted to excavate along the frontage of the Tradies Club for basement parking. If so, how close to the property boundary will this excavation be permitted?

This is a DA issue but it is intended that the pedestrian walkway immediately adjoining the Tradies Club at the southern boundary of the subject site will not be disturbed with excavation under the pathway.

30. Is the successful tenderer entitled to full commercial revenues from the operation of the car park prior to the commencement of development or will this be shared with the Government?

The land will remain in the ownership of the Territory until settlement. Thereafter revenues from any continuing car park operations will be at the discretion of the Owner

31. Given ongoing emphasis on more sustainable modes of transport, can you advise if there have been any discussions with TAMS regarding a reduced level of onsite parking provision in this location? If so, what were the outcomes of those discussions? Alternatively, has TAMS indicated whether or not parking generated by future activities must be provided in addition to, or as part of, replacement parking?

No discussions in relation to this matter have been undertaken with the Territory agency responsible for transport planning. This will be a matter between the Landowner and the relevant agency

32. The Precinct Code does not permit business agency, community activity centre, financial establishment or public agency facing Badham Street however the proposed lease purpose clause does not appear to make this distinction. If the lease is issued in its current form, will it be possible to establish these uses facing Badham Street and or the pocket park?

See response to question 14.

33. The height of future development is limited to the lowest of 20m or RL595, including rooftop plant/lift overruns etc. Noting Clause 3(k) of the RFT document, will the site be surveyed and the existing RL confirmed before the RFT closes and the survey plan issued as an addendum?

No

34. The document '*Intended Design and Development Outcomes'* envisages a highly articulated frontage and roof line. Can the full 14000m2 GFA be achieved within a mandatory 6 storey height limit given these parameters? Do you have any concept plans illustrating how this can be achieved on site?

It is the responsibility of each respondent to satisfy themselves as to the development potential of the site.

35. The document '*Intended Design and Development Outcomes'* has not been endorsed by ESDD. Has it been reviewed by ESDD for consistency with the Precinct Code? Will ESDD's endorsement be forthcoming prior to closure of the RFT and participants advised?

The design guidelines released with the RFT do not require ESDD's endorsement as it neither constitutes an application nor forms part of the Territory Plan with which development proposals must be consistent.

36. The '*Intended Design and Development Outcomes*' document states that blank frontages are discouraged to Badham Street and Dickson Place, and that 'blank frontage along the proposed street will be minimised as much as possible'. Figure 1 states that 'Non-active uses are permissible' along the southern elevation. The proposed lease clause requires active frontages at ground floor along the pedestrian access way. A blank wall can create community safety problems. Can you please clarify the intention in this regard? How does this interface with the Precinct Code which requires secondary active frontages in this area? Will any blank frontages be entertained facing towards the Tradies site? Or is there a requirement to maintain an active frontage around the entire periphery of the site?

Further to the response to question 35, the draft precinct code contains specific provisions for locations shown as primary and secondary frontages. Where an area is not shown as either of these classifications, as in the case of the southern boundary of block 20, then development would be assessed against the relevant codes in the Territory Plan, including the Crime Prevention through Environmental Design general code.

37. Can you confirm that the plaza will be assessed as a 'pedestrian parkland' in terms of TAMS Urban Design standards?

No. Refer to 14.3.4 "Design Standards for Urban Infrastructure"

38. The design standards indicate the provision of street trees in the laneway, and shade trees within the plaza. What size/type trees are envisaged? Have these been selected with due regard to the verge width? Will requirements to provide deep root planting limit the extent of basement levels?

The developer will be required to submit landscape plans for assessment with a development application.

39. Is there any expectation by TAMS to retain the existing trees around the periphery of the development site?

See Indesco SIR.

40. The design standards indicate that the laneway will comprise shared vehicle/pedestrian way, even where two way traffic is contemplated. Has any consideration been given to the number of vehicles utilising this area relative to pedestrian safety?

See Indesco SIR.

41. Clause 3(i) of the RFT requires the successful tenderer to excise the parkland from the land. Clause (h)(iii) requires a public access easement be provided by the lessees over the area delineated as parkland. Can you please confirm which requirement applies?

The successful tenderer will be required to excise the parkland from the land.

42. Clause 3(j)(iii) requires the provision of a public easement over the access way following its completion. Has this been cleared by ACTPLA leasing, having regard to Section 306 of the Planning and Development Act?

Section 306 of the Planning and Development Act 2007 is concerned with subleasing and is not relevant to the issue of public access easements. The easement will be registered in accordance with section 103B of the Land Titles Act 1925.

43. Noting clause 3(k) of the RFT and also Rule 18 of the Proposed Precinct Code, will the developer of Block 20 be required to prepare noise management studies as part of the DA assessing the potential for noise impacts on future residents from adjoining Club and surrounding group centre activities? Has EPA offered any advice in this regard?

The developer of Block 20 will be required to comply with the Territory Plan as amended.

44. The site is located close to an existing service station. Noting clause 3(k) of the RFT, will site contamination assessments be made available during the RFT period?

See Indesco SIR.

45. Noting the Government's reintroduction of penalties for failing to adhere to commence and complete clauses, and the relatively restrictive 24 and 36 month commence and complete clauses, would the Government consider negotiating alternative commence and complete clauses?

No.

46. Assessment Criteria C3 requires tenderers to submit a schematic development plan for the site. In light of Assessment Criteria 4, can you confirm whether this is to be consistent with the Territory Plan, Proposed Territory Plan Variation 311 or the Dickson Master Plan?

Yes.

47. Assessment Criteria C4 requires tenders to demonstrate compliance with the Dickson Master Plan. Can you confirm whether this should also be interpreted as demonstrating compliance with TPV311 Dickson Centre Precinct Code?

Yes.

111. This Clarification shows that the Indesco Site Investigation Reports ("**SIRs**") became, by way of reference, part of the RFT. As will be seen, the extent to which the ultimate transaction departed from the RFT became an issue of some significance. It is necessary to bear in mind that the Clarifications (including the references to the SIRs) were part of the RFT for the purpose of this consideration. They were not, however, referred to either by the Auditor-General or the Committee.

Tradies' bid

112. The tender price offered by Tradies was $2,420,000 including GST, and a cheque for $242,000, being 10% of the tender price, was provided with its submission. The bid stated that, "This offer could be structured to have full payment of the agreed price at settlement within 30 days from the exchange of contract of sale of the subject site". Tradies "endorsed" the PAD security of $1 million payable on completion of the contract of sale, "subject to final negotiations on inclusions at the time of sale". So far as the purchase price was concerned, the bid stated that it was based on "the following considerations", referring to Tradies Board approval of the final contract, PDA, and associated conditions, "uncertainty in the sale offer conditions" and "subject to satisfactory review of the Territory government car parking strategy referred to in the Addenda" which was then underway, as mentioned above. As to development, the bid referred (amongst other things) to "provision of 84 public parking spaces in the development as replacement parking as per the RFT". The bid envisaged the integration of Block 30 with Tradies' other holdings and "approval for a comprehensive master plan for the Tradies Precinct…[to] enable staged development of the entire site including [Block 30]". Mr Ellis informed the Auditor-General that some of the replacement car parking would be provided by Tradies in its existing basement. It appears that the Auditor-General was not prepared to accept this information, stating that no documentation to support it was found. However, as the Auditor-General also noted, there was discussion

between the EDD and Tradies with respect to making some of its existing carparking publicly available as part of a temporary parking strategy for Dickson while Block 30 and Block 21 were being developed. It would have been consistent with the initial requirement of the RFT that such a strategy be put in place for the development period. In his evidence to the Committee, Mr Dawes said that "Tradies were going to open up their car park for free while the [Coles] development was being done". The lack of documentation, though not entirely insignificant, does not warrant any suggestion that Mr Ellis' statement was untrue. Indeed, the logic of events itself would support the opposite conclusion. Furthermore, as will be seen, for various reasons the EDD, it is clear, never agreed with the proposal to provide 84 replacement spaces, although the Auditor-General and the Committee mistakenly assumed that it had, thus compromising a number of important findings.

Tender Evaluation

113. A Tender Evaluation Plan provided for a Tender Evaluation Team, its roles and responsibilities, various administrative processes for the tender evaluation process and processes for the assessment of tenders, including evaluation criteria. It appears that Mr Dawes had oversight of the selection of the four Team members. He told the Committee that the Team was "very competent … across government". The Team was chaired by Mr Drummond and comprised persons from the EDD, EPSDD (one of whom was the government architect) and Treasury. Mr Drummond, who was not a public servant, had worked in the property industry for more than 40 years, amongst other things, as a consultant to the New South Wales government, the federal government and the Territory government, as well as working for high net worth individuals and in investment banks. Mr Drummond told the Committee that he ensured that the Probity Officer fully briefed Team members "in terms of their roles, duties and responsibilities, and all of the probity issues, prior to convening and making a decision". Although the understanding of Mr Garrisson SC, the ACT Government Solicitor was that his Office's records did not show any involvement of the "Probity Adviser *during* the tender evaluation phase" (emphasis added), this should not be taken as contradicting Mr Drummond's evidence, which concerns what occurred before the evaluation actually took place. Furthermore, there was no need for any probity officer to be involved in what was, essentially, a technical assessment, which followed what can reasonably be inferred to have been a well-worn path.

114. As to the assessment of tenders, the Tender Evaluation Plan stated –

- All compliant Tenders will be evaluated against the assessment criteria.
- Tenders will be reviewed…against each criterion. The Evaluation Team will then agree on a consensus score out of 10 for each Tender against each criterion in accordance with the scoring regime. Any Proposal that is rated as marginal or less against any of the Evaluation Criteria may be excluded from further consideration.
- The agreed Evaluation Team score will then be multiplied by the criteria weighting to obtain a weighted score for each criterion for each offer. The individual weighted scores for each criterion will then be summed to obtain a total weighted score for each Tender.
- The preferred Tenderer with the highest weighted score, offering best value for money having regard to all relevant factors, might not necessarily be the lowest priced Tender. In cases where the scores do not clearly differentiate between the leading tenderers (within one point), they shall be evaluated comparatively against two highly weighted criteria Technical Skills and Methodology.
- The Evaluation Team will recommend to the Delegate that the Tender with the highest overall weighted score, having regard to all relevant factors, be declared the preferred tenderer.
- Post tender negotiations will take place solely with the preferred tenderer until such time as: (i) a contract is agreed, (ii) the preferred tenderer withdraws their tender, (iii) the capacity to negotiate is exhausted or (iv) the LDA decides to accept no tenders and elects to recall tenders.

115. The “mandatory assessment criteria” were (reflecting the RFT) –

- Tenderers should provide a schematic development plan for the site showing the floor plans elevations and proposed uses within the development.
- Tenderers shall provide estimated timeframes for redevelopment of the site.
- Tenderers shall demonstrate the compliance of their proposed development with the proposed Master Plan.
- Tenderers shall provide details of proposed purchase price for the site and payment terms.
- Tenderers shall demonstrate their financial capacity to undertake the development.

116. These criteria were subsequently assigned a weighting ranging from Excellent (exceeds requirements in all ways, with very little or no risk, scoring 10) to Very Good (scoring 8-9), Good (scoring 6-7), Marginal (scoring 4-5), Poor (scoring 1-3) and Non-compliant (Tenderer has either stated non-compliance, demonstrated non-compliance, or there is insufficient information to assess, scoring 0). The weighted evaluation criteria were communicated to prospective tenders as part of the RFT.

117. The Auditor-General noted that the Evaluation Plan did not give any guidance on how to interpret the different criteria and apply the numerical rating, commenting that this lack of guidance introduced “risks of inconsistency in practice and assessment”. Quite what the capacity they actually had for confusion in the context was not explained, making this criticism difficult to evaluate. Leaving aside the issue of principle (however generally

articulated) stated by the Auditor-General, it should be borne in mind for present purposes that the bids needing evaluation were not complicated and, because they differed so markedly in what might have been regarded as the most important elements, relatively easy to compare, especially by a highly expert Team which, it may safely be assumed, did not need guidance on the matters they were required to assess. Mr Dawes, with reference to this issue, said –

> The tender criteria were deliberately broad to encourage innovation in development outcomes. Applying an interpretation to the criteria could have the effect of stifling creativity by placing boundaries on what is acceptable, noting that all of the normal planning controls would automatically apply to the proposals.
>
> The members of the Tender Evaluation Team were highly experienced and abundantly capable of assessing proposals against the criteria without the need of additional guidance or interpretation.

118. The response of the Auditor-General was to observe that "the risks of inconsistency in practice and assessment associated with the lack of guidance on how to interpret the criteria and apply the numerical rating were subsequently compounded by the lack of documentation associated with the assessment of the tenders…[so that, while] not ideal, the lack of guidance may have been subsequently mitigated by more appropriate documentation associated with the tender evaluation, but this did not occur". Another aspect of the Auditor-General's criticism about the lack of guidance about how to interpret the criteria and apply the numerical rating and not adequately record the reasons for some important ratings did not concern the character of the process itself but, rather that "there is no means by which the Tender Evaluation Team decision to select the Tradies as the preferred tenderer can be substantiated". With great respect, the reasons for the Team's decision appear to be readily understandable and easily substantiated. The Auditor-General added, "it would be inappropriate to assume (*scil* infer) that the Tradies tender was not the better one". With respect, it is obvious that the Tradies' tender was superior, for the reasons set out below. Giving due weight to the Auditor-General's position as a matter of process, the points made by Mr Dawes seem to be reasonable and, as a matter of evidence, should be accepted.

119. As mentioned, two tenders were ultimately submitted: Tradies bid proposed a mixed-use development comprising 130 residential apartments, 1,240m^2 of ground floor commercial space and a two-level basement for public and private parking; the Woolworths bid proposed a 1,250m^2 Dan Murphy's store, 440m^2 for three other retail spaces and two levels of basement car parking. It can safely be assumed that each of these bids was made by rational

actors in their commercial interests. The evaluation criteria (applying the scheme stipulated in the RFT) were: details of proposed purchase price (C1, weighting 40); financial capacity to undertake the development (C2, weighting 20); schematic development plan for the site showing the floorplans, elevations and proposed uses within the development (C3, weighting 20) compliance of their proposed development with the Dickson Centre Master Plan (C4, weighting 10); and estimated timeframes for redevelopment of the site (C5, weighting 10). For C1, Woolworths scored 25 and Tradies 35; for C2, Woolworths scored 18 and Tradies 15; for C3, Woolworths scored 15 and Tradies 18; for C4, Woolworths scored 6 and Tradies 8; and for C5 both Woolworths and Tradies scored 7. The ultimate scores, therefore, were Woolworths 71 and Tradies 83.

120. In relation to the price criterion the Evaluation Report stated –

> Woolworths Limited offered a price of $1,600,000 excluding GST with settlement in 2015 consistent with the terms of the sale contract.
>
> It should be noted that the schematic plans for the Woolworths proposal only appears to provide 100 replacement car spaces but this was not conditioned as part of its offer and therefore they would be bound to provide the full replacement car parking as assessed. The value of the shortfall in the car parking would equate to $350,000 excluding GST if they sought to contract with only 100 replacement car parks.
>
> The Canberra Tradesmen's Union Club Limited (the Club) offered a price of $2,420,000 Inclusive of GST ($2,200,000 exclusive of GST) with settlement 30 days after exchange of contracts. Its offer was conditional on only being required to provide 84 replacement car parks.
>
> …
>
> Both offers are below the MMJ Real Estate valuation commissioned for the RFT which valued the land at $3.180 million exclusive of GST based on a settlement due in 2015 and a requirement to provide 139 replacement car parks.

(It was an error to state the $3.18 million MMJ valuation was based on settlement in 2015; it was explicitly based on a conventional settlement period of 30 days following the date of the contract. Furthermore, as the Auditor-General noted, the valuation assumed 154 and not 139 replacement car parking spaces.)

121. In order to enable price comparison, the Team noted that both bids "needed to be standardised to a common position, taken as a presumed settlement 30 days after exchange,

adjusted for any reduction in car parking" (which represented, on the Team's view, Tradies' position but not Woolworths). The Evaluation Report added –

> MMJ Real estate has indicated that it would discount the [Woolworths] purchase price by 5% compounded over two years to equalise the settlement terms and MMJ Real Estate values the reduction to 84 spaces in requirement for car parking at around $500,000 and to 100 car parks at around $350,000.
>
> On a standardised basis, the offers would then be Woolworths Ltd $1,101,247 ex GST and the Club $1,700,000 ex GST.
>
> Any consideration of the Club offer would also need to be adjusted for the loss of revenue to the Territory over the two year period unless they agreed to the Territory retaining this income.

122. It is important not to take this reasoning out of context. The standardisation was for the purpose of comparing like with like and Tradies' offer did not need to be adjusted by reference to the settlement delay. The offer by Tradies, in effect, involved cash and 84 car spaces. If MMJ had valued on the basis of 84 rather than 154 replacement car spaces in addition to what was already required under the planning requirements, the valuation would have been higher, since the cost of development would have been less because 70 replacement car spaces would no longer need to be constructed. If the assumption as to number of car parking spaces were reduced to this extent, the saved cost was said to be $500,000, which would result in a concomitant increase in the valuation to $3.65 million to $3.7 million, in effect setting a higher reserve price and increasing the gap between the reserve and Tradies' bid. By parallel reasoning, if Woolworths' offer was taken to include provision of only 100 replacement car parking spaces, the gap between this offer and the putative adjusted reserve would also increase. However, the valuation had not at any point taken account of the requirement to provide interim parking during development, which would have had the countervailing effect of increasing cost and decreasing the value (though this requirement was later withdrawn, as has been shown). There is no information as to how the increase of $500,000 was calculated. As has already been mentioned, a pro rata re-costing of the starting cost (whatever it was – this was never disclosed) would not be appropriate. Given the purpose of the adjustments, and the omission of any calculations, it could not be appropriate to base any conclusion as to value for money upon it. From the point of view of the task of the Evaluation Team, however, the substantial difference between the prices offered by the bids was not significantly affected.

123. The Team rated Woolworths slightly higher in terms of financial capacity on the basis of relative size of the two respondents, but concluded, on considering Tradies' financial statements, that it had sufficient financial capacity to raise the finance required for the proposed development.

124. The Evaluation Report described the bidders' schematic plans –

> Both parties submitted schematic plans, with the Woolworths Ltd proposal showing a single storey retail development comprising mainly of a Dan Murphy liquor store and two levels of basement car parking.
>
> The Club proposal depicted a six-storey building with retail uses on the ground floor and residential units on the upper floor.

The Auditor-General noted, "No further analysis was provided, including how the Tradies proposal was rated higher than the Woolworths proposal for this criterion". This is correct but presently inconsequential: the mere descriptions adequately explained the ratings.

125. As to compliance with the Dickson Centre Master Plan, the Report stated that both bidders "addressed the merits of their proposal against the Dickson Master Plan" but, as the Auditor-General pointed out, the Team did not analyse the information provided or explain the reasons for affording the Tradies' proposal the higher rating. As part of its tender, Tradies said –

> The Tradies are the only organisation that can effectively implement a substantial part of the Dickson Centre Master Plan adopted by the ACT Government following extensive community and business consultation. Successful implementation depends on combining Block [30] with adjacent land holdings to create a critical mass for a substantial mixed use development on Section 34 that will generate new residential apartments, entertainment, hotel accommodation and other land uses. This consolidated redevelopment will represent a major investment over time for Dickson and provide substantial new jobs as well as revenue to the Territory.

126. The Dickson Centre Master Plan was generated by the EPSDD. The Framework makes a number of specific references to Tradies club, of which the following is but one example –

> 5.1.5 Southern car park (adjacent to the Tradies Club). It is probable that in the longer term the Tradies Club site (Blocks 28 and 29 Section 34) will be redeveloped. The site is very deep and without additional road frontage would be difficult to develop. Redevelopment would present an opportunity to introduce new vehicular and pedestrian connections through the site which in turn

would increase the frontage of the site and also improve permeability in the centre. Furthermore, a better outcome could be achieved if the southern car park Block [30] which is adjacent to the Tradies Club site was amalgamated with it. Similarly, the amalgamation could provide an opportunity to obtain public benefits. The nature of any benefits is likely to change but could include:

- replacement of existing parking in accordance with the Territory Plan
- development of a small public open space on part of the car park in order to introduce 'green' areas into the centre, and
- transformation of Dickson Place from a service road to an address road (in conjunction with redevelopment of blocks in the retail core).

Achieving these or other benefits should be a condition of any site consolidation.

The Plan also specifically mentions the Tradies site and Block 30, as well as making many indirect references to it. One example is –

Planning and design principle: anchors

Large scale and specialist retailers are important anchors as they can attract large numbers of people to and through a centre.

Anchors should be located to maximise pedestrian movement past specialty/small scale retailing.

Applying the principle

- Allow for Block 19 Section 30 to be released for major retail development (including a supermarket) with basement car parking.
- Consider the release of Block 21 Section 30 for major retail development with potential residential development along Antill Street.
- *Encourage contiguous development with the 'Tradies Club' on Block [30] to be released for mixed use development, including major retail, to add to the activation of the centre.* [Emphasis added.]
- Investigate the potential to consolidate part Block 20 Section 30 with Block 10 Section 30 (Harris Scarfe store) to allow for establishment of a major retail anchor.

127. The LDA statement of Intended Design and Development Outcomes for Block [30] stated –

OBJECTIVES

The Dickson Group Centre vision

Dickson centre will be a multicultural, progressive and safe hub with a diversity of services and amenities for the local and wider community, a place where people live, work and play.

