ACT INTEGRITY COMMISSION

Special Report in relation to a corruption complaint concerning the identified transactions as part of the City to the Lake Project

made pursuant to s.206 of the *Integrity Commission Act 2018*

ACT INTEGRITY COMMISSION

Our Ref: REC23/406912
Your Ref:

Ms Joy Burch
MLA Speaker
Legislative Assembly
CANBERRA ACT 2601

Madam Speaker,

On 28 November 2019 the Standing Committee on Public Accounts tabled in the ACT Legislative Assembly its inquiry report on Auditor-General Report No 7 of 2016: Certain Land Development Agency Acquisitions, by the then Auditor-General. There were four transactions that were considered which concerned acquisitions of land, leases and businesses that occurred between March 2014 and February 2016 as part of the City to the Lake Project.

On 4 December 2019 the Chair of the Committee, Ms Vicki Dunne MLA made a corruption complaint pursuant to s 57 of the *Integrity Commission Act 2018* in relation to the four transactions. In its Special Report of February 2022, the Commission dealt with the first of the four listed acquisitions. This Special Report deals with the Commission's consideration of the remainder.

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

Sincerely,

The Hon Michael F Adams KC

Commissioner

15 December 2023

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INTRODUCTION

1. On 28 November 2019 the Standing Committee on Public Accounts ("Committee") tabled in the ACT Legislative Assembly its inquiry report ("Committee report") on Auditor-General Report No 7 of 2016: Certain Land Development Agency Acquisitions ("Auditor-General's report"), by the then Auditor-General. The transactions considered concerned acquisitions of land, leases and businesses that occurred between March 2014 and February 2016 as part of the City to the Lake Project ("Project"). They were –

   (i) the lease of land adjacent to Glebe Park comprising Block 24, Section 65, City (referred to as "Block 24");
   (ii) Mr Spokes Bike Hire (both the business and the principals – Mr Shanahan and Ms Edwards – will, for convenience, usually be identified as MSBH), lease and business, comprising Block 13, Section 33, Acton;
   (iii) Dobel Boat Hire (the principals will be identified as DBH), comprising Block 16, Section 33, Acton lease; and
   (iv) Lake Burley-Griffin Boat Hire (both the business and the principals – Mr Black (a pseudonym) and Ms Brown (a pseudonym) – will, for convenience, be identified as LBGBH).

   [Note: Section 210 of the *Integrity Commission Act 2019* (the Act) concerns the inclusion of names in any Special Report. The names that are mentioned in this Report have already been placed in the public domain by the publication of the Committee report or, otherwise, it is in necessary or desirable in the public interest to publish them. The Commission is satisfied that this will not cause unreasonable damage to their reputation, safety or well-being. No named person is the subject of any adverse comment or opinion. Persons who have not been identified in the Committee are named by pseudonym as a precaution. They also are not the subject of adverse comment or opinion.]

2. Recommendation 13 of the Committee report was –

   i. The Committee recommends that the ACT Integrity Commission investigate the four acquisitions and any other matters raised in the Report.

3. An additional issue concerning employment of contractors gave rise to Recommendation 12 –

   The Committee recommends that the ACT Government clarify principles and constraints for the hire and retention of contractors so that government agencies will not re-hire recent employees as contractors.

This is a distinct issue that is not raised by the particular questions concerning the acquisitions and is discussed after those matters are dealt with.

4. On 4 December 2019 the Chair of the Committee, Ms Vicki Dunne MLA wrote to the Commission to convey the recommendations and request that the letter be dealt with by the Commission as a corruption complaint made on behalf of the Committee pursuant to s 57 of the *Integrity Commission Act 2018* (the "Act", to which all statutory references are made unless otherwise indicated). Ms Dunne also asked that the Commission "consider the concerns raised in the Committee's Report as specific grounds of the complaint". In its Special Report of February 2022, the Commission dealt with the first of the four listed acquisitions. This Special Report deals with the Commission's consideration of the remainder. (Where these are being considered collectively, the descriptors "West Basin properties" or "West Basin acquisitions" will be used. For convenience, the names of the relevant businesses will mostly be used rather than those of the individuals interested in them.)

5. All the West Basin properties were located near Lake Burley Griffin and needed in connexion with developments envisaged by the City to the Lake Project, an urban renewal project announced in March 2013 involving areas in and around the city and the lake, linking revised land use and activity in the city with the amenity and environmental aspects of the lake and the surrounding area.

6. At the outset, it should be noted that, whilst a substantial number of written communications and notes of conversation referred to in minutes and similar documents has been provided, it is significantly less than comprehensive. The Auditor General was – with respect, rightly – critical of the absence of relevant and potentially significant documents. In a number of instances, the evidence does not permit the inference confidently to be drawn, from the apparent lack of then current availability, that no contemporary record of a particular identified matter was made but subsequently mislaid. However, probity requires that this should not be open to doubt. The failure to make records of significant processes or explaining decisions is certainly a failure of governance but, as it happened, it has not precluded the ability to draw reasonable inferences from other surrounding evidence as to what occurred sufficiently

for present purposes. As may be understood from the discussion below, in some circumstances a failure to create or maintain appropriate records might well qualify as corrupt conduct for the purposes of the Act. In the present case, the evidence – in both documentary and oral form – gathered by the Auditor-General and the Committee, when considered as a whole, provides an adequate basis for explaining the impugned transactions for present purposes and does not raise a reasonable suspicion of corruption.

THE CONCERNS IDENTIFIED IN THE COMMITTEE REPORT

These were, in substance, as follows –

Mr Spokes Bike Hire

The process was "protracted and fraught", involving a number of officials who appear to have lacked "continuity of purpose" and did not effectively communicate with the owners. There were differences amounting to conflicts in the approaches between the owners and government, but the latter should have been guided by the standards expressed in the *Law Officer (Model Litigant) Guidelines 2010 (No 1)*, which was said to "describe an altogether different approach to dealing with parties who hold a view different to that of the ACT government [requiring the] 'Territory and its agencies [to] act honestly and fairly in handling claims and litigation brought by or against the Territory or an agency', in the context of court proceedings". The LDA "failed to do this" and "the ACT government should conduct its business to a higher standard". An intermediary "would not have been necessary if the conduct of the LDA, as an ACT government agency, had been consistent with accepted principles of due process".

Dobel Boat Hire

In contrast with the "long and arduous" negotiations in respect of the acquisition of Spokes Bike Hire, acquisition of this property was completed after a relatively short period of negotiation, despite "the fact that the lease was concessional and would have required a further payment to convert it to a conventional ACT Crown lease, making it inherently less valuable … [thus raising] questions as to whether the LDA achieved appropriate value in expending public money".

Lake Burley Griffin Boat Hire

The vendor's tenure "consisted of an illegal sub-lease" so that in "strict terms, the ACT

government had no obligation to compensate its owner for the loss of capacity to trade and was advised of this". Nevertheless, the ACT government paid the owner $602,000. In the "absence of supporting documentation, it is difficult to ascertain that the LDA achieved value for money … or that there was a defensible foundation for the purchase". In addition, the business was purchased as a going concern but had ceased to operate at the time of acquisition, raising "further doubts on whether value for money was achieved".

Inconsistent approaches by the LDA

The LDA approaches to the negotiations for the acquisitions were inconsistent. In respect of the land adjacent to the Casino, "the LDA had gone to some lengths to expedite the sale and negotiations, once begun in earnest, had taken place over a relatively short space of time" whilst, in respect of MSBH, the dealings were "lengthy, confused, and inconsistent" although this was not true of the acquisition of Dobel Boat Hire. The LDA lacked a uniform approach, "[reserving] to itself a broad discretion … at odds with community expectations that government agencies will behave predictably, fairly, and spend public money wisely".

Roles and responsibilities

These were "complex … and … in general persons who were involved in these transactions appear to have disavowed their responsibility" ... If all of these [presumably, "their"] representations were to be believed, then the events considered in this Report would have no author. It appears more likely that a number of participants contributed to practices that can be considered, at best, 'informal'. In aggregate … these actions do not meet an acceptable standard for the conduct of transactions by government. Taken as a whole, these actions are suggestive of an environment in which compliance with relevant principles was low …, indicates low levels of transparency and accountability and is a matter of grave concern". (Though in general terms, it appears that this criticism related rather to the acquisition of Block 24 rather than the West Basin properties.)

The failure to utilise the power of compulsory acquisition or, alternatively, align the processes used with those mandated by the Lands Acquisition Act 1994

The status of the *Lands Acquisition Act 1994*, (the "Acquisition Act") in the context of the transaction is ambiguous and its provisions "are not well understood". "Of particular

concern are statements to the Committee by witnesses that employing the [Acquisition Act] inherently litigious, time-consuming, and expensive … [but this] ... is not borne out by any record of court proceedings in the Territory". If "the provisions of the Act … [had] been used as they should … the ACT Government would have made declarations that acquisitions … that economic development from the Project was a public purpose … [which] would have … [been] made openly in the Assembly and subject to public scrutiny … and the LDA would have been considering how to compensate owners, in accordance with Territory law, for surrendering their leases to the ACT Government, rather than seeking ways to increase valuations as a way to achieve acceptance for an offer of sale … [It] could also have been seeking, in accordance with the [Acquisition Act] and/or any other relevant legislation, to compensate leaseholders and business owners for the loss of their ability to trade rather than attempting to 'buy' businesses … [which] would have been a more defensible, transparent and accountable approach … As the ACT government chose not to engage the [Acquisition Act], it was open to the Government to adopt similar standards of transparency and accountability in its dealings as if it had used the Act. This did not occur, to the detriment of probity for the matters considered in this Report".

Valuations

Valuations were obtained by the LDA for all acquisitions but it "paid significantly more for the acquisitions than the valuations allowed for … [with] no documentation in relation to the rationale for the … the amounts that were eventually paid".

THE RESPONSE OF THE COMMISSION

7. Following the referral, the Commission commenced an investigation of each acquisition pursuant to s 100 of the Act: Operation Lyrebird. Consideration of the referral required detailed examination of the Auditor-General's Report as well as that of the Committee, together with the comprehensive documentary and oral evidence that was obtained by them. In the result, the Commission has determined that the investigation must be discontinued in accordance with s 112(1), on the basis that, pursuant to s 71(3)(k), having regard to all the circumstances, further dealing with the corruption report is not justified. Detailed reasons for this decision are set out below.

8. To save unnecessary repetition, what follows assumes familiarity with both the Auditor-

General's Report and the Committee report, both of which are public documents, with reference being made only to those matters necessary to explain this decision.

9. 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.

THE ROLE OF THE COMMISSION

10. The Commission decided that it should regard the Committee's Report as a "corruption complaint" under Division 3.1.1 of the Act and deal with it accordingly.

11. 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).

12. 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)).

13. The Commission is 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 –

(a) 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;

(b) 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
>
> a significant employment penalty.

(Original emphasis.)

14. 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".

Commission of a criminal offence requires no explanation; it should be noted 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 commentary in the Committee's report that, explicitly or implicitly, suggests conduct influenced by ulterior considerations, departure from appropriate standards of probity or what should have been understood by a competent official of the relevant legal and administrative requirements, and lack of impartiality are capable of raising the possibility of the commission of corrupt conduct (and, no doubt, prompted the reference to the Commission).

15. No suggestion of any inappropriate conduct by a Minister is made either by the Auditor-General or the Committee or arises otherwise in the evidence and it is therefore unnecessary to consider the application of the definition of corrupt conduct to such public officials.

16. 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 or 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, to an actual apprehension that the relevant fact exists as distinct from being a mere possibility.

17. 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.

18. 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's report refers to and relies on both the evidence gathered and the opinions expressed by the Auditor-General. A number of criticisms asserting or implying possible 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.

19. 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 these transactions may appear to undertake the task of critiquing those reports. This is obviously not the Commission's legislative remit, as such, but the Commission's detailed examination has been necessary in order to give appropriate consideration to the corruption report constituted by the Committee's referral to the Commission and to decide, in particular, whether an investigation can or ought to be undertaken.

20. 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

21. 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.

22. 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 City to the Lake acquisitions. 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. 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 which, if it could constitute corrupt conduct within the meaning of the Act, would now be referred to the Commission.

23. 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. 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 present and, thus, required consideration by the

Commission in response to the referral by the Committee, which was in general terms.

THE CITY TO THE LAKE PROPOSAL

24. The City to the Lake Proposal (the "Proposal" or the "Project") had been under consideration for some little time before the period which it is necessary to consider for present purposes. A minute from the then Deputy Director-General - Land Development, Strategy and Finance (Mr Dan Stewart) to the Director-General, Economic Development Directorate (EDD, then Mr David Dawes) noted that the Minister (then, Mr Barr), having been briefed by officials on 9 July 2013 on the next steps to be taken, had, amongst other things, noted that work would be undertaken concurrently with the feasibility and design development of Parkes Way and the West Basin waterfront and to consider the allocation to the LDA of certain funds for the purpose.

25. By late 2013 it appears that particular attention had turned to how the issues involving acquisition of the West Basin properties were to be resolved. Three possibilities were identified: first, relocation to other sites on or near the lake; secondly, commercial negotiation to a purchase; and, thirdly, compulsory acquisition. For obvious reasons, no decision had yet been made as to the best course to follow. On 6 February 2014, Mr Xirakis, the then Project Director initiated discussions with potentially affected third parties about the possible relocation of MSBH and DBH to other sites where the businesses could continue to function.

26. Work on the Project was itself subject to continuing refinement. The City to the Lake Master Plan Implementation Feasibility Reports were not formally completed until August 2014. These described the Project as "a long term infrastructure and urban regeneration programme proposed by the ACT Government's Land Development Agency (LDA) and represents one of Australia's most significant urban renewal projects" and "comprised a number of projects or elements that can be viewed broadly as three asset classes created over a 25 year investment period". These were –

> 1. Enabling infrastructure - the grade separation, re-alignment and modification of Parkes Way and the reclamation of land at West Basin ... central to achieving the connectivity between Civic and West Basin, unlocking prime residential, retail and commercial property development opportunities, and land for new social

infrastructure projects such as the Canberra Stadium and the Aquatic Centre …;

2. Land development - prime residential, retail and commercial property development lots at West Basin and in Civic; and

3. Social infrastructure - the Aquatic Centre at West Basin, Canberra Stadium near Civic, a cultural centre at West Basin and a new exhibition and convention facility (Australia Forum) in Civic.

To give the scale of the proposal a number, Mr Dawes told the Committee that "the city to the lake project … is in the order of $2 billion worth of revenue".

27. The City to the Lake Strategic Urban Design Framework was not formally completed until August 2015. It included, as one of its objectives, "[bringing] the everyday life of the city to the lake where it intersects with festivals, sporting and cultural events and activities", … [involving the creation, amongst a number of other things,] at West Basin as Canberra's great meeting and event space - a truly public waterfront for all Canberrans". The Framework specified the six "key moves" as: the West Basin Waterfront development; an Aquatic Centre; the realignment of Parkes Way; an "Australia Forum'" Convention Centre; a City Stadium and Entertainment Centre. The first of these was expected to involve the redevelopment of land around the West Basin to include residential and commercial development as well as community spaces. It was described as a "central component" of the Project, linked to the realignment of Parkes Way and the extension of existing roads from the City to the West Basin area.

28. The Auditor-General pointed out that it was not until October 2014 that the City Plan and City to the Lake Strategic Coordination Committee was established by Cabinet pursuant to a Cabinet decision. It was intended to be "the central administrative body for the projects included within the City to the Lake (CttL) project and the broader City Plan". It was co-chaired by, respectively, the Directors-General of Economic Development and the Environment and Planning Directorate. Its role was described as including executive (as well as advisory) functions, which appear to have been envisaged at a relatively high level of involvement. As the Auditor-General noted, it was not until September 2015 that a Project Control Board was in place to strategically oversee the implementation and delivery of the Project and a Project Control Group operated from January 2016 to operationally oversee implementation and delivery. This delay in managerial oversight was described by the Auditor-General as "a significant inadequacy"

for the Project throughout 2014 and 2015, when the LDA was undertaking, *inter alia*, the West Basin acquisitions. This wider issue of strategic governance is not understood to form part of the concerns referred to the Commission by the Committee and is mentioned only for completeness. At all events, this apparent tardiness (and the reasons are not the subject of examination by the Auditor-General) plainly do not give rise to any apprehension of corrupt conduct and thus fall outside the scope of the Commission's present consideration, except as history.

29. This (highly abbreviated) description of the Project – helpfully referred to in greater detail in an appendix to the report of the Auditor-General – is mentioned to provide some context for the negotiations which were the subject of that report and that of the Committee. It is regrettable, however – given the focus of each on the questioned timeliness and suggested incoherence of the officials' interaction with the property owners – that neither the significance of the unfolding planning documents and work on associated issues (referred to indirectly or in passing in the documents that were mentioned or the subject of analysis), nor the available government resources, which provided the real world context for the issues being considered were referenced, let alone explored. In other words, the negotiations and the decisions under consideration, particularly by the Committee, were part of a complicated structure of interlocking and moving elements, of which incomplete, passing mention was made in the various submissions, minutes and briefs collected by the Audit Office (but not analysed in these respects for the purpose of appreciating the context in which the particular actions under audit were being undertaken.) Moreover, it will have been noted that the Committee ranged over a wider spectrum of issues and, in respect of those, the wider context, though plainly relevant, was not taken into account, even if only to the extent of qualifying the critical opinions expressed in its report (as summarised above in the Introduction).

30. The notion of "value for money" is a key element in calculating the compensation appropriate to be paid by the Territory for an acquisition. Although it is not a term of art but a phrase used in its ordinary vernacular sense, it enters the present discussion as derived from s 22A(1) of the *Government Procurement Act 2001* (the "Procurement Act"), which requires Territory entities to "pursue value for money in undertaking any procurement activity". Sub section 22A(2) defines the term as meaning "the best

available procurement outcome" and sub sec 22A(3) requires this to be done whilst having regard for probity and ethical behaviour, management of risk and other (presently irrelevant) factors. It is important to note that, whilst the notion of market value will inevitably be a major element of the calculus, there is no legislative stipulation that it is decisive for the determination of "value for money". It will sometimes be the case (and this is almost certainly one) that a market valuation does not set the upper limit of compensation. If acquisition of a property is essential to a significant public project, its value *to the Territory* may well be greater than, say, the sum calculated by a willing commercial developer as affording a reasonable return; the obverse is also true, namely, in a particular case, the property's value to the owner may be greater than the amount which a willing but not anxious seller would accept. The relationship between the notions of "value for money" and "just compensation" (discussed below) is complicated and not capable of straightforward analysis; though each might yield more or less the same outcome in most cases, this is not a given and in some instances the variation in outcomes might be substantial.