Dickson Centre presents a new typology for mixed use centres in the ACT that seeks to pursue an active centre that is focussed on pedestrians, cyclists and provides an attractive and amenable public domain. Dickson Block [30] Section 34 should respond to objectives contained within the Dickson Group Centre –
Draft Variation to the Territory Plan 311. The following objectives inform development on Section 34:

- To create the developed site as a destination with extended hours of use and a strong sense of place through its connection to a new, high quality urban park that generates activity and promotes social interaction and economic vitality.
- To produce conditions that encourage use of the public space. Designs should contribute to a sense of comfort and amenity for people by providing weather protection and street furniture.
- To encourage a mix of uses, including high density residential components, which contributes to an active and diverse character;
- To encourage activity at street frontage level which contributes to pedestrian activity and social interaction composed mostly of entertainment venues such as restaurants and bars but may have some retail space;
- To induce life and activity by the establishment of a useable and observable public domain;
- To create safe and convenient zones for pedestrians & cyclists;
- To promote 24 hour natural surveillance with overlooking residential uses accessed from the public domain;
- To provide Dickson Group Centre with a contemporary character;
- To provide a development that is environmentally sensitive and incorporates best practice sustainable design elements;
- To avoid exposing public parking to the pedestrian orientated public domain;
- To support sustainable transport;
- To promote opportunities for energy efficiency through good solar access; and
- To ameliorate adverse climate impacts e.g. NW winds.

DESIGN PRINCIPLES

DEVELOPMENT OF BLOCK 20 SECTION 34 WITHIN THE DICKSON GROUP CENTRE MUST BE RESPONSIVE TO THE INTENT OF THE PRECINCT CODE CONTAINED WITHIN DRAFT VARIATION 311 TO THE TERRITORY PLAN, WHICH IMPLEMENTS THE DICKSON CENTRE MASTER PLAN (2010).

STREETSCAPE

Badham Street borders the development site to the west. It is designed for safe movement for all users, being convenient for cars, buses, pedestrians and cyclists alike. The intent of Badham Street is to enhance the pedestrian experience, creating an activated and attractive street.

Dickson Place borders the development site to the north and is to be maintained for safe movement of pedestrians and cyclists, as well as vehicular access to the site.

The new public plaza to be constructed by the purchaser, will provide a pedestrian link from Badham Street and Dickson Place. This connection is expressed through a widened pedestrian verge which is integrated with the predominantly paved (hardscape) application to the open space.

At no point along any existing or proposed streets will the basement car park extend above the finished footpath level.

PEDESTRIAN ENTRIES

All entry points will be clearly expressed through the built form and provide at-grade interface with the public domain, providing ease of access and transition between the built form and the street.

Private entries to residential apartments will be clearly demarcated from the public areas, well lit and safe. The residential entries will be separated from other ground floor uses such as shops or restaurants.

SITE + VEHICULAR ACCESS

A new access way is required to be constructed at the southern edge of Block 20 Section 34 in order to facilitate access to the Tradies Club … It is a low speed, low volume traffic environment to be designed as a shared way providing for both pedestrian and vehicular access.

Vehicle ramp widths will be kept to a minimum and will prioritise pedestrian movement when crossing verges, through elements such as material selection.

Vehicular movement into the site will be from Dickson Place. The access ramps for on-site parking are to be clearly differentiated from the service vehicle entry.

SERVICES

Servicing areas are required to be internalised within the built form and fully screened from public view. Service areas are not to visually or materially impact the streetscape or adjacent sites.

MASSING

The massing of the building will be developed in response to internal uses, adjacent built form, streetscape outcomes, climate and views.

Overall the building form will be articulated at a scale appropriate to its context, and be engaging and expressive.

STREET LEVEL

The ground floor will promote public permeability, encourage interaction with the street, provide enticing access points and be generous in its finished floor level to finished ceiling level.

Blank frontages are discouraged to Badham Street and Dickson Place. The use of clear glazing along these frontages will promote passive surveillance and add to the sense of street activity.

Blank frontage along the proposed street will be minimised as much as possible along the length of the access way. Lighting, windows and designed detailing to the facade is encouraged to promote both a safe and aesthetically pleasing environment.

UPPER LEVELS + ROOFTOP

The upper levels of the built form will be composed with a balance of solid and void, projecting and recessed and opaque and transparent elements to provide high amenity internal and external living spaces. The treatment will maximise passive surveillance of streets, public thoroughfares, and communal open spaces below. The facades will be visually engaging through articulated projection of walls, balconies, terraces and windows.

The roof line will provide modulation for visual interest, and its setback will be considered in relation to its impact upon the streetscape. Plan and lift over-runs should be an integral part of the roof design of buildings.

Terrace/balcony gardens are encouraged for use by the residents.

MATERIALS

Materials will be selected for permanence, durability and low on-going maintenance.

Weathering effects will be considered and used as a tool for enhancement, allowing ongoing change without reduction in the inherent quality of that material.

Materials will enhance architectural expression and enhance visual, audible and tactile experiences in streets and public spaces.

Embodied energy, thermal properties and potential for future recycling capabilities will influence a material selection. Selected material will avoid being highly reflective to avoid glare and focussed heat transfer.

AMENITY + SUSTAINABILITY

In order to achieve a built form that is functional and amenable, best practice Environmentally Sustainable Design (ESD) principles will be followed. They will optimise cross ventilation, and where cross ventilation is not possible corners of buildings and articulated elements will be utilised to provide through ventilation.

Plan depths will optimise ventilation and natural day light, reducing dependence upon air conditioning and artificial lighting.

Energy efficient lighting will be installed and consideration given to the use of solar devices such as solar Teams, solar hot water systems and the like.

Sustainable transport choices should be promoted by facilitating access to efficient public transport, cycling facilities, shelters and providing clear and direct lines of travel.

DESIGN PRINCIPLES

THE DEVELOPMENT OF BLOCK 20 SECTION 34 IS REQUIRED TO RESPOND TO THE DESIGN PRINCIPLES WITHIN THIS DOCUMENT, AND HAVE REGARD FOR THE PROPOSED PRECINCT CODE CONTAINED WITHIN THE DRAFT VARIATION 311 TO THE TERRITORY PLAN.

128. These provide a small window of detail into a complex, large-scale and inevitably dynamic plan which had broad community input and provided a critical context for the consideration of all the relevant actors, especially the EDD. For present purposes, it demonstrates the wide range of matters that the Team were required to have in mind when considering its evaluation of the tenders, in respect of which it is reasonable to infer they were well informed. Accordingly, it is reasonable to consider that the Team's conclusion that the Tradies proposal "was superior in terms of the … overall solution for the site" was based on a thorough understanding of how the solution fitted with the Master Plan. Given the Plan's scope and many moving parts, and the real possibility of differing opinion about the relative significance of each of the many elements, it seems obvious that any analysis of the consensus, to which each Team Member might well have made a different contribution, would have been virtually impossible to sensibly draft unless by use of high-level generalities unlikely to be of any practical utility. Put shortly, the conclusion was that of experts considering matters well within their expertise, on the face of it justifiable and directed to a knowledgeable audience familiar with the wider developmental context. The absence of any analysis explicitly directed to permitting evaluation by laypersons does not suggest that the conclusion was not appropriate. Nor does it suggest any want of probity in the sense of good governance. It is not a requirement of "transparency", let alone probity in public administration, that matters of expert opinion and judgment need to be justified to laypersons without the requisite knowledge and expertise, here, for example a detailed understanding of the Dickson Centre Master Plan. The relevant test for present purposes is whether an examination of the Report, together with the contextual material, made it reasonably clear how the Team derived their conclusions. Whilst more details can always be provided, and in the opinion of the Auditor-General should have been, which might have made the Report more understandable to lay observers, the manner in which the Team approached its work and reported its findings does not give rise to any real apprehension that suggest a lack of integrity or the possibility of corrupt conduct.

129. As to estimated timeframes, the Team Report said –

> Both parties acknowledged that they would not commence development until the development of Block 21 Section 30 was completed [following issue of the Certificate of Occupancy] to a stage that replacement car parking was available on that site.
>
> Woolworths estimated it would take 10 to 12 months to construct its scheme from the time a contractor took possession of the site for construction.

> The Club advised that the development of [Block 30] would be rolled into a comprehensive master plan of all the adjoining sites that are owned by the Club which would result in a comprehensive redevelopment of the whole of that Section within the Dickson Group Centre.

130. The Auditor-General observed that no further analysis was provided on this criterion, "importantly nothing on the potential implications for the timing of redevelopment to be impacted by the Tradies' intention to combine the redevelopment of Block 30…into a broader redevelopment of its Dickson land holdings". This criticism is correct, as far as it goes, but does not appear to reflect the actual purpose of the evaluation at this point. The RFT itself in effect provided (as mentioned above) for a time frame for the completion of development with which the Tradies bid did not cavil. The fact that both bidders achieved the same score implies that both bids were regarded as equally compliant. On the assumption underlying the Auditor-General's comment, that the quicker the completion of the development the better, the conventional smaller development would always outscore the more creative ambitious project. The essence of the evaluation process was comparative, not substantive. The scores were all context-driven: the equal scores in respect of redevelopment timeframes implied that, for *each* bid, the timeframe was reasonable. This point is so obvious that it did not require explanation. The Report was clear enough for its purpose, which was to guide the LDA in choosing the successful tenderer by a method that was sufficiently transparent to demonstrate the reasonableness of its recommendation.

131. The Tender Evaluation Report noted that neither bid met the reserve price of $3.18 million and recommended –

- Tradies be selected as the preferred tenderer;
- obtaining an updated valuation of Block 30 on the basis that settlement occurs 30 days after exchange and only 84 car spaces are replaced; and
- the Economic Development Directorate be given authority to negotiate with the Tradies to achieve a sales price consistent with the updated valuations.

132. It is not necessary for present purposes to point out the problems with the second and third of these bullet points, although each was problematic in its own way, for example: the number of replacement car parking spaces in fact was not 84 and anyway could not be varied unilaterally by the EDD; the valuation was already calculated on the basis of a 30 day settlement; and bringing forward the settlement date would not change the delay in commencing development. As the Auditor-General fairly noted, Mr Ellis responded to the Report's criticism by expressing the opinion that there was nothing wrong or inappropriate in the way the Team went about its evaluation. He thought "it provided an exemplar of how

such processes should be run". He emphasised the importance of the independence of the Planning Authority and its significance for the evaluation process. This meant that, although the other members of the Team may have expressed an opinion about the planning merits of a proposal and its compliance with the Dickson Centre Master Plan, the decision about this "was entirely a matter for the Planning Authority representative". It would not have been considered either necessary or appropriate to have explained to the Chief Executive of the LDA the basis for this view and, in effect, allowing the LDA to sit in judgment, which would have been regarded as an infringement on the Planning Authority's prerogative in planning matters. In fairness, this does not answer the point being made by the Auditor-General which was, essentially, that an explanation for the rating was desirable for consistency in decision-making and in the interests of transparency: it was not directed to the relationship between the Planning Authority and the LDA. At the same time, the response of the Auditor-General to Mr Ellis, which merely pointed out that there was no documentation that the Planning representative "would be providing advice and information on planning matters associated with the future development of Block 30 on behalf of the ACT Chief Planning Executive as part of a tender evaluation" invites the obvious question: if not, what were they doing there?

133. Mr Dawes, in his response to the Audit Office, also emphasised the considerable expertise of the Team members as being well able to assess the merits of the tender proposals (noting that this fact was not mentioned by the Auditor-General). He said (as appears to be the case) there was no evidence that either the absence of the proposed guidance or appropriate documentation regarding the assignment of numerical values demonstrated, as a matter of fact, inconsistencies or other deficiencies in this evaluation process.

134. The Auditor-General, in effect, rejected the validity of these views, and responded that the lack of the suggested guidance and lack of explanatory explanation "highlight the difficulty in demonstrating the merits of one tenderer's responses over another". At the same time, the differences between the bids were obvious and consideration of fine distinctions would seem unnecessary. The Report demonstrated a methodical and objective approach and succinctly outlined the major considerations that differentiated the bids. The Team was not addressing a lay audience innocent of contextual knowledge. The audience was a professional one, well able to assess the adequacy of its Report. The assessment was, essentially, of the *difference* between the bids, not their inherent merits as such, but as compared one to the other in light of the RFT and, in particular, compliance with the Dickson Centre Master Plan. The manifest difference between a Dan Murphy liquor store, two shops and two levels of basement car parking compared with a six-storey building with retail uses on the ground floor

and residential units on the upper floor needs only to be stated to be appreciated and even a cursory comparison with the Dickson Centre Master Plan and its *Intended Design and Development Outcomes* would confirm the superiority of the latter over the former in terms of compliance with its aspirations.

135. It seems tolerably clear that the extent to which written explanations need to be provided for particular assessments or decisions made by public officials, both generally and in this particular instance, depends upon the circumstances in which the assessment or decision needs to be made and is attended by a significant degree of uncertainty upon which minds may reasonably differ. In this case, having regard to the terms of the RFT, the documentation surrounding the considerations outlined in the Dickson Centre Master Plan and associated documentation, the information in the tenders and the terms used in the Evaluation, the Commission considers that the reasons for its assessments are sufficiently clear as to exclude any reasonable apprehension of a lack of integrity. Nor is there any matter that is capable of giving rise to a reasonable suspicion of corrupt conduct.

136. The recommendations of the Team received "divisional approval" by Mr Ellis on 11 December 2012 and "delegate approval" by Mr Dawes on 20 December 2012. On 19 December 2012, Mr Ellis sent a briefing note to Mr Barr as then Minister for Economic Development to advise him of the preferred tenderer for Block 30. The note explained that, of the two tenders (Woolworths and Tradies), the latter scored higher against the assessment criteria, although neither tender reached the reserve price. Mr Ellis said that, "consistent with market practice" EDD would now negotiate with Tradies, adding that, "if the reserve cannot be reached … [Woolworths] will be offered the opportunity to meet the reserve … [whilst, if Woolworths] does not reach the reserve price, the block will be made available as an over-the-counter sale". The amounts said to be offered (as adjusted by MMJ at the request of the Tender Evaluation Team) were $1.6m (Woolworths) and $2.2m (Tradies). It was noted, in addition, that "while the terms of the RFT only required settlement in 2015, the Tradies offer to settle one month after the exchange of contracts provides the Territory with an additional real value in terms of the time value of money". Discounting the Woolworths offer by two years, its offer had a Net Present Value of $1.45m. (The suggestion that settlement was required in 2015, though perhaps a not entirely unreasonable prediction, was both extremely optimistic and mistakenly precise: as at the date of the brief, the contract had not yet been finalised and settlement could not occur before the later of two years after that date or the development on Block 21 had been completed. Whilst MMJ had used a 5% discount compounded over two years to account for Woolworths' delayed settlement payment as compared to Tradies',

as mentioned, this was to equalise the offers for the purpose of comparison; no adjustment whatever had been made for the delayed settlement in its valuation of 10 October 2012.) In connexion with the car parking, the brief went on to point out –

> Neither the Woolworths' nor the Tradies' offers met the RFT requirement for 139 car spaces.
>
> Although this number of spaces will not necessarily be mandated by the Planning Authority, it is relevant in terms of assessing the value of the offer.
>
> As the Tradies offer includes only 84 spaces, the value of the offer should be discounted by 55 spaces. MMJ has used an estimate of $9090 per space, this brings the Tradies offer down to $1.7million, ie $1.2 million below the $2.9 million NPV [Net Present Value] reserve.
>
> Were negotiations with the Tradies to be unsuccessful, it would be open to the government to negotiate with Woolworths. However, it should be noted that its adjusted offer, taking into account the time value of money and the shortfall of 39 car spaces would mean the NPV of their offer is $1.101 million, almost $1.8 million short of the NPV adjusted reserve price.

137. Although, as noted above, neither the Cabinet decision nor the RFT initially required the provision of permanent additional car spaces as distinct from a short-term strategy of replacement parking, this had been varied shortly before closure of the tender by requiring provision of 154 replacement spaces as part of the envisaged development, even though it was subject to finalisation of the Interim Development Plan. The statement that the RFT had been amended to require 139 spaces was a mistake (likely derived from an early traffic report that was not, in the result, accepted). Mr Barr "noted" the brief on 21 December 2012 and did not seek any discussion.

The first stage of negotiations

138. Negotiations proceeded through the next two years, with contracts eventually being exchanged on 15 December 2015. Mr Dawes was not involved in any of the day-to-day negotiations with Tradies although, as he told the Committee, he was generally aware of what was going on. Mr Dawes said that he had great confidence in the team undertaking the negotiation. As then Director-General, EDD and CEO of the LDA, he was responsible for ultimately signing off on the contract. It has not been suggested that he did not have legal authority to do so. Although Mr Barr, was, according to Mr Dawes, apprised of "where the negotiations were", he "did not give us any direction at all about the way we proceeded".

139. Mr Dan Stewart was Deputy Director-General of the EDD and Deputy CEO of LDA from late in 2012, when he was seconded as Acting Under Treasurer, returning to the EDD and LDA from April 2013 to August 2015. Mr Stewart had been involved in setting up the RFT team, in particular, nominating Mr Ellis to lead the process. He was not, however, sure whether he did this as Deputy D-G of the EDD or Deputy CEO of the LDA (perhaps not surprising, given the elapse of time and certainly unimportant). Mr Stewart's recollection was that the decision to give the EDD responsibility for managing the project arose from resource constraints within the LDA team. He explained that there were two sales areas within government, the direct sales team within EDD and the sales team within the LDA. He said the sales team within the LDA claimed that they did not have the capacity to release that parcel of land at that time, whilst the direct sales team within EDD had just undertaken a tender process for a supermarket site. They thus had recent and relevant experience and it seemed sensible for them to proceed with the process for the Dickson Tradies site. Mr Ellis' involvement ended in early 2013 but, Mr Stewart said, he (Mr Stewart) did not take over responsibility for the project, although he attended, so far as he could recall, one meeting with Tradies and organised a meeting involving the Government Solicitor's Office. His recollection was that Mr Drummond and Mr Ellis had been leading the negotiations and, when Mr Ellis left, Mr Drummond completed them, but he could not now say to whom he reported. However, his recollection as to this must be mistaken, since Mr Drummond also left the team not long after Mr Ellis. For his part, Mr Drummond thought Mr Stewart had taken over from Mr Ellis, but his evidence was somewhat vague on quite what Mr Stewart's involvement was since he, himself, had moved on to other work. Mr Stewart told the Committee that it was "entirely plausible that the matters in relation to this transaction were being dealt with directly by the Director-General". He did not recall seeing or signing off on briefings that went to either Mr Dawes or the Government, about the sale of Block 30. Mr Dawes told the Committee, in substance, that he was kept informed of the course of the negotiations but did not intervene as they proceeded.

140. Ms Julia Forner was the Senior Manager of Sales at the time, working primarily with contracts. She told the Committee that the Block 30 project was a bespoke project managed by the EDD rather than the LDA. She explained, in substance, that there were some sites, such as Block 30 and those under the supermarket competition policy, where the management and the direction were coming from the EDD, whilst the LDA acted in more of a service provider than a project role. The LDA would deliver greenfield or urban development sites where it had done the due diligence and the planning "but where they

were a little special, the direction and the main lead would be given by the directorate". Mr Clint Peters, the Director of Sales and Marketing for the LDA at the time, explained, in effect, that the directorate had a policy position and accompanying framework which made it more efficient for EDD to manage and carry that through as the policy did not necessarily have a bearing on the standard contracts that LDA were facilitating. As set out below, in an email of 27 October 2014, Mr Peters emailed ACTGS about negotiations in terms which, however, strongly implied he was responsible for them at that stage and reporting to Mr Stewart. This position was consistent with several other emails during this period into which he was copied. Even so, Mr Peters' evidence to the Committee was, in effect, that he was not in fact managing the process. It is unfortunate that the email of 27 October was not brought to his attention, as it may have jogged his memory. Mr Stewart, for his part, said that his involvement was relatively minor, though he took part in one or two meetings and was present at the meeting of November 2014 with Mr Garrisson AM SC and Mr Dawes to discuss the stage of negotiations and, in particular, whether there were any issues of probity arising from the variations.

141. Whilst, of course, memories fail over time, it is unsatisfactory that, even given the lapse of time since the relevant events, the records do not clearly show who in the EDD or LDA was responsible for the hands-on negotiations with Tradies. Although the Committee regarded the inconsistencies in the evidence of the officials as creating doubt about the responsibilities of, and formal relationships between, actors involved in the sale of Block 30, this uncertainty (and the differences in the evidence) do not suggest lack of candour as distinct from confusion in recollection. More importantly, the lack of clarity about this issue does not support any finding of lack of integrity or provide a basis for suspecting corrupt conduct. This is sufficient to dispose of the third complaint mentioned at the outset.

142. Mr Ellis, who actively conducted the negotiations with Tradies until his departure in early 2013, explained to the Committee that his position was "pretty inflexible" in the sense there could not be an agreement with Tradies unless they met the reserve of $3.18 million and replaced "all the car spaces" (though he did not clarify whether this meant 84 or 154, it seems likely that it was the latter). He said that the consequence was that "almost from day one, for most of the year, there was no movement". When, after some time, he met with Tradies, "we were a million miles apart". He told Tradies, in effect, that they would have to accept the price and the terms. It appeared that the only way there could be movement was by reviewing the valuation. Accordingly, in April 2013, Mr Dawes instructed Colliers to conduct an independent review "with a view to seeing if there was some way that we could make a

recommendation to the government that there should be more flexibility". As it happened, this recommendation was not seen as necessary.

143. Colliers' report noted that they were to review MMJ's valuation of Block 30 and the assumptions underlying it, which included the requirements of the RFT as to settlement timing, the commencement and completion clause, reinstatement of car parking, construction of a park and hand back, development rights and site constraints. After reviewing these issues and the MMJ report, Colliers was to provide an opinion of value for the purposes of a direct sale to the Tradies Group. After briefly describing the property, Colliers noted that it had recently been offered for sale by tender but did not refer to the outcome. It seems strange that this was omitted, since it would have provided up-to-date and directly relevant information about the market. It may be surmised that the instruction to review MMJ's valuation, was taken to mean, as it were, a review within the four corners of MMJ's approach. After all, the client was well aware of the tender outcome and its implications about value.

144. Colliers noted the conditions of the tender included a Proposed Purpose Clause in the lease and assumed that the use of a car park would be added to the list of uses "given that 154 spaces are to be reinstated on site and will be commercially leased". (Since the parking required to be reinstated was public parking, to describe it as available for commercial leasing is not quite accurate.) Some 1,300m^2 was to be developed as a public park at a cost of $800,000 (identified as a "provided" assessment but differing from the Indesco estimate of $330,000 plus GST) and returned to the Territory. The reinstated parking and that attributable to the development was to be accommodated in basements under the entire site, including the park. How this was to be arranged was uncertain, since it was not envisaged that the park was to be returned "as a stratum". Colliers went on to say, "However, the difference in the value of the completed car park and the cost to construct including holding charges and return on costs, has an impact on the land value by approximately $1,350,000". In short, the value of the car park was significantly less than its cost. Colliers noted the time frame for settlement and the requirement that construction must commence within 24 months and completed within 36 months of the commencement of the Crown Lease or the issue of a Certificate of Occupancy for Block 21. The developer of either the existing Tradies site or the purchaser of this site would be required to construct the road that will run from Dickson Place, north of the existing Tradies Club, and connecting to Badham Street, but the only information about the cost was "Contribution to road cost $400,000", without stating a source, presumably also "provided".

145. The net site area available for development was noted as approximately 2,430m^2. Allowing for some articulation in the façade and balconies, the net developable area of the site was not considered to exceed 2,000m^2 with a maximum total of 12,000m^2 GFA over the six-level building height. The Crown lease was noted as permitting 14,000m^2 GFA but, given the site constraints, this was not regarded as achievable.

146. Colliers considered the MMJ valuation report to be comprehensive and in accordance with normal valuation practice, noting that it used both direct comparison and hypothetical feasibility approaches and advised that the assumptions adopted in the MMJ report were "within market parameters and on the whole a conservative approach to the valuation of the land". However, there were some significant qualifications. As to development costs, the adopted yield of 108 units mainly comprised one bedroom, which would increase the rate per square metre of construction costs. Colliers considered that "the normal cost for a mixed use six level apartment building is in the order of $3,200/m^2 - $3,400/m^2 (GST Exclusive) of living area design and construct", yielding $32,175,000. To this the cost should be added of the 154 reinstated car parking spaces (4,620m^2 x $1,000/m^2 or $30,000 per space), being $4,620,000, which assumed that the development car space cost had been included in the overall amount of $32,175,000, the public park of $800,000 and construction of the road from Dickson Place to Badham Street at $700,000 (Indesco said $135,000 – the difference is unexplained), a resulting total of $38,295,000, "say $38,200,000".

147. Colliers noted that the MMJ report stated that all of the car parking generated by the project and reinstatement could be constructed in basements over the whole site area, resulting in 2.5 or 3 levels of basement car parking, assuming that the substrata underneath the park would be provided at no cost. As already noted, in respect of the ground floor, Colliers' opinion was that it would not yield 2,170m^2 GFA, when the need for a residential lobby, lifts, waste and access to the basement was taken into account, which would result in a significantly compromised ground floor, in turn reducing the amount of useable GFA. Colliers adopted a GFA of 1,400m^2 in their calculations. Colliers' analysis of market evidence showed a ground floor GFA rate of $400m^2 and a rate per apartment unit site of $45,000. Colliers' assessment of value was –

Direct Comparison

Ground yield after allowing for residential foyer etc		
1,400m^2 GFA x $400/m^2		$560,000
Residential unit	108 x $45,000/site	$4,860,000
Value of Development Rights		$5,420,000

Less impacts on site value		
a) Cost of park - as provided	$900,000	
(plus interest & return on costs)		
b) Difference in car park value over cost	$1,350,000	
(plus interest & return on costs)		
c) Contribution to road cost	$400,000	
		$2,650,000
Net value by direct comparison		$2,770,000
	As	**$2,250,000**

We note that if the developer of this site does not have to make any contribution to the cost of the road between Dickson Place and Badham Street, the value will be $3,150,000.

Hypothetical Feasibility Approach

Based on similar assumptions to MMJ but with a slightly higher cost base, our residual land value is in the range of $2,750,000 - $2,800,000.

Summary

The preceding valuation calculations by Colliers and MMJ show that the market value of Block [30] to be in the range of $2,750,000 - $3,180,000 based on the requirements of the RFT.

The developer of the site is required to construct a park and hand back to the Territory, reinstate 154 cars onsite plus that generated by project, and contribute to the cost to construct a road from Dickson Place to Badham Street.

On the basis that the developer can construct the basement cars across the whole 5,282m^2 site and get title, Colliers believe the value of the site to be $2,750,000.

If the developer does not have to contribute to the cost of the road between Badham Street and Dickson Place, the land value is closer to $3,100,000 – $3,150,000.

This assessment is conservative but adequately reflects all the risks and requirements that a developer is taking on with these site acquisitions.

148. As to the $1,350,000 difference between the cost of the replacement car parking (154 basement car spaces) and the value of the completed car spaces, Capital Valuers (retained by the Auditor-General) commented that “it appears this amount is a Colliers assessment as there is no break-up of construction costs to deduce this amount from the MMJ report [and] the cost would be more likely to be in the order of $3,500,000 greater than the “completed value” based on an allowance (by Capital Valuers) of “$36,000 cost per car space (subject to a qualified cost estimate)”. The Capital Valuers assessment was said to be “estimated and consistent with development studies undertaken around the relevant time”

and, accepting that Colliers did not make an egregious error, this would seem to demonstrate utilisation of significantly different data – selection of which is an inherent difficulty in valuing. (I should mention that Mr Ellis was of the view that the Capital Valuers' estimation of the cost of the car parking spaces as it was in 2012-13 was highly inflated and the true cost of "*surface* spaces" was around $8,000 to $9,000 per space but, as these were not *underground*, this assessment seems irrelevant, at least for present purposes). As the evidence stands on this particular question, the estimates of the costs of construction of the car parking spaces vary widely, with no material available to enable a sensible choice to be made between them. On Capital Valuers' estimate of the cost of construction of the 154 car spaces, both MMJ's and Colliers' valuations appear to be significantly too high. A further and substantial difficulty facing acceptance of the ultimate Capital Valuers' figure is that it assumed that the EDD recommendation of 84 car parking spaces would be accepted, whereas in fact it was not and the RFT requirement was not varied.

149. It is worth observing that both Colliers and Capital Valuers focused on particular calculations in MMJ's valuation which, they reported, impacted the reliability of the matters upon which they commented and did not undertake a fine-grained analysis that would have exposed the problems described above. Given the patent limitation imposed by the settlement (and, thus, development) delay it is not surprising that this did not warrant specific discussion: as already mentioned, this limitation was not an error but arose from the inherent difficulties in estimation of its effect. Both Colliers and Capital Valuers may be taken to have regarded it (reasonably) as unnecessary to make this point.

150. The Auditor-General noted the advice of Colliers that there were no instructions as to a negotiation concerning the change to 84 car spaces and commented that it was not clear why Colliers was asked to value the Block on the assumption that 154 car spaces were to be replaced when negotiations were underway with Tradies on the basis of 84 spaces. Given the purpose of the valuation, this comment is surprising: it is obvious that the valuation had to be made on the assumption of facts as they were and not on the basis of what appeared to be Tradies' bargaining position or LDA's hopes for a planning outcome. Mr Ellis told the Committee, in effect, that, whilst LDA was optimistic about the outcome of the Planning Variation requiring only 84 spaces, as at the date the Colliers valuation was sought, the requirement remained at 154. In substance, there was no negotiation on foot with Tradies on the basis of the provision of 84 spaces. That was Tradies' offer (having regard to the indication in Clarification 2) but was not capable of acceptance for the reasons that have been explained (nor, as a matter of fact, was it ever accepted). There was, accordingly, no

basis for a valuation that assumed less than 154 replacement spaces. (The Auditor-General repeatedly pointed to Tradies' offer of 84 spaces in its commentary about value, as though this was the number ultimately agreed. It is not necessary for present purpose to identify every occasion: this will suffice as a general correction both in respect of the Auditor-General's report and that of the Committee.)

151. Mr Ellis told the Auditor-General, in effect, that he was relieved when the Colliers valuation did not vary significantly from MMJ's, as otherwise it would be necessary to seek ministerial approval for "something outside the – beyond, or after commercial process", which was "what Treasury always hates", its invariable view being to "put it back in the marketplace, you know, do it again, so it would have been a relief that we didn't have to go through that again". This response was both explicable and reasonable. It did not suggest that Mr Ellis (or anyone else, for that matter) was any less committed to undertaking the negotiations with Tradies in an appropriate way, seeking the best outcome for the Territory.

152. Mr Ellis told the Committee that negotiations stalled, principally because Tradies did not accept that they needed to provide the 154 replacement car spaces and, by October 2013, it seemed that agreement could not be reached. In further discussions, however, Tradies proposed what Mr Ellis described as an "innovative notion" utilising "their existing car spaces rather than replacing them with new ones underground". Mr Ellis explained –

> The solution that was arrived at on this was that they would not be building all new car spaces but that 55 of them, 55 of the 154, would be car spaces which they would convert in their existing facility from private spaces that only members could use to public spaces. It was only when the Planning Authority agreed to this that we could move forward.

Mr Ellis said that, when the proposal was put to the Planning Authority, they agreed, "for reasons which related to what they were trying to do in terms of a modal shift in transport usage". According to Mr Ellis, it was this approval that led Tradies ultimately to accept the provision of 154 car spaces. The Auditor-General observed that the Audit Office was unable to find any documentary evidence of this approval. However, there is no reason for not accepting Mr Ellis' evidence, especially since the Draft Variation required the 154 replacement car spaces and applied it to the proposed development. Ultimately, the question of car parking was not one for the EDD or LDA to determine, let alone bargain away, nor was it in a position to enter into a contractually binding agreement about it: it always remained a matter for the Planning Authority to decide, as indeed the contract made clear. The importance of the issue was that it was part of the cost of the project and, hence,

affected, the price which Tradies was prepared to offer and the government was disposed to accept. Of course, the arrangement for the provision by Tradies of 55 spaces from its existing resources did not affect the value of the site. This is obviously true for third parties, but also true for Tradies, since the 55 spaces were valuable and were to be a contribution to the public use. It may be that there was an advantage in no longer having to construct this number of spaces under the park but, again, it is illogical to consider that this reduced the price to be obtained by the Territory, which obtained the spaces for which it bargained.

153. It is convenient to point out at this stage that the conclusion of the Auditor-General that –

> there "is a high risk that…the Territory sold Block 30…for less than its value…[in part because the] price the Tradies will pay at settlement for the block reflects the original 5 November 2012 MMJ Real Estate valuation produced for the RFT, which has not been adjusted to take account of the fewer replacement car parks offered by the Tradies in its tender and the resulting uplift in value…]

is clearly wrong: first, because the question is obviously not what Tradies was prepared to *offer* but what was ultimately *agreed* – an offer made in the course of a negotiation (and that cited by the Auditor-General was made in Tradies' bid at the outset) is patently not final; and, secondly, because, at the conclusion of the negotiations (as known to the Auditor-General), the offer had not been accepted and the number of required car parking spaces was unchanged, namely (as provided by cl 3(g) of the Specimen Lease attached to the contract) provision of a car parking area "in accordance with plans and specifications…approved…by the [Planning and Land] Authority". Mr Gentleman informed the Committee, in effect, that (as at 25 July 2019) the Crown lease had not yet been provided to Tradies (the trigger for settlement pursuant to cl 32 of the contract), presumably because the Planning Authority had not yet received the Certificate of Occupancy for the Coles site (which was still the position in May 2020); not surprisingly, development plans had not yet been lodged by Tradies, so the number of replacement car spaces had still not been determined by the Planning Authority. The position therefore was (and, at present, appears to remain) that, as Mr Ellis advised, the Territory Plan requirement of 154 replacement spaces still obtained. Even if this were not the case and the number of replacement spaces were undetermined, there is no proper basis at all for the Auditor-General's conclusion about value to have been based on 84 spaces. It is appropriate also to observe that, quite apart from the question of the number of required replacement car spaces, it was (for the reasons already given) a serious error to rely on the MMJ Valuation as the determinant of actual value.

154. Capital Valuers did not undertake an independent valuation. Rather, it was asked about the implications for the MMJ valuation of various changes to the assumptions that underlay it and the appropriateness of the Colliers valuation advice in respect both of Block 30 and the Downer site. The opinion of Capital Valuers in respect of the MMJ value has been referred to above, when dealing with the particular issues. It is worth mentioning again, however, the comments about the cost of replacement car parking. The calculations relating to a reduction in the requirement from 154 to 84 spaces can be disregarded, since, as has been explained, this was based on the mistaken view that the Territory agreed to this reduction whilst, in fact, the ultimate agreement was based on the need to replace 154 spaces – or, implicitly, such number as was ultimately set by the Planning Authority. As already explained above, Capital Valuers, starting from the MMJ assessment of "the completed value of 154 publicly accessible car spaces at $2,100,000" and, "ascribing a development cost per car space of $36,000…[concluded that] the cost of 154 replacement spaces would be in excess of the completed value by $3,470,000". For the reasons already given, this was based on a mistaken assumption.

155. It is not necessary for present purposes to analyse the differences between the valuers' estimates (nor is it possible in respect of a number of them, because the details of the calculations are unknown). The presently important point is that the calculations in a number of respects differed significantly, with the consequence that all must be treated with a high degree of caution before drawing critical conclusions. At all events, the valuations must be evaluated in light of the actual bids.

156. It appears from Mr Ellis' account that, negotiations having stalled, Tradies proposed at that point that it could accept the Government's position on the provision of 154 replacement car spaces and the $1,000,000 cash security for appropriate completion of the PDA on certain conditions, in particular, if the Government would accept, rather than cash, payment by way of the acquisition of other land it held in Dickson, Blocks 6 and 25 Section 72 (the "**Downer site**"), subject to a leaseback and a rent holiday. Mr Dawes considered that this might be an appropriate way forward and authorised obtaining a valuation from Colliers of the Blocks on offer. (As will be seen, although the Territory did acquire the Downer site, in point of fact, payment was by cash from the proceeds of sale of Block 30.)

157. Mr Drummond told the Committee that he had arranged for the valuations to be obtained and had also recommended that a contamination report be obtained because a building had burnt down on the site, which raised the risk of asbestos contamination. This subject will be

returned to in due course, but it is worth noting here that the proffered sites were already of some interest to the Territory.

158. Colliers valued Block 25 at $45,000 (GST exclusive), resulting from subtracting from the market value of $636,680 the cost of $594,535 to pay out the concessional amount of the lease. This led to a 'current market value "as is"' of $42,265, which was rounded up to $45,000 for the purpose of the valuation report. The value of Block 6 was $3,250,000 (excluding GST) assuming a leaseback with an 18 months' rent-free period and $3,550,000 assuming vacant possession. It seems likely, therefore, that by April 2012 discussions had reached the stage where a "land swap" was on the table, part of which envisaged a rent-free period of 18 months in respect of the leaseback on Block 6. The negotiations continued, however, and it appears that, by December 2013, the rent-free period had been extended to 40 months, as stated in a Briefing Note of 13 December from Mr Ellis to Mr Dawes (and was ultimately increased to 42 months).

159. In that Briefing Note, Mr Dawes' "formal endorsement" was sought to what Mr Ellis described as "the financial reconciliation of the negotiated outcome for the sale of Block [30]", which was necessary to enable the sale to be transacted. (It seems virtually certain that Mr Dawes had already agreed informally to the arrangement.) The briefing note mentioned the evaluation report for the RFT having nominated Tradies as the preferred tenderer (of two) and the reserve price, based on the valuation by MMJ of $3.18 million (GST exclusive). Mr Ellis also pointed out that Tradies valuation from Knight Frank, on which it based its initial offer, was $2.2 million. The briefing note stated that Tradies were prepared to pay the reserve price but, rather than pay cash, wished to do so by selling to the Territory certain land owned by it in Dickson (namely, the Downer site). It stated that both Colliers and Knight Frank agreed that "the total value of the two sites is $3,595,000, taking into account "a 40 month rent free" lease back to Tradies. Mr Ellis calculated that the value of the two sites offered was thus $415,000 greater than the reserve price the Territory would receive for Block 20. Unfortunately, as Mr Ellis acknowledged, this was a mistake, since the Block 6 component was valued at $3.55 million for vacant possession. Furthermore, the $3.25 million value was premised on a rent-free period of 18 months. There is no evidence as to whether, despite Mr Dawes unqualified approval for the recommendations, the elementary errors made by Mr Ellis were ever picked up, though it seems that this would have been likely at some stage. It is possible, although this seems unlikely, that the negotiations continued to finalisation without it having been noticed. (The significance of this matter is discussed below.)

160. Three issues were identified as needing further clarification. The first of these was that car parking was not listed as a permitted use in the Specimen Lease for Block 30; secondly, it should not be necessary to replace 36 car spaces lost due to the creation of the park, which could be accommodated in Tradies' existing basement; and, thirdly the requirement to build a road between Tradies' existing site and Block 30 was not mandatory because it applied only if the adjoining land owners were different parties. That these were seen as the only issues requiring clarification was unduly optimistic, however, as further negotiations in respect of different issues emerged.

161. Mr Ellis' recommendations were –

> Acceptance of the Tradies offer to pay the reserve price of $3,180,000 (GST exclusive) for Block [30] through a transaction involving:
>
> - the purchase by the Territory of Block 25 Section 72, Dickson for $45,000 (GST exclusive);
> - the purchase by the Territory of Block 6 Section 72, Dickson for $3,550,000 (GST exclusive); and
> - the waiver of 40 months rental payments on the premises for Block 6 Section 72.

This was agreed by Mr Dawes on 17 December 2013. Regrettably, it appears he did not appreciate Mr Ellis' error in calculation, at least at this time.

162. There appear to be no records that detail comprehensively the process of negotiation that led to the position as it stood in December 2013, although a selection of relevant emails passing between the parties and their solicitors have been obtained. This is a significant failure of management and hence of probity in that sense. However, it does not give rise in all the circumstances to a suspicion of any corrupt conduct. Mr Ellis was asked by the Committee about the significance of the ACTGS advice concerning the risks of departure from the RFT (discussed below). He said that this occurred when the changes were proposed in mid-2014, after he had departed. In a sense this was correct, but the advice did, in fact, concern the accumulated changes, including those which he had proposed. At the same time, the position in December 2013, as Mr Ellis rightly believed, had not at that time signalled to the ACTGS a risk that the transaction had moved or was moving to a direct sale. Mr Ellis cannot be fairly criticised for his views about the ACTGS advice. He acknowledged his involvement in the position as it was at end of December 2013 but declined to take responsibility for the changes that followed. This was entirely reasonable. Nor was he bound (as appears to have been the opinion of the Committee) to accept the

view of the Auditor-General about the significance of the changes to the RFT as at December 2013. His evidence could not fairly be taken to indicate any lack of candour. The statement by the Committee that there was a contradiction between the evidence of Mr Ellis and the account provided in the Audit report is unjustified, as is the suggestion that his account was "not an accurate reflection of the legal advice quoted in the report". If this is a reference of the ACTGS advice, it is quite wrong and, if it refers to the advice obtained from the AGS, it is also wrong. Moreover, it was not for Mr Ellis to comment on the AGS advice at all events: he was entitled to his view, as a layman, of how the matter stood when he departed, which, as it happened, had the additional advantage of being correct. The Committee's observation that "an accurate understanding of the account provided in the Audit report is necessary to establish who was responsible for matters *not conducted according to due process*" (emphasis added) is, perhaps, correct (as far as it goes) on the assumption that the Audit report was correct but, in fact, the assumption was not correct – for the reasons explained below and there was no adequate basis for the suggestion that the transaction was not conducted according to due process in the sense of lacking in integrity. Nor is there a fair basis – again, for the reasons explained below – for the conclusion that the tender process was conducted "contrary to the obligation which falls to entities putting projects out to tender that they conduct the tender process in good faith" which, put simply, is to misapprehend the requirements of good faith in the context of this tender. More directly, since the conclusion that due process (in the presently relevant sense) was not followed was wrong, the problem of establishing who was responsible for this does not arise. This deals with the fourth matter identified above.

Negotiations leading to contract

163. By late 2013 or early 2014 the parties had reached a position that brought in communications between their solicitors, ACTGS for the Territory and Clayton Utz for Tradies. It appears that, amongst other things, Tradies' understanding about permitted uses and lease conditions, based on the first phase of negotiations, was very different from that of the LDA. It seems that various iterations of a "discussion paper" had been used in the course of negotiations, which may not have been provided to ACTGS when it came into the contractual discussions. Mr Garrisson AM SC, told the Committee that, from November 2012 until the middle of 2013 his office had "no involvement whatsoever while the negotiations occurred", and this was "quite normal". In May and June 2013 there were "a couple of discrete issues" on which LDA sought advice. The ACTGS received instructions at the end of December

2013 and early January 2014 that the sale was to proceed, terms had been agreed, and there was a need to negotiate the terms of the contract of sale. As Mr Garrison put it in his evidence to the Committee, his office was "quite vigorously engaged" with Tradies' solicitors over the next 12 months or so until settlement. There is no basis, therefore, for the Committee's opinion that it would have been "a more conventional scenario to have seen those negotiating on behalf of the Territory government advise other parts of the Territory government, including ACTGS, of the agreement negotiated". This also evidences a fundamental misunderstanding of the contractual process. The terms agreed by the end of December were in no sense binding. There was no negotiated agreement in any legally relevant sense. The terms, such as they were, when the ACTGS came into carry the matter, simply provided a point of departure. They could be changed, qualified or added to as the negotiations then proceeded, as indeed occurred. Thus, there was in fact nothing "unusual" in the fact that "the ACT government's legal representation…[was] unaware of the details of the first phase of negotiation" although there can be no doubt that the stage which the negotiation had reached was communicated when ACTGS was engaged to assist with the contract. Nor did the lack of disclosure to other parts of government "raise questions on the extent to which the first phase of negotiations can be considered open and transparent". There were sound commercial reasons why negotiating details should remain confidential, which general requirements of openness and transparency did not affect. For example, it would not be expected that the reserve price would be made public, let alone the amounts of the responding bids or the competing proposed developments. And there could be no obligation to inform "other parts of government" which had no role in the transaction of any aspect of the negotiations. Nor would it be expected that the course of negotiations would be publicly disclosed.