31. There are, in the end, only two ways in which a price can be set in a situation such as the present: firstly, by negotiation between the parties; and, secondly, as the outcome of a compulsory process pursuant to the Acquisition Act, ultimately by a court if the parties cannot reach agreement. Each course required consideration of expert advice as to value, perforce calculated by reference to the market. (As explained below, however, compensation for compulsory acquisition is not entirely determined by market value.) The possibility of compulsion arises only if the property is required for a public purpose. Where this is not the case, the owner can refuse all offers and insist on setting a price which the government either accepts or not, in the latter case, perhaps frustrating a proposed government project for which the acquisition was essential. (By way of illustration, a purchase by government for, say, investment or commercial reasons will not necessarily satisfy the public purpose requirement, though it might be completely proper as a government undertaking.)

32. As will be seen from the discussion below about the Acquisition Act, whether the West Basin properties were indeed required for a public purpose was susceptible of some – though perhaps not substantial – doubt. In the event, therefore, that agreement could not be reached and it was necessary to proceed by way of compulsory acquisition

(walking away was not an option), the transaction, including of course the price, would have been governed by the Acquisition Act. It followed that, failing agreement, not only did the potential cost of litigation become relevant but, as well, procuring "the best available procurement outcome" needed to factor in the highly uncertain but nevertheless very real and potentially very substantial economic and social cost of significant delay in achieving the outcomes that drove the Project.

33. For completeness, consideration should be given to the possible application of the *Planning and Development (Land Acquisition Policy Framework) Direction 2014 (No 1)* (the "Framework"), which came into effect in June 2014, to the West Basin acquisitions. Compliance with the Framework was referred to explicitly in several of the relevant documents and it appears that it was assumed that the Framework was at least relevant, if not determinative. The Framework "… provides the principles that are to govern the exercise of the Land Development Agency functions under the *Planning and Development Act 1997*". Since the Framework is specifically aimed at enabling "the Land Development Agency to pursue business opportunities for the acquisition of land available on the market", its strict application to the West Basin acquisitions is uncertain, since they represented business opportunities only derivatively. The Framework required "proposed acquisitions to be assessed against the principles and associated tests provided in the [Framework]", which stated, "All principles (tests) must be followed for an acquisition". Many of these tests did not fit well with the undertaking here, of which the acquisitions were a necessary part, but reference in several briefs was made to test 5, that "The proposed purchase price for the site is consistent with the independent market valuation". The language of consistency seems (unnecessarily) vague, but implies some uncertain room for movement; it is markedly different from the mode for calculating compensation prescribed by the Land Acquisition Act – perhaps one of the reasons for specifically excepting the application of the Framework in cases where compulsory purchase was appropriate or necessary. At all events, in the circumstances, even on the assumption that the Framework applied, the extent of departure was not such as to raise any suspicion of corrupt conduct and further discussion of its application is unnecessary. (The Commission's Special Report No 1, dealing with the acquisition of Block 24, referred to in para 1(i) above, discussed the development and application of the Framework in some detail, which does not need to be repeated here.)

34. In the result, although it was appropriate for the Auditor-General and the Committee to pay close attention to the valuations that had been obtained by the LDA, it was a serious error to consider the issue of "value for money" by reference exclusively to them.

35. For its part, the Commission has borne in mind the broader picture outlined in the documents but has not considered it appropriate, given the legislative limits, to use its powers to gather further evidence that would disclose this information in greater detail. Its remit, as explained above, is much more limited than that of the Committee. The examination which follows is drawn from the documents collected by the Auditor-General and information provided by officials and the owners in answer to questions of both the Auditor-General and the Committee. This material (not all of which is referred to in either report) suffices to determine the relevant corruption issues referred to the Commission and, incidentally, to deal with some of the criticisms levelled at the officials.

THE LANDS ACQUISITION ACT 1994

36. Because of the emphasis given by the Committee to the Acquisition Act, as having been an appropriate vehicle for the acquisitions, and as setting out the approach that, it was said, ought to have been taken by analogy, it may be instructive to outline the process the Act prescribes. The first matter to be noted is that s 18 prohibits acquiring authorities ("government") from acquiring an interest in land otherwise than in accordance with this Act unless certain exceptions apply. Since it appears agreed on all hands that the West Basin acquisitions were not required by this provision to be made under the Act, it is not necessary to explore the application of the exceptions to them.

37. Section 13 permits acquisition of "interests in land" by agreement (under s 32) or compulsory process (under s 33). Section 14 prescribes the "nature of the interests" that may be acquired, namely a legal or equitable estate or interest in land and, in effect, any other "rights" connected with the land or interest (for convenience all such interests in the West Basin which were sought to be acquired will be referred to as "land" unless indicated otherwise). It follows that the acquisition of a business, as such, does not come within the purview of the Act, even where it operates on land or by a person with an interest in the land on which it is situated. (This issue is discussed later in connection with s 45.) Section 16 sets out the "principal steps" in acquiring land by agreement, which are (subject to immaterial exceptions) the making or reconsideration

of "a pre-acquisition declaration", the authorisation of the acquisition, the making of the agreement and completing the acquisition.

38. Section 19 permits the Government to declare that it is considering acquiring land for a "public purpose", which is defined in the Dictionary as "a purpose in respect of which the Legislative Assembly … has power to make laws". Section 22 of the *Australian Capital Territory (Self-government) Act 1988* (Cwlth) confers on the Legislative Assembly "power to make laws for the peace, order and good government of the Territory", subject (relevantly) to the exclusion in s 23 of power "to make laws with respect to … the acquisition of property otherwise than on just terms". At the same time, the requirement of a public purpose to be specified means that the acquisition must be for some purpose related to a need for or proposed use (be it active or passive) or application of the land to be acquired and thus not for any purpose that might otherwise be within the wider power of government relating to "the peace, order and good government of the Territory. Acquisition either by agreement or compulsorily requires a "pre-acquisition declaration" under s32 to be made. In addition to identifying the land in question, it must state the public purpose for which the land is being acquired, including that it is suitable for such purpose, the particular use to which it will be put or developed and the reasons why it is suitable for such a purpose. (The pre- acquisition declaration may, but is not required to, also contain particulars of the relevant policy being implemented.) The link between wider powers of the Territory Government and the declared public purpose is manifested by the fact that the pre- acquisition declaration is a mandatory prerequisite of the acquisition: in short, the question is not so much what public purpose the *acquisition* serves, but the public purpose the *land* is to serve. It remains to point out that the declaration will not convert something that is or may not be a public purpose into a public purpose. The declaration, together with information about their rights, must be provided to the registered owner of the land, who may seek reconsideration. Certain circumstances, presently irrelevant, cause the declaration to cease to be effective. A declaration is a notifiable instrument (and thus is laid before the Legislative Assembly) by virtue of s 20, which also requires it to be advertised and given to the Registrar-General.

39. The "public purpose" issue was the subject of advice by the ACT Government Solicitor to the LDA in March 2014 –

> There is some uncertainty whether the proposed acquisitions are for public purpose. On the one hand, the LDA intends to service and on-sell the land more or less like a private developer. On the other hand it is part of a great vision of the development of the City to the Lake project. The narrow purpose is probably not a "public purpose"; the broader purpose is.
>
> I think on balance the acquisition is for a public purpose and therefore permitted under the Acquisition Act, though the matter is not entirely free from doubt.

In a subsequent advice of May 2014, the ACTGS said –

> Having a "public purpose" is essential if land is to be acquired under the Act. There is a continually evolving body of law on the nature of a public purpose both in Australia and overseas and an agency wanting to rely on the Act to acquire property should seek advice and discuss the nature of the public purpose for the acquisition. Urban renewal for example may not be a public purpose whereas on the other hand the construction of a main road or railway line would seem obvious public purposes.

And, in May 2015, in a further advice –

> While the definition ["a purpose in respect of which the Legislative Assembly or the Commonwealth Parliament has power to make laws"] seems broad, there is a continually evolving body of law on the issue of what constitutes a "public purpose" in Australia and overseas. The interpretation of "public purpose" may restrict the Territory from acquiring the Crown Leases if the Territory intends to use the land for private purposes or selling it on commercial terms.
>
> As discussed at our previous meeting, we require further instructions regarding the exact plans for the blocks to allow us to provide more definitive advice as to whether the public purpose test is satisfied. Once you have provided this detail, we will examine this issue further.

It appears that further advice was not sought, no doubt on the basis that commercial rather than compulsory acquisition was the chosen option, with the latter regarded as coming into play only if the former proved futile.

40. When all procedural requirements have been satisfied in respect of the declaration (thus becoming "absolute"), the Government can authorise acquisition of the land either by agreement (s 32) or by a declaration of compulsory process (s 33). In the former situation, a statement must be laid before the Legislative Assembly, giving details of the acquisition, including the price and the public purpose. In the latter, the declaration must be advertised and is a notifiable instrument (but, for obvious reasons, no specification of price or compensation is made); on notification, the land is vested absolutely in government. Each person affected by the vesting may then make a claim for compensation (s 38).

41. Part 6 deals with the assessment of compensation to the person whose land has been compulsorily acquired. Section 45 sets out what are described as the applicable

"general principles". So far as is relevant, it provides –

45 Amount of compensation—general principles

(1) The amount of compensation to which a person is entitled under this part in respect of the acquisition of an interest in land is such amount as, having regard to all relevant matters, will justly compensate the person for the acquisition.

(2) In assessing the amount of compensation to which the person is entitled, regard shall be had to all relevant matters, including—

(a) except in a case to which paragraph (b) applies—

(i) the market value of the interest on the day of the acquisition; and

(ii) the value, on the day of the acquisition, of any financial advantage, additional to market value, to the person incidental to the person's ownership of the interest; …

…

(c) any loss, injury or damage suffered, or expense reasonably incurred, by the person that was, having regard to all relevant considerations, including any circumstances peculiar to the person, suffered or incurred by the person as a direct, natural and reasonable consequence of—

(i) the acquisition of the interest; or

(ii) the making or giving of the pre-acquisition declaration or certificate under section 21 in relation to the acquisition of the interest …

"Market value" is defined in s 46 as "the amount that would have been paid for the interest if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer". Of crucial importance is the governing principle expressed in sub section (1), which brings all "relevant matters" into account that ensure that the compensation for acquisition will be just and provides that the relevant matters are not exclusively listed in the subsection and will in all cases include loss or injury caused by the acquisition. The important point here is that this last element is not limited to economic loss. Thus, people whose property is compulsorily acquired may well suffer the loss of particular personal amenities and networks, unique to them, that are linked to the location. These can be of considerable significance, especially where, say, a family home, is expropriated. In principle – though often not recognised (even here, not mentioned by the ACTGS, perhaps because the issue was not raised) – the same considerations may apply in particular circumstances to a place of business by, for example a corner store owner whose local connexions may be neighbourly and not purely commercial. Compensation for the subjective and imponderable consequences of compulsory departure due to expropriation such as nuisance, annoyance, inconvenience and distress is called "solatium" and is payable by virtue of the governing principle in subsection (1) and the particular terms of para (2)(c). The amount is

necessarily both incommensurable and at large and, although not likely to be a substantial proportion of the compensable amount, needs to be factored in. Of course, a market valuation of the property will not include such an allowance. It is important to note that compensation for acquisition is not limited to the price that sale of the land on the open market might achieve. There remains the item of compensation conventionally referred to as "disturbance". This aspect was relevant on the basis that the owners would incur economic costs (legal, accounting and, potentially, valuation fees) in the process of resumption. Of course, a valuation of property at its highest and best use necessarily includes its actual and potential use as a source of income, from which it follows that an owner cannot claim compensation for the highest and best use of the land and, in addition, claim loss of income, as this would be double counting.

42. As will be seen from the narrative of events outlined below, the LDA obtained valuation advice from a number of valuers. Those values were rightly regarded as informing (rather than constraining) the amounts to be offered by way of just compensation (this description meant in its ordinary usage sense, though it is also a crucial term in the compulsory purchase context). This approach was inevitable (although not articulated, so far as the available documents go), given not only the predictable variations in estimates but also because the valuers were instructed to estimate market value – which, indeed, was all they were qualified to do. As has been mentioned, however, market value is only one, though, no doubt, the most significant, factor to be taken into account when determining the amount which "having regard to all relevant matters, will justly compensate the person for the acquisition" on the one hand or, on the other, what sum a commercial negotiation will settle on. Quite apart from the point that market value is not the sole element of the compensation calculus, the notion itself is susceptible to considerable, inherent uncertainties (for obvious reasons that do not call for explanation in this Report and which were discussed in Report No 1). It has been frequently, and rightly, said that valuation is an art not a science. There will always be room for inferences and inclinations of opinion which are more or less conjectural and difficult to reduce to exact reasoning or calculation, as is demonstrated by the valuations in this case.

43. In addition to the possibility of litigation about the issue of whether the public purpose identified in the declaration is indeed a public purpose, the risk of substantial

disagreement about "market value" and "just compensation" is obvious. In the case of the West Basin properties this was (as will be seen) a major risk and litigation a live possibility.

44. At all events, where government and the owner have (fairly) bargained for sale at a price mutually agreed, it may be that the price will end up as either less or more than "market value" (in the view, say, of a professional valuer) but it might well represent value for money in the sense that it represents "the best available procurement outcome". This test obviously comprises elements going significantly past market value. For practical purposes, if the owners refused to sell at the price offered by LDA, an assessment would need to balance, on the one hand, the amount which they would be prepared to accept with, on the other, the risks arising from undertaking a compulsory acquisition, comprising the compensation possibly to be assessed following litigation, plus the cost of that litigation (incompletely dependent on which side won), plus the social and economic cost of likely delay. This is further discussed below.

45. There then follow a number of sections which are presently immaterial, dealing with costs of development where market value is determined on basis of potential of land (s 47), cases where there is no general market for the interest acquired (s 48) and interests restricted to use for a purpose of a public nature (s 49), matters to be disregarded in assessing compensation (s 50), acquisition of dwellings (s 51), interests subject to mortgage (s 52) and compensation to mortgagees (ss 53, 54, 55). Sections 56, 57 and 58 deal with the formalities of making claims for compensation.

46. Section 59 requires an offer of compensation to be made to the dispossessed owner with an explanation of how it was worked out and offering internal review. Section 60 provides for the effects of a decision of the ACAT, should an application be made by the claimant for review under the *ACT Civil and Administrative Tribunal Act 2008*. Section 62 permits the claimant to accept or reject the offer and, in the latter case, propose another amount, explaining how it is calculated. The Government then makes its final offer, which is a reviewable decision and, absent review, is taken to be a final offer of compensation (s 63). The owner may then accept or reject the offer (s 64). It should be noted that the Government and the owner can agree, before or after the compulsory process is completed, on the amount of compensation to be paid (respectively s 65 and

s 66). Ensuing sections deal with the formalities of payment (ss 67 to 77 inclusive) and do not call for consideration. Neither do Part 7, which deals with compensation in cases where there is ultimately a failure to complete the process of acquisition, Part 7A dealing with acquisitions by utilities, Part 8 with cases where the owner has limited powers to deal with interests in land, Part 9 with dealings by government with acquired land or Part 9A covering the formalities for notification and review of decisions.

47. Part 10 makes provision for a miscellany of issues, the most important for present purposes being the jurisdiction of the Supreme Court. The Court has explicit jurisdiction under s 106 to adjust rights as between competing claimants, under s 107 to stay or enjoin proceedings by a mortgagee of the land and under s 111 to enjoin conduct of an owner inconsistent with restrictions on the land. (Orders for possession may be made by the Magistrates Court under s 110.) As will have been seen, a decision of the Government about the amount of compensation properly due is reviewable and, thus, enables the dissatisfied owner to apply for a review by the ACAT. The effect of s 68(2) of the ACAT Act is that, on such a review, the Tribunal may itself determine the appropriate amount of compensation payable for the compulsory acquisition. That decision is subject to appeal to an appeals tribunal and, ultimately, to the Supreme Court, by leave of the Court, on a question of fact or law. The Acquisition Act gives the Court original jurisdiction to ensure that any acquisition is on "just terms" –

> **78 Courts to ensure just terms**
>
> In any case where the Supreme Court … is of the opinion that the application of any of the provisions of this Act would result in an acquisition having been made otherwise than on just terms, the Supreme Court, or the High Court, may determine such compensation or make such order (whether against the Executive or against another person) as, in its opinion, is necessary to ensure that the acquisition is on just terms.

48. Although "just" is a protean term, in this context it has come to mean compensation that is governed by the owner's right, so far as money can do it, to be put in the same position as if the land had not been taken. It encompasses all loss and injury suffered on account of the expropriation, calculated in much the same way as general damages for pain and suffering are assessed at common law. Furthermore, it is fundamental that statutory provisions (in this context) will be liberally construed in favour of the person whose rights have been affected and doubts are to be resolved in favour of the more liberal estimate. Whilst accepting that "just terms" apply to both owner and acquirer,

the "generous" approach in the interest of the former is nevertheless required.

Significance of the Acquisition Act

49. The matters raised by the Committee as suggestive of a lack of probity (other than not using the Act) all concern the approach of the LDA in respect of obtaining valuations and the course of negotiations with the owners in agreeing the purchase prices. Once the price had been agreed, the acquisitions went forward to conclusion without complaint. It will have been seen that the Act gives no guidance whatever about how negotiations about acquisition or price are to be conducted. The suggestion, therefore, that the negotiations would or could have been better dealt with by reference to the processes prescribed by the Act is insupportable, except to the extent that, as the Solicitor-General, Mr Garrisson AO SC, told the Committee, "a structure is always good". The problem here, however, was that the matters that needed structure were not, at all events, to be found in the provisions of the Act.