164. Requirements of openness and transparency applied to the character of the tender, such as informing the market of the tender and exposing the terms of the RFT, including the evaluation criteria, and could not, as a practical matter, encompass these ensuing aspects of the process. The criticism of maintaining the confidentiality of the course of negotiations is quite unjustified. To the contrary, there was a duty to maintain confidentiality. Nor is there any basis for supposing that the ACTGS lawyer with carriage of the matter was not armed with all those details of the negotiation that were necessary for the task at hand and every reason for thinking the opposite. Finding 5 of some members of the Committee that the EDD "did not meet the stated objective that the tender for the sale of Block 30…would be open to all interested parties and fully transparent" should therefore be rejected. As to this matter,

there is no basis for suggesting any lack of integrity on the part of either Mr Ellis or Mr Dawes or, for that matter, any other official.

165. For the purpose of assuring probity, it was necessary to keep adequate records, but this is quite a different point. As it happens, the reference to previous iterations of the "discussion paper" in an email from Clayton Utz establishes there was a paper record as between the parties which (though apparently no longer available, at least from government sources) is some evidence of an appropriate system. The fact that the course of the initial negotiations had not been disclosed to the ACTGS does mean that they were not overseen by probity officers as apparently claimed by Mr Dawes and Mr Ellis, but this does not establish that these officials had not followed due process. Mr Garrisson explained to the Committee that the role of the probity officers was that of responding to particular queries rather than general oversight. The evidence of Mr Dawes and Mr Ellis, in effect, that probity officers oversaw the process, if meant in the sense of active supervision, is mistaken but presently immaterial. Their evidence does not suggest, let alone establish, that due process was not followed or that they acted wrongly. The fact is that, as Mr Dawes explained, once the ACTGS took carriage of the transaction, a solicitor was necessarily involved in the negotiation of every condition of the contract. (He used the term "embedded", but this is a distinction without a difference.) Mr Garrisson told the Committee that, in the course of negotiations, parties would often change their positions and the ACTGS would provide advice on the changes. This, of course, is the conventional role of a solicitor in a matter of this kind. That he or she was not specifically tasked with probity oversight made no matter; the solicitors were necessarily concerned to ensure probity, were in a position to contact the ACTGS probity officer if this seemed appropriate and, as the course of communications that have been made available shows, did so. There is no justification for the Committee's conclusion that different views about whether the probity officers were embedded or not "negated…claims by both of those officers that they followed due process in the conduct of the sale". For completeness, it is fair to state that there is no evidence that the officials did other than follow due process, although it may well be that the consideration of each variation should have been recorded. The first listed complaint should therefore be dismissed. It does not raise any reasonable suspicion of corruption.

166. Protracted negotiations continued into 2014. A number of adjustments in Tradies' favour were made to the transaction. Amongst the earliest was the abandonment of the requirement for a PDA. In short, as outlined above, the PDA required the purchaser to obtain endorsement from the LDA, prior to lodging a development application ("**DA**") with the

Planning Authority in respect of the Block, to ensure that it substantially accorded with the schematic development plan provided as part of the tender, included a publicly accessible park on the north-west corner of the Block and a pedestrian access way from Badham Street to Dickson Place in accordance with terms set out in the PDA, and provided a bond or guarantee in the sum of $1 million as security for performance of its obligations under the PDA. Essentially, therefore, it provided a means by which the LDA could ensure that the DA by the purchaser complied with the ultimately agreed stipulations. (Of course, the matter would then be in the hands of the Planning Authority, over which the LDA had no control.) A consultation process was also prescribed in the PDA. Clause 3(a) of the Specimen Lease required the completion of the "approved development in accordance with plans and specifications…approved by the [Planning] Authority". It is not apparent that the interest of LDA in the complying design of the development could have any impact on value, one way or another, since that design was necessarily part of the original tender and hence integral to the value of the bid from the outset.

167. The Committee was critical of the witnesses called to give evidence before it – particularly, it appears, Mr Dawes – for "not…[seeking] to defend the waiving of the PDA, including the requirement for a $1 million security deposit and pedestrian easement". Since the question was not put to him, this seems a predictable outcome. Nevertheless, objective consideration of the matter provides a reasonable basis for assessing the significance of the impugned changes. First, as to compliance with Tradies' tender development proposal, in the context of a substantial and complex development such as was contemplated here, the requirement that the DA was to be "substantially in accordance" with the original schematic plan was always going to be difficult to apply with enforceable certainty and without even substantial departures, which were for the Planning Authority to consider and, if not approved, could not go ahead. It is notorious that, as detailed architectural and engineering consultations proceed for the actual purpose of construction, initial schematic plans may need to change. The extent of these and changes for other reasons are obviously difficult to predict. Moreover, as the original Cabinet approval stated, the purpose of the PDA was to ensure compliance with the Dickson Centre Master Plan and thus a wide range of complying possible designs would prima facie have been acceptable. Providing this fundamental requirement were satisfied, the mode of doing so seems relatively inconsequential. As mentioned, it appears to have been accepted, for good reason, that the Planning Authority would require any design to so comply and, accordingly, there was no real possibility that any construction would occur that relevantly departed from the concept plans, the

fundamental purpose of which was to assess compliance with the Dickson Centre Master Plan and, incidentally, enable choice of preferred tender.

168. In respect of the security, Clause 4 of Schedule 2 to the PDA provided –

> The LDA may without notice call on the Security if the Developer breaches any of its obligations under and [sic] the Agreement where the breach is incapable of remedy or, where the breach is capable of remedy, where the Developer fails to remedy that breach within seven days of being required by LDA in writing to do so.

It is not necessary to examine in detail the legal effect of the proposed security, but its actual utility was highly problematic. It could not be enforced without proof of non-compliance with the obligations imposed by the PDA, which would at all events necessarily engage the right to remediate and otherwise does not need the security to enforce and, of course, would inevitably involve notice, rendering the lack-of-notice right practically unavailable. Additionally, there is no definition of the nature and extent of the breach or breaches (likely to be matters of fact and degree) which would amount to default (and many breaches capable of remedy may well not be capable of remedy within seven days of notice) nor as to the degree and manner of calculation of payment out specified. And, of course, the security could not be used to penalise a breach. The security's enforceability was significantly doubtful and, thus, its practical value to the Territory, except *in terrorem*, was likely to be rather slight. Nevertheless, it should be observed that, despite its being characterised by Tradies as involving "substantial cost", both tenderers accepted the condition as part of their bids. Whether, in the market, its presence was likely to have made any significant difference was not the subject of any evidence and it may well have been relatively minor, depending on the differing ways in which the security could have been provided and might have been understood. As to pedestrian access, this was required by cl 3(d) and (e) of the specimen lease.

169. Objectively, therefore, relinquishment of these requirements appears to be relatively insignificant, certainly so far as impacting the value of the site was concerned. Criticism of the decision to relinquish the requirement for the PDA, which did not refer to any assessment of its legal effect and likely utility, the transfer of its obligations into the proposed lease or its actual significance in the market, which was the approach of the Auditor-General and the Committee, cannot be given much weight. It may be worth noting that, whilst the PDA was a requirement of the approval of Cabinet to the RFT, no security was then stipulated. Finally, when assessing the legal propriety of abandoning the PDA requirement, it is difficult

to see why the approval ultimately given to the contract by the ACTGS (discussed below) was not taken into account.

170. On 15 April 2014, an email from an officer of the ACTGS to the Probity Officer within the ACTGS reported a meeting with staff from the LDA earlier that day who requested ACTGS advice –

> … in respect of any probity issues that may arise from the following:
>
> - LDA decided that the PDA which was included in the RFT is no longer required and would like this removed from the contract.
> - LDA would like to settle the sale in this financial year. This means that the special condition regarding a delayed completion will be removed, however LDA would still like to ensure that the car park on the land continues to be operational until the nearby land which was recently purchased by Coles had been redeveloped. This, in turn, also means that LDA would like to extend the "completion covenant" in the Crown lease to ensure that the time reasonably required by the Tradesman's Union Club to develop the site does not run out while they are being required to keep the car park open.
>
> I understand that you do not consider that those issues raise any probity concern and would be grateful if you could please provide your view.

Shortly after, the Probity Officer responded –

> I confirm that I have no probity concerns in relation to what is proposed. In the case of this particular sale by tender process, there was only one tenderer. Had there been other tenderers we would have needed to analyse more closely to what extent what is proposed differs in substance from what was set out in the RFT, and to consider those other tenderers' expectations to be invited to tender again on the basis of substantively revised provisions.
>
> In any event I would think that the RFT included very broad-ranging discretions for the Territory, including to negotiate with any entity.

171. It seems surprising that the Probity Officer (and, it seems, the querying officer) was apparently unaware of the competing Woolworths bid at this point in time. I say "apparently" because Woolworths may have been thought not to be a tenderer since its bid was non-complying (although it seems clear that the Tender Evaluation Team thought it did comply). The apparent ignorance of Woolworths' bid is concerning since it was part of history of the relevant context. At the same time, there is no basis for inferring that this misunderstanding continued and it is most likely that it did not, since it is clear there were a number of discussions between the ACTGS and the LDA about the possible significance of departure from the terms of the RFT and, given that this issue was highlighted at this early stage, it is

very likely the misunderstanding was corrected (although there is no record of this). As has already been pointed out, whether the tender should have been reopened was essentially an issue to be decided according to commercial considerations and, depending, amongst other things, upon the then market conditions, may have been inadvisable. Under the RFT provisions to which reference has already been made, Woolworths could have had no reasonable expectation that a material change following negotiations with the preferred tenderer would entitle it to re-enter the competition. In substance, this view reflects the last sentence in the Probity Officer's email. Mr Dawes told the Auditor-General –

> … the number of tenders would have no bearing on whether the RFT should be recommenced as it would have been readvertised if I had considered (based on the information and advice provided to me by my senior staff) that the changes represented a significant departure from the RFT, regardless of the number of tenderers.

On the face of it, this appears to have been a reasonable approach.

Was there a "process" contract?

172. As mentioned above, as part of its consideration of the ultimate contract, the Auditor-General obtained the advice of the AGS as to the legal right of the LDA/EDD to relinquish the requirements for the PDA, including the security bond. Two advices were obtained, dated 22 September and 16 October 2017. The first made it clear that the material provided by the Auditor-General to the AGS did not include the RFT (and its attachments), the Clarifications, the first Specimen Lease provided before finalising the contract, or the ultimate Specimen Lease. While the second advice referred to the provision of "various documents", it seems certain that these foundational documents were not amongst them. The advices were provided, it appears, on the basis of the Auditor-General's then draft report, and in relation to the second, also upon an analysis document prepared by the Audit Office concerning "probity implications of key departures from RFT". The omission to provide the AGS with the primary source material was neither disclosed nor explained in the Auditor-General's Report, which gives the mistaken impression that the AGS independently considered the terms of the relevant documentation for the purpose of the advices. Furthermore, the briefing material given to the AGS itself contains the significant error that the requirements for the PDA and security bond were "described in the RFT as *key features and conditions*" (see the reference to paragraph 2.1.1 in the below quote, emphasis added). The italicised words were those of the Auditor-General (reasonably adopted by the AGS) and were not actually used in the RFT.

The phrase appears to have been adapted from a passage in the Specimen Lease, the entirety of which was—

> ***Note to Tenderers***: While this specimen lease comprises the essential terms and conditions under which the Authority may issue the Crown Lease it will not be endorsed by the Authority until the Prescribed Conditions have been approved and the Territory and the Authority reserve the right to amend the terms and conditions before the Lease is signed.

When the selected passage is read in its context, its meaning is fundamentally different from that conveyed to the AGS: in effect, the note is a warning to tenderers that there are *no* "essential terms and conditions", as all can be varied up to the time the transaction is finally agreed. It should also be noted that the exclusion clauses in the RFT to which attention has been drawn above also have the effect of not binding the LDA to any particular requirements. Although it is within the remit of solicitors to provide qualified advice limited by the instructions and information they have been given, this will logically have the result that the advice will not be any better than the assumptions upon which it is based. As it happens, however, the advice was problematic even in its own terms.

173. In its first letter of advice, AGS concluded:

> **Failure to comply with RFT conditions –**
>
> 8. We note your comments at point 2.1.1 of the draft report that the requirements for the PDA and security bond (described in the RFT as key features and conditions point 1.3.2) were dispensed with during negotiation. Leaving aside other procedural and regulatory issues, the legal right of the [EDD] to delete these requirements (assuming that the conditions [sic] were being conducted under the RFT) should be investigated ie there needs to be a clear right reserved in the RFT conditions [to] delete 'key requirements and conditions'.
>
> 9. In the absence of a clear and explicit right to delete these requirements under the RFT conditions, it is doubtful that [EDD] has the legal right to do this. This is because the RFT conditions create a 'process contract' that can only be varied with the consent of all parties in the process ie removal of these conditions may have needed the consent of Fabcot - who should have been given the opportunity to reprice their bid on the basis of the changed conditions. At the very least [EDD] would owe a duty of good faith to both Fabcot and Tradies which requires that they be given an equal opportunity. It is debatable that good faith has been afforded to Fabcot when the change to the RFT conditions (and the right to reprice their bid) was only afforded to Tradies.

With respect, this advice is highly contestable. Whether, in any particular tender process, a request for bids will amount to no more than an invitation to treat or an offer to enter into a preliminary contract (ie, a "process" contract), with the expectation that it will lead in defined circumstances to a second or principal contract, will depend on a consideration of the circumstances and the obligations expressly or impliedly accepted. Although the adjective

"process" describes the kind of contract it is, it is a contract like any other contract, which only comes into being when the legal prerequisites of contract formation have occurred. Thus, the mere existence of a request for tender and a response to it will not automatically give rise to a process contract.

174. At the outset, there can be no such contract with a bidder whose tender is non-conforming, since the offer to abide by a particular process in deciding a tender is obviously only *actually* accepted when a conforming bid is proffered. It is then essential to determine the terms of that process contract by examining what requirements the offeror has agreed to satisfy. The issue of whether one or other of the bids was conforming and, hence, whether there was a contract of any kind created by the bids, was not adverted to by the AGS, since the Auditor-General had instructed the AGS to assume that the bids did conform. As explained below, this assumption was mistaken, at least so far as the Woolworth's bid was concerned.

175. The Woolworths' bid is sufficiently described for present purposes in the Tender Evaluation Report. It will be recalled that the RFT required tenderers to "provide a schematic development plan for the site showing the floor plans, elevations and proposed uses within the development". Clarification 1 specified in effect that, *in addition* to the car parking required by any development, the "existing car parking on Block 30" had to be replaced. The Precinct Code specified that was 154 spaces. Although Clarification 2 held out the possibility of reduction in the number of required spaces, this did not vary Clarification 1. The Tender Evaluation Report noted that Woolworths' schematic development plan showed only 100 spaces, though whether these were replacement spaces or the total including those required by its proposed development is unclear. (As it happened, the schematic sub-basement plan showed 99 and the basement 82 spaces and the Report does not explain how the figure of 100 was derived.) Either way, this did not amount to acceptance of this tender term by Woolworths. (The Tender Evaluation Team thought that, as Woolworths had not specifically addressed the parking number, it was bound by the 154 requirement. With respect, this was mistaken for a number of reasons which it is not necessary to presently discuss.) As Woolworths' bid was not conforming – either because it offered only 100 spaces or its planned development did not comply with the Dickson Centre Master Plan in this respect – no contract, process or otherwise, was entered into between it and the LDA. On the alternative assumption that Woolworths' was a complying bid, it is necessary to consider whether the other requirements of contract formation were satisfied. Amongst other things, this required adequate certainty as to the contractual terms and, in respect of a "process" contract, as to the "process" to which (in this case) the government was binding

itself. Or, to put this latter point otherwise, a "process contract" is just as limited by its own terms as any other kind of contract. More fundamentally, it required the intention by government to enter into contractual obligations or, in other words, to be legally bound to follow the so-called "process".

176. Analysis of the invitation to tender is the starting point. Here, the RFT prescribed an "Evaluation Process" which set out the weighted criteria that would be used to "assess the tenders", and provided –

> **17 SELECTION**
>
> (a) At the end of the evaluation process, a Tender may be selected as successful, or one or more Tenders may be selected as preferred or shortlisted by LDA. LDA may conduct further negotiations with anyone or more tenderers, or LDA may discontinue the tender process without selecting any tenderers as successful or preferred or for shortlisting.
>
> (b) LDA is not obliged to accept any tender, or to select any tenders as preferred all for shortlisting, and may discontinue the Tender process at any time.

Although the RFT referred to an evaluation process, there was no specification as to how it was to be conducted, except to outline that identified aspects of the tenders would be evaluated by reference to specified scores. Examination of the RFT reveals that the evaluation process, and the broader tender process itself, were subject to unilateral change. Thus, cl 20(a)(i) of the RFT permitted the LDA to "at any time…cancel, add to or amend the information, requirements, terms, procedures or processes set out in this RFT" and cl 20(a)(vii) permitted the LDA to "accept or shortlist any Tender, regardless of its compliance or non-compliance with this RFT". Reference should also be made to the exclusions of liability referred to above, particularly clauses 19(a)(i) which specifically excluded "the submission of any Tender" from creating "any contractual or other enforceable obligations…in relation to…the *conduct of this RFT process*…", 20(c) which allowed the LDA to do anything permitted by the RFT (including amending the terms and negotiating about price) "at any time and *without having to notify* any tenderer(s)", and 21(a)(iii) which excluded liability "in any circumstances whatsoever for…any *failure by LDA to inform* tenderers of the exercise of any of LDA's rights under the RFT" (emphases added). These clauses were part of any putative "process contract" as much as any substantive contract, had it been entered into. The AGS advice pointed out the potential relevance of clauses that permitted variation of supposed "key requirements and conditions" and excluded the obligation of the LDA to notify changes but the Auditor-General did not refer to the clauses that had this effect and adopted the advice as though these qualifications had not been included.

177. As mentioned, it is fundamental that, for the creation of a contract, there must be a mutual intention to enter into contractual obligations. As noted above, cl 19(a) limited the rights conferred on any bidder, but its full scope was much broader: it provided that "Neither the release of this RFT, nor the submission of any Tender, will create or evidence *any* contractual or other enforceable obligations or *any* other binding undertaking of *any* kind by LDA" (emphasis added). This was sufficient by itself to exclude the formation of a "process" contract and inescapably so when the other exclusion clauses are taken into account. In the result, the RFT was, in legal terms, no more than an offer to receive tenders, which imposed no contractual obligations whatever on the government or, for that matter, the tenderers. (As an aside, cl 19(b), even if legally effective – which is doubtful – characterised the tender as an "offer". This is of little consequence because the LDA was at complete liberty to decline to accept any such "offer".) Furthermore, to suggest that there was a contract on foot is to disregard the significant number of outstanding issues requiring determination, one way or another, before the tender could be finalised which, at all events, may well have rendered any putative process contract unenforceable for uncertainty.

178. It is true, as a general proposition, that tenderers who devote time and expense in the preparation of tenders have a reasonable expectation that the competition for the contract will be conducted, and a contract awarded, in a principled way (in good faith), which is especially so if they are dealing with a public agency. What is required by the obligation to act in good faith will necessarily depend on the circumstances. Whether, in the present case, it included the notion of "equal opportunity" (to use the language of the AGS) required consideration of the specific terms of the contract. Thus, an implied specific obligation such as "equal opportunity" as an element of good faith could not extend to imposing obligations on the parties that were inconsistent with the express terms of the RFT. The exception to this is where the general legal requirements for the implication of terms, including the necessity for business efficacy, are satisfied, which is clearly not the case here. More generally, the concept of fair dealing (or good faith) is more often likely to be of importance in considering whether there has been compliance with the contractual terms (here, governing the tender process), rather than as a source of new terms. That said, the case can be made that good faith is, in effect, an appropriate presupposition of a competitive tender process (especially one involving the disposition of public assets). And, given that a public body is the contracting party whose performance of the contract is being relied upon, a necessary incident of such a contract is that it will deal fairly with tenderers in the performance of its tender process with them, although it is not an *ad hoc* implied term.

However characterised, it is nevertheless clear, as already pointed out, that what the duty of fairness requires in a particular case is subject to the express terms of the contract, which may exclude or modify any particular aspect. No doubt governments are obligated, in their dealings with the public, to act in good faith as a matter of good governance. This carries the obligation not to act in a misleading, dishonest or capricious manner, which in some situations may be legally enforceable by way of judicial review, otherwise by internal management (and, now, subject to investigation by an integrity agency) and, possibly, under the *Competition and Consumer Act 2010*. However, there is no basis here for suggesting that LDA/EDD was in breach of this good faith requirement.

179. Aside from any contractual obligation, there is a question also whether, as a matter of sound public administration, the omission to disclose the changes to Woolworths, as the other bidder, or to the market at large, was a failure of appropriate transparency and fair dealing, and compromised the probity of the transaction. In this respect, of course probity requirements attaching to government dealings are wider than those applying to private enterprises. However, it is difficult to see how, when the government has contracted with commercial enterprises in a purely commercial transaction that is subject to explicit terms as to their mutual rights and obligations in respect of particular issues, any notions of transparency or fair dealing require the government to surrender the rights (of which, by the way, it is the custodian for the public) of which the other parties are well aware and have accepted as applying to their relationship. Dealing with a transaction in a way that the contract explicitly permits or of which notice is publicly given when the contract is proffered does not lack transparency nor is it unfair, always providing that what is done is not capricious, dishonest or misleading. Put in another way, negotiating or contractual rights of government and whether they should be qualified or relinquished depends on the circumstances of each case, taking into account the public interest: reference to some generic notion of “fair dealing” or “transparency” is inapt. Any insistence on either that does not take into account the express terms of the negotiation or the contract and the legitimate interests of government in the particular case will lead to error. Here, all would-be (and actual) tenderers must be taken to have been well aware of the exclusion of any contractual or quasi-contractual obligations of the LDA, as well as its very widely cast contractual right to unilaterally vary the terms of the tender and the specimen contract and lease, and the exclusion of any liability of any kind for doing so. Importantly, they must also be taken to have knowingly accepted the risk that the LDA might exercise these rights in respect of one tenderer and do so without notice to any other if it considered that it was in its

legitimate interests to do so. It was, moreover, inherent in the tender process itself that changes, perhaps substantial, to some conditions were likely to be made in the course of negotiations with a tenderer; indeed, the RFT itself indicated that there were a number of important issues that were outstanding and still needed to be resolved in that context.

180. In the present case, short of conduct akin to dishonesty, misrepresentation or capriciousness, there is no room for positing some overarching obligation of government not to exercise any or all of its rights (particularly those expressly stipulated) in respect of the extent of modification and/or publication of the conditions of sale. It was suggested by the AGS that it *may* be (and adopted without this qualification by the Auditor-General and some members of the Committee) that the failure to inform Woolworths of the variations was a breach of the obligation of "equal opportunity". However, there was no such obligation, either explicit or implicit; as explained, such an obligation was explicitly excluded. In light of the terms of the RFT, Woolworths could have had no reasonable expectation that it would be informed of any such variations. Moreover, the variations here arose in the context of particular conditions applicable to the character of Tradies' bid that was markedly different to Woolworths' bid; they were also made as part of a dynamic process of negotiations and were not stand-alone concessions. Should negotiations with Tradies have failed, it is difficult to see why the government's obligation of fair dealing could (let alone should) have required it to disclose either to Woolworths or some other putative tenderer the concessions it had been prepared to make in that negotiation; to have done so might well have placed it at a significant commercial disadvantage. Whether, in that event, it should have reconsidered the conditions of the tender in order to make it more attractive to Woolworths or the broader market is another, purely commercial, question. It is a question which does not raise any issue of probity and anyway appears, in light of the evidence, that an affirmative answer would have been very likely to have been disadvantageous to the government.

181. To briefly sum up the position, contractual rights depend on the existence of a contract, and a contractually implied condition is enforceable only by a contracting party. There must be an intention to enter into a contract. A "process" contract is not an exception to this rule. No general obligation of good faith or fair dealing which was inconsistent with the particular terms of the contract (even assuming one came into existence) gave rise to any requirement other than the duty to avoid misleading, dishonest or capricious conduct. This includes, in particular, any putative general obligation of "equal treatment". No notion of good faith as applied to government obligations required the LDA to disclose the variations it had negotiated with Tradies to Woolworths or the market more generally. Nor is there any

evidence that suggests any relevant person acted in a misleading, dishonest or capricious manner. It follows that it was not necessary to inform either the market or the interested parties of the changes and, in particular, Woolworths' consent was not necessary to variations in the terms of the tender negotiated with Tradies. The possibility that Woolworths might have been able to sue for not being given the opportunity to consent is so remote as to be inconsequential.

182. The Auditor-General referred to cl20(a)(i) – permitting amendments to the terms of the RFT – and commented that "[the EDD] only did so for one tenderer (Tradies) and did not offer a similar opportunity to the other tenderer" opining that the EDD should "have carefully considered the need to cancel and restart the tender, but this did not occur". No reference, however, was made to clauses 19(a)(i), 20(c) or 21(a)(iii), which deal with the issue of notification and make it clear that none was required. The conclusion is also somewhat ambiguous since it is unclear whether the Auditor-General was expressing the view that that the possibility of restarting the process was not considered or merely that the process was not restarted. Whatever was meant, it would not have been correct to say that this question was not under review. As Mr Dawes told the Auditor-General (in a passage quoted in the Report) –

> [The tender] would have been readvertised if I had considered (based on the information and advice provided to me by my senior staff) that the changes represented a significant departure from the RFT…

There is no basis for suspicion that this statement was not accurate or that Mr Dawes was not kept informed of the negotiations as they proceeded. As previously mentioned, the question whether, for other governmental process reasons, continuing with Tradies' transaction was appropriate arose. The ACTGS, as the lawyers with carriage of the contract, both raised the issue and (implicitly, but clearly enough) did not think it should have been discontinued. (In an attempt to keep to chronological order, this is dealt with below.)

Negotiations continue

183. On 22 April 2014, when providing advice on the park and pedestrian access, the ACTGS officers working with EDD staff on the sale noted that –

> These matters were originally in the PDA, however, they are now set out in the Precinct Code and the PDA has been set aside.

This seems reasonable, however, there are a couple of issues:

There is no security for what are essentially off site works (the PDA contained a $1M unconditional guarantee);

There is no surveyed line setting out where the Park and Access route will be.

These matters could, in theory, be left to the DA process, however, if they are not undertaken properly and to a standard satisfactory to the Territory, there will be substantial problems attempting to enforce compliance.

184. Following a meeting on 1 May 2014, on 2 May 2014, in an email to the ACTGS and other LDA staff an EDD officer noted –

A PDA was prepared as part of the RFT, however, there has been some movement in this area since that time.

The draft PDA had two main functions: the Park and the Pedestrian Access.

The meeting resolved that the required 1,300m^2 park to be constructed on the land was to be handed back to the Territory following issue of a certificate of occupancy.

This is consistent with the … [Clarifications given] during the RFT process.

There is an unresolved question of the exact requirements of the park and access way.

The draft PDA contained fairly detailed specifications, some of these have been incorporated into the Precinct Code, which contains a requirement to provide a pedestrian plaza (park) of 1,300m^2 and rules about access ways including in Section 34.

As discussed at the meeting, in our view, the Precinct Code is necessary but not sufficient to achieve the requirement of the project and the PDA needs to remain part of the sales suite.

…

The draft PDA required a security of $1,000,000 to be lodged with LDA.

During the meeting concerns were raised that this was an onerous burden on Tradies. You have asked for advice about other ways to secure the obligations to undertake the works.

185. On 6 May 2014 the ACTGS provided this further advice. The advice commenced by referring to the issue as it then stood, which appeared to be whether controlling the requirements for the proposed park, which was to be handed back to the Territory, still needed reliance on the

PDA. The solicitor outlined a range of alternative modes to provide security other than by way of a cash security or bank guarantee, the choice of which was regarded as a commercial decision for the LDA to make but which, on balance, was seen to involve practical difficulties. It is fair to say, however, that completely relinquishing the provision of a security (in whatever form) which, plainly enough, was thought to have significant utility was not contemplated. I have already explained why this view of its utility should not, with respect, be accepted so far as its actual legal enforceability was concerned, as distinct from providing an encouragement for compliance or, on the other side of the coin, deterrence of non-compliance. Ultimately, the Specimen Lease provided for a "pedestrian plaza" as part of an approved development, thus dealing with the requirements for what would be a park handed back to the Territory on settlement and also dispensing with the need for any public access easement.

186. On 30 May 2014, Mr Dawes agreed to relinquish the requirement for the PDA and provision of a $1 million security bond as prescribed by the RFT. The Auditor-General considered that the evidence suggested that Mr Dawes did so because Tradies did not see the value of the PDA and raised concerns about the financial burden associated with paying the $1 million bond and, also, the parties had agreed to amend the Crown lease and related Precinct Code to include conditions that incorporated some elements of the PDA. There was no response by Mr Dawes to this part of the Audit report and it may be that it accurately states Tradies' attitude to the PDA and the bond. The ACTGS obviously did not consider that the decision to relinquish these requirements adversely affected the viability of the contract. The extent to which the security was important for ensuring compliance with the requirements for the park was very much a question of judgment which involved an assessment of those requirements, the proposed development as a whole and the Planning Authority's approach to compliance with the relevant planning rules. A judgment about the real chance that Tradies might be tempted to avoid its obligations in this situation would also be relevant. I have already explained why the security would not have been of any practical use at all events. Whilst there is no documentation that explains Mr Dawes' decision, there seem to be good reasons for it and, at all events, no basis for suspecting that was not conscientious or lacked integrity.

187. On 19 September 2014, the ACTGS responded to a number of issues raised by Clayton Utz about the terms of the specimen Crown lease. Many of the issues were answered by reference to the requirements of the RFT. In its response of the same day, Clayton Utz expressed doubts about the relevance of the RFT, "in light of the negotiations in this matter

which relate to what is effectively a 'land swap'". It is clear that the LDA approached the issues, so far as it was concerned, in the context of the RFT, which was decisive in respect of most. Further discussions ensued, relating in particular to whether parking needed to be specifically permitted by the Purpose clause in the Crown lease, the specification in the lease of purposes relating to an area that was part of a different block, construction of a subterranean car park and adjustment to GFA calculations. These were essentially technical issues for which the RFT made no provision. The valuers retained by the parties met on 24 October 2014 but issues remained outstanding. On that day, the ACTGS emailed Mr Mundy, the former Project Director, Urban Projects, EPSDD, stating –

> It appears there is a misunderstanding of what was offered to Tradies. Whether or not this misunderstanding is justified is irrelevant, the question remains what the LDA is willing to offer.
>
> We note our previous advice that the concessions they are seeking are at odds with the Minister's brief signed by David Dawes and the content of the RFT. We would expect that any changes inconsistent with Mr Dawes' briefing would need to be cleared through him or the Minister.
>
> It appears that the options at this stage are either they agree with our position, we agree to negotiate a new price, or we terminate this arrangement and start the negotiation process again.
>
> Any further concessions at this stage may contaminate the RFT process to the point that there may be … significant probity issues in selling the Land on that basis. If you wish for further advice on this matter, please instruct us accordingly.

188. Three days later, on 27 October, Mr Peters emailed ACTGS asking for an opinion on "what the differences are that are being requested" and stating that he was "prepared to work through each issue" and was "very reluctant to negotiate a new price or terminate this arrangement and start the negotiation process again". He asked to be advised "of the best position the LDA can take so I can discuss these options with Dan [Stewart]". On 28 October, ACTGS responded –

> The difference between the Crown lease that has been endorsed and the position presented in [the Clayton Utz senior lawyers'] email is Tradies are requesting (as they believe they were offered during the evaluation process):
>
> - car park be included as an independent use in the Crown lease. Currently, it is only an ancillary use to any other use permitted on the land;
> - commercial accommodation not be limited to hotel and community use not be limited to community activity centre;

- the current limitation of 300m2 on shops selling food be removed; and
- the removal of the clause which relates to any building which straddle both Blocks 28 and 30 Section 34 Dickson with frontage to that proposed access way.

These divergences from the original offering in the RFT can [possibly] be viewed as the normal post tender negotiations that the Territory engages in with most transactions.

This really only becomes an issue if a reasonable person (say the Auditor General) considers that negotiations have gone so far that the terms of the sale no longer reflect the offering to the market in the RFT.

As you know, section 240 of the *Planning and Development Act 2007* prohibits ACTPLA issuing a Crown lease via direct sale except in circumstances set out in the Act and the Regs. If the terms of sale are so divergent from the terms of the RFT, it may be considered a direct sale rather than the outcome of the RFT process.

If this were the case, the exemption for the direct sale of land offered under a tender but not sold (reg 130(1)(b)) would not be effective because the conditions of sale were not materially the same as those in the tender.

Whether the terms to Tradies are "conditions materially similar to the conditions of the lease offered by tender" is a matter of degree and judgement, however, we have concerns that making any of the requested concessions may move the terms offered beyond what is “materially similar" to the original tender.

Please advise us of your position and we will respond appropriately to [Clayton Utz]. We look forward to [your] instructions.

189. The question whether the Auditor-General might have a view as to the materiality of any change does not, of course, state any relevant legal test. It is obvious that this reference was made *in terrorem*, no doubt sensible in the context, of suggesting caution in agreeing to changes in the conditions. Matters of fact and degree are frequently subject to differing judgments by reasonable minds. Providing, in the result, it would be reasonable to conclude that there was no material change within the meaning of reg 130(1)(b), the mere fact that it might be reasonably open to hold a different, even contradictory, opinion would not suffice to compromise the legality of the transaction. It will be observed that, whilst raising a concern, the ACTGS (in contrast to the less well-informed language of the AGS) does not express the opinion there was a “significant risk” of non-conformity that, in fact, the proposed changes had gone or would go so far as to compromise the legitimacy of the transaction.

190. Reference has already been made to the “vigorous” engagement of the ACTGS in the contractual negotiations following Mr Dawes approval of Mr Ellis’ briefing in December 2013. It is clear, as mentioned, that the issue of variation was a live one. By November 2014, the negotiations had reached a stage of clarity that required consultation about compliance with

the regulatory requirements. A meeting was held on 19 November with Mr Garrisson SC, Mr Stewart and Mr Dawes (amongst others, it seems likely) to consider what should happen with the tender. Mr Stewart said that Mr Dawes and Mr Garrisson discussed the "process to date", and Mr Garrisson had advised that, in terms of probity and "process", the EDD "had not stepped outside the boundaries of what would be considered reasonable". Mr Dawes had told the Auditor-General –

> Members of my executive team informed me that concerns had been raised by the [ACTGS] about the negotiations. On my request, we held a special meeting on around 19 November 2014 to consider whether the RFT should be restarted. Following careful consideration of the verbal advice and information that I received from my senior staff regarding, I decided to proceed with the RFT. At no time during this meeting (or on any other occasion) were the [ACTGS's Office] concerns put to me in terms that there was "significant risk" regarding the terms being negotiated with Tradies or the legality of the tender process.

191. These accounts are consistent with the evidence of Mr Garrison about the propriety of the transaction and should be accepted. The failure to take (or, at least, keep) a record of this meeting was unfortunate but does not suggest a lack of probity.

192. It follows that there is no basis for the conclusion of some members of the Committee (in Finding 4) that it remains unresolved whether the Territory government met its legal obligation to deal fairly with tenders when it offered terms to Tradies that were significantly different to those offered to Woolworths as the other party responding to the RFT.

The contract for sale of Block 30

193. The ultimate transaction involved a number of changes from the provisions of the RFT. As already explained, the extent and character of those changes is significant since the degree of variation might indicate such a substantial departure from the terms of the RFT as to suggest the transaction was no longer permitted pursuant to reg 130(1)(b). This required consideration to be given, not only to the terms of the variations but also their materiality, that is to say, as a matter of substance, not form. The following matters were listed by the Audit Office as "departures from the RFT"; a comment about their significance is inserted in square brackets –

> 1. Relinquishment of the requirement for a PDA and $1 million security. [This issue has already been dealt with. This became essentially of facial importance.]

2. The RFT stated that interest on the deposit would be paid to the party who becomes entitled to the deposit, but this was deleted in the final contract for sale. [This is correct, but inconsequential: clause 35.4 of the Contract provided that, "The Deposit and all instalments of the Deposit are released to the Seller (when paid) and become the Sellers property absolutely (being part payment of the Price)". Consequently, the Seller was entitled to the benefit of the deposit, which included any interest that might be paid on it on the assumption that it might be invested, although this was not required and the government was entitled to treat the money as its own. This clause therefore clarified the RFT condition in favour of the Territory.]

3. The RFT required tenderers to submit a 10% deposit with their tender. Revised conditions changed this by allowing the buyer to submit a deposit by instalment being (a) 5% on date of contract; and (b) the balance of the 10% paid on settlement. [But a 10% deposit of $242,200 was paid on lodgement of the tender. The variation followed conventional conveyancing practice in the ACT. At all events, the difference was, as a practical matter, comparatively trivial.]

4. The RFT stated the date for completion of contract this was 21 days from the later of either a Certificate of Occupancy being issued on Block 21, or two years from date of contract. It also allowed the buyer and seller to terminate the contract if a Certificate of Occupancy was not issued within 4 years of the contract. The termination clause was deleted in the new contract for sale. The completion (or settlement) date was changed to 'within 30 days of the seller serving the Crown Lease on the buyer'. The deletion of the termination clause means the Territory can no longer terminate the agreement if the adjacent carpark remains unfinished after four years. Changing the completion (or settlement) date to 'within 30 days of the seller serving the Crown Lease on the buyer' has the effect of further de-coupling the development of Block 30 from Block 21. [This overlooks the following clause in the contract, which provided that "the seller shall serve the Lease on the buyer within 30 working days of receiving notice from the Planning and Land Authority that a Certificate of Occupancy has been issued in respect of improvements that include a public car park on [the Coles] block 21 Section 30 Dickson". The assertion about de-coupling was thus mistaken. It was already known that construction on the Coles site had been delayed by litigation concerning the DA and, thus that the Certificate of Occupancy was inevitably delayed for a lengthy period. The opportunity to terminate on 4 years delay had been based on what turned out to be unrealistic expectations in the timing of the Coles development. Reaction to significant

changes in the facts on the ground are appropriate and there is no basis for supposing that its relinquishment favoured Tradies at the cost of the Territory. Furthermore, the actual legal effect of the termination clause was problematic. The parties were left to their contractual rights in the event of a frustration of the contract. This could not reasonably be regarded as a major variation of the RFT conditions as distinct from a negotiating position in the light of unfolding events, implicit in the context of the tender and the lengthy timeframes for which it provided. Capital Valuers considered that removal of the "Sunset Clause" was "not commercial but on the basis that the LDA had received payment the effect is not significant."]

5. The RFT special conditions allowed the buyer and seller to terminate the contract if the agreed 'associated works' differed from those prescribed by the specimen lease. This clause and associated reference in the specimen crown lease with the final transaction were removed. Removing the opportunity for the parties to the contract to terminate the contract if the agreed 'associated works' differed from those prescribed by the specimen lease, weakens the ability of the parties to enforce compliance with the contract. [This clause was not directed to giving rights to enforce the contract (the LDA was unable to ensure there would be no change) but to deal with the situation where a change to requirements occurred. At all events, the effect of this clause is uncertain, since the required works (except for heavy duty driveway crossings) were either described in vague terms (eg "to fully service the land") or by way of requirements yet to be specified by another government agency. Furthermore, a difference might range from trivial to considerable. This clause was practically unenforceable. It was also of little practical use to either party, doubly so if all that was to trigger termination was disconformity of language between the RFT draft Prescribed Conditions and the Crown lease. A significant difference in expectations was best left to the application of the ordinary law of contract.]

6. The RFT required the tenderer to sign a Deed of Unconditional Undertaking committing to supply funds for the 'associated works' when requested by the Territory, but this was removed in the new conditions. [Given the uncertainty of the requirements, this clause would have been practically unenforceable.]

7. A new provision was added to the revised special conditions (at the request of the Tradies) permitting it to apply to ACTPLA to remove an easement designed to ensure pedestrian 'access over and along the ground floor' of any development on Block 30 and to amend their Deposited plan without objection from the Territory. The Auditor-General

contended that this variation "materially reduced the obligations of Tradies on the degree of pedestrian access along the ground floor required by its development". [Given the nature of the proposed development, the easement had little utility. Provision of public access was still required under the lease. The development still required Development Approval which would necessarily have dealt with adequate access. This change reflected the particular location of the Tradies' site and did not materially affect the character of the tender. The terms of the contract but not the lease were varied, so that there was in fact *no* change, let alone material change, to the lease for the purpose of reg 130(1)(b). Furthermore, there is no evidence as to the likelihood of approval in fact being given to the removal of the easement, which plainly could not be assumed. Capital Valuers advice about the benefit of the variation was expressly stated to be "subject to Town Planning/Architectural advice", which was not obtained, rendering reliance on the opinion problematical. Capital Valuer's noted that the Territory government's online mapping showed the depicted easement as approximately 240m^2 and estimated that, if verge works were not required, additional areas might become available for development and enhance value by $200,000 to $300,000 and possibly more. However, the verge works were in fact still required.]

8. The Specimen Crown Lease issued with the RFT restricted community uses to "community activity centre" use only. The Tradies received a "concession" to eliminate this restriction. [In the specimen Lease, the definition of "community activity centre" was "the use of land by a public authority or a body of persons associated for the purpose of providing for the social well-being of the community" and "community use" was "childcare centre, community activity centre, community theatre, cultural facility, educational establishment, health facility, hospital, place of worship and religious associated use". In strict language, it is arguable that each of the permissible uses in the latter definition was at all events within the former. It does not appear to be any significant practical difference. Capital Valuers thought the change had a "minor beneficial effect on land value".]

9. The specimen Crown Lease issued with the RFT restricted the gross area of any supermarket or shop selling food to less than 300 square metres. The Tradies sought and received a concession to eliminate this restriction during negotiations, thereby facilitating agreement between parties on the mutual understanding that shops of size greater than 300 square metres would be permitted to sell food. ACTPLA did not enact this change when amending the Crown lease as it was inconsistent with the Commercial Development

Zone. EDD's agreement to this concession during negotiations nevertheless altered the course of tender deliberations and underpinned the final agreement between the parties. [This does not appear to be a significant point. Regulation 130(1)(b) was not engaged. Capital Valuers thought this was inconsequential from a value point of view.]