50. Turning specifically to the matters raised by the Committee identified above, the first-mentioned asserted, in effect, that the responsible officials did not have an adequate (and appropriate) level of understanding about the "status" and the "provisions" of the Act and identified, in particular, the negative opinion about its litigious character. Aside from the latter consideration, there is no evidence that the responsible officials were insufficiently informed about the Act. Advice was obtained about the potentially contentious matter of "public purpose" and nothing useful would have been obtained from the Act about value, which was simply defined in accordance with generally conventional standards together with conventional qualifications. Mr Xirakis was asked about considering the issue of compulsory acquisition and exploring it with the ACT Government Solicitor (ACTGS). He told the Committee –

> I explored it on all three blocks [ie, the land adjacent to the Casino and the West Basin properties] in question, yes. The Spokes and the paddleboat dual negotiations were all going concurrently. We had made a decision to develop a public area down to the lake. It did require those lessees to be sensible. It was not an absolute requirement, and we had had many conversations around: "Could we build around them and deal with it at a later stage?" The sensible thing, and the advice from the GSO, was: "Let's see if we could negotiate it out." It was far less clear than Glebe Park in terms of the requirement for public infrastructure, because if a new commercial block of apartments sat on that lease that could be considered other than for public interest. We had not got down to the fine detail of designing the whole precinct to know whether those particular blocks of land sat on public land or what would end up as a developer's block of land to build and sell. We could not make that decision. It was also considered unlikely that we would get a favourable response in the media for going after a compulsory acquisition of two leaseholders. So, the decision was made to negotiate

it out. We made that relatively early, in terms of not pursuing any sort of compulsory acquisition.

51. Given the litigable issues mentioned above and the absence of a bright line enabling certainty, it appears sensible for the officials to have had doubts about the possible application of the Act, fundamentally, in respect of the "public purpose" issue but also as to the issue of the amount that might be found to constitute just compensation. Accordingly, it seems reasonable to have decided that direct purchases on a commercial basis should be undertaken if that were practicable. It may be that the uncertainties about satisfying the public purpose test in the circumstances could have been resolved by legislation, as suggested by the Committee, but legislation based on the precedents identified by the Committee would not have resolved the particular issues identified in these cases, which related to the terms and timing of the negotiations and disputes about price. At all events, the desirability of such legislation is, of course, a political question out of the hands of the officials and failing to advise as to undertaking it (if that occurred) does not give rise to any question of probity.

52. Returning to the evidence about use of the Acquisition Act, Mr Dawes said –

> [Whether the public purpose is clear at] the end of the day you have still got to pay fair value for land, otherwise you end up in court as well. And there have been some other compulsory acquisitions that are still going after three and four years. There are certainly two winners out of those sorts of cases as well. It is neither of the two parties. You can get in and move on as well. If I could have bought the land for less, I would have.
>
> Q. … When you compulsorily acquire something is it cost effective or are the costs of going down that road quite extreme? --- A. It depends, I suppose, on the person you are dealing with and what the purpose of it is. We acquired some land which we did not do through compulsory acquisition – we did not need to threaten that – where we wanted to put a substation for an electrical easement. That is a lot easier to negotiate as well, but some of the more difficult ones are: if you want to run a road through a car park that is owned by a particular building owner, that can be problematic, especially if the building owner has other plans and he might want to put another building on it. Again, it talks a bit about value, the perception of what we might think is for a public purpose, to put a road through, and what a particular owner of a property has as well. So that is where you can end up in a dispute.
>
> Q. I am just trying to understand this dispute and how it plays out. I am assuming the cost comes from the legal dispute that starts from trying to compulsorily buy something. How big in dollar terms are we talking when one of these disputes escalates? --- A. That is a good question. I could not quantify that, but it could be a small amount to a substantial amount, depending on where it gets to. If it ends up in the Supreme Court, and some of these matters have ended up in the Supreme Court, it could run into the hundreds of thousands of dollars, I suppose, but I could not quantify that.

53. Mr Powderly, State Chief Executive, Colliers International and Colliers ACT Pty Ltd

(Colliers) gave evidence of the practical implications of the risk of litigation in respect of finalising an acquisition, starting with the example of the DBH purchase –

> … In that final advice [to the LDA], it said, "Market value of the property is $438,000, but if you want to go down the track of not going through a drawn-out litigation process you can pay up to $500,000, which is what we have sourced from other jurisdictions as a payment to avoid going down that process." We provided then that the maximum range you could pay would be the addition of the two.
>
> Q. Okay? --- A. We did not say the market value was $950,000; we said that would be the maximum which you could pay if you wanted to avoid going down that process.
>
> Q. Because also, in that, you have a range. I recall from your evidence when you last appeared here that you said a real valuation would not have a range; it would have a point? --- A. Yes. The advice clearly states the market value of the property as being $438,000 …. Then it goes on for a couple of paragraphs to talk about this issue of compensating people for going down this process, and that some governments choose to do that and some governments do not. What we did was do the research we were asked to do, and we came back with the maximum, really, that people are paying for this sort of ---
>
> Q. A long, drawn-out court process could easily cost at least those sorts of sums? --- A. It could do. That would be excessive. I think it is more about – in the case of New South Wales – imagine holding up the public infrastructure for four years, what that cost would be … In the case of the ACT, our brief and our instructions clearly were that this was a City to the Lake project that they wanted to proceed with. Obviously, nothing has happened so urgently since, but the point was that, if you were going to try to go forward with a project that had economic benefits, you would not want to be sitting there for four years wondering whether you were actually going to go ahead with the project. Governments really need to put a quantifiable price on that. I guess that has been the whole argument about this. You put a business case together to make decisions about whether you do or do not pay somebody more than the market value.

54. Mr Garrisson's evidence was –

> Compulsory acquisition is used infrequently, mostly associated with public utilities, roads and the like, if you cannot negotiate an appropriate deal. The complexity with compulsory acquisition is that. if you get to that point, you sometimes have some difficulty negotiating a mutual arrangement, and you then invariably will have a fight over what the compensation is, which can take some considerable period of time. The general approach is that if you can reach an agreement in relation to an acquisition then that is a far better course than proceeding by way of compulsory acquisition, which has a number of formal steps associated with it and can take some time, particularly if the party from whom the land is being acquired disagrees.
>
> Q. Is there a capacity to use the Lands Acquisition Act as a sort of template for acquisition, even though you are not going through a compulsory acquisition? --- A. That would be difficult. It is a particular formal process. It requires first the giving of a notice of acquisition, then a response by the parties.
>
> Q. So if there were agreement there would be too many steps? --- A. If you reach agreement, which happens, there can be some good reasons for using the Lands Acquisition Act rather than a negotiated arrangement. But if you do negotiate, you give the notice and then the party says, "All right, let us agree a price," and everyone is happy, and it is acquired by agreement. Generally speaking, the steps that the parties are required to take are: let them know that you want it, agree on the terms of it and then document the terms of it. The Lands Acquisition Act does not give the party from whom the land is being acquired the

> option to have terms and conditions, because if it is compulsory, once the acquisition notice is given the land is gone, on the terms of that notice. Then it is simply an argument over the money that is involved, which can be and indeed has been litigated and can take some considerable time.
>
> Q. I asked the question because, in relation to this inquiry and the acquisition of these three particular blocks, at least one, possibly two, of the parties involved said that if we had had some structure, perhaps like the Lands Acquisitions Act, or we had used the same principles, it would have been easier. I wanted to see whether you thought it was possible to use the structure without using the formality of the --- A. A structure is always good. Perhaps I could leave it at that.

55. The Committee implicitly criticised witnesses who gave evidence about use of the Acquisition Act for –

> [equating] the use of the Act with compulsory acquisitions, and suggesting that any use of the Act would inevitably lead to extended litigation, although no evidence was presented to establish that this was the case … [and noted] there is no record of the matters under *Lands Acquisition Act 1994* (ACT) ever being the focus of litigation in ACT courts.

56. As the relevant passages set out above show, there was in fact no equating (or eliding) of the two processes of acquisition so far as litigation was concerned, nor did any of that evidence suggest that the use of the Act, by way of compulsory acquisition was considered to be *inevitable*, let alone that litigation would occur, merely that it was a risk to be borne in mind. This is entirely correct, as Mr Garrisson – well positioned to know – stated in connection with disagreements about value. The reference to lack of the records is baffling. Certainly, the Supreme Court website does not show any judgments (since 1974) concerning litigation involving the Act. But this says nothing about litigation that may have been threatened or commenced and settled about which, it is clear, the Committee neither had, nor sought, information, though the ACTGS was a witness and presumably able to give or obtain it. The evidence about the risks of litigation is consistent with what is notorious in this field and avoiding them if practicable not unreasonable. The decision to attempt negotiation outside the confines of the Act was not in any sense improper and, at all events, there is no basis for concluding that the problems that arose in negotiating the West Basin acquisitions would likely have been avoided had the decision been otherwise. Nor is it possible to identify any significant relevant advantage in attempting to follow a process analogical to that prescribed in the Act. In the result, no probity issues reasonably arise from the fact that the negotiations for the purchase of the West Basin properties did not utilise or reflect the process provided by the Acquisition Act.

MODEL LITIGANT GUIDELINES

57. The Committee, as noted above, also criticised the LDA for not adopting an approach analogous to or consistent with that contained in the Model Litigant Guidelines. It can readily be accepted that government agencies should, where practicable, apply principles or practices stipulated by government as representing standards of probity, in the interests of coherence and consistency, even where the particular standards have been developed in relation to other instances of official action. The Model Litigant Guidelines (the Guidelines) require government to adhere to standards of conduct that, although directly relevant to the conduct of litigation, are capable of more general application. The first of the obligations, requiring government to "act honestly and fairly" is, of course, a policy of general application. A failure to act in this way in any particular transaction may well constitute corrupt conduct warranting investigation by the Commission. Accordingly, the assertion by the Committee that the LDA failed in this way in its dealing with MSBH is tantamount to a corruption complaint requiring consideration. This is made more difficult, however, by the omission of any specification of the particular matters thought to demonstrate the lack of honesty or fairness. As will be seen, however, from the narrative of the negotiations and the decisions set out below, there is no evidence that establishes a reasonable suspicion that this allegation is made out.

58. The Guidelines particularise matters of particular application to the litigation process, most of which are also capable of application by analogy to the present transactions. These are, in effect, dealing with claims promptly and not causing unnecessary delays, paying legitimate claims without litigation, including making partial settlements of claims or interim payments where appropriate, acting consistently in the handling of claims and litigation, keeping costs to a minimum, including by not requiring the other party to prove a matter known to be true, not contesting liability if there is no doubt concerning liability, not taking unfair advantage of a claimant who lacks the resources to litigate a legitimate claim, and not relying on a technical defence which will delay or circumvent the resolution of the issues involved. There was no occasion that triggered the application of the last requirement, namely the need to apologise where the Territory or the agency is aware that it or its lawyers have acted wrongfully or improperly. Again, as

the narrative demonstrates, the evidence strongly supports the conclusion that these principles were adhered to or, at least, not contravened.

THE COURSE OF NEGOTIATIONS

59. On 27 March 2014 ACTGS (Mr Brendan Ding, Special Counsel - Land and Property Development) wrote to Mr Tom Gordon, then Director, LDA as to the mode by which the Crown leases of the land occupied by DBH and MSBH could be acquired. Mr Ding succinctly described the Project in respect of the envisaged redevelopment of the Acton Foreshores around Lake Burley Griffin, noting that this would require the extinguishment of the current Crown leases to make way for additional services and utilities prior to being sold at fair market value for the purposes of residential development. Mr Ding advised that (for technical reasons not requiring explanation here), whilst the Territory could enter into agreements to acquire the leases, the better course was for an agreement that the Crown lessees would surrender their leases in exchange for other property rights over different sites, payment of cash and other benefits or a combination of these. The other available course was to use the processes of the Acquisition Act in respect of either voluntary or compulsory acquisition. The relevant considerations were briefly outlined (and are discussed below). For the present, it is enough to say that the advice was sufficiently comprehensive for the stage at which the Project had reached which, from the acquisition point of view, was just beginning.

60. On 21 March 2014 a meeting took place between officers of the LDA and MSBH at which (according to an email of the latter) three options had been discussed: financial compensation; relocation; and partnership in the Project. LDA also sought involvement from MSBH in developing a design brief for a possible relocation site. On 15 April, MSBH wrote to the LDA, noting they were waiting for a letter outlining the available options and describing what would be the government's process to acquire their lease. They referred to the three possible ways forward that had been outlined, namely, financial compensation, relocation of the business or MSBH becoming partners in the Project, noting that LDA had sought a design brief from them for a possible relocation site. MSBH said that no decision had been made as to the outlined alternatives and they would await an approach in writing before coming to a decision. In an emailed response on 16 April, Mr Gordon (Development Director) noted that MSBH had not

decided on any preferred course and wished to consider the matter. He pointed out that the developments forming part of the Project would "result in significant changes to the road and block layout in the West Basin precinct that will result in extinguishing your lease as it currently exists". In the interests of reaching an outcome that was "commercially acceptable" to MSBH, they and LDA would "benefit by having a good appreciation of each other's requirements and intentions". Mr Gordon correctly pointed out – as had been stated at the meeting – the options were, in substance, sale or relocation and that, whilst compulsory acquisition was also available, the Territory preferred a commercial negotiation and was prepared to discuss the options. It was indicated that LDA needed more information about the business and would make contact shortly. An invitation for future contact was made.

61. (Mr Xirakis had not considered whether it would be necessary to acquire a business and told the Committee that there was no intention of doing so. It is clear from his evidence to the Committee, that, whilst he may not have appreciated the precise effect of s 45 of the Acquisition Act, he understood that the value put on the business was by way of compensation, as distinct from acquisition. (The ACTGS was, however, always clear on the elements that needed to be part of the package.) The issue was, in a practical sense, only capable of significance when the position of LBGBH came to be considered, since the rather doubtful status of their interest in the property, derived from an unauthorised sub-lease from the lessee of the building (DBH did not have a Crown lease, but only a rental lease of the land and building) raised, in respect of LBGBH, the issue whether the business was relevantly an aspect of any land acquisition within the meaning of s 45. In light of what happened in respect of LBGBH and the lessee DBH, it is not necessary to consider what might have been the legal effect of an attempt to acquire the business itself. It is somewhat doubtful that the Territory would have had the power of *compulsory* acquisition although, of course, it could have acquired the business like any other purchaser in the market at an agreed price if the owner had agreed to sell. However, this issue did not arise, not least because all acquisitions proceeded by way of commercial agreement without the need for compulsion.)

62. In the meantime, on 23 March 2014, Mr Ding wrote to Mr Gordon pursuant to a request for advice as to whether the West Basin properties could be acquired either

compulsorily or by agreement. Both modes were acceptable but there was some uncertainty as to whether the proposed acquisitions were for a public purpose within the meaning of the Acquisition Act. Mr Ding considered that, on balance, this requirement was satisfied. His letter outlined, comprehensively enough, the acquisition process. This advice repeated, in somewhat greater detail, what was stated in another letter of 9 May 2014 by Mr David Gray, Principal Solicitor of the ACTGS which concerned Block 24, adjacent to the Casino, (part of the Project, acquisition of which was dealt with in Special Report 1). As negotiations proceeded for the acquisition of the West Basin properties, the possibility of compulsory acquisition loomed larger. Neither of these advices adverted to the specific terms of s 45.

63. In May 2014, the LDA met with DBH for initial discussions about their relationship with LBGBH and, on 27 May, for the first time with LBGBH. DBH had sublet the site, in breach of their Crown lease, on which LBGBH operated a boat hire business. The two entities were owned by two brothers who, by this time had fallen out. A subsequent meeting occurred in October 2014, attended by Mr Jim Seears and his lawyer, Mr Red (a pseudonym). (This is dealt with below.) (The ACTGS had given advice – the date of which is uncertain – that the latter had a tenure of sorts over the lease site and should be treated as impacted by the Government's decision to develop the West Basin waterfront.)

64. The LDA reached out on 21 May to arrange another meeting and was told that MSBH was seeking legal advice and, hence, was reluctant to have further discussions at that stage. On 29 May 2014 LDA contacted MSBH to arrange a meeting to keep them in the loop. The meeting took place on 13 June 2014. Minutes were taken. In the result, a meeting was agreed for 13 June for a general discussion of developments at Acton. The topics covered were the timetable for works approval to be obtained from the National Capital Authority, the possibility of involvement of MSBH in the Project itself, planning aspects, including the possibility that the scale of the Project may well prevent MSBH from operating its business, events planning and the possibility of competition from other operators, construction works disruptions and possibilities for temporary relocation. LDA suggested that it would assist further discussion if a valuation from an agreed valuer were obtained but this was not agreed at this point as (though this is a *non sequitur*) MSBH had not made a decision about relocation. Detailed minutes of

that meeting were taken, provided to the participants, and finalised (with some changes) by mid-July. On 31 July, Mr Xirakis, who had commenced earlier that month as Project Director (by way of private consultancy, as to which see more later, directly reporting to Mr Stewart, Deputy CEO of the LDA), informed MSBH by letter that that no partnerships with leaseholders would be entered into.

65. From 23 May 2014 a number of unsuccessful attempts had been made to contact Mr Pat Seears (principal of DBH) by telephone and email (20, 23, 24 June 2014) to arrange a meeting to discuss the Project but, for whatever reasons, there was no response. It was only following press reports about the impact of the Project on the West Basin foreshore in late August that, on 26 August 2014, a Mr Yellow (a pseudonym) emailed on behalf of DBH about the article.