10. The specimen Crown Lease issued with the RFT restricted the use of floors above the ground floor of the development. Specifically, only 'hotel, 'office' and residential uses' were permitted above the ground floor. Further, the only permitted uses for the ground floor were as a club, drink establishment, hotel, indoor entertainment facility, indoor recreation facility, restaurant and shop. Tradies received a concession to eliminate the restriction on permitted ground floor uses, thereby significantly increasing the available permitted uses. [It is difficult to see how this change was of real significance.]

11. The RFT required the development to be completed within 36 months from the later of either a Certificate of Occupancy being issued on Block 21 Section 72 or commencement of the Crown lease on Block 30. The Tradies were given an extra 12 months to complete the development than what was offered than was offered to prospective tenderers. [Extension of the completion date was envisaged in pre-closing correspondence. The additional period is inconsequential in practical terms, with extension inevitably permitted to any developer whose works were advanced. There is no evidence that this limit would have been a significant obstacle in the market.]

12. The Specimen Crown Lease issued with the RFT made reference to prescribed associated works that had to be completed by the Lessee within 36 months from the later of the date of Lease or issue of a Certificate of Occupancy on Block 21. These works covered water supply, sewerage stormwater, driveways footpaths and other ancillary works; the lessee indemnifying the Territory for all actions, claims, suits etc arising from the associated works.

This clause was removed in the 'final' special conditions. Removal of this explicit obligation and associated indemnity reduces certainty regarding the lessee's obligations for delivering these works exposes the Territory to potential future costs associated with any failure by the lessee to deliver the associated works as originally required. [See response to clause 5. The indemnity had little practical application.]

13. The Specimen Crown Lease issued with the RFT restricted the commercial accommodation to "hotel" use only. The Tradies sought and received a concession to

eliminate this restriction. This changed the permitted commercial uses of the land from that advertised in the RFT. [This was inconsequential, having regard to the proposed development and the Territory Plan. Capital Valuers thought it had "minimal land value impact".]

14. The specimen Crown Lease issued with the RFT restricted the use of floors above the ground floor of the development. Specifically, only 'hotel, 'office' and residential uses' were permitted above the ground floor. Further, it permitted only the following uses to the ground floor: club; drink establishment; hotel; indoor entertainment facility; indoor recreation facility; restaurant; shop. The Tradies received a concession to eliminate the restriction on permitted ground floor uses, thereby significantly increasing the available options for permitted uses on the ground floor. [The "further" uses applied only to what became identified as "Area C", which was not on Block 30. It was therefore irrelevant and excised. There was no significant variation to the RFT in respect of Block 30.]

194. A fundamental problem with the Auditor-General's analysis (additional to those identified in the above commentary) is the failure to take account of the relationship between the changes and the particular issues raised by the proposed Tradies' development. Given the number of matters left uncertain by the RFT and the Clarifications, it was inevitable that a number of apparently significant issues, though not all, would arise from that development and would also have required resolution had there been another competing bid of a similar character – namely one that sought to develop the site to its maximum value. Moreover, the fact that Tradies were taking advantage of the contiguity of the block with its adjoining land presented unique issues that would obviously not have arisen had the successful tenderer been a developer who could only build on the block itself. It followed that the "advantages" available to Tradies at the end of the day would by no means necessarily be of any significant value to a potentially competing tenderer. The opinion of the Auditor-General was that the "changes to the sale conditions…[were] agreed to during negotiations fundamentally and materially altered the sale conditions from those advertised with the RFT". This conclusion was not based – as demonstrated above – on an analysis that would be adequate for the purposes of considering whether reg 130(1)(b) was satisfied. The Auditor-General further opined –

> Had these been agreed and communicated to prospective tenderers at the commencement of the tender process it may have led to: greater interest and thus increased competition; different

proposals from those submitted based on the more restrictive clause; and a different outcome from the tender process.

The problems to which reference has already been made, together with the lack of any description of or discussion of the actual market in which both the tender and the subsequent negotiations occurred, shows that this opinion was based upon the assumption that the potential real-world effects of the changes did not need to be considered. In the absence of expert evidence, this does not carry much weight. More problematic, however, is the fact that it overlooks the evidence of Mr Ellis, apparently reliable, as to the distinct disadvantages from the Territory's point of view, of recommencing the process. Certainly, it provides no proper basis for any suggestion of lack of integrity on the part of the relevant officials, let alone reasonable suspicion of corrupt conduct.

195. The AGS gave advice to the Auditor-General in respect of the "implications of the negotiated outcome and its divergence from the terms and conditions outlined in the RFT". The AGS advised –

> Based on these departures *from the RFT*, it would be reasonable to conclude that the eventual sale to Tradies departed so far from the provisions of the RFT as advertised that it could reasonably be regarded as a direct sale [emphasis added]. Tender negotiations are common in clarifying tender responses before acceptance. Clarifications are typically in relation to matters that have arisen during the tender evaluation or variations or alternatives identified by the tender in its tender response, or some other matter referable back to the RFT (eg occasional specifications identify essential and desirable requirements. For budgetary reasons desirable requirements may not be required, in which event it is common to negotiate adjustments to the offered price for the deletion of these 'desirable requirements'.) Tender negotiations can be complex, especially where complex services or equipment are being acquired.
>
> In the context of the sale of freehold or leasehold title, the scope of tender negotiations is usually much lower. The types of things that are occasionally negotiated include:-
>
> - delayed completion dates
> - tenders submitted subject to zoning changes
> - tenders submitted subject to development approval
> - tenders submitted subject to detailed due diligence
>
> The key constraint on tender negotiation in any context is that the items of negotiation are identified as part of the tender evaluation. This enables the evaluation board to take these matters into account as part of their tender evaluation and recommendation to the delegate.

> None of the matters identified … appears to have been identified as qualifications or alternatives in Tradies tender response. They appear to be 'after the event' changes designed to secure the valuation.

196. The comments about what might be regarded as conventional negotiations are interesting but immaterial: the question here is what is required by law, to which these aspects of the advice do not refer. The evident purpose of the negotiated changes was to secure a sale on conditions that were the best the Territory could procure. Whether the result had gone awry might be debated but the characterisation of what occurred in the last sentence in the AGS advice quoted by the Auditor-General, if it is intended to convey the notion that the process was intentionally undermined or misdirected in some way, is both without evidentiary support and unfair, particularly in the absence of any analysis of the RFT, the Clarifications, the Specimen Lease or the ultimate contract. The material it was given, namely only an "Analysis of the probity implications of key departures from RFT", was authored by the Audit Office**,** essentially, it may be inferred, in something like the form set out above, contained in or derived from a draft report. Since this comprised the basic data upon which the advice depended, it cannot be effectively evaluated against the actual position. The AGS advised –

> Based on these departures *from the RFT* [emphasis added], it would be reasonable to conclude that the eventual sale to Tradies departed so far from the provisions of the RFT as advertised that it could reasonably be regarded as a direct sale.

Since the AGS did not explain why the assumed changes resulted in a transaction that was not materially similar to the RFT, this statement is not much more than an *ipse dixit* and of little real value: use of the phrase "reasonable to conclude" does not fill this gap. In addition, the Auditor-General's Report, unfortunately, did not indicate that "the changes to the sale terms and conditions that were subsequently negotiated with the Tradies represented significant departures from the RFT" were the changes *identified by the Auditor-General and not by the AGS* and thus "these departures" mentioned by the AGS that led to the opinion of direct sale were derived second-hand. This lack of independent examination of the relevant material seriously compromised the utility of AGS' opinion and, necessarily, the ultimate conclusion of the Auditor-General, in reliance on it. Accordingly, the conclusion, that it "[posed] a significant risk to the validity of the negotiated transaction as only the government has authority under section 240 of the *Planning and Development Act 2007* to approve a direct sale in these circumstances...[which] approval was not secured" was significantly undermined.

197. As well as the problem raised by the omission to independently gauge the nature, extent and significance of the changes identified by the Auditor-General, the AGS misstated the relevant regulatory test under the Planning Act and Regulations since, although the relevant test was correctly extracted (namely, whether the new lease is proposed that "includes conditions materially similar to the conditions of the lease that were offered by tender") the answer that it did not was determined incorrectly by reference to "conditions materially similar to those that were stated in the RFT". That the relevant comparator is not the terms of the tender, but the terms of proposed lease has been pointed out above and is derived from the language of the regulation itself. The AGS was instructed that the RFT contained the Specimen Lease and, hence, was entitled to assume that, in effect its terms were stated in the RFT. (As pointed out, whether the Specimen Lease was part of the RFT is (at least) doubtful). Of course, the RFT was certainly not part of the Specimen Lease and the regulatory issue remained whether there was a change in the terms of the lease and the need to assess the material significance of the changes.

198. In her evidence to the Committee, the Auditor-General explained –

> We had auditors look at this. We had AGS independent from the ACT system advice, and then I and the director also looked at this and said, given the departures—and that is always a judgement—there were not just one or two, there were so many that we felt that it was a significant departure.

This succinctly describes the process undertaken not only by the Auditor-General but also, in the result, by the AGS, amounting to a mere enumeration of changes with no weighting of effect against the regulatory test in the actual market context. Although the AGS certainly is "independent from the ACT system", its advice was in substance based on the Auditor-General's view as to the significance of the changes. The AGS opinion was, therefore, not actually independent. The opinion of the Auditor-General and the director may have been all very well as far as it went, but it was lay opinion which did not rely on any relevant expertise.

199. Mr Garrison SC told the Committee that, "had my office formed a view that the Territory or EDD had agreed or was intending to agree to changes that in our view jeopardised the process…very clear advice would have been given. That advice was not given". The ACTGS necessarily signed off on each variation as it was agreed – the conventional function of a solicitor responsible for the legal character of the contract – and, of course, the final contracts for the sale and related purchases. (The Auditor-General's Report does not deal with this

matter and its implications for the probity of the transaction, possibly arising from a misinterpretation of a communication by the ACTGS, quoted in that Report, that clearly, but mistakenly, assumed the Audit Office would understand the role of a solicitor having carriage of a conveyance.) Thus, the warning by the ACTGS about the potential consequences of significant departure from the RFT demonstrated an acute awareness of the risk which, it is fair to infer, was based upon a detailed appreciation of the character and extent of the changes. This permitted a judgment to confidently be made that the risk had not materialised and the ultimate transaction complied with the relevant legal framework.

200. Given that the regulatory issue of material similarity or otherwise is a matter of fact and degree, the ACTGS was in a far better position than the AGS to provide an opinion on the question, since its officers were intimately involved in the transaction as it developed and, furthermore, had specifically raised the potential risks posed by the suggested departures, whilst the AGS was dependent on second-hand and, to a significant extent, mistaken information.

201. It should additionally be observed, in all fairness, that the extensive criticism of the EDD concerning the legal significance of the agreed variations failed to take into account, and make fair allowance for, the fact that the EDD were not only entitled to rely on, but as a practical reality were bound by, the advice of the ACTGS.

202. Accordingly, the evidence well supports the legality of the sale of Block 30 to Tradies, and it is not reasonable to regard the question as unresolved (*vide* Finding 3 by some members of the Committee).

203. It follows that there is nothing in the evidence concerning the variations from the terms of the RFT that suggests any impropriety on the part of the relevant officials or raises a reasonable suspicion of the commission of corrupt conduct or, for that matter, gives rise to a substantial doubt about the legality of the ultimate contract.

The car parking spaces

204. The position as at the contract date in respect of the number of car parking spaces additional to those necessary as part of the development required by the ACTPLA (as already mentioned) was 154. The contract, as has been mentioned, did not specify the number, as

it was (rightly) understood that the actual determination would await lodgement of the DA and the ensuing approval process. It was stated by the Committee –

> It is unusual for either a buyer or a seller to be satisfied with a transaction where they don't know what they have bought or sold. It is particularly so due to the significance of car parking spaces for the value of the land. The fact that the parties agreed without a confirmed number of replacement car parks works against any view that the transaction was an 'ordinary commercial transaction' [a description used by Mr Docker, Tradies' CEO].

Whilst the opening passage as to unusual transactions may be correct, as far as it goes, that Tradies did not know, as a practical matter, what it had bought or the LDA what it had sold because some matters (including the number of car spaces) required determination is a significant overstatement. The fact is that many commercial contracts are entered into leaving significant uncertainties remaining for resolution. This is especially so in contracts that depend on outstanding governmental decisions, such as planning requirements, that will, in turn depend on some relevant envisaged action by a party, such as lodging a development application (as required here pursuant to cl 32 of the contract, discussed below). There is no basis for concluding this meant that the contract was not an "ordinary commercial contract" *of its type*, let alone that this impugned its probity or Mr Docker's evidence. Whether the uncertainties, in the end, mean that a contract is not binding depends on the particular terms and context of the transaction. The relative number of such "uncertain" contracts does not give any useful information, even if there were a factual basis for ascertaining how frequently such contracts arose, which of course there is not. The Committee's stated expectation that the contract would stipulate the number of replacement car parks to which the Territory government and the Tradies had agreed was, however, somewhat surprising, since it was never a term of the Specimen Lease attached to the RFT and the Clarifications made clear the number would ultimately be decided by the ACTPLA. It is difficult to understand, at all events, why this matter is significant, since it must also have affected Woolworths' bid or, for that matter, any bid by any tenderer. The implicit suggestion that the tender of the Block for sale should have waited until this matter was determined makes no sense, since the determination of replacement parking spaces was always going to have to await consideration of any proposed development by any potential bidder, the application for approval of which could not be made until the lease was granted after completion of Coles' development. Moreover, the parameters for decision were relatively clear as the criteria applied by the Planning Authority are in the public domain, as was the requirement that the spaces lost by a development on Block 30 were to be replaced.

205. Whatever meaning be attributed to the description "ordinary commercial contract", the circumstances surrounding the uncertainty of the number of replacement car parking spaces does not raise any question of probity or any basis for a reasonable suspicion of corruption. Nor is there any evidence that the form of the transaction, however characterised, had anything to do with the relationship between "Tradies, the CMFEU and the ACT Labor party". This suggestion, which amounts to an implicit slur on the integrity of the relevant officials, cannot be justified.

The "land swap"

206. Reference has already been made to the initial proposal for a "land swap" in connection with the third application by Tradies proposing the direct sale (from Tradies' perspective, direct purchase) of Block 30 at market value in accordance with the Planning Act with a partial set-off by swapping the Downer site. The EDD supported this proposal, differing with the Treasury view, which favoured a competitive process. The advantages of the acquisition of the Downer site were briefly identified as follows –

> [The Downer site] is a well-located vacant Block, proximate to the Dickson Group Centre. The direct sale arrangement proposed will provide additional land for affordable housing and possible community use in the inner north in accordance with the Affordable Housing Action Plan. This is a unique opportunity for the Territory to access land that is suitably located to deliver good social outcomes for the Dickson area and community

The submission went on to argue that the direct sale route, rather than the competitive route, was preferable. Cabinet, however, decided that the sale of Block 30 should be effected by a competitive process. There is no evidence that the merits or otherwise of acquiring the Downer site were considered. Accordingly, the statement, made a number of times both by the Auditor-General and the Committee in criticism of the officials with carriage of the tender, to the effect that "Cabinet had specifically ruled out a 'land swap'", in the sense that the Downer site should not be acquired was quite wrong. This was a decision that the sale should be by way of a competitive process, not how the purchase price was to be paid.

207. As mentioned above as the sixth issue, the Committee considered that "impartiality of the process" was compromised because "certain elements of the ACT public service appeared to support Tradies' attempts to acquire Block 30 by arguing against a competitive process in the Cabinet Brief which accompanied Tradies' third application for acquisition of Block 30 by direct sale in 2011…[and also being] involved in tender negotiations in 2012-13". This is

untenable. Public servants are frequently called on to make recommendations to Government and, when their recommendations are not accepted, having to conscientiously carry out the Government's decision. To suggest that, when this occurs, the outcome is compromised by lack of impartiality is to undermine one of the fundamental assumptions upon which the relations between public servants and Government is based, one of which is that the former will unhesitatingly provide independent, fearless and honest advice, whatever might be perceived to be the attitude of the latter and that the latter, for its part, can rely on the public servants to conscientiously undertake its tasks in accordance with its decisions. If it were indeed the case that the relevant public officials involved in this transaction did not impartially act in accord with the Cabinet decision, that would be a serious charge certainly capable of amounting to corrupt conduct. However, there is no evidence that raises any reasonable suspicion that this occurred.

208. It was also stated by the Committee that "the 'land swap'…was not envisaged at the time the Tradies became the preferred tenderer". No doubt this is correct, but this is of no moment as nothing follows from it. The possibility was certainly not excluded by requiring a tender process. The so-called "land swap" was merely a way of financing, by sale to the Territory of other property, the purchase of Block 30 and would have been available to any putative purchaser with property to sell. It played no part in the selection of Tradies as the preferred tenderer. The proposal appears to have been introduced in March or April 2013. However, the evidence about who did so first, as the Committee rightly characterised it, was "contradictory, inconsistent, and incomplete". Given the number of actors and the expiration of time, this is not surprising. The approach by Tradies in 2010 would scarcely have been forgotten and such a sale may well have suggested itself to any party concerned to move the negotiations forward from the stalemate they had apparently reached. Whomever it was, it was not improper to put the possibility on the table. For this reason, identifying that person is of no real importance, at least for present purposes, despite the Committee thinking that the inability to establish the facts about the matter "is a matter of concern".

209. In his Brief to Mr Dawes of 13 December 2013, Mr Ellis said –

> **Method of Payment**
>
> Rather than pay cash for the purchase of Block [30] Section 34, the Tradies proposed payment through the sale to the Territory of its land assets on Section 72 Dickson. These are Blocks 6 and 25. Block 25 is a concessional lease. Block 6 is a commercial site with considerable improvements, including an apprentice training facility and childcare centre.

> Based on your instructions that these sites could be considered as payment, their value was considered within the negotiation. To arbitrate on the valuations you also agreed to the appointment of Colliers International Ltd to assist in EDD's negotiation with the Tradies …
>
> Taken together the value of these sites is thus $415,000 greater the reserve price the Territory will receive for Block [30] Section 34.
>
> This payment would see the Tradies meet their obligation to pay the reserve price for Block [30] Section 34; and would see the purchase of two sites on Section 72 that the Territory can consolidate for future development.

210. As mentioned, Mr Dawes signed off on this proposal. Mr Ellis (as a lay person) characterised the issue as he saw it in a response to the Auditor-General's report –

> … during my time dealing with the land swap action I was never advised that the land swap was, *per se*, a contravention of due process; and at no time do I ever recall being told that considering a land swap instead of cash was not in accord with the Government's wishes. After all, the terms of the payment were not as important as the payment. If the Government wanted payment in cash and rejected the land swap idea that was of no concern to me either way. Land swaps had been a part of other transactions entered into by the ACT Government; and land is usually a very good currency. Although it wasn't my idea that a land swap would form a part of the negotiation, I had no reason to believe that land properly valued wasn't as good as cash. It wouldn't have mattered who had won the tender.

This view was not unreasonable and is sufficient to justify the form of the transaction, but it does not accurately describe what actually happened. This was that Tradies sold other land it held and used the *proceeds* (and not the land) to pay for Block 30. This may well have been due to the conservative approach quite rightly adopted the ACTGS, when it took over carriage of the transaction: it had the advantages of being both conventional and simple. There was nothing wrong, in principle, with a "land swap", nor was it implicit in Cabinet's decision to sell Block 30 by competitive process that the purchase could not involve a land swap, thus that Mr Ellis was not told that it was not appropriate was unsurprising. At the same time, to characterise the transaction as a "swap" is a narrative description, reasonable as far as it goes, but inaccurate. What actually occurred is that Tradies contracted to pay in legal tender and did so, albeit by a contra *cash* transaction using the proceeds of sale of the Downer site. It is correct to say that, at the end of the day, Tradies finished up with Block 30 and the Territory with the Downer site. However, this cannot make irrelevant the actual process which was involved. It is quite incorrect to say (as Mr Ellis did) that Tradies paid for

Block 30 with the Downer site (as it would be inaccurate to say that the Territory paid for the Downer site with Block 30). No distinction between substance and form arises here: the legal form of the transaction was also its factual substance. The Downer site was not, in any relevant sense, consideration for the purchase of Block 30 (or *vice versa*) and was never so treated in the contracts or the leases. Regulation 130(1)(b) concerns circumstances where "the new lease includes conditions materially similar to the conditions of the lease offered by tender, other than any conditions relevant only to the tender process". The conditions of the lease were never varied by virtue of the Territory's purchase of the Downer site. The notion that the Planning Act would have required the new lease to be regarded as a direct sale by reason of the "land swap", despite there being no change in its terms in this respect, is simply wrong.

211. More generally, the mere fact that the transaction involved a sale of the Downer site to the Territory and those funds were used to purchase Block 30 was no more significant than if Tradies had acquired funds from the sale of any other asset (including, for example, shares) to any other purchaser and used the proceeds to buy Block 30. The fact that it may be that Tradies would not have continued with the tender (at least at the stipulated price) if the Territory had not agreed to acquire the Downer site (though this is entirely speculative) did not change the terms of the tender in any way, no more than had Tradies declined to exchange contracts until it had (for example) secured finance to enable payment or sold another asset, whatever that might have been. It follows, therefore, that there was, in this respect, no departure at all from the RFT, nor from the approval of Government for the tender. It is scarcely surprising that the ACTGS saw no problem about this aspect when they came into the matter. At the same time, of course, the question whether the acquisition of the other land was appropriate given the relevant policies governing land purchases needs to be dealt with. This is discussed below. The conclusion of the Committee (noted above as fifth) that the effect of the "land swap" was to vary significantly the terms of the RFT, contrary to the obligations of the government as tenderer is therefore mistaken on two levels: firstly, the terms of the RFT gave the government wide powers of variation (and, thus, there was no obligation to limit variations) and, secondly, at all events, the terms of the RFT were not varied in this respect at all, either in form or in substance.

212. The conclusion of both the Auditor-General and the Committee to the effect that the "land swap" transaction was "materially at odds with the RFT [and] the terms and sale process approved by government" is unsustainable. At all events, the relevant officials were entitled to rely on the carriage of the legal issues by the ACTGS, who considered that the transaction

was lawful and authorised. There is no lack of probity associated with the form of the transaction and no reasonable suspicion of corrupt conduct is raised.

213. In dealing with the question raised by the Auditor-General whether the transaction was an "appropriate outcome for the Territory", Mr Ellis gave a comprehensive description of the course of negotiations (as they then stood) that resulted in his briefing to Mr Dawes of 13 December 2013, by which time the Colliers' valuation had been obtained and agreement had been reached (subject to Mr Dawes' approval) that the Territory would purchase the Downer site. He started by highlighting the extent to which the Territory would provide a rent-free period to Tradies in respect of its occupation of its office in the building on Block 6 around which, he said, "the negotiation primarily revolved" and then went on –

> At the start of the negotiation we (with me doing the negotiating) would have been proposing to accept the valuation on the main block as per the Colliers figure of $3.25 million plus the rent free period (about 18 months initially I think), instead of the higher figure ($3.55million without the rent free period). However, agreement on this aspect of the deal got the two parties nowhere in terms of the $1million shortfall between our price of $3.2m for Block 30 and the Tradies winning bid (of around $2.2m). The Tradies argued – and they were correct – that the MMJ valuation was inflated because the $3.2million figure was based on there being no road separating the Tradies existing block on Section 34 (the Club site). Although the Tradies, unlike any other developer, would have been able to build right across the block and up to the boundary of their existing club site – and thereby been able to realise the full development potential that MMJ assessed the block as having – they said they had no intention of blocking their existing basement carpark and main club entrance and so fully intended to have a road (just as would have been mandated by ACTPLA had anyone other than the Tradies been the successful bidder).
>
> We (me in particular) continued to insist that to sell the block we had to secure the MMJ valuation figure, otherwise we would probably have to cancel the sale and put it back up for tender. Faced with this impasse the Tradies suggested they could pay the full amount in exchange for the Territory paying the full valuation for [Block 6 Section 72] and an extended period of peppercorn rental at that property. This looked to me then – as it does now – like a good deal. If my memory serves me correctly, the deal left us on the good side of the ledger in terms of the shortfall. According to MMJ, 18 months worth of rent was about $300k. On that basis we would have said, OK so 36 months would be roughly $600k i.e. still about $400k on the good side of the $1m gap between the parties (the 36 months was later upped to 40 [in fact, 42] but still the rough balance was on the Territory's side). Although I believe the Tradies did at one stage offer to increase their bid to around $2.7million, they were only willing to go all the way to $3.2million if they were granted the lengthier peppercorn rent. So, while it might look theoretically like we should have been adding

the $670k to the $2.7 rather than $2.2, the negotiation just didn't work that way. As I recall it now, the Tradies were willing to pay either $2.7m with no rent free period or they were willing to pay $3.2m with the extended rent period – and as the first was not acceptable to us, I agreed to put the latter option to Mr Dawes as the basis for a settlement, which I did in writing. (As I mentioned I can't recall for sure whether this was also the subject of a brief to the Minister or Cabinet but I would be surprised if it wasn't. I am almost certain we would have done a brief to the Minister though at this late remove I can't remember drafting one. [There was no evidence of such a briefing and it does not appear that one was necessary, certainly to seek Ministerial intervention.]

More broadly, the deal gave us our headline figure meaning we had the letter of the procedures around the sale of land. It meant the sale could proceed as the Government wanted it to proceed and in a reasonably timely way (though I don't remember if we quite met the deadlines we were aiming for.) We possibly could have gone back to the Government and sought its agreement to a lower figure than the $3.2m but we saw it better this way: it was quicker – more 'efficient' if you will – it delivered the $3.2 million to the LDA budget (which would already have been factored into that budget), and it deferred payment of the shortfall which would otherwise have meant the loss upfront.

Although some might seek to interpret what happened as circumventing the process, the fact was that the Tradies had a good case with respect to the MMJ valuation. And certainly, there was no justification, or indeed sensible rationale, for seeking a new valuation for the purpose of getting a valuation which more closely resembled the Tradies offer. MMJ's evaluation was peer reviewed and it was found to be perfectly sound except for the assumption it had made about the road. What's more to the point is that while getting another valuation would certainly have been in the Tradies' interests it would not have been in the Territory's. All that would have done would have weakened our negotiating position. The $3.2 million was good to have as our starting position, even if it made agreement at first difficult.

214. The Auditor-General's response to this account referred to two elements. First was the discount represented by the 42 months rent-free period that was eventually agreed, resulting in an estimated value of $2,420,000 for the site, which was approximately $830,000 less the agreed price. This was mentioned above in the context of the brief by Mr Ellis to Mr Dawes of 13 December 2013, which contains the mistaken calculation. Secondly what was said to be the omission to "take account of the Tradies only providing 84 replacement public car parks (instead of 154) as part of the redevelopment of Block 30, for which Capital Valuers has provided an estimated value of approximately $1,570,00". For the reasons already given, this second point represented a mistaken elision between Tradies' offer at the outset and the ultimate number required and agreed to and resulted in Capital Valuers making a

pointless and, as it happened, debateable calculation. Another issue, however, with the Auditor-General's response is the reliance on the Capital Valuers estimate of cost, despite the very different calculations on particular elements provided both by MMJ and Colliers. The absence of any explanation for this preference gives it the appearance of an arbitrary choice made to fit with an already reached conclusion about the propriety of the EDD approach. At the end of the day, however, since the number of car-parking spaces was in fact not reduced in the ultimate agreement, it is unnecessary to explore this matter further.

215. Mr Ellis, in a subsequent communication, said –

> [Granting the Tradies a rent-free period] was put forward as an option because the negotiation was going nowhere, and it looked at that point as if there was no scope for agreement. I had insisted that the negotiation would be terminated if the Tradies did not increase their offer for Block 30 to $3.18 million as per the MMJ valuation; and the 40-month rent-free option was their suggestion as the basis for agreement. Their bid at auction had been $600,000 more than the next closest bid, and by them increasing their bid by almost $1 million and the Territory giving them the rent-free concession – that margin would be extended by the difference between $1m and the value of the 40-month rental period, which I estimated to be an additional $330,000. This would take the difference between two bids we had received to around $930,000, a margin which more than justified not starting the whole process again, in light of the full spectrum of risk factors I have outlined.
>
> … at that juncture, I was aware that along with the generally depressed state of the commercial market in Canberra at that time that:
>
> - the MMJ valuation was in fact inflated given that it hadn't factored in the road easement, and that if we had to go and get another valuation we would have to include the easement (and thereby the valuation would be significantly less than $3.18 million);
> - any new valuation would also take account of the process we had just gone through and would be bound to factor in the obstinate fact that the market reckoned the site was worth no more than $2.2 million; and
> - the proposed settlement on our estimates gave the Territory an additional $330,000 (i.e. $1m upfront in exchange for around $670,000 in rental concessions), over and above the $600,000 that was the difference between the Tradies bid and the next, and only, conforming bid.

Mr Ellis thought, with good reason, that it was inevitable that the outcome of the tender, in terms of the offers made, would become known in the market and inevitably affect any new tender process.

216. The response of the Auditor-General to Mr Ellis' opinion about the MMJ valuation was to observe that "there was no evidence that MMJ was asked to reconsider its valuation and the EDD continued to use the $3.18 million valuation as the basis for negotiation with the Tradies". (It is unfortunate that this language appears to imply, unjustifiably, that Mr Ellis'

evidence about value might not have been candid.) It is correct, as far as it goes, that MMJ was not asked to reconsider its valuation and there may be a valid case that this might have been in some ways an appropriate course, but the reasons appeal more to administrative neatness than to actual utility in the context of a dynamic negotiation – how many reconsiderations would need to be sought, with what cost and delay? As Mr Ellis said, there did not seem to be much point in obtaining a valuation that matched Tradies' offer (which is what he thought was likely). The MMJ valuation was obtained expressly as a reserve price. It became immediately apparent once the bids came in that it was not going to be reached because, as it happened (and, indeed, as it asserted), it did not represent the real value in the market place. However, despite this, the new Colliers valuation did not materially alter the figure, perhaps not surprisingly since Colliers were essentially asked to value on the basis of the same assumptions and not asked to take into account the bids actually made. Adjusting the valuation by pointing to its not factoring in the road easement was thought undesirable for the knock-on effects explained by Mr Ellis. (These appear to be reasonable, although ignored by the Auditor-General.) As Mr Ellis explained, the EDD felt bound to proceed on the MMJ figure, resulting in stalemate. The alternative of ending the negotiations with Tradies and recommencing the tender was unattractive for the reasons Mr Ellis explained. Mr Ellis considered that adjusting the rent-free period as part of the negotiations for the purchase of the Downer site was the only way forward. This had the effect, of course, of paying a higher price for the Downer site than the face value of the valuation of that site by Colliers. (It seems that this valuation was not seen as binding in the same sense as the MMJ valuation of Block 30 but there is no explanation why this was so. It may be that this was because the negotiation for that purchase was in the hands of the EDD and had not been the subject of a Cabinet process.) From Tradies' point of view, the rent-free period it had negotiated was reasonable since it made the purchase price paid by the Territory for the Downer site acceptable and justified paying the $3.18 million demanded for Block 30.

217. As Mr Dawes told the Auditor-General and is evident from the statement of Mr Ellis quoted above, a very significant factor from the officials' point of view was what was seen as the need to carry on the negotiations for the sale of Block 30 with Tradies as the only viable purchaser to a conclusion at the reserve price. In the result, Tradies agreed to purchase Block 30 at this price (subject to the variations discussed above) with the proceeds it obtained from the Territory's purchase of the Downer site, which must be seen as including the rent-free period. In that sense, the two transactions were linked and dependent on each other. The Auditor-General considered "the final terms for [the Downer site], on balance, appear to

provide significant benefits to the Tradies (eg 42 months rent-free and immediate cash payment) for no evident additional value to the Territory" and concluded "the merits of the Territory's agreement to the final settlement terms for the blocks is not evident". However, this reasoning ignores two relevant factors: first, as discussed below, the "merits" cannot fairly be measured and were not seen in financial terms; and, secondly, the transaction should be considered as a whole (that is to say, taking into account, *inter alia*, what amounted to MMJ's overvaluation). Mr Dawes, in responding to the Auditor-General's report, made the following points –

> The true value of any property can only be established by the market. Although valuations are a critical tool on determining negotiation parameters, the property is only ultimately worth what someone is willing to pay. In the case of the land in question, the two tenders received were substantially below the valuation, indicating that the market value was lower than the valuation. This is further reinforced given the two tenderers owned blocks adjacent to the land and would be expected to gain the highest value from development of the block.
>
> Similarly, although it is reasonable to attribute a value to car park replacement, it is overly simplistic to present that value as separate from the other aspects of the negotiated outcome.
>
> The … [range of] relinquished value appear[s] to have been estimated by the Audit Office based on adding separate elements of the final negotiated outcome. To have legitimacy, the full negotiated outcome should be reviewed by a valuer with expertise in complex commercial negotiations. Alternatively, the estimates should be removed.
>
> I have not had an opportunity to review the advice to the Audit Office from Capital Valuers Pty Ltd regarding the estimated value of the concessions made to the Tradies. It is not clear how the estimated value of those concessions has been calculated, in particular whether the estimate is based on the value of those concessions at the time the advice was prepared or at the time the concessions were granted during negotiations.

The Auditor-General did not respond to the substance of this submission, but only to the last paragraph, merely to assert Capital Valuers had provided the relevant calculations. This was less informative than it might usefully have been. Capital Valuers had, in this respect, simply arithmetically reworked Colliers' figures to calculate the amount referable to a 42 rather than an 18-month rent holiday. The other, more fundamental, points made by Mr Dawes about value appear, at least, to have warranted consideration. (It will have been observed that these reflect the above discussion about value.)

218. The Committee took up the Auditor-General's opinion that the variations to the RFT, including in respect of the number of car parking spaces, the pedestrian easement and security bond of $1 million, which resulted in what was said to have been an increase in the "value range" of $4.75 million to $5 million. The changes to which the Auditor-General attributed this increase were "the reduced requirements for easement access and the replacement of only 84 car parking spaces" derived from Capital Valuers' report. As already explained, the figure for the car parking spaces (by far the largest component) was simply wrong, and the analysis of the easement change was also questionable, since the requirement remained in the Specimen Crown Lease to the same practical effect.

219. In dealing with Auditor-General's conclusion about the "merits of the…final settlement terms for the blocks" etc, the Committee referred to a passage in the Audit report that Mr Dawes "could not recall…why it was considered necessary at the time of the negotiations to enter into the arrangement [for acquisition of the Downer site] but indicated that "the imperatives of reaching a final transaction with Tradies was a significant motivating factor". Both seemingly regarded this failure of recollection as relating to the purchase of the Downer site, when it was in fact a reference to the increase from the 18-months rent holiday recommended by Mr Ellis in his Brief of 13 December 2013 to the ultimate 42 months. There is little doubt that Mr Dawes had a clear idea about the reasons for and benefits of the purchase of the Downer site.

220. Taking up the question of the merits of the Downer site, Mr Dawes said –

> … it was attractive for us … it was quite a developable area …we wanted to do some affordable housing, some affordable aged accommodation for older women in the inner north. That was a government sort of commitment at the time.
>
> …
>
> The agreement reached with the Tradies will deliver significant financial and social outcomes for the Territory. In addition to the cohesive development of Block 30 Section 34 Dickson, the transaction enables development of a significant part of Section 72 Dickson, including for much needed community facilities, public housing and supportive housing.

The Auditor-General noted that "there is no evidence of how the Economic Development Directorate documented and analysed the nature of these perceived benefits, or valued these benefits, in order to support the land swap arrangement that was negotiated by the Economic Development Directorate and the Tradies" and added –

3.75 There is no evidence that the economic benefits to the Territory of the final land swap arrangement and related commercial terms were ever assessed. While it is asserted that the acquisition of Blocks 6 and 25 Section 72 will provide land for future affordable housing, there is no evidence of how the Economic Development Directorate analysed the nature of these perceived benefits, or valued these benefits, in order to support the land swap arrangement.

221. It is reasonable to infer from the evidence of Mr Ellis (up to December 2013) and Mr Dawes and the other officials conducting the negotiations as they proceeded and the emails going back and forth between the solicitors that they were all indeed assessing the overall arrangement as well as, of necessity, the particular variations. As already mentioned, Mr Dawes told the Committee he was following the negotiations though he did not interfere. Ultimately, he signed off on the transaction. What quite is meant by the Auditor-General's reference to the failure to assess "the economic benefits to the Territory" of the ultimate arrangement is not clear. For obvious reasons, the benefits of community uses, including public or affordable housing for an identified group of disadvantaged people, cannot be measured in purely or even mainly economic terms. Aside from this point, it does not follow that each of the variations and the numbers as they were agreed occurred without due consideration because there was no documentation of the reasons for each decision or the final outcome. The economic and policy reasons for selling Block 30 were obvious in light of the Dickson Centre Master Plan, quite apart from the sale consideration. And, at all events, it had been decided on by Cabinet. The reasons for acquiring the Downer site were also reasonably clear. Mr Drummond told the Committee that the EDD or the LDA were looking at consolidating land in that area. He said that the "idea of doing a land swap where the government got land that it in turn could rezone, redevelop and sell, be it as affordable housing or other sorts of medium density housing close to a group centre, was an eminently smart transaction to do". The notion that this was done capriciously without regard to the substance of what was agreed is baseless and ought to be rejected. The lack of any documentation which dealt with the benefits and drawbacks of each departure from the RFT and the calculation of the rent holiday (which appears to have been simply a quasi-price adjustment) is certainly a failure of appropriate governance but there is no reason not to accept the evidence of Mr Ellis and Mr Dawes, in particular as to the way in which they approached the issues of value and benefit. Mr Dawes had himself already turned his mind (presumably with the assistance of his staff at EDD) to the desirability of acquiring the Downer site for the Territory for community use when the direct sale was mooted in 2010. It is reasonable to infer that, at the time, such a proposal would have been put to Cabinet

with an adequate policy basis. Mr Dawes told the Committee of some elements of the wider context –

> …at the end of the day there were a number of concessions that were agreed to on the site. I think what we have got to remember is that the Tradies paid $1 million, in round figures, more. At the same time, we had another transaction which the Tradies was not aware of. That is the Salvation Army site or Mancare site that is between the Downer Club and the CFMEU headquarters and CIT training headquarters. So all of a sudden we were looking at developing 2.2 hectares or getting 2.2 hectares. That was one of the other reasons why getting and consolidating those three blocks was quite valuable. It was in the order of that coming back into the Territory for us to sell at highest and best use, somewhere between $22 million and $25 million. So there were these sorts of considerations going on at the time as well.

222. The absence of documentation that captures the precise point does not, of itself, suggest that the benefits were non-existent, especially when they are arguably apparent on the face of the transaction. It does appear that there was an element of "blue sky" in respect of the benefits of acquiring the Downer site, but it should be borne in mind this was done by a very senior, knowledgeable and experienced official with wide responsibilities for land use in the Territory that involved the very considerations relevant in the instant case and authorised to make the decision in question. Moreover, there was no evidence that suggests his opinion about the usefulness of the acquisition was unreasonable, let alone mistaken. Nor was it put to Mr Dawes that there was no justification for his views about the matter. The transaction itself and the granular documentation (though incomplete) that is available is evidence that there was an assessment of the benefits to the Territory by the transaction and evidence also that the officials involved thought it was their duty to proceed to finalisation as best they could. The lack of supporting documentation does not fairly support any inference of wrongdoing, let alone raise any reasonable suspicion of corrupt conduct.

223. The Committee found it to be a "significant" concern that Mr Ellis had "a strong focus…on achieving the price of $3.18 million without taking into account the effects of other factors on value". As the transaction stood at the end of 2013, those "other" factors appear to have been the method of payment, the comparative values of Block 30 and the Downer site and the "clarifications" that concerned not allowing car parking as "a permitted use", enabling some of the car parking spaces lost due to the park to be replaced by Tradies using its existing basement and that the requirement to build a road between the Tradies existing site and the Block was not mandatory. It is simply inaccurate to say that Mr Ellis disregarded these matters. He considered them in the context of the arrangement as a whole as he

(with reasonable accuracy) understood it to be. This clearly emerged from his evidence to the Auditor-General though, perhaps, not so much from his evidence to the Committee (readily explained by the lack of any questions that directed him to the point). At all events, this raises no issue of probity nor any reasonable suspicion of corrupt conduct. Whilst it is reasonable to point to the need for a policy justification for the acquisition of the Downer site, the economic benefit issue loses most of its significance when the fact is brought into account that the price was calculated with reference to a purely market valuation.

224. To return to the Auditor-General's view – in turn, adopted by the Committee – the provision for the rent holiday of 42 months ultimately resulted in a downwards departure from the Colliers valuation of the Downer site in the order of $830,000. This figure should not be regarded, as it was by the Auditor-General and the Committee, as a loss to the Territory of this sum. It certainly represented an amount lower than would have been the value according to Colliers (and, subsequently, to Capital Valuers) had no rent holiday been agreed, but the cost to the Territory can only by calculated by reference to the transaction as a whole, given the dynamic relationship between the two contracts it comprises. Part of this figure includes the mistaken calculation of the Colliers value by Mr Ellis in his briefing of 13 December 2013 but, as previously explained, it seems likely that the error would have been noticed as negotiations were continuing. If not, then it may have distorted calculations of value and thus acceptance by the Territory of the ultimate agreement to that extent would have been flawed by error. This aspect was not explored either by the Auditor-General or the Committee and, for the reasons given, it is not for present purposes necessary to do so. It is important, however, to note that limiting the calculation of value for money to the arithmetic of the valuations is at all events unreal, for the reasons already extensively discussed. Whilst the downwards variation by comparison with the Colliers valuation is indicative of the acceptance of a price that was higher than the market value of the land and, thus, at a cost to the Territory (as it suggests the price paid was too high), no fair conclusion can be drawn simply by relying on Colliers' valuation without taking into account both the inherent uncertainties of the valuation process and the *value to the Territory*, as explained above, for wider social factors outside the calculus utilised by Colliers. Mr Dawes was sufficiently qualified to make his own assessment of these matters and, it is reasonable to infer, accepted the ultimate transaction as a fair reflection of the Territory's interest. The stipulated loss must therefore be regarded as based on somewhat inadequate grounds. At the same time, the requirements of good governance required the departure from the Colliers' valuation to be carefully explained, outside the mere terms of the transaction itself, to the LDA Board when reporting the

purchase of the Downer site. It appears that there was a report to the Board in November 2013 about the "land swap" but what was actually communicated does not seem to have been the subject of any enquiry and Mr Dawes was not asked about it. It seems reasonable to infer that there would have been a further report to the Board when the purchase of the Downer site was settled (Block 6 on 19 December 2014 and Block 25 on 19 February 2016) but no report was obtained by the Auditor-General or the Committee. For the present, however, filling this particular gap is unnecessary, since the circumstances do not give rise to any reasonable suspicion of corruption.

225. Overall, the Committee, whilst noting Mr Dawes' opinion that, in the result, the consolidated land was worth $22 to $25 million, as "useful", commented that it was not apparent how this value was arrived at and is not referred to in any of the documentation available to the Committee. Whether Mr Dawes adequately explained his assessment is, of course, a matter of judgment upon which reasonable minds can differ. But this is not an issue that raises impropriety or any reasonable suspicion of corrupt conduct and, for present purposes, requires no further discussion.