66. On 12 August 2014 a further meeting between LDA representatives and MSBH took place. Amongst other things it was agreed that appointment of an independent valuer would not be discussed. MSBH sought information about inappropriate use of car parking at West Basin (LDA agreed to write and responded on 4 September 2014) and claimed that closure of one of the nearby carparks, scheduled for mid-October would have a negative impact on their business. They also wanted to know what rent a nearby operator was paying (this was commercial-in-confidence and could not be provided). As to catch-up meetings, MSBH requested future communications be in writing. In his report to the Minister about this meeting, Mr Stewart said that Mr Shanahan "was quite aggressive in his approach and refused to discuss certain matters, such as … [the] current lease in the absence of an Executive level officer". Mr Stewart said the meeting terminated early when Mr Shanahan and Ms Edwards became agitated and commented to the Auditor-General that "it would be reasonable to say that [the owners] exhibited signs of mistrust in their dealing with the [LDA] from about this time onwards". The owners of MSBH told the Auditor-General that the meeting ended poorly and they were left "frustrated and disappointed". Perhaps because of their longstanding personal involvement in their business, they found the lack of clarity difficult to deal with and productive of stress and anxiety. It is possible that the officials were insufficiently sensitive to their situation. However, it is not reasonable at this remove to attribute any blameworthy motives or conduct to the latter. There is no evidence that the delays and uncertainties surrounding what was, on any view, a complex and very large-scale

development with a number of moving parts involving conflicting interests both at policy and ground levels were the product of any lack of assiduity on their part. The lack of any real detail about the resources available of itself prevents fair criticism of progress. A degree of incoherence was inevitable. (This subject is further discussed in due course.) As will be seen from the ensuing chronology of events, the owners had adopted, no doubt in their own interest, as they saw it, an adversarial approach to negotiations.

67. On 25 August 2014 an article was published in the Canberra Times with the headline "Paddle and pedal operators fear future" with a photograph of the owners of MSBH. It is apparent that the operators were seeking public sympathy for their positions to the embarrassment of the LDA. Of course, they were entitled to do so.

68. On 4 September 2014, Mr Stewart wrote to MSBH to inform them of the solution proposed for the parking issues that had been raised at the meeting of 12 August.

69. Mr Xirakis had unsuccessfully attempted to meet with Mr Pat Seears (DBH) in May and September 2014. Mr Seears eventually contacted the LDA on 19 September and a meeting took place on 2 December 2014.

70. On 19 September 2014 DBH contacted Mr Xirakis concerning the interest of DBH in the lease of Block 16, advising that it was intended to seek legal advice with a view to re-establishing their rights to the Block (which, as noted above, had been subleased to LBGBH). Litigation was subsequently commenced to retrieve possession.

71. On 30 September 2014 Mr Green (a pseudonym) of Meyer Vandenberg, MSBH's solicitors, wrote to the Minister about the West Basin Development. That letter commenced with a brief description of the Project as it was understood and pointed out that "the proposed development is of great concern to our clients" in light of the information conveyed on 16 April that it would result in the extinguishment of MSBH's lease and thus its business. (Of course, this was reasonable in the circumstances and undoubtedly appreciated by the responsible officials.) The outstanding uncertainties of scope and timing were referred to, with the suggestion that the "power the LDA has or has been delegated to treat with [MSBH] was not obvious". It was submitted that "the

invitation [to MSBH] to prepare valuations for LDA's consideration" was premature "where works approval has not been sought from the National Capital Authority". Mr Green sought a meeting to discuss the nature of and timetable for the proposed development, its impact on MSBH's business, assessment of compensation and the information needed from MSBH to assist the process. It is fair to say that this approach simply ignored what had been happening.

72. As mentioned above, on 20 October 2014, the Project team, with a solicitor from ACTGS met with Mr Jim Seears (LBGBH) and his solicitor to commence commercial negotiations for the acquisition of the business. A valuation methodology was agreed and valuers retained.

73. On 5 November 2014, Mr Purple (a pseudonym), the Deputy Project Director minuted Mr Barr MLA, then Minister for Economic Development in connexion with a proposed response to Mr Green's letter. Amongst other things, he informed the Minister that the MSBH site would be "the focus of significant construction activity", in respect of which the LDA had initiated discussions in June 2014. Development of the Estate Development Plan (EDP) had commenced; a draft would be completed in the first quarter of 2015 and "inform the timeline for the redevelopment". The minute pointed out that two options had been raised with MSBH: relocation or negotiated acquisition, but they had not been in a position to decide. Advice had been obtained from the ACT Government Solicitor (ACTGS) on the options and LDA planned to meet with MSBH soon. On 12 November, the Minister responded to Mr Green –

> The … [Project] is being undertaken to transform the city centre's connection with Lake Burley Griffin. Early planning for the project is underway and the Land Development Agency is preparing an Estate Development Plan to guide the design of the West Basin waterfront. It is anticipated that the draft Estate Development Plan will be completed in early 2015. I acknowledge that this causes uncertainty for your clients, however, I am advised that it is not possible for the Land Development Agency to determine the project time frame with any certainty until the Estate Development Plan is complete.
>
> I appreciate your client's desire to establish certainty over the government's timeframes for Development at West Basin and I have asked that discussions be progressed with Mr Shanahan and Ms Edwards as a matter of importance. To this end please contact Mr Purple of the Land Development Agency [details given] … to arrange a suitable time for you and your clients to meet with the Land Development Agency and its legal representative to resolve the issues raised in your letter.

74. On 19 November 2014, a meeting was convened involving Mr Xirakis, Mr Purple, Mr Shanahan, Ms Edwards, Mr Gray (ACTGS) and Mr Green. Mr Xirakis outlined the

Project timeframes for sketch plans finalisation (February 2015), EDP and submission to the NCA (March/April 2015) and works approval (April 2015). Mr Gray said the LDA preference was to acquire MSBH by commercial negotiation, with agreement via the Land Acquisition Act being a possibility, as to which no decision had yet been made. Mr Green pointed out that there might be a public purpose problem (as to which see discussion below). Relocation was also a possibility. Mr Xirakis assured MSBH that the Government would not take possession without their consent. The issue of valuation was discussed, Mr Gray saying that the LDA was seeking advice from valuers as to the appropriate approach. MSBH was asked to provide quotes for legal advice and disbursements for valuations and provide sufficient financial information to support a valuation process within two to four weeks. There should be an agreed position on costs and disbursements when a quotation from MSBH had been received. The solicitors on each side agreed to meet in a week to refine timeframes.

75. Also on 19 November 2014, Mr Purple discussed in broad terms with Mr Kalenjuk of Price Waterhouse Coopers (PwC) the various methods for valuing a business. Mr Kalenjuk responded in more detail on 20 November, pointing to the need for the following information: at least three years financial statements; budgets/forecast/cash flow projections; a description and understanding of the business, the industry it operates in, and its competitors; copies of last three years tax returns; the owner's remuneration structure; list of plant and equipment, asset register, depreciation schedule; customer base; and purpose of the valuation. (The reason for this information needs no explanation: the requirements were both obvious and conventional.)

76. On 20 November 2014, Mr Xirakis's weekly update of the Project for the Chief Minister, the Minister and Mr Dawes (CEO, LDA) noted, inter alia, that negotiations with the West Basin lessees to acquire their interests were continuing and stated –

> The preferred solution would be a mutually acceptable commercial agreement. Concurrently, the LDA is developing a clear understanding of legislative provisions and processes for the compulsory acquisition of land, should commercial negotiations fail. The LDA understands the sensitivities involved and you will be briefed regularly on this issue.

(The "sensitivities involved" would appear to include public controversy stoked by publicity in the media, which included complaints made by Mr Shanahan and Ms Edwards about the LDA.)

77. On 3 December 2014, a meeting between DBH and LDA took place to discuss the proposed acquisition of DBH. Amongst other things, the fraught relationship between DBH and LBGBH was raised, with Mr Pat Seears flagging his intention to evict LBGBH from the site. DBH pointed to the commercial potential of the site and there was discussion concerning financial and non-financial compensation. He agreed to provide LDA with the information necessary to permit valuations to be obtained.

78. On 4 December 2014 Mr Green wrote to the ACTGS forwarding the corrected minutes of the meeting of 19 November. He said that land valuers and accountants had been contacted to obtain timeframes for completion of the valuation tasks and suggested that the LDA should formulate a proposal for consideration, attaching an estimate of the anticipated costs that would be incurred if MSBH were to undertake the valuation tasks. Since MSBH was not in a position to fund this, the agreement of LDA to pay for this work should be obtained, payment of the costs at all events being required for an acquisition under the Land Acquisitions Act. The attachment listed the work and estimated cost based on an hourly rate of $500 an hour plus disbursements for accounts and valuations, with a 30% loading, totaling in all $55,763 (including GST). Mr Green concluded by indicating that, were LDA unwilling to fund MSBH, "the remaining avenue is for the LDA to put an offer for our client to consider".

79. On 8 December 2014 Mr Xirakis submitted a brief to the Minister and the LDA CEO and Deputy CEO about the Project. Based "on the Government's plans to complete the Waterfront redevelopment by October 2016, and a proposed construction timeframe of 15-17 months" (needing to commence by April/May 2015), a number of critical issues were identified, including the acquisition of the leases and business interests of MSBH, LBGBH and DBH by April 2015. The brief noted, inter alia –

- The process to achieve a negotiated (ie, non-compulsory) outcome could take several months and, amongst other factors, will be subject to delays over the holiday period and also the parties' aspirations on what constitutes fair compensation.
- There are no known factors that would compel or entice the separate parties to negotiate an outcome within the Government's timeframe.
- It is suggested that this is likely to result in claims for compensation (whether financial or otherwise) in excess of what the Government could be willing to pay or be able to defend.

- Commencement of a compulsory process under the *Land Acquisition Act 1994* … does not mean that it is the preferred, or recommended, means of acquisition. Rather it sends a clear signal there would exist a point in time beyond which a more prescriptive (and potentially less generous) process could be pursued. The Government Solicitor's Office … suggests that such a process could be finalised within six months.

- A compulsory acquisition process can be initiated in parallel with commercial negotiations with the knowledge of the parties. This was raised in discussions with Mr Spokes and LBGBH.

80. A discussion followed dealing with procurement and construction and funding issues, which were very much at the initial stage, with the illustrative masterplan of what was called "the West basin Estate", to be presented to the NCA Design and Review Panel in January 2015, a full business case to be provided to Cabinet by early February, and packages dealing with works design documentation not expected to be submitted until May. Mr Xirakis then turned to land acquisition, in particular the leases held by MSBH and DBH (with a further sub-lease to LBHBH), pointing out that, to undertake the waterfront works, "the LDA must … acquire both Blocks 13 and 16 and the business interests of the lessees", which could be achieved either by "a commercially negotiated (strategic) acquisition or compulsory/voluntary acquisition using the Acquisition Act. He commented –

> For a number of reasons, acquisition by commercial negotiation is the preferred method by which to achieve ownership of the land:
>
> - the seller is party to a voluntary process that, to all intents and viewpoints, delivers a fair and reasonable outcome;
>
> - the application of compulsory provisions of the Acquisition Act at the outset could be seen to be 'heavy handed';
>
> - it avoids the prescriptive processes set out in the Acquisition Act;
> - and it allows the sale price to be determined according to the principles of market value and permitting consideration of factors that may be precluded under the compensation terms of the Acquisition Act.
>
> In acquiring the land by negotiation the Government has flexibility to compensate interested parties through a mixture of financial compensation, relocation or conferring other property rights. The Government could, for example, enter into an agreement to offer 'first refusal' on a portion of future land release (or a future licence) in West Basin to one or more of the parties. The Acquisition Act, on the other hand, is generally considered to prescribe a more restrictive process and to drive a less favourable financial outcome (for the seller). Its application also recognises that non-monetary means of compensation can no longer be offered.

There was a discussion of possible relocation sites for MSBH and DBH. Mr Xirakis noted that "no formal position has yet been reached with any party on their preferred

outcome", summarising the situation as follows –

- … [LBGBH] has indicated a preference to sell [its] interests;
- … [DBH] has expressed a long held ambition to establish a hospitality business at West Basin … [and] may be open to discussion on how the Government might assist [them] to achieve this, if … [they] were to surrender his lease; and
- the position of … [MSBH] is not yet clear.

… [The] the LDA has progressed negotiations with all parties to a stage where they are at least willing to discuss the steps toward reaching a strategic (negotiated) acquisition. However, the Government's desire to proceed with the works within a specified time frame places it in the position where it needs to acquire the land as as early as possible, as opposed to the other parties, who do not appear to be subject to a compelling need to sell. This places the Government in a difficult negotiating position where it may need to consider what inducements could be offered, within the constraints of the relevant legislation (including the *Financial Management Act 1996*, the *Government Procurement Act 2001* and the *Planning and Development Act 2007*), to entice all parties to act.

The LDA is currently procuring expert advice to conduct valuations on the lease and business interests on Blocks 13 and 16 and is not in a position to provide meaningful advice on the likely extent of compensation until valuations are complete. Before the valuations can be conducted, the methodology to be used by the valuer will be agreed between all parties and documents obtained to enable business interests to be valued (annual accounts, tax returns etc). This process is under way.

Once agreement is reached with the separate parties on the valuation methodology, and valuations are conducted, the LDA can then proceed to financial negotiations. If negotiations proceed to offer and acceptance, the principles of *intended outcome, risk, policy alignment and value for money* enshrined in the Land Acquisition Policy Framework under the *Planning and Development Act 2007* will come into effect. Depending on the proposed purchase prices (compensation), the acquisitions would be subject to endorsement by either the LDA Board, the Chief Minister and the Treasurer or the Government.

…

If a negotiated settlement cannot be reached with one or more of the parties, the provisions of the Acquisition Act provide a method by which the Territory can acquire the leases. The LDA has sought additional legal advice on the options available, however if land is required for a purpose defined as a 'public purpose', a lease can be acquired compulsorily. The LDA has been advised that the application of the legislation is not a straightforward process, though the acquisition of the leases at West Basin would most likely represent a 'public purpose'.

The LDA has also been advised that a compulsory acquisition process could be commenced in parallel with negotiations for a commercial outcome (that is, immediately). This process would be initiated openly and with the full knowledge of all parties on the basis that the Government requires the land.

Subject to your agreement, preparations for a compulsory acquisition process will be initiated by the LDA in parallel with commercial negotiations. The first step in the process is the making of a pre acquisition declaration by the Director-General of the Environment and Planning Directorate. Specific advice is being sought from the GSO on timeframes and approving authorities and you will be separately briefed on these aspects. It is important to note that, regardless of the methods by which the businesses and leases at West Basin are acquired, the process must be concluded by April 2015 to ensure the completion of stage

one of the redevelopment by October 2016.

81. Mr Barr agreed where that was requested, otherwise noted the identified issues, sought discussions as to all and added the wish to discuss staging options in 2015-16.

82. On 13 December 2014, Mr Orange (a pseudonym), the LBGBH accountant, provided them with advice, sent on to the LDA, that they should seek a minimum of $1.7m as compensation for relinquishing the business. He is not a qualified valuer. His advice was unconventional in a number of respects: the net profit figure used was net of wages and thus overstated; the discount rate of 20% applied was significantly lower than the industry standard of 33% and there was double dipping by adding both the value of the business and the value of the business profits. A number of other issues were identified in a commentary by PwC of 29 July 2015 (referred to again below) which it is not necessary to detail, except to observe that the criticisms appear to be justified, indeed, determinative.

83. On 24 December, Bonsella Business Solutions (Dion Cannell) wrote to Mr Purple on behalf of DBH to provide a costing in response to the request of the LDA. It was said to represent "the direct costs incurred by [DBH]'s from the time of purchase of the Crown lease in 1997 and future lost revenue", comprising purchase cost, maintenance and repairs for 15 years, fees and costs associated with developing the site including communications and negotiations with various government offices since 2000 and an estimate of revenue of the business to 2028. The amount sought for purchase of DBH was $3,075,300. There seems to have been a misunderstanding as, although the amount sought by DBH was requested, it had not been suggested that this would include the costs associated with the business since its inception. It is, at all events, obvious that acquisition by the government would never encompass these costs and expenses and it is difficult to understand why it could have been considered to represent a reasonable approach. The amount sought was varied downward to $2,650,170 by a letter from DBH to Mr Purple on 19 January, explaining the difference as being a deletion of annual net rental and other amounts referable to consultancy fees prior to 2008. In that letter, Mr Purple was informed that the business accounts and tax returns in respect of LBGBH (the sub-lessee of the premises) were the property of LBGBH and (by implication) not available to DBH. The compensation proposal lacked

any commercial reality and, plainly enough, could be regarded only as an ambit claim. Of course, the proprietors were entitled to take this approach and make what they could of what appeared to be strong bargaining position. However, there could be no reasonable expectation that it would be accepted.

84. On 10 February 2015, Mr Purple confirmed retaining PricewaterhouseCoopers (PwC) and Herron Todd White (HTW) to undertake a valuation of Block 13 Section 33 Acton "for the purpose of assisting the … LDA in making a fair and just offer to … MSBH to acquire their interests and surrender their Crown leases". Mr Purple pointed out that approved improvements were owned by the lessees, the lease purpose is limited to bicycle hire and ancillary café; the bicycle hire business was in operation but the café was not. The quotation was to include "a valuation of … Crown leases, business undertakings, improvements and any other matters that you consider, in your professional opinion, to hold value". Provision of the valuation was requested by 20 February 2015. On 11 February, Mr Purple sought a quotation for the same valuation from MMJ Valuers.

85. On 18 February 2015 Mr Green wrote to ACTGS to the effect the LDA had refused to fund the costs indicated in the previous estimates for the purpose of putting a proposal to it and, therefore, that it should put forward a proposal for the acquisition, noting that discussions about the possibility of relocation required concrete proposals. (The assertion that LDA had refused to pay the earlier estimates was correct, as far as it went, but was rather misleading as LDA had always agreed to pay the costs attributable to relocation or acquisition and, as has already been mentioned, could not simply agree to the essentially ambit estimates that had been provided.) Mr Green said that MSBH was in the course of preparing an offer of the amount for which they would be prepared to surrender the lease. It was agreed that the valuers could have access to the site.

86. On 19 February 2015, Mr Green wrote to the ACTGS proposing the "basis upon which … [MSBH] would be willing to surrender the Crown lease … [on the assumption that that there is no alternative location available]" –

extinguishment of business	$1,785,130	
loss of potential earnings on café business		400,000
bike fleet		175,000
sundry business equipment including tools, hardware, office etc		175,000

land	TBA
building	450,000
legal and accounting fees to date	20,000
legal and accounting fees to end of transaction	40,000

Mr Green added that it was understood that a land valuation was being obtained by the LDA and that this would be considered when it was provided and an independent valuation obtained if that was considered necessary. It is clear that this "basis" (aside from the obvious double counting) was an ambit claim and could not have been reasonably regarded as capable of acceptance by the LDA. Except for the information that the amount proposed would be accepted by his client to relinquish the Crown Lease, no attempt was made by Mr Green to justify the claim, not, of course, that he was obliged to do so. It could not have been surprising that this proposal was not taken up as a basis for negotiation.

87. It is not intended in this Report to make extensive reference to the evidence taken by the Committee, which has of course been considered by the Commission. The evidence reflects an inevitable degree of uncertainty and problems of recollection, especially on the part of the owners. With due respect, the task of assessing the weight to be given to this material is rendered more difficult by the lack of a forensic approach to the questioning including, in particular, asking questions that were based on untested or mistaken assumptions and not testing the evidence where it was ambiguous or uncertain or appeared to conflict with contemporaneous documents or objective facts. The Commission's consideration of this evidence has led to the conclusion that a more useful course is to rely on the contemporaneous documentation. By way of example, Ms Edwards (one of the principals of MSBH) told the Committee –

> In February 2015 there was an email that went from the ACT Government Solicitor to Mr Green apologising that he had accidentally sent an email to the wrong area. He thought he had sent one to Mr Green which explained why the LDA were not taking up the processes that were discussed in the meeting the previous year. It was because of a notifiable instrument that they had found. I do not really know what that means.
>
> We were no longer on that path at all. It really was then the beginning of the fog. I do not really think they knew how to approach it. They kept threatening. Every now and then we would get a letter that might say, "If you don't respond."

88. However, as will be seen from the following, on 3 March Mr Green wrote to the ACTGS in connexion with the provision of financial information, to which Mr Gray responded on

6 March in eminently reasonable terms.

89. On 26 February 2015, Mr Purple wrote to LBGH to inform them of the three valuers engaged to obtain independent valuations of their interests at Block 16 Section 33 Acton, explaining the valuations would cover "your business undertakings, stock and any other matters that they consider to hold value". Mr Purple noted that it would therefore be necessary to provide access to the premises "to ensure of all aspects of your business are considered" and that no more than an hour would be required. He also pointed out that any further information that could be provided, "such as financial records of your business or other factors that you believe should be assessed, would greatly assist the valuers in conducting their assessments". The valuers would make contact as soon as possible.

90. On 3 March 2015 Mr Green wrote to ACTGS responding to a request from Mr Purple of the LDA seeking authority for Mr Kalenjuk of PwC to undertake a valuation of the Crown lease, the business and any other matters of value. He said that MSBH wanted to know the methodology proposed to be used and to ascertain the instructions and the assumptions that would operate. Although the letter is, with respect, rather confused about this, it appears that Mr Green, in respect of the business records, was attempting to convey that they would not assist the valuation of the Lease but would assist the valuation of the business and that, in either event, they would not be provided as they were irrelevant to the former issue and, as to the latter, since this "would possibly result in … receiving an offer that it was not obliged to consider and, if it were to consider it, would require significant expenditure … [to assess, which the LDA had not agreed to meet]. (This explanation is both illogical and factually incorrect; it smacks of considerable confusion.) Nevertheless, a proposal was made that, for MSBH to consider a sale, further information regarding timeframes for development at West Basin, relocation, purchase timeframes and terms of engagement of the valuers, should be provided with their reports to be made available and agreement to pay expenses, including for valuation, assessment of losses and legal costs. Noting that it had been expected that approval for the proposed works would be obtained by April 2015 and the lease would be extinguished and MSBH had declined bookings for later in 2015, any new information about timing should be made available.

91. As mentioned, on 6 March 2015, Mr Gray responded to Mr Green's letter of 3 March pointing out – as should have been anticipated – that the demands made in that letter exceeded legitimate commercial limits. Mr Gray agreed that MSBH was entitled to know the proposed timing of any purchase and the proposed price. He pointed out that the limits placed on access for the valuers were unreasonable, although HTW's valuation as at 5 March 2015, summarised below, referred to 2008/09 Financial Statements, which must therefore have been provided by at least that date. For obvious reasons, this limited information was insufficient for reliable valuation advice. On the other hand, the instructions to the valuers were not matters for MSBH, which was free to reject any offer that was made. As to relocation, it was pointed out that MSBH had declined to discuss its needs and the possibility of relocation, leaving purchase along the lines proposed on 19 February 2015 as the only alternative. Any response by LDA, however, had been thwarted by its inability to obtain any relevant financial records to justify either the price demanded or any counteroffer. There was no suggestion that the Crown lease would be unilaterally extinguished, making premature any business closure. Since acquisition of the lease on reasonable terms (either because MSBH did not wish to sell or the price demanded exceeded LDA's capacity to pay), the parcel of land would not be available for integration into the Project until the lease expired or was acquired by other means.

92. On 8 March 2015 Mr Xirakis minuted the CEO and Deputy CEO of the LDA with details of the negotiations as they then stood with the West Basin lessees. Amongst other things, he referred to the meeting between the LDA and the ACTGS and LBGBH on 20 October 2014 in which LDA agreed to pay the costs of their solicitors (then acting pro bono), relocation was declined and valuations of the business would take place to inform further negotiations. (Mr Black – the principal of LBGBH – explained to the Committee that relocation was never an option because the only available lakeshore sites were in a position that, because of prevailing winds, would have rendered navigating the boats back to the location practically impossible.) Attempts to contact the solicitors since then had been unsuccessful, although an email had been sent to the ACTGS seeking an increase of legal funding. Mr Xirakis referred also to meetings on 2 December 2014 and 6 March 2015 with DBH in the course of which relocation options and also a process towards assessing the offer to sell were discussed. DBH remained "non-committal and undertook to 'seriously consider' the options and respond". MSBH had

not indicated to date a preference to sell or relocate. The minute observed that "discussions could largely be described as unproductive and, on occasion, confrontational". The minute appended a reasonably comprehensive memorandum on the compulsory acquisition process.

93. On 9 March 2015, Mr Xirakis briefed Mr Dawes, Mr Stewart and Mr Purple for an impending meeting with the ACTGS. Amongst other things, he noted what he described as "a lack of co-operation from either [MSBH or LBGBH] to help support a valuation process" and inferred (quite reasonably) that this was "probably because their financial accounts/tax returns will not help support the big payout numbers they are expecting". MSBH had "indicated they would not sell the lease without the business, effectively rejecting any notion of relocation", again a reasonable inference in the circumstances.

94. Mr Xirakis, not surprisingly, regarded the offer of MSBH to surrender its lease for $3,045,130 (excluding land valuation) as unreasonable, particularly having regard to the fact that financial data was not provided, and sought advice from ACTGS concerning compulsory acquisition. Comprehensive advice was provided in March 2014 and March and May 2015 noting, however, that further information was necessary in order to permit greater certainty about whether the "public purpose" test was satisfied.

95. A valuation as at 5 March 2015 by HTW in respect of Block 13 Section 33 Acton, occupied by MSBH, was obtained by the LDA. The details are provided below. For now, it should be noted that the interest being valued was the unencumbered ACT Leasehold in vacant possession. HTW noted the availability of solatium, using the usual term "disturbance", but referred under this head only to the costs of professional advice. The wider available ground for compensation, as discussed above, was not considered, almost certainly as there was no information provided that suggested it might be relevant and, at all events, it appeared that the prevailing (but mistaken) understanding was that solatium was not available in respect of the expropriation of commercial assets.

96. On 2 April 2015 ACTGS wrote to DBH stating that the LDA "remains committed to negotiating a commercial solution with regard to the acquisition of your Crown lease" on the basis of financial compensation for the surrender of the lease, improvements and

extinguishment of their interest or relocation and payment for reasonable relocation costs, business disruption and loss of goodwill. It was pointed out that the offer of 19 January 2015 to sell DBH for $2,650,170 referred to items which could not be part of valuing the business or lease and requested the financial records of the business which set out turnover, expenses, assets and liabilities, in the form of audited accounts backed by tax returns, noting however, that it appeared that DBH did not have those records (because the business was operated by LBGBH). The dispute between DBH and LBGBH was referenced and information about any proposed resolution was sought. It was pointed out that planning for West Basin needed to move ahead and, if the requested information were not provided within seven days, instructions would be sought as to how the issue was to be resolved. This was, clearly enough, an implicit reference to the possibility of compulsory acquisition.

97. Also on 2 April 2015 ACTGS wrote to Mr Green on behalf of MSBH responding to his letter of 3 March 2015, assuring him that the LDA remained "committed to negotiating a commercial solution" and being prepared to look at compensation for the surrender of their Crown lease by way of financial compensation for the lease and improvements, relocation of the business and payment of costs and business disruption. ACTGS pointed out that the terms for progressing negotiations as set out in the letter of 3 March 2015 imposed unreasonable conditions and limited "LDA's ability to investigate the proposal". It was pointed out that the LDA had hoped to finalise negotiations by April, "prior to commencement of construction of project" but that that now appeared unlikely and "the decision to decline future bookings [remained] a matter for your client". If acquisition on reasonable terms through negotiation was not possible, the LDA needed to consider compulsory acquisition. A response was sought in seven days. This was both clear and eminently reasonable; in no way could it be described as "foggy".

98. On 10 April 2015, Mr Blue (a pseudonym) of Aulich Civil Law responded to the ACTGS letter of 2 April. He advised that he acted for DBH and Mr Pink (a pseudonym) of Kamy Saeedi Lawyers acted for LBGBH. DBH did not wish to relocate its interest "and therefore considers financial compensation the appropriate course". Mr Pink would contact the ACTGS separately concerning his client's interest, in particular, as to the documentation sought. LBGBH agreed to grant site access to any valuer on one day's notice, to be arranged through Mr Pink. The litigation then pending between DBH and

LBGBH had been adjourned to 12 May to enable the parties to focus attention on the proposed acquisition of the Crown Lease and business. Mr Blue would write separately about the valuation. Information was sought as to the Territory's position regarding the sublease. (There was a suggestion that the Territory might approve the sublease but it appears this was declined. In the result, this had no significance to the settlement.)

99. HTW provided a valuation as at 16 April 2015 of Block 16 Section 33 (of which the lessee was DBH but the business on it conducted by LBGBH as sub-lessee). On 21 April 2015 PwC provided a valuation of the MSBH business. The details of these valuations are set out below.

100. On 29 May 2015 Mr Green responded to a letter of Mr Gray dated 1 May to advise of MSBH instructions that it would provide the books and records sought and allow access to the premises provided that the LDA agreed that the legal fees so far incurred (set out in an annexure) were reasonable and would be paid together with "all other reasonable expenses" (as detailed in a further annexure) and draft, presumably valuation, reports were provided before a formal offer were made, failing which no further negotiations for a "pre-acquisition agreement" would be entered into and MSBH would await acquisition under the Lands Acquisition Act. As to the fees incurred ($17,600), no details of the actual work performed were provided, whilst the estimates of future expenses (totalling $25,100 for professional costs, $14,000 for disbursements such as accounting and valuations, and almost $5000 "loading for contingencies" plus GST, hence $55,763) were not sufficiently detailed to enable acceptance as such, though the order of expenditure could have been accepted as not unreasonable but requiring more detail in due course. It should be stated, at this point, that it was not reasonable to expect the LDA to agree to pay the claimed expenses without further information.

101. MMJ provided valuations of Block 13 Section 33 (MSBH) and Block 16 Section 33 (DBH) as at 29 May 2015. These are detailed below. The first Report noted –

> This assessment has been prepared on specific instructions … for Current Fair Market Value to assist the [LDA] in making a fair and just offer to the Lessee to acquire their interest and surrender of their Crown Lease.

102. On 9 June 2015 Mr Gray informed Mr Green that his correspondence, together with valuations that had been completed (without the requested books and records) would be submitted to the LDA board "this month" with recommendations as to an offer and a response would be provided in accordance with the Board's approval.

103. On 29 June 2015 Mr Xirakis provided a caveat brief to the Ministers for Planning and Urban Renewal, the CEO of the LDA and the Coordinator General, Urban Renewal as to the status of the negotiations with LBGBH. Mr Xirakis pointed out that, despite a failure to produce financial records as promised, "very approximate" valuations had been obtained, sufficient "to provide advice to the LDA on the next steps in negotiating with … [LBGBH], noting that DBH and LBGBH "had agreed to suspend their legal action to allow negotiations with the LDA to proceed".

104. It is convenient at this stage to dispose of the ultimately irrelevant, though potentially legally significant, complication that arose because of the separation by way of sublease between the property of DBH and that of LBGBH and the disagreement between the principals that needed to be negotiated. This ultimately faded away because the parties agreed, in effect, that they would act cooperatively, although this left their separate claims for compensation to be agreed. Even if (and this should be accepted as the case) the subletting of the lease by DBH was in breach of the Crown lease, that gave rise merely to a right to contractual relief and did not mean that LBGBH had no enforceable rights against DBH, merely that there were no rights enforceable against the Territory. The Committee's description of the sublease as "illegal" was misleading to the extent that it implied that it was contrary to law and, somehow, improper. Theoretically, the Territory may have had recourse against DBH for breaching the lease but it was not legally bound to take such action which, at all events, would be likely to have lacked any practical utility. It is unnecessary to delve further into the arcane realm of contract or property law. For all practical purposes, especially after DBH and LBGBH agreed to act together, the LDA needed to deal with the extant property rights, however they might have been divided up. This approach accorded with advice by the ACTGS and was plainly sensible. The notion adopted by the Committee that LBGBH's business did not attract compensation liability was mistaken. If LBGBH were not to be compensated for its business, DBH remained its beneficiary to the same extent. From the LDA's point of view, therefore, those with an interest had to be compensated for the

acquisition of what they had and there was no need to complicate an essentially commercial transaction with legal niceties rendered irrelevant in the result by settlement of the dispute between the brothers. At all events, as ACTGS advised, LBGBH did have an interest, if somewhat inchoate, that made it "just" to compensate them for expropriation and, by extension, appropriate to negotiate a commercial acquisition.

105. On 2 July Mr Xirakis wrote to MSBH concerning matters they had raised with Mr Gray of ACTGS, stating the material they had requested was being assembled and released to them as soon as possible. Noting that the LDA had obtained valuations of their Block, Mr Xirakis told MSBH that advice was being prepared for the LDA Board for its consideration "of the broader planning for the redevelopment of West Basin and [as] part of that process, the LDA is prepared to …[1] provide you with a copy of the valuations …; [2] assist you with the costs of obtaining your own valuation (should you require one); and [3] contribute to future reasonable legal and financial advisory costs in settling any agreement". Mr Xirakis advised that the ACT government had provided money to construct a park and two intersections at West Basin and on Commonwealth Avenue, representing the initiation of the first stage of the redevelopment of West Basin. He said that the LDA planned to submit an application for works approval to the National Capital Authority within the next fortnight and, subject to that approval, commence work following the conclusion of Floriade 2015. He pointed out that the boundaries for that work would "stop well short of your property and the work [would] be staged in such a way as to, as much as possible, minimise impacts". He undertook to keep MSBH "fully informed through that process and would be happy to arrange a briefing at your convenience". Mr Xirakis expressed surprise that, as Mr Gray had understood from the conversation, MSBH were advised that relocation was no longer an option being considered by the LDA, pointing out that relocation was most recently offered as a viable option in the letter from Mr Gray to Mr Green (MSBH's lawyer) on 2 April 2015. Mr Xirakis confirmed LDA's willingness to assist in relocation, noting that such a transition would not be without challenges. He sought an opportunity for an open discussion about MSBH's requirements and to understand the factors that may need to be taken into account, such discussion not needing a commitment to any future action on MSBH's part. Lastly, Mr Xirakis indicated that, if MSBH preferred simply to discontinue negotiations, that would be respected.

106. On 6 July MSBH responded to Mr Xirakis' letter by email to Mr Dawes (following a discussion with the latter) in terms of surprising asperity. They expressed disappointment with what they called the "[lack] of specifics". They pointed to the assistance with the costs of obtaining a valuation and the contribution to future reasonable legal costs, both of which, they said, "were open to interpretation" and said they could not make "any decisions for our business when communication from the LDA is full of subjective language and as such remains ambiguous". It should have been obvious to any person with reasonable business or commercial experience that the offers could not, in the nature of things, be made more specific at that stage, since the amounts that would be sought were then unknown and proffering a blank cheque was plainly inappropriate. They said that the legal costs already paid to Mr Green had been advised and they were waiting for a response. As outlined above, the costs information was at a level of uncertain prediction which could not reasonably have been thought capable of acceptance, except perhaps in principle as to its elements. It is difficult to accept that this was not clearly understood but, for present purposes, it is not necessary to enter into subjective issues. Objectively, the situation is clear enough. MSBH asserted (correctly) that there had been a number of meetings with LDA officials "with no progress towards a resolution". Essentially, those meetings had involved a general description of the Project and the alternative possibilities for relinquishment of the MSBH site, which was necessary to enable it to proceed. Given that (not unreasonably) MSBH had not been prepared to make (or, at least, convey) a decision on the alternatives, it is scarcely surprising that matters were left in a state of flux. Although its general lines were clear, the precise character of the Project and timetable were also somewhat uncertain and, as MSBH knew, subject to approval by the National Capital Authority (not expected until March and May 2015). The fact is that it must have been clear to MSBH that the possible outcomes were relocation or acquisition (by commercial negotiation or compulsorily). As to relocation, as already mentioned, the calculations for the proposed settlement proposed in 19 February 2015 assumed that no alternative location was available. The need for valuations was also noted. The offer that was made in Mr Xirakis' letter was clear enough at that stage, when MSBH had not been prepared to give any indication of what they wished to do. The available information about what had been conveyed at the meetings with LDA has been set out above. Since any compensation (whether for purchase or relocation) obviously necessitated a

valuation, provision of the financials was essential but this was denied – as well as access to the site – for reasons that could not objectively be understood as businesslike, as distinct from being actuated by other motives apparently seen to be advantageous. Further meetings were described as "unwise". A written response was sought by 3 August, failing which the issue would be brought to the Legislative Assembly.

107. On 22 July, LBGBH provided tax returns (but not assessments until 30 July) to support their claim for business earnings.

108. On 29 July 2015, PwC provided advice to the LDA concerning the valuation advice letter of 13 December 2014 from Mr Orange on behalf of LBGBH. (This has already been referred to above.) PwC also provided what was described as a "high level view on value".

109. On 29 July 2015 Mr Xirakis minuted Mr Dawes on the values attributable to LBGBH in advance of a proposed meeting on 30 July. As at that time, the valuers had been asked and had provided additional advice that took into account additional financial information. As will be detailed in due course, this was heavily qualified indicative advice from MMJ at $278,750, HTW at $320,000 and PwC at $270,000, including $170,000 for assets (all GST exclusive). Mr Xirakis reported that the "most optimistic value attributed to LBGBH (not including assets) is $320,000". (This is somewhat confusing, as this valuation did include $50,000 for "improvements"). On 30 July 2015 (as appears from a caveat brief to the Minister) Mr Dawes made an offer, implicitly, orally, to LBGBH of $500,000 to acquire their interest. (How this was calculated does not appear in the brief or other documents and does not appear to have been justified on the basis of the information supplied the previous day by Mr Xirakis. It is possible that Mr Dawes took Mr Xirakis' minute to mean that the HTW figure of $320,00 could be added to the $170,000 nominated by PwC for assets, but this is speculative – as, patently, it ought not to have been). Mr Black (one of the principals of LBGBH) spoke to Mr Dawes expressing his unhappiness with the LDA taking away his income and his lifestyle. Mr Dawes encouraged him to seek further accounting and legal advice and then meet again.

110. On 3 August 2015 Mr Orange provided advice to LBGBH on what he described as the

"LDA's offer" of $500,000 which, it seems, had been accompanied by the valuation reports which had been obtained. The communication containing this offer has not been provided (but it is likely to have been oral, as explained above) but, for present purposes, this does not matter. More problematic is the non-production by the LDA of any documentation that explains how this offer was calculated, although this does not necessarily mean that there was no record made. Mr Orange made a number of critical comments about the offer to the effect that the reports did not "suggest what is a fair value of compensation for the resumption process to take effect" and the offer did "not indicate what rationale had been employed in support of the amount of $500,000". Other criticisms (unjustified, in a valuation sense) were made which it is not necessary to set out, to the effect that the offer was inadequate and LBGBH should accept a figure between $805,000 and $1.163 million. Since these figures represented a total of earnings respectively for 9 and 13 years, without any discount to align with present value, they provided no sensible basis for negotiation.

111. Reference was made above to the discussion between MSBH and Mr Dawes on 6 July. In a caveat brief to the Minister on 7 August, Mr Dawes said that MSBH had agreed to meet that month following their return from leave and he had asked for the necessary valuations and advice to be prepared to enable him to discuss a possible offer of compensation and relocation, in respect of which one site had been identified as possible. The preference remained to negotiate a strategic acquisition of MSBH and the Crown lease, or relocation (with an element of compensation). Mr Dawes added that the process needed to "align with the policy, risk and value for money principles set out in the Planning and Development Land Acquisition Policy Framework … [which was] considered a less prescriptive process than compulsory acquisition". Mr Dawes added that, on 30 July 2015 he had made an offer of $500,000 to LBGBH which was being considered by them and DBH was then considering an offer to relocate which, if accepted, would mean that some compensation for business operation and a long-term tenancy arrangement entered into "in keeping with a vision for the waterfront".

112. On 14 August 2015 Mr Dawes, referring to his then understanding that MSBH did not wish to sell and wished to continue operating the business, wrote to MSBH to provide them with the valuations that had been obtained of the leased property and the

business and advise that, in light of their preference to remain in the present location, the LDA had "developed a solution that can work around your lease and business and, consequently, it was not necessary to pursue acquisition. He added that the LDA would pay the reasonable professional fees incurred to date and "will continue to work with you to attempt to limit the disruption of your business during the … development [though] a level of noise and other disruption will be unavoidable."

113. MSBH told the Auditor-General that "they were upset at the inference that their preference was to remain in the current location" and asserted "that they had never expressed a preference to remain at the location, but rather that they wished to withdraw from negotiations that were proving unfruitful and could no longer afford to keep going, mentally or financially". Objectively, however – as the preceding chronology shows – there was a reasonable basis for Mr Dawes' understanding of MSBH's position as it then was.

114. Mr Ben Parsons came to represent MSBH in negotiations with LDA following an interview in mid-August 2015 on ABC radio, which involved Mr Dawes and Ms Edwards. His (worthy) reasons for doing so are immaterial. The fact is that MSBH obtained his assistance and his intervention, in effect, became a circuit breaker that enabled the transaction – which had stalled – to move forward and ultimately reach settlement. Mr Parsons had extensive legal and business experience and was well qualified to undertake this work. His agreement with MSBH was that he would act for them without expense to them but, should LDA (as, it seemed very likely) pay him a fee, that would suffice. As it happened, Mr Parsons had previously met Mr Dawes in a personal capacity when he had some discussions with him about the sale of the latter's house (which did not go ahead). Mr Parsons started his involvement by going through the correspondence up to that time. He explained –

> I could see that they were often at cross-purposes. I also knew that a valuation of the business had been conducted on financials for the three preceding years from 2009 [a mistake of recollection: they only covered two years] which undervalued the business because it had grown significantly since then. The lawyer who was advising Mr Spokes had been setting up, on instructions, conditions for the release of the more recent financials. The LDA had indicated that the conditions which had been imposed on the release of those more recent financial statements were unacceptable to the LDA.
>
> I could see that it was in the interests of the proprietors of Mr Spokes to release their more recent three years financial trading. It would give a larger valuation figure and a valuation figure that was more representative of the value of the business. My opening proposition to

> the proprietors of Mr Spokes was that the best way to conduct this was to be open and cooperative with the LDA, to seek to work with them to get a valuation of the business, which would underpin any payment. I had indicated to them that, as an organisation spending government money, they needed to do things according to a process and that we needed to engage in that process to allow the optimum outcome.

115. Whether MSBH had previously been given this common-sense advice it is not possible to say. Certainly, their conduct had not reflected it, but it appears they were prepared to act on it from this point.

116. On 4 September 2015 a further valuation advice was obtained from PwC in respect of MSBH.

117. In the meantime (as noted in a minute of 9 November 2015 from Mr Holt, then Acting Director, City to the Lake, to Mr Dawes) on 31 August 2015, Mr Dawes had negotiated the purchase of LBGBH for $575,000 (ex GST) plus legal expenses and unpaid rent, with contracts exchanged on 28 October and settlement expected on 25 November 2015. Amongst other things, this demonstrates communication (direct or indirect) about the matter between Mr Dawes and Mr Holt, although this has not been provided, for reasons that do not warrant present inquiry.

118. Mr Black gave evidence to the Committee about his negotiations with the LDA in respect of the sale of LBGBH's business. His first complaint was that LDA told him his business was worthless because he did not have a valid lease, although he agreed that, in later discussions, it was accepted that he was entitled to compensation for the acquisition of the business. It does appear that, at the beginning of the process, Mr Xirakis indeed had the view that LBGBH had no (or very little) continuing value because of the highly doubtful legal right to future occupation of the site and the conflict with his brother, the legal owner of the Crown lease. It was quite reasonable for Mr Xirakis (or other relevant officials) to bring this important factor to Mr Black' attention at the outset. However – as Mr Black himself acknowledged – this position changed with the involvement of the ACTGS and, although it obviously continued to irritate, it became irrelevant as the process developed, particularly once he and his brother reached at least a commercial reconciliation.

119. Mr Black' continuing complaint was that LDA did not accept his approach to the issue

of compensation, which he described as follows –

> Well, I wanted loss of income. I was not young anymore; I was getting on a bit—60 years old—and I thought, "Well, they're taking eight or nine years of the lease off me." I wanted the income from that eight or nine years that I would have had the business for. That is what I valued it at … as well as the stock … [The loss of income] … was about $800,000 or $900,000.

The flaw in this mode of calculation has already been explained, but its superficial plausibility seems to have been sincerely believed and, it may be accepted, the refusal to pay it left Mr Black with a genuine sense of grievance, though this cannot fairly be placed at LDA's door. In considering the value of the LBGBH business, however, it was not reasonable for the Committee to have regarded it as significantly lessened because, at the time of the negotiations, it was being run on a very reduced basis. Mr Black explained that he was ill and required to spend long periods in Sydney caring for his ill wife and that his son could only help on weekends in his absence, which significantly affected cashflow. Perhaps the most significant aspect of value is, of course, the *potential* to produce income.

120. One of the interesting revelations of Mr Black' evidence (and a commentary on how small Canberra is) is that he (and, it follows, though this was not mentioned, his brother Pat, one of the principals of DBH) was in the same class at school with Mr Dawes –

> "So, we had known each other for forever. Yes, everything was quite civil. He was very cunning, though, did everything. But, yes, there was no roaring; everything was quite amicable …"

(Mr Dawes told the Committee that he had been classmates with Mr Pat Seears in 1966, and a sponsor of the MBA when Mr Dawes was executive director, but he did not regard this as giving rise to a conflict of interest.) Mr Black gave a somewhat confused account of his negotiation with LDA and Mr Dawes which, he said, occurred between Mr Dawes and him alone. He did not think his acquaintance with Mr Dawes was advantageous, Mr Black evidently being of the view that his claims were not fairly weighed and the compensation inadequate, saying Mr Dawes had attempted to "trick" him. He complained about being allowed only $10,000 for his solicitor and accountant's fees. He said that Mr Dawes had told him that, if the fees were more, they would be paid but, "When I asked him for it, he said, 'No, that's it. That's what you signed up for'", which suggests that the request was made after finalisation of the transaction. The Committee asked for Mr Black' documents, but he told them, "It was an extremely stressful part of my life and I burnt

most of everything. Every bit of communications I had with the LDA and everybody else involved, I burnt everything".

121. (It is noted, by way of completeness, that it was certainly not good – let alone, best – practice for Mr Dawes to have conducted any negotiations with an interested party without another official present, quite apart from the problems arising from doing so with an acquaintance from school days. For reasons that do not call for present discussion, such an acquaintance does not, of itself, give rise to a conflict of interest but the probity of negotiations involving officials that concerning conflicting commercial or financial interests requires precautions to be taken against the risks of misapprehension or allegations of unethical conduct. However, Mr Black' evidence on this point was not tested. Mr Dawes' recollection was to the effect that he spoke to DBH (Mr Patrick Seears) alone but that Mr Gray was present at his meetings with Mr Black (LBGBH). It is not necessary to take this matter any further for present purposes.)

122. Mr Patrick Seears also gave evidence to the Committee. He said that he had known Mr Dawes for a long time and summed his role in acquiring the West Basin properties as "[making way] for the development of the best parcel of land in this Territory" though he asked "why they gave me such a pittance for my prime piece of property." In substance, he said he left the negotiations to his professional advisers though he spoke to Mr Dawes once and went twice to meetings with his advisers and officials. He said he did not take it seriously, which – in light of the history summarised above – seems a candid admission.

123. Overall, the available written record of the negotiations with LBGBH presents a very different picture to that presented by Mr Black. His evidence, however, appears to have been accepted at face value. It is not necessary for present purposes to analyse it, but it is clear that this was (for understandable reasons) a highly charged situation for him in a personal sense, and it was very difficult for him to deal with what had happened with any degree of objectivity. Absent any testing, his account does not provide a sufficient basis for drawing any adverse conclusions about the conduct of the relevant officials.

124. On 9 September 2015, Mr Xirakis' contract was terminated. The reasons were the subject of evidence but remain somewhat obscure. It seems that his approach to

negotiations was not appreciated by some of the parties who (as the above account shows) were not altogether reasonable themselves but the extent to which this was relevant is difficult to assess. Mr Dawes told the Committee he found reporting requirements were not being adequately satisfied but confined himself to generalities and the issue was not taken any further. Mr Xirakis himself said that his was always intended to be an interim involvement and he did not expect to remain until completion of the acquisitions. (This is mentioned merely as a matter of the chronology of events.) Following Mr Xirakis' departure, the management of the negotiations with the West Basin owners was taken over by Mr Dawes, assisted by a new deputy director-general and deputy CEO, Mr Ponton, as Mr Stewart had also moved on by that time.

125. Following the publicity about the negotiations for the West Basin properties, Mr Parsons contacted MSBH. Mr Dawes thought he had met with Mr Parsons not more than two or three times.

126. MMJ provided a further report of the current market value of Block 13 Section 33 (MSBH) on 29 September 2015, as did HTW on 30 September 2015.

127. On 14 October 2015, Mr Holt briefed Mr Dawes on the position as it then stood with the acquisition of DBH, in anticipation of a meeting with Mr Black. DBH's offer to sell for $2.65 million (ex GST) was contrasted with the current valuations from HTW ($50,000) and MMJ ($100,000). Mr Black' interest in acquiring a lease in a new building on the waterfront was mentioned but effectively dismissed as not viable. The need to apply the principles in the Framework were mentioned, together with consulting the Board prior to finalising any agreement for sale.

128. On 21 October 2015, PwC provided a further amended report of the "fair market value" of the MSBH business.

129. On 23 October, Mr Parsons wrote a comprehensive email dealing with the valuations of MSBH, with which he had been provided. He suggested that an increased allowance could be made for income on the basis that, as with many small cash-based businesses, not all income is reflected in the accounts, proposing an adjustment of 15% to this item. Also, the potential for a café, as permitted by the lease, should be accounted for,

accepting that it was not presently operating but had been in previous years (before it stopped because one of the owners needed to care for their sick mother), returning revenue in excess of $90,000 pa. He also proposed an increase of the earnings multiple to 5, from PwC's 3-5-4.5, MMJ's 3.5 and HTW's 3.25, to reflect "a strong and growing business". For technical reasons, he explained that the earnings multiple should be applied to EBITDA (as done by HTW); furthermore, MMJ (unlike PwC or HTW) did not add back interest and also increased the allowance for wages, despite being informed that the wages actually paid were market wages. He also proposed increasing "the land value component" (sic) by using the highest replacement cost ($325k in HTW valuation of 30.9.2015) and the lowest depreciation rate (25% in MMJ valuation of 29.5.2015). Mr Parsons also relied on s 45 of the Acquisition Act to support a claim for "disturbance", contending that the owners' skills at running the business are "peculiar" to the bike hire business which could not "operate in … many other locations", this being further limited by the need for flat level areas for the pedal cars. The owners were at an age that made it difficult to find alternative employment and likely to take two years, at a loss of wages and profits of $100,000 pa each, together with the costs of reskilling. (Though not conventional, these considerations could well have been relevant to the question of "just terms" if compulsory acquisition became a live issue. For obvious reasons, they would not be included in any estimate of market value and were, at all events, outside the relevant expertise of the valuers.)

130. On 3 November 2015 Mr Holt and Mr Purple met with the valuers from PwC, HTW and MMJ in connexion with the MSBH valuations to discuss the issues of loss and disturbance, the suggestion that an allowance of 15% be made for unaccounted cash receipts, the potential for the kiosk generating profits of $50,000 pa and the possibility that a reasonable multiplier should be 4.5-5.0. The consensus responses were that loss and disturbance (rightly) were not relevant to value, though it was a consideration under the Acquisition Act, which had not been triggered (Mr Heaton for MMJ agreed to explore further aspects relevant to compulsory purchase but did not ultimately provide any additional information), undeclared cash takings could not be taken into account, both from the perspectives of being undeclared and the associated taxation implications, the kiosk was not believed to be a profitable exercise because, if it were, it would be operating (however, this was, for obvious reasons, a *non sequitur* for a small family business, where the owner had explained the problems) and therefore able to

contribute value and, finally, it was agreed that 3.5-4.0 was a realistic multiplier and 5.0 could not be justified. These were reasonable and justifiable responses, except for the *non sequitur*, which justified reconsideration. Mr Holt concluded his report of this meeting to Mr Dawes with the statement that the "valuers felt that they had interpreted the LDA's instructions to date and had sought to attribute the highest/fairest possible defensible value to the differing elements of Mr Spokes … [including] inventory, improvements and any component for the land". The Auditor-General categorised the purpose of this meeting as seeking "advice on whether there was any possibility for increasing the valuations". Given that the purpose was to obtain advice on Mr Parsons' proposals, which were aimed at seeking a larger offer, this was not an altogether unreasonable description of it, but it was coloured rather than objective and unfairly did not note that the approach was actually required to enable the offer to be evaluated – and it led to unjustified criticism by the Committee. No question of probity arises.

131. On 12 November 2015 Mr Dawes informed Mr Parsons that the valuers "had difficulties in reviewing their valuations ... [and were] all very comfortable with the advice that they … provided. Mr Dawes said he had "asked for additional information and should have that next week", pointing out (rightly) that "it is public money and I need to be able to justify any purchases". At that stage the LDA's valuations stood at between at between $640,000 and $720,000 (GST ex, including goodwill, inventory and improvements). In the result, on 30 November an offer to sell MSBH's interests for $1.1 million plus GST plus costs was verbally agreed between Mr Dawes and Mr Parsons and ultimately settled on 1 February 2016. The Land Development Agency Board was advised of the acquisition on 25 February 2016. Mr Dawes informed the Valuer General that oral updates had been provided to Land Development Agency Board on the proposed acquisition.

132. An additional criticism of the Committee about the negotiations with MSBH (noted at the outset above) was –

> Without question this was an asymmetrical transaction, in which the resources of the lease-holders could not possibly match those available to the ACT government. The decision by the leaseholders to cease their legal representation due to mounting costs is a concrete indicator of differences in resources between the parties, and of the implications of the LDA's approach.

It is difficult to understand the basis for this conclusion. At all relevant times, the LDA

made it clear that government would pay the costs of professional advice and assistance incurred by virtue of the proposed transaction. The amounts sought, however, were in the form of ambit claims, without adequate particulars that would have enabled proper assessment. Providing such particulars, including those of expected future costs on an adequate basis is an everyday task for competent lawyers, not to speak of accountants or valuers, but, regrettably, this was never done. Furthermore, it was at least likely that, had a proper case been made for some amount to be paid in advance, this would have been favourably considered. There was, having regard to this factor alone, no relevant imbalance or asymmetry in a practical sense. In a more general sense, also, the imbalance was by no means as great as that described by the Committee. Acquisition of the land was essential to a massive government development scheme. The only legal tool available, should the owners decline to sell, was the compulsory process mandated by the Acquisition Act. The risks, as well as the costs, of litigating were substantial, not to speak of the potential for delay. In reality, the owners had a strong hand, which would objectively have been fairly obvious and explains a great deal about the course of the negotiations.

133. The Committee also commented that, whilst Mr Parsons' involvement on behalf of MSBH "brought negotiations to a conclusion … [this] would not have been necessary if the conduct of the LDA, as an ACT government agency, had been consistent with accepted principles of due process". Departure from the accepted principles of due process might, in some circumstances, at least raise the reasonable suspicion of corrupt conduct. However, in this instance there was no evidence that suggested such a departure in connexion with the negotiations. Mr Parsons' involvement significantly changed *MSBH's approach* to the negotiations; it did *not* affect that of the LDA except in the sense that it permitted Mr Dawes to respond to sensible proposals.

134. As mentioned below, Mr Purple had obtained a valuation of Block 16 Section 33 from Colliers for the purpose of "making a fair and just offer to the Crown lessee" (DBH). This was provided on 30 November 2015. In this report, Colliers brought the attention of LDA to the following –

> In addition to the unimproved market value of the Crown lease, the property is being essentially compulsorily acquired from the lessee to allow future redevelopment of the West Basin.
>
> In other jurisdictions, heads of compensation for compulsory acquisition would take into

> account future losses, injurious affection and solatium. Due to confidentiality most of the details of these examples cannot be set out in this advice. As this is not a residential property solatium would not be considered [this is actually mistaken but it seems all the valuers proceeded on this assumption] but … future losses, and injurious affection would be taken into account in arriving at a premium.
>
> Whilst the purchase of this property is not being processed as compulsory acquisition, it is not unreasonable to pay a premium over its straight real estate value for the above heads of compensation of up to $500,000.

(The "real estate value" should be understood as the value of the asset or interest being compulsorily acquired.)

135. Mr Powderly, the State Chief Executive ACT of Colliers, in his evidence to the Committee, in substance, characterised this premium as involving an allowance for the potential costs of litigation and, more significantly, the economic consequences of delay in undertaking major public infrastructure. This information obviously applied to all the compensation claims arising out of the Project and was not confined to the DBH transaction. It is important not to conflate the important distinction between, on the one hand, the amount that might be expected to be ordered by a Court determining just compensation for a compulsory acquisition, which would not make allowance for the broader economic cost of delay and, on the other hand, the additional amount that it would be reasonable to pay to avoid that cost arising from the delays of that litigation, reflecting the notion of "value for money" derived from the Procurement Act as "the best available procurement outcome". It is plainly relevant and, on the face of it, reasonable to evaluate the price to be offered in negotiations of the kind being undertaken here in light of this consideration. Neither the Auditor-General nor the Committee referred to this factor.

136. On 20 November 2015 a minute from Mr Holt to Mr Dawes noted that a meeting was soon to take place by Mr Dawes with Mr Parsons to negotiate a settlement of the acquisition of MSBH and pointing out that the purchase "will need to be undertaken in the context of the [Framework]".

137. Capital Valuers provided to the Auditor-General a review of the valuations of Block 13 Section 33 Acton (MSBH) comprising those of the real estate and business prepared by MMJ as at 29 September 2015 (real estate at $119,000, business at $421,500 and business assets at $106,500, totalling $647,000) and HTW as at 30 September 2015 (real

estate at $160,000, business at $520,000, totalling $680,000) and PwC dated 21 October 2015 of the business at $532,000). Following an analysis of these valuations, which identified a number of matters with which issue was taken, but did not much affect the outcome, the review concluded –

> Note that the MMJ and HTW valuations for the real estate have the greatest variance. … [It appears that the MMJ assessment of the real estate at $119,000 is lower than I might adopt by about $20,000.
>
> The principal variation is in the PwC business assessment. However, that report is more detailed in approach and a result I agree with.

138. The Capital Valuers' review is part of the relevant material but does not, of itself, raise issues requiring discussion. In respect of the Colliers' valuation of DBH – detailed below – several different criticisms were made but are not presently significant: they represent the differences between experts that are common in these cases. Mr Dawes was not conducting a trial involving values but gathering information for the purposes of a negotiation and was entitled to take a general view without descending to close analysis. Both the Auditor-General and the Committee accepted the views expressed by Capital Valuers but did not explain why they did so. In respect of the additional matter quoted above, Capital Valuers commented –

> This is advice for which there is no underpinning calculations or methodology. There is no further explanation as to how this figure was derived or calculated.

The Capital Valuers report concluded –

> The Colliers' report does not stand on its own and cannot be relied upon without further review of a number of anomalies in the report. The final ascribed value lacks evidence and methodology and has not been justified.

As to the "anomalies", as mentioned above, this is (with one exception, involving an apparent typographical error, discussed below) a contested opinion which does not give rise to any presently relevant issue. The final sentence in the first set out passage is accurate, so far as it goes, but it does not follow that the opinion was therefore not to be relied on. It was clearly based on experience in the field by a reputable and qualified expert and, in its terms, appeared to be reasonable. The lack of data is not surprising: the matters referred to were inherently incapable of numerical analysis; an empirical report is all that could be provided; and an overall indication all that reasonably could be sought. It is obvious that both solatium (as explained above) and litigation expenses are case specific and, in principle, cannot be subjected to useful statistical analysis. The mere collection of particular examples, given the inherent

incommensurability of the inputs could not be usefully informative. The wider context explained by Mr Powderly referencing the significance and potential economic cost of litigation and its delays for a project such as that here, for which the acquisition of the property was necessary, could not be a matter of calculation but, rather, of judgment. The basis for Colliers' opinion and that of Mr Powderly (which is expressed somewhat differently from that in the Colliers' report) was commercial experience. It was designed to give Mr Dawes an understanding of relevant considerations to which (rightly, as being outside their briefs) no other valuer had referred. The failure to mention, let alone analyse, this vital consideration significantly qualifies the utility of Capital Valuers' advice. Accordingly, their criticisms did not provide an adequate basis for the conclusion that the Colliers' opinion should have been disregarded, either by Mr Dawes in the first place or by the former Auditor-General and the Committee later in the day.

139. Mr Dawes was questioned by the Auditor-General about his reasons for agreeing to compensation that significantly exceeded the market values advised by the valuers. He mentioned the additional relevant factors and stated that he came to a "commercial" decision. What precisely he meant by this was not explored but, on its face, it appears to reflect the definition of "value for money" in the Procurement Act as being "the best available procurement outcome". It was undoubtedly a serious failure of the probity of the process that there appears to be no documentation of the reasoning behind the amounts ultimately offered to the West basin owners – here the sums paid to DBH and MSBH. Nevertheless, Mr Dawes would have been well justified in taking into account the information from Colliers (as expanded by Mr Powderly) in arriving at his offer. The sequence of events and the history and context of the transactions provide strong objective support for the conclusion that value for money was indeed achieved. No question of corrupt conduct arises.

140. It is mentioned, for completeness, that MSBH, in their response to the proposed Report of the Auditor-General, made a number of criticisms of the process but at a level of generality which defeats useful analysis. For present purposes it is sufficient to say that the objective record does not support them and, at all events, they do not suggest any corrupt conduct.

141. HTW's valuation as at 5 March 2015 in respect of Block 13 Section 33 Acton, occupied by MSBH, was $160,000 for current market value of improvements (depreciated by 50%) and $450,000 as compensation for "business operations". The inspection took place on 18 April 2015 but only externally, as "access was denied". The existing use was considered to be consistent with the highest and best use. The valuation method of the land and improvements was described as "Cost Approach (Depreciated Replacement Cost). Referring to terms of the Crown Lease that required payment to the Lessee, on surrender, "the value of the building or other improvement … constructed on the land", the valuer noted that, "from the assessed replacement cost (based on Rawlinson's Cost Guide) we have deducted an allowance for the physical and functional (or economic) obsolescence of the improvements …". The valuer added –

> The value of the land would normally be assessed from sales of comparable zoned land. However, in this instance there is no value applied as the land on which the improvements are situated remains in ownership of the Territory. It does not appear from our research that the lessee enjoys a profit rent – the passing rent appears to reflect market rental value of the land.

142. So far as the business operations were concerned, the valuer noted that, if the property were to be acquired under the Acquisition Act, the heads of claim which it would then be appropriate to consider included market value, special value incidental to the ownership, severance, injurious affection/enhancement and disturbance or consequential loss. Of these, the first was relevant to the land and improvements, the second to the value of the business and the last and last covered the cost of obtaining professional advice (which should be obtained from the lessee at first instance). As to special value, the valuer said –

> The lessees operate what we understand is a viable business which in 2008/09 indicated a Net Operating profit after interest and depreciation of $74,000 – to show the true operating profit we need to add back interest on borrowings of $36,000 and depreciation of $43,000, giving an income of circa hundred and $50,000 – based on 2008/09 Financial Statements. The business we believe would sell on a circa three years purchase – approximately 30% for the residue term of the lease, namely 12 years. The suggested value for the business then is $450,000 based on six-year-old figures.

143. HTW provided a valuation as at 16 April 2015 of Block 16 Section 33 (of which the lessee was DBH but the business on it conducted by occupied by LBGBH as sub-lessee). The statutory land value as at 1 January 2014 was $68,000. The land was used as a "kiosk", which was a permitted use under the current planning guidelines, the business on it within the sole use specified in the Crown lease of boat cruises and hiring and storing boats. The lease was a "rental lease" at a rent of $13,000 pa, expiring on 25 August 2028. The value of the tenant improvements "as is" was $50,000 and the business was $270,000. The current use was regarded as consistent with the highest and best use of the land. The valuation method applied was the Cost Approach (Depreciated Replacement Cost) for lessee improvements and an estimate of the operating profit for the business. The valuation referred to the relevant elements to be considered were the property to be acquired under the Acquisition Act. In respect of market value, the valuer noted that, although the improvements were owned by the Crown Lessor, the lessee had erected partitioning and other improvements which, although now relatively old "provide a needed utility" and valued these improvements at $50,000. No value was ascribed to stop all movable items, including the boats. As to special value, trading figures were not provided but the claim for compensation indicated an "annual net return" for the business of $97,500. This figure could be neither confirmed or disputed. The valuer added in this regard –

> To try and justify the figure we suggest that the "peak season" would last circa eight weeks, "mid-season" allow four weeks to include Easter and school holidays other than December/January and "off-season" the remaining weeks – 40 weeks. If a net profit of $5000 is achieved "peak season" the "mid-season" profit is say 50% of peak and "off-season" 20% off peak we can arrive at a turnover close to the suggested figure – circa $90,000 … Furthermore, we are advised that the business in reality closes for the winter months.
>
> Without any supporting evidence, the operational profit of $97,500 does not appear unreasonable but we propose adopting the figure as discussed above of $90,000 for the potential business net income.
>
> This income may be sustained for 13 years until lease termination. If the business was put on the market with a known lease termination date of 2028 we would anticipate that a purchaser would require a return of a minimum of 20% (reflecting the high risk and lack of trading figures). Thus we are looking at the Present Value of the right to receive $90,000 based on a term of 13 years at 30% – circa three years purchase, equating to a value of $270,000. However, it should be noted that the operation of the business is across both Blocks 16 – subject to this opinion of value – and Block 15. We suggest that as the primary arrival point is on Block 16 we have thus ascribed the full value of the business to Block 16.

> The business is seasonal we understand although probably with the current greater interest in water activities such as canoeing and kayaking it might be possible to extend the use beyond the paddle boats and casual recreational kayaks and have close to a year-round operation. If the kiosk was upgraded again added opportunity could be realised.
>
> With the limited details of the current financial returns from the current operation we ascribe a value of $270,000 to the business operations. It is noted that the purchase price for the business … [as claimed] is stated as $230,000 as at 1997 … [with the present amount at] $356,000.

144. Neither severance nor injurious/affection were relevant. With respect to disturbance, it was accepted that the lessees would have costs associated with professional advice, which information should be obtained from them in the first place.

145. On 21 April 2015 PwC provided a valuation of Block 13 Section 33 Acton subleased by MSBH for the purpose of determining compensation on the termination of the sublease by the Territory. PwC commenced by pointing out that the only information available for the purpose of preparing the valuation were the financial statements (of the operating Trust) for the year ended (unusually) 31 March 2009, which included comparative figures for the year ended 31 March 2008. A formal valuation required far more financial information and access to the working proprietors which was understood not to be possible in this case. Accordingly, PwC was "unable to provide a formal opinion of value".

146. To assist with the assessment of the "likely quantum of compensation", PwC provided some "high level comments and illustration". The business assets (and book value) identified in the financial statements comprised leasehold land ($110,000), plant and equipment ($60,582) and goodwill ($375,553). The book values of these assets provided "a possible proxy for the value of the business as at 31 March 2009, assuming that the value recorded for goodwill reflected the amount that was actually paid in an "arms-length" transaction and the profitability of the business in 2009 was similar to that being generated when the business was purchased, which appears to have been 2007 based on an analysis of accumulated depreciation. For the year ended 30 June 2008, EBITDA was $110,683 and, for the year ended 30 June 2009, $153,204. After deducting depreciation, EBIT was, respectively, $87,133 and $110,136. PwC noted that, in respect of the identified "wages", whether this included appropriate market based payments to the working proprietors for their inputs was unknown. Given full distribution of the profits to the beneficiaries of the operating trust it was considered "quite possible that

no remuneration for the working proprietors is included" and, accordingly, the reported earnings could be overstated. However, it was assumed for the purposes of an illustration about profits, the wages reported covered all employee costs, including a fair market salary for the inputs provided by the working proprietors. Noting that EBIT grew from $87k in 2008 to $110k in 2009, primarily as a result of increased sales, if EBIT remained at a similar level since, the value of the business as at 31 March 2009 could be estimated by applying EBIT multiples to 2009 EBIT. In the opinion of PwC, a business like MSBH would be "likely to trade in a range of, say, 2-5 times", suggesting enterprise values ranging between $220k and $551k but pointing out that the latter value would need to be supported by strong growth prospects. PwC noted that these values were "comparable with the 'total business assets' of $546k … [previously identified] in that they include all of the assets required to operate the business (for instance, all plant and equipment, the lease and goodwill (if any)).

147. PwC also noted "that the lease terminates on 31 December 2022, meaning there is currently less than seven years to run. When … [MSBH] purchased the business (which appears to be 2007) it paid $110k for the leasehold land and $376k for goodwill. Arguably the value of both assets diminishes as the lease term gets closer to the end." (Although this point is important, as a matter of principle, the termination date of the lease appears to be an error. The lease in fact commenced on 25 March 2002 with a term of 25 years, meaning that it comes to an end in 2027.)

148. PwC concluded –

> … [Our] analysis suggests the business is likely to have had a value in [the] range of $220k to $551k in 2009. The top end of this range is close to the book value of the business assets in 2009. As to the value of the current date, this will depend on the current and prospective profitability of the business but we note that, as described above, value is likely to reduces the end of the lease draws near.

149. MMJ provided a valuation of Block 13 Section 33 as at 29 May 2015. The report commences with a general description of land and title which it is not necessary to repeat here. In respect of the Crown Lease, MMJ observed –

> It is noted that there is circa 12 years remaining on the lease term. There is provision for a further term in the lease but there is no guarantee that it would be granted. In the marketplace that this is typical of these types of lease due to the limited term as a result of the underlying identification of a future planning purpose. For the purpose of this report we have considered it fair that the lease would cease at the end of the term.

150. It was noted that it was not possible to physically inspect the property as access to the site was not provided. Moreover, although (as mentioned above) the latest audited financial figures for the last three years were required to accurately assess business value, the profit and loss figures provided related only to the years ending 30 June 2008 and 30 June 2009 whilst the balance sheet as at 2009 provided no breakup or detail between property, plant and equipment (and was thus regarded as not suitable for the purpose of the report). MMJ considered "this information is not suitable to accurately assess the potential current fair market value of the business … [but for] the purpose of this exercise these figures have been employed as some basis but we accept no liability and reserve the right to review our estimated figure in the event the required information is provided. (It never was.) In respect of assets, no asset register was provided and, as mentioned, access to the premises did not permit viewing its assets.

151. A sample of ground rents was considered for the purpose of assessing market value of the land rental. It was noted that direct comparison was not possible although some indicative information was obtained. MMJ concluded –

> Taking into consideration the size, location, permissible use of the subject site we consider the passing rental of $10,580 per annum ($18.18 per square metre of site) to be a fair rent for the property. For the purpose of this report we have adopted it accordingly as part of the assumptions utilised in this report.

152. MMJ considered investment sales evidence, noting that the rental lease would have no value other than its association with the business value, since it required consent to transfer with no certainty at the end of the term that it would continue. Again, only limited comparative examples could be found but they provided a range of investment yields for retailing assets and were employed to make an assessment of a hypothetical yield for the property at 8.5% subject to a split of the lessor's and lessee's interest in the

site. As a concession lease, a potential purchaser would see no value in it except in respect of the business and associated assets directly relating to the business operations carried on at the site. In respect of the Crown interest, the yield approach (passing rents) resulted in a rounded adopted value of $126,000 (it is unnecessary for present purposes to set out the calculations). In respect of the lessee's interest, the figures were –

Current Passing Income		$10,850	
Add Recoverable Outgoings		$6403	
Potential Gross Income Fully Let		$17,253	
Less Vacancy Factor	0%	0	
Outgoings	$11 per m^2	$6403	
Fully Leased Net Passing Income		$10,950	
Capitalised (12 years)	8.25%	8.5%	8.75%
Capitalised value	$80,717.81	$79,689.84	$78,682.02
ROUNDED ADOPTED VALUE			**$80,000**

MMJ made the point that the adopted value of $80,000 was a hypothetical amount "if seen fit by the LDA to pay a compensatory amount for the early termination of the Crown Lease but it is not noted as a requirement under the Crown Lease … [and furthermore] it is deemed by the market that the Lessee does not have a saleable interest in the land apart from what is captured in their business value to operate from the site".

153. Having regard to the provision in the Crown lease for compensation where a building or other improvements had been constructed on the site by the lessee, an assessment of the value of the improvements was made although this was done without access to the building or a building survey. On the assumption that the building on the site was constructed at about the commencement of the Crown lease to the maximum GFA permitted by the lease and all improvements and appropriate consents, the indicative estimate was $140,000 depreciated by 25%, resulting in $105,000.

154. In respect of the estimate of business value, reference has already been made to the limited financial information made available by MSBH, which did not permit a reliable assessment but merely an indicative estimate. Without detail of the business model and required staffing, it had been assumed that the business could be operated by a

single person unsupervised. MMJ "prudently assessed a net profit of circa $30,270.14" without any warranty as to accuracy for the current business operations. It noted the "potential that there is limited or no value for the business in the current economic climate but for the purpose of this report in assessment of a fair value we have considered a multiplier of 2.5 times the net profit under the prevailing conditions of this report". This resulted in the sum of $75,000 plus GST plus stock. As to business assets, in the absence of an assets register or an opportunity to view the items that would be sold with the business, a "nominal" amount of $15,000 plus GST was allowed on "the assumption that there would be value for the bicycles, workshop tools/equipment and other related items for the assumed café".

155. In respect of an amount for disturbance, MMJ suggested that this information be obtained from the relevant professional sources (namely lawyers, accountants and, possibly, valuers).

156. The total indicative compensation was estimated by MMJ at $275,000 excluding GST.

157. MMJ also provided a valuation as at 29 May 2015 of Block 16 Section 33 (DBH). Although there was about 13 years remaining in the term of the lease with provision for extension, there was no guarantee it would be granted and the market would regard the term as limited as a result of the underlying identification of a future planning purpose. MMJ considered it fair, therefore, to proceed on the basis that the lease would cease at the end of its term. Again, the lessee's interest in the land was hypothetical only as, in the open market, no value would be attributed to the land. Current detailed financial figures for the business had not been provided although the lessee (not a current business operator, LBGBH) had provided estimated projections. Obviously, the lack of up-to-date information seriously hampered the accuracy of estimates depending on financial information. An asset register was also not provided, with no information about age or functionality of what was observed of the items on the side and no inventory of stock or assets. Although the sublessee had constructed awnings on the site, as there was no confirmation of appropriate approval, this had been disregarded. As at the date of the valuation the lessee had terminated the sublease.

158. As mentioned, the lessee provided a projected amount of $97,500 as an indication of the net profit of the business. This figure was provided as a single line with no information about how it was calculated. MMJ thought the number was high from its observations of the business but in the absence of any other information it was adopted as the fair depiction of the net profit. (For obvious reasons, this must be regarded as a given assumption rather than any true estimate.)

159. Although not provided with an assets register, MMJ was verbally given a list of items (boats, surf skis, refrigerators, etc) by LBGBH without any age, serviceability or other specific details. This permitted only an indicative estimate of value. LBGBH indicated verbally that the business assets were insured for $110,000 (assumed to be new replacement for old). The report lists values against the items, resulting in a total depreciated amount of $33,445, rounded to an adopted sum of $35,000 plus GST.

160. Some limited comparative market evidence was analysed to evaluate ground rentals, giving rise to a "passing rental" of $13,000 pa ($91.55 per m^2). Other comparisons were attempted – necessarily a limited sample – to estimate a hypothetical compensation amount for the lessee. There was no real market value under this head given the limitations to the lease. A yield of 8.5% was adopted, subject to a split between lessor and lessee. The lessor's interest had the adopted value of $150,000. The lessee's adopted value was calculated as follows –

Current Passing Income			$13,000
Add Recoverable Outgoings			$4,114
Estimated Gross Rental on Vacant Space			0
Potential Gross Income Fully Let			$17,114
Less Vacancy Factor	0%		0
			$17,114
Less Outgoings	$28.97 per m^2		$4,114
Fully Leased Net Passing Income			$13,000
Capitalised (12 years)	8.25%	8.5%	8.75%
Capitalised value	$101,351	$99,982	$98,642
ROUNDED ADOPTED VALUE			**$100,000**

161. Utilising the assumed annual net return figure of $97,500, for the purpose of assessing a fair value (although there was limited or no value for the business in the current economic climate), applying a multiplier of 2.5 times yields the (adopted) sum of $243,000 plus GST plus stock.

162. The total estimate of current fair market value to assist the LDA in making a fair and just offer to the lessee to acquire their interest and surrender of the Crown lease was $378,750.

163. On 29 July 2015, PwC provided advice to the LDA concerning the valuation advice letter of 13 December 2014 from Mr Orange on behalf of LBGBH. (This has already been referred to above.) Leaving aside the pointed criticisms of some aspects of Mr Orange's methodology, PwC provided what was described as a "high level view on value". This was based on the tax returns of the partnership for 2012 to 2014, although PwC commented that a reliable view on the value of the business required more information. Information from Mr Orange as to the working proprietors' labour input implied salaries for the two of them, at the Australian minimum wage rate, of at least $94k. Since earnings before proprietors' income, interest and tax were $89k in 2014, this implied that the business did not return enough to pay its working proprietors even a minimum wage for their inputs. PwC went on to state –

> If we were to derive the fair market value of the business adopting the capitalisation of earnings methodology, it is unlikely that the value would exceed the market value of the fixed assets. The 2014 tax return states the cost of the fixed assets on hand as at 31 March 2014 being $170k. We would suggest this amount would represent the upper boundary for what the market value of the fixed assets, and therefore the value of the business, might be. That aside, we observed transactions in the market whereby purchases of a business will pay goodwill despite the earnings being less than a fair working wage merely to secure a job or lifestyle. In this case a notional goodwill of say $100,000 may be appropriate.
>
> We would therefore suggest to the potential upper limit of the value of the business we $270k (reflecting the market value of fixed assets of no more than $170k) and notional goodwill of no more than $100k).

164. On 4 September 2015 a further valuation advice was obtained from PwC in respect of MSBH. On 6 October, the final valuation was provided.

165. Mr Kalenjuk described the work done by PwC –

> The scope of our services was limited to providing comments surrounding the valuation of the business known as Mr Spokes Bike Hire rather than a formal opinion of value. The different reports reflect the different information available at each point in time in relation to the business. The work undertaken in relation to these reports did not include verification of the financial information being provided. We did not perform an industry analysis or any valuations of the improvements and we did not visit the business premises.
>
> On this basis our report contained a high-level analysis of the financial information on the business operations.

166. MMJ provided a further report on Block 13 Section 33 (MSBH) as at 29 September 2015, this time based on the financial details for 2013, 2014 and 2015, indicating annual profit before tax respectively (rounded) of $95,635, $113,733 and $137,924. The adopted annual estimate was $120,424, resulting in a business value of $421,500 (excluding GST). Assuming the correctness of the assets register of equipment an estimate of $106,000 was made. Building improvements were assessed at $119,000.

167. HTW provided a further report on Block 13 Section 33 (MSBH) as at 30 September 2015. This report was based on additional financial information disclosing the trading performance of the business for the previous three financial years. HTW noted that profit over this period had "remained relatively stable" and adopted a gross trading profit of $320,000. Taking into account expenditure, a net annual operating profit of $160,000 after adding back interest and depreciation was calculated. HTW considered, based on "anecdotal evidence" that suggested "small businesses sell in the range of a 2.5-3.25 multiple of EBITDA" and adopting the later figure, the suggested "value for the business is $520,000". Equipment was not valued. The current market value of improvements remained unchanged at $160,000. The assessments were GST exclusive.

168. On 21 October 2015 PwC provided a further valuation report concerning MSBH. Mr Kalenjuk explained that two (self-explanatory) approaches were adopted: earnings capitalisation; and discounted cash flows. The former method (relying on financials for 2012,2103, 2014 and 2015) showed EBITA for each year respectively of $125,000, $115,000, $125,000 and $158,000. Applying a multiplier of 4 to the 2015 figure yielded

a business value of $640,000. The second method adopted EBITDA for 2016 at $172,000 and annual growth of 5%, assumed depreciation of $15,000 with annual growth of 5%, winding-up of the business in March 2027, with stock and assets sold for $100,000, and a discount rate (post tax) of 15% to 20%, yielding a value for the business between $600,000 and $730,000. Leaving aside other (minor and somewhat imponderable) factors, the overall conclusion was that the value of the business was between $600,000 and $700,000, with the favoured single-point estimate at $650,000.

169. In his evidence to the Committee, Mr Kalenjuk pointed out that it was fairly common that a business owner might have a different view of the value to that of the valuer. Applicable to all the valuations being done in this case is the point that valuation "is not an exact science, but it does provide an objective means to get to a starting point for negotiations". The ultimate price "depends on many factors, one of which is the negotiating power of the buyer and the negotiating power of the seller and whether it is a strategic acquisition; there are a whole range of factors, and they are different for every business you value …"

170. On 3 November 2015, Mr Nicholas Holt – Director Infill (LDA) met with the valuers in connection with MSBH. He raised with them the possibility of adjusting the valuations upwards by reconsidering loss and disturbance, a 15% cash component that might not have been included in the financial records, the kiosk business generating profits of $50kpa and whether the business multiplier was more reasonably set at 4.5 to 5.0. The valuers felt unable to reconsider their valuations on the basis of these items. As to loss and disturbance it was pointed out that this was not part of the valuation process although it is relevant when a compulsory acquisition was being undertaken; cash takings could not be taken into account as they are undeclared and there were associated taxation implications; the kiosk was not believed to be profitable because, if it were, it would be operating and then able to contribute value (for obvious reasons, this is a non sequitur, however); and 3.5 - 4.0 was a realistic multiplier for selling a business and a multiplier of 5.0 could not be justified. The valuers considered that, in light of the LDA's instructions, the highest/fairest possible defensible values had been

attributed to the various relevant elements. A possible way forward was to request that MSBH present their own valuation.

171. On 23 November 2015, Mr Purple sought a valuation of Block 16 Section 33 from Colliers International for the purpose of "making a fair and just offer to the Crown lessee (DBH) for the surrender of their lease to the Territory". This was obtained on 30 November 2015. Leaving aside some discussion of details and comparative properties, Colliers stated –

> The Crown lessee interest is considered to be the market value of the lease as a nominal rent lease market value lease less the cost to convert to a nominal rent lease (land rent payout), less the cost to discharge the concession … [Assuming the correctness of the information from the Crown lessee of a payout in 1997 of $230,000] the value of the Crown lessee interest may be calculated as follows :
>
> | | |
> |---|---|
> | Value of Crown lease as a nominal rent market value Crown lease | $568,000 |
> | Cost to payout land rent | 130,000 |
> | Value of Crown lease (with no concession) | $438,000 |
>
> [The value of the Crown lease was based, as the narrative in the report makes clear, on a site rate of $3,000 per m^2, but this was – obviously mistakenly – transcribed into the calculation at $4,000 per m^2, thus overstating the value by $142,000.]

Colliers also pointed out –

> In other jurisdictions, heads of compensation for compulsory acquisition would take into account future losses, injurious affection and solatium. Due to confidentiality most of the details of these examples cannot be set out in this advice. As this is not a residential property, solatium would be considered, but taking into account future losses, injurious affection would be taken into account in arriving at a premium.
>
> Whilst the purchase of this property is not being processed as a compulsory acquisition, it is not unreasonable to pay a premium over its straight real estate value for the above heads of Compensation of up to $500,000.
>
> A total acquisition price could therefore be in the range of $900,000 - $1,000,000.

172. Mr Powderly, gave evidence to the Committee. To some extent, his evidence was second hand as he had not himself undertaken the advice. He said that, in accordance with its usual practice, Colliers had provided a draft advice to the client (the LDA) and discussed its conclusions. Following the draft, LDA had informed Colliers that it was considering the issue of just compensation under the Acquisition Act and what premium might be needed to avoid compulsory acquisition. Mr Powderly said –

> I think we were asked to look at other jurisdictions, at New South Wales, to see what was occurring and whether there were premiums paid in excess of just the market value of the property, which we did. We spoke to a number of our valuers in the team working on the New South Wales infrastructure projects … We were told that, in excess of the market value, there were premiums being paid for disturbance, solatium in the case of residential properties, all heads of compensation, and that those premiums range from anywhere between $50,000 and up to half a million dollars depending on the circumstances of the property. We provided that advice to the LDA. In that final advice, it said [in effect], "Market value of the property is $438,000, but if you want to go down this track of not going through a drawn-out litigation process you can pay up to $500,000, which is what we have sourced from other jurisdictions as a payment to avoid going down that process." We provided then that the maximum range you could pay would be the addition of the two.

173. Mr Powderly agreed that it was possible, as suggested by a member of the Committee, that drawn out litigation could cost the additional amount, but rather thought the amount would be excessive and that the more significant economic issue was the impact of substantial delay on undertaking major public infrastructure, such as the city to the lake project.

Outcomes

174. In respect of Block 16, Section 33 (MSBH) the final total valuations for lease and business were –

- MMJ: $647,000
- HTW: $680,000
- PwC: $600,000 - $700,000

The LDA agreed to the surrender of the lease and the associated business for $1.1 million. The owners preferred payment for the former to be for $1.1 million, and for the latter $1.00. There was some criticism for the lack of explanation for this division. It was requested by the owners. Their reasons (not asked for and not provided) were irrelevant to the Territory. This was not a matter calling for inquiry by the LDA. A further $52,238 was paid for associated costs.

175. The correspondence that has been set out demonstrates a broad consistency of approach, responding to the varying and somewhat confused commentary and proposals of the owners. Objectively, this was relatively clear, although it is possible that the owners, from their perspective, found some aspects difficult to understand. Whilst it is fair to describe some of the interactions as amounting to conflict, there is no basis for the suggestion that the relevant officials acted otherwise than honestly and

fairly in their dealings with the owners – as, in the different context of litigation, the *Law Officer (Model Litigant) Guidelines 2010 (No 1)* required. Whatever the "higher standard" the Committee had in mind with which the LDA should have complied, it is enough to state that there is nothing in their conduct of this negotiation that gave rise to a reasonable suspicion of corrupt conduct. As has been explained, Mr Parsons' intervention was a useful circuit-breaker, but the objective facts showed that this was desirable because of the owners' approach rather than due to any lack of "due process" on the part of the LDA. As discussed above, the payment of a premium as referred to in Colliers' advice in respect of DBH applied also in this case and provided substance to the appropriateness of Mr Dawes' commercial approach.

176. DBH was paid $1.0 million for its lease, settled on 17 December 2015. As already mentioned, the initial valuations obtained in April and May 2015 ranged from $50,000 to $100,000 (GST exclusive). In November 2015 a third valuation was provided by Colliers that calculated a value of the Crown lease (with no concession) at $438,000 and advised (on a basis that was not referred to by the other valuers) that it could be reasonable to add a premium that could bring the acquisition price "in the range of $900,000 - $1,000,000". The Auditor-General was (with respect, rightly) critical of the lack of any documentation that articulated the basis upon which this advice was applied – as, plainly enough, it was – which would or should have referred to the nature and costs of delays, at least in broad terms that explained the process adopted, in short, the "commercial" considerations that led to the ultimate offer. At the same time, it is clear that Colliers' advice – understood in the sense ultimately explained by Mr Powderly – objectively provided a proper basis for the ultimate agreement.

177. In respect of LBGBH the valuations (ex GST) were –

- MMJ: $278,750 (comprising $243,750 for goodwill and $35,000 for assets)
- HTW: $270,000 (goodwill alone)
- PwC: $270,000 (comprising $100,000 for goodwill and $170,000 for assets)

178. LBGBH was paid for $575,000 (GST exclusive) for the business, $10,000 as a contribution to legal and accounting fees and $16,387 to settle unpaid rent payable to DBH. The acquisition was settled on 17 December 2015. Again, it was a serious failure of appropriate procedural probity not to articulate and record the considerations which led to the decision to make an offer on a "commercial basis" and what the offer should be. However, the Colliers' opinion about premium payments provides in this case also an objective basis justifying Mr Dawes' approach.

179. Lastly, the Committee noted that the business was purchased as a going concern but had ceased to operate at the time of acquisition, which it considered raised "further doubts on whether value for money was achieved". However, it was appropriate to value the property as a going concern, since the issue was compensation for expropriating its potential value as a business. The evidence about this transaction does not raise a reasonable suspicion of corrupt conduct.

RE-HIRING OF RECENT EMPLOYEES AS CONTRACTORS

182. The Auditor-General examined a history of the LDA and EDD contracting for consulting services with E11even Consulting Pty Ltd and E11even Project Coordination Pty Ltd ("E11even") in connexion with the Project. The conclusion, summarised in the report under the heading "Administrative matters", was as follows –

> Since 2011 approximately $2.66 million in payments have been made to [E11even] for services to the Land Development Agency/Economic Development Directorate. These services were all approved on a single-select non-competitive basis, with the Chief Executive Officer of the Land Development Agency approving their exemption from the requirements of the Government Procurement Regulation 2007. A significant proportion of these payments relates to services provided by former executives of the Land Development Agency/Economic Development Directorate. The former Project Director for the City to the Lake Project advised under oath/affirmation that the former executives were employed on the basis that their previous public service remuneration package was matched by the company, but that there was a profit component built in to the fees charged to the Land Development Agency/Economic Development Directorate. The administrative arrangements used to secure these services, being successive single-select non-competitive procurement processes, make it difficult to demonstrate that the services are an effective use of public money.

183. The Auditor-General's Report sets out extensively the relevant minutes that justified the successive procurements, effectively of two former LDA/EDD employees, explaining in substance that the services being acquired from E11even relied on the specialised

expertise of the former employees, whose experience and knowledge of the Project – in addition to their more general skills – were effectively unique, and necessary in the interests of effectively managing the particular areas on which they were consulting. A fairly typical characterisation of the reasoning was set out in a minute of September 2012, from the Director of the Office of Coordinator General to Mr Dawes seeking his agreement to use the single select method of procurement –

> There are clear advantages in contracting for [the former executive] to provide