226. Some members of the Committee concluded that "the loss of the car parking, the leaseback arrangement of [the Downer site], the waiving of the security deposit and, potentially, waiving the requirement for easement originally stipulated in the Request for Tender, resulted in the Territory not receiving value for money for the sale of Block 30..." (Finding 2). To briefly reiterate: first, the starting point for the Committee was the mistaken acceptance of the MMJ valuation as determinative; secondly, there was no loss of car parking; thirdly, the waiving of the security deposit did not materially affect value; fourthly, the easement was, in light of the proposed development unnecessary and, at all events, was still required by the Specimen Crown Lease (so a matter for the Planning Authority to determine); and, fifthly, the evidence that the leaseback arrangement for the Downer site was unjustifiably generous depended on an incomplete analysis. Finding 2 therefore must be regarded as seriously flawed; neither it, nor the underlying facts, give rise to any reasonable suspicion of wrongdoing or corrupt conduct.

227. The Committee's report stated, further, that –

> 5.129 The matter of greatest concern, however, is the evidence…showing that the EDD had objects for the transaction, other than what the RFT indicated. These included the defence of value for money from the transaction on due to the commercial attractiveness of the land at Section 72, prospects of assembling a continuous parcel of land at Section 72, and the apparent interest in

building affordable housing at Section 72. These were not specified in the RFT and not reflected in the assessment of the two tenders received.

5.130 The fact that the land swap and affordable housing had been proposed in the Tradies' third application to acquire Block 30 by direct sale of November 2010, and evident enthusiasm by the EDD for this proposal—before the release of the RFT—makes these concerns more pressing, because they point to factors that were evident at the time, but were not included in documentation for the RFT.

5.131 If it had been a direct sale, the ACT Government and the Tradies would have been free to negotiate without prompting these concerns. Because more than one tender was accepted, however, there were obligations on the Government to act in good faith toward all tenderers. Giving weight to matters not stipulated in the RFT raises questions over whether the officers acting for the Government discharged the obligation. In a sense, the obligations of an entity putting projects out to tender are simple: to say what it will do, and then do it. It is not possible to say that the officers acting for the Government satisfied this test.

5.132 Witnesses who were involved in and responsible for the transaction on behalf of the ACT government continued to defend the deal on grounds not included in the RFT. This shows that there is a general lack of awareness, in the ACT government, about the obligations which fall to public entities which put projects out to tender.

228. This concern, if well-founded, suggests that the relevant officials (Mr Dawes and, perhaps, Mr Ellis) were not conscientiously undertaking the task of moving the tender for the sale of Block 30 to completion but, rather, using it as a pretext for the acquisition of the Downer Site and, thus, is capable of being regarded as raising a reasonable suspicion of corrupt conduct. It also implies that their evidence about the course of negotiations ought not to be accepted. However, there is no proper basis for the concern, nor for the attack on the honesty of the witnesses. This is explained in the preceding discussion, which does not need to be repeated. Additionally, a number of points should be briefly made or repeated as a summary: first, there is no evidence that supports the suggestion that the object of EDD was otherwise than to secure the sale of Block 30 pursuant to the RFT and appropriate ensuing negotiations; secondly, the mere fact of the proposal to purchase the Downer site to enable completion of the sale of Block 30 (whomever it was who proposed it) does not suggest that its acquisition was the true object of the RFT negotiations, and the fact that the direct purchase of Block 30 by way of land swap with its Downer site had earlier been proposed by Tradies and supported by the EDD does not support any such inference; thirdly, there is nothing that suggests the decision of Cabinet for a competitive process to sell Block 30

contemplated the acquisition or non-acquisition of the Downer site and, rightly, the RFT (drafted by the ACTGS) did not refer to it; fourthly, identification of Tradies as the preferred tenderer followed an independent evaluation process and, since the proposal to sell the Downer site arose in the course of negotiations that ensued following a stalemate it was, of course, not possible that it was part of the RFT and the evaluation; fifthly, it was necessary, before agreeing to purchase the Downer site, that the relevant officials needed to be satisfied that doing so provided value for the Territory, which necessarily involved not only the price paid itself but also the wider public interest; sixthly, the suggestion that, had the disposition of Block 30 been by way of a direct sale (rejected in favour of a tender process by Cabinet), the possibility of Tradies selling its Downer site would not have arisen is a *non sequitur* as it could still have made such a proposal and it would have been reasonable for it to have been considered; seventhly, there was in fact and law no breach of the government's obligations to act in good faith towards the tenderers or would be tenderers and the obligations under the tender were in fact and law fulfilled; and, lastly, what occurred, though not, for good reason, in part specifically contemplated by the RFT was consistent with it and the government's obligations under it and the fact that the witnesses defended the process they undertook was a response to the questioning to which they were subjected and does not demonstrate any lack of awareness of the obligations that arise from a tender process.

229. Since the concerns raised are unjustified, no question of impropriety or reasonable suspicion of corrupt conduct arises.

The involvement of the Chief Minister

230. Mr Barr, at the relevant time, was Minister for Economic Development and is now Chief Minister and Treasurer, Minister for Social Inclusion and Equality, Minister for Tourism and Special Events, and Minister for Trade, Industry and Investment. (What follows is largely drawn from his evidence to the Committee, mostly omitting quotation marks and editorial indications for ease of reading.) Information was provided of matters on the Cabinet agenda as well directly as relevant to his responsibilities as Agency head. Each Agency would have a different set of officials who would brief him weekly, fortnightly or even monthly, depending on the area. He would be briefed by the EDD/LDA, on average between weekly and fortnightly over the year. Although he was briefed on Board meetings, this would not be "blow by blow". Perhaps once a year he would be invited to a Board meeting, usually aligned with the budget process. The discussion would cover the Government's expectations for the

coming year. There would be a briefing, for example, where there were any significant items that came before the Board, particularly where there was an interface with another area of government that might require legislative consideration or a decision of Cabinet. In the case of the LDA, there would be an annual process around setting the indicative four-year land release program, sometimes more frequently when variations to the Territory Plan might be needed. In respect of advertising the RFT before actual decision by the Cabinet, Mr Barr confirmed that, on occasion, matters on the agenda were not reached, so were adjourned to the next meeting. Agencies might well be aware of the likely decision. He did not believe it was a Cabinet decision not to advertise in the Australian Financial Review and pointed to the different deadlines for the publications. As to the tender evaluation process, Mr Barr said he was not a decision-maker but would have received a brief that advised the outcome for noting (reference has already been made above to the brief of 19 December 2012 from Mr Ellis to the Minister and the Director-General as to the outcome of the tender evaluation, noted by Mr Barr on 21 December 2012. He said he did not believe he was formally briefed as to the proposed "land swap", he was not a decision maker, nor was he asked about the matter. He said –

> …[There] was very clear Cabinet direction in relation to the process as it related to the tender. For obvious reasons, ministers do not get involved in tender negotiations. That is a very clear and important distinction and line that you do not cross: you are not involved in the nitty-gritty of tender negotiations. It is just not a Minister's role under the procurement act. There is a very clear separation. We have a decision-making role in relation to the determination to sell a block of land, but we are not sitting around the table negotiating those processes.

Mr Barr commented that there have been cases where a Minister may have been approached in respect of a particular complaint about a procurement process where the public service has not answered it satisfactorily. He gave the example where tender criteria excluded a local operator, although the government's policy is local participation and local procurement in a positive way. That is the sort of engagement that Ministers often have: being asked to effectively be an ombudsman of sorts to ensure that the processes are followed. The appropriate response is that this remains something that should be at arm's length from a Minister, but it is appropriate to refer a complaint about a tender process to the Head of Service or to the head of procurement.

231. It was suggested to Mr Barr that the "land swap" had, in effect, made the transaction bigger than that originally envisaged and approved, and he was asked whether he, as the responsible Minister, or Cabinet as the original decision-maker should have been informed

of this. Mr Barr responded that he thought that the policy framework around what level of threshold discretion Directors-General and agencies are given meant that Cabinet did not have a site-specific consideration but had set an overall framework for sites up to a certain value. As a result, it might not return to the Minister or Cabinet because it came below the delegation threshold or that the variance from the RFT process was not considered so significant as to require it to come back for consideration. He commented that this was obviously a subjective judgement. Mr Barr recalled that there had been cases in the previous seven years where the variance justified rebriefing and the obtaining of guidance, but this RFT was not one. He was asked to provide the guidelines and did so following his evidence, referencing the Cabinet Handbook, which provided that "Ministers are responsible for ensuring that action is taken on Cabinet decisions affecting their portfolios…[and if] a significant change in implementation is proposed, then the matter should come back to Cabinet for further consideration".

232. Mr Barr was asked whether there was any sensitivity from his point of view, or from Cabinet's point of view, because of the Block's location and the interest of, in effect, the CFMEU as an organisation affiliated with the ALP having interests in this block [through Tradies]. He answered –

> There was sensitivity to the extent that Cabinet considered and rejected a direct sale and sought and made very clear, through a documented decision, the process that we wanted: that the market should be tested and there should be an expression of interest process. For the conspiracy theorists who would say, "We would have just given a direct sale," if that been the procurement path preferred, that would have been the outcome. But it was not. It was rejected and an alternative process was put in place.

The Chair asked –

> Q. Was the alternative process put in place because the Tradies wanted access to that site or was it put in place because it was the right time to put that block up for sale? A. The block was part of the land release program. It was part of the Dickson master plan work that we discussed earlier [in my evidence] that had concluded by that stage. It was obviously ultimately tied to the discussions for the land release, which I think had already then occurred, for the site to the north of [the Block, namely the Coles site and earlier discussions about the need for supermarkets in the area]…the subject of a major discussion around the Cabinet table was managing the parking during the construction phase. The desire for an additional supermarket dates back into the previous decade. I recall that being an issue at the 2008 territory election. That is how long ago it was. This second

> supermarket at Dickson issue has been a decade-long one…[The development] would have to be consistent with the Territory Plan…and Master Plan…

Mr Ponton (Director-General, EPSDD, who gave evidence with Mr Barr) interpolated that the Master Plan envisaged something more than a small building with some surface parking (ie, the Woolworths proposal) such a mixed use development with activated frontage and provision of the community park. (In fact, the RFT contained a condition that Block 30 Section 34 Dickson be developed in accordance with the 2011 Dickson Centre Master Plan.)

233. The Chair returned to the question whether there might be sensitivities about the "land swap" "because of the relationship between the Labor government and the unions involved?" Mr Barr answered, "There are sensitivities in relation to any 'land swap' in the Territory, full stop. If you look at the history of 'land swaps'…I think it is more in the context of swapping land than who the owners are…[and the phrase now] will attract a degree of interest from anyone in a ministerial, Legislative Assembly or other role". Mr Barr, however, said he did not believe he had discussed the issue of a "land swap" in the Block 30 transaction with the head of agency or his senior political staff. He added –

> It was not a topic of any particular frequency in my office. Once the cabinet decision had been made, there was a process; that was it. That is the end of the political decision-making process. It is then handed to the bureaucracy to undertake the procurement in accordance with the territory's procurement rules. At that point we are advised of an outcome, at the end of a process. That is it.

He said that is how he had always operated his office. In respect of a question about a member of his staff following up with someone in the public service to check how something set in train was proceeding, Mr Barr said –

> There would be a process around ensuring that a Cabinet decision was adhered to, as in Cabinet would decide on date X that this process would occur and information might be sought as to whether the process had begun and whether the process had concluded, but it would be information at that level. Often you would get a brief that would say, "The tender process opens on date X and closes on date Y. The Team will consider over whatever period and a decision will be announced at a subsequent date." Sometimes there is not even that level of granularity around exactly when the Team might make a decision. You are then advised of the outcome. That certainly was the case in this instance. There was a brief that came up to me for noting, to say that this was the result of the process. But between the Cabinet decision…and that final brief to say the process is concluded…[it] was likely, over that intervening period, that there would have been an update to say that negotiations were ongoing, but that would have been the extent of the information.

There might have been inquiries about the status of the negotiation and the likely conclusion date. It was not a regular standing item and there was not a weekly update.

234. Mr Ponton interpolated that, for probity reasons, "it is the nature of negotiations that [they] would not be shared with a Minister…[and] in terms of probity it is important that we keep that separation, being a procurement process—the distinction between the executive and the public service". Mr Barr said he had never been made aware of the ACTGS advice that might be some risk, in terms of how the negotiations were going, that this could be perceived to be a direct sale and reiterated, "I would be in a lot of trouble if I were in there negotiating a request for tender process or attempting to influence an evaluation Team". He added –

> My decision-making role, along with every other member of Cabinet, is to determine a process for a procurement. The two options in this instance were direct sale or a public process, a request for tender process. We determined not to pursue a direct sale process. That, by and large, is the position that is taken. There has to be a very good reason for a direct sale. For most government land sales, it is through a competitive process. I can think of a handful of examples over time where direct sales have been undertaken.

Returning to a question about the extent to which the transaction was something more than merely the tender of the Block, Mr Barr was asked why it did not come back to Cabinet. He said that the extent of variation was a subjective matter. In substance he did not become aware of the "land swap" because he "was not involved in the negotiations". In effect, he may have become aware after the CEO had agreed the change but (implicitly) it was not for him to veto that decision. Although he became aware at some stage that "land swap" was part of the negotiation, it did not occur to him that the transaction should go back to the Cabinet. He said –

> The extent of all of that is not something I had visibility of, because I was not involved in the negotiations. It is very difficult to form an opinion on what should come back to Cabinet if you are not privy to the negotiations...I was aware that there were negotiations going on and that there were outstanding matters, but the fine detail of any of that was, rightly, not before me. I would not have expected it to be.

(It was mistakenly suggested by members of the Committee that this was contradicted by an email – referred to above – stating the responsible Minister (ie Mr Barr), had "called a halt to this process until further site investigations have been completed". However, this email concerned the commencement of the tender process, not then underway, whilst the negotiations in the quoted evidence were those following the choice of preferred tenderer.)

Mr Ponton interpolated to point out (correctly) that there were two transactions: a sale and a purchase, both within the delegation of the then Director-General, Mr Dawes. He expressed the view, in substance, that it would have been inappropriate to countermand the decision once made as this would be, in effect, to intrude into the negotiations. In response to further questions, Mr Barr agreed that it would be possible in theory to restart the process. As it happened, Tradies had proposed a "land swap" when it had earlier applied for a direct sale of Block 30 as part of an arrangement to facilitate the development of affordable housing at the former Downer Club site. As mentioned above, the proposal was considered by Cabinet on 28 October 2011 but rejected in favour of going to market. It is clear that the question about Mr Barr being aware of the "land swap" proposal was raised in the context of this consideration and that his answer referred to that proposed transaction.

235. It should be observed that the brief by Mr Ellis of 13 December 2013 seeking endorsement for the financial reconciliation of the negotiated outcome, which referenced the proposal to pay for the purchase of Block 30 by selling to the Territory Tradies' interest in Blocks 6 and 25 Section 72 Dickson, was addressed to the Director-General (Mr Dawes) and Deputy Director-General Land Strategy and Planning and *not* the Minister. This was in contrast to his Brief of the previous year about the outcome of the tender evaluation. There is no evidence that Cabinet and the Minister were advised by executive management of the terms of the final transaction before it was signed off by Mr Dawes or, for that matter, of departures from the process Cabinet approved, or asked to review and approve the final outcome.

236. Mr Dawes' evidence to the Committee appeared to differ from that of Mr Barr in some respects –

> Q. To your recollection, did you go back to anyone for approval to change what was being negotiated as part of that process? A. No, I did not. I kept government informed of what the negotiations were. There are always the things you do on question-time briefs and all of those sorts of things that you provide. All of that was well known as far as I was concerned.
>
> Q. Who did you go back to in government? A. The relevant minister at that time…the Minister for Economic Development, Andrew Barr. He was apprised. I have to put on the record that he was not involved in any way, shape or form in the transactions. He did not give us any direction at all about the way we proceeded, but I kept the government informed of where the negotiations were. They were also aware that the other block was in play because that was a separate transaction.

In the Committee Report, some members pointed to this evidence as being "at odds with evidence provided by the Chief Minister stating that he had an arm's length relationship with

the sale of Block 30". The characterisation of the evidence is misplaced. In fact, it strongly supports Mr Barr's evidence as to any *involvement in*, as distinct from *knowledge of* the negotiations. This distinction is of critical importance in assessing the probity of his conduct. There can be no fair criticism of a Minister being aware of how a transaction within his or her ministerial responsibilities is proceeding but to interfere with the way in which it is proceeding is entirely different. (Even in the latter case, there may be instances when it is not only desirable but necessary for the maintenance of good governance to be involved but it is not suggested that was so in the present case.) Mr Barr told the Committee he did not interfere. Mr Dawes' evidence is to the same effect. I note, in passing, that the Committee Report in respect of this subject cited Mr Ellis' evidence as also "at odds" with Mr Barr's evidence as to being at arm's length. In fact, as discussed above, this is not the case. Mr Ellis told the Auditor-General that there was no actual interference in the process by the Government. Accordingly, so far as the evidence goes, it corroborates Mr Barr's evidence to the effect that he was not involved in and did not interfere with the negotiation process. Reference was also made to the email exchanges (detailed above) concerning the release date of the RFT as supporting the "at odds" suggestion. However, this exchange has nothing to do with the negotiations following the tender evaluation. Moreover, the suggested involvement of the Minister was relatively minor, merely requiring delay for already proposed site investigations to be completed. Thus, the suggestion that Mr Barr had not acted at "arm's length" was not only not justified by the evidence but contrary to it.

237. This leaves the question of the extent to which Mr Barr was informed of the progress of negotiations. It should firstly be noted that there is no documentary evidence that he was so informed (the shortcomings in record-making being the responsibility of the LDA/EDD) and, as appears from Mr Ellis' Brief of 19 December 2013, unlikely that he was. Mr Dawes evidence did not give any information about how any information was passed on; the reference to "question-time briefs and all of those sorts of things that you provide" points to confusion or, at least, generalisation, that does not clarify the issue. The general statement that "they [unspecified] were also aware that the other block was in play because that was a separate transaction" appears to be a *non sequitur* which, regrettably, was not followed up by apposite questioning. In the result, Mr Dawes was never asked what he actually conveyed about the negotiations and to whom. Nor does his evidence contradict Mr Barr's statement that he was not apprised of the "fine detail". On the state of the evidence, it is not possible to accept the suggestion conveyed (or implied) by some members of the Committee that Mr Barr's evidence about what he was told did not represent the fact.

238. A consideration of the whole of the evidence does not demonstrate any “significant contradictions” between the evidence of Mr Barr and that of other witnesses as to his involvement in decision-making. With one minor exception (the delay in releasing the RFT), the evidence is all one way, namely that he was not so involved, more particularly, that he was not involved in any decisions that led to the transaction as it was ultimately agreed. Nor does the evidence support any suggestion that “political influence was applied” to any degree, either in the negotiations or the outcome. In the result, therefore, there is no basis for any reasonable suspicion that the Chief Minister was engaged in corrupt or, for that matter, any conduct that lacked probity.

Conclusion

239. The evidence does not provide grounds for a reasonable suspicion that the Chief Minister, Mr Dawes, Mr Stewart, Mr Ellis or any other official acted corruptly in connection with the acquisition of Block 24.

240. As was mentioned at the outset, the coercive powers of the Commission pursuant to an investigation are not available at large simply because the Commissioner considers that the examination of particular circumstances might be worthwhile: the statutory criteria must be satisfied. Nor does a request to the Commission that a matter be investigated provide a legal basis for its doing so. For the purpose of considering whether an investigation should be undertaken, in particular to ascertain whether there are reasonable grounds for suspecting the commission of corrupt conduct, s 89 of the Act enables the Commission to request relevant information from the head of a public sector entity and, under s 90, to issue a preliminary inquiry notice requiring a person to produce a document or other thing "if production of the document or other thing is necessary to decide whether to dismiss, refer or investigate a corruption report, or investigate a matter on its own initiative…and it is reasonable to do so". However, it does not permit the Commission to exercise its other coercive powers, such as conducting examinations, whether public or private, or investigative powers such obtaining search or surveillance device warrants.

241. Since, as the evidence stands at present, there are no reasonable grounds for the relevant suspicion (so that there is no room to exercise the investigative powers of the Commission), it was necessary to consider whether exercising the more limited powers under s 89 and s 90 to obtain further information is justified. In this respect, there needs to be some basis for inferring that there is a reasonable likelihood that relevant information is available to be

requested or some document or thing able to be produced which is reasonably likely to shed light on the questions that require to be answered affirmatively before an investigation can be conducted, namely in this case, might give rise to a reasonable suspicion that corrupt conduct occurred.

242. Here, the Auditor-General and the Committee examined the facts surrounding the sale of Block 30 and the purchase of the Downer site. So far as they were able to be gathered, the relevant documents were obtained and considered, and the relevant witnesses questioned. The Commission has also obtained and examined the underlying documents. The totality of that evidence has been taken into account by the Commission. As to the possibility that corrupt conduct was committed, that evidence not only does not give rise to any reasonable suspicion that it was but is inconsistent with any such conclusion. It may be that some relevant documents, as yet unidentified, remain to be collected, but this is speculative. In any event, they are unlikely to be forensically probative. The only reasonable conclusion is that it is most unlikely that further inquiries will disclose any additional useful information. The Commission's use of coercive powers in searching for such material is therefore not appropriate.

243. Accordingly, it is considered that the Commission's involvement in this matter ought to be discontinued, pursuant to s 112(1) and s 71(3)(k) on the ground that, having regard to all the circumstances, further dealing with the corruption report is not justified.

244. Where an investigation is discontinued under s 112(1), the Commission must inform the reporter of the decision and the grounds and reasons for it (per s 72(1)(d)). Given that both the Auditor-General's and the Committee's Reports are in the public domain, as well as the fact that the latter was publicly referred to the Commission as a corruption complaint, it is appropriate and in the public interest that this response to the referral should be the subject of a Special Report which, pursuant to s 206, may be made to the Legislative Assembly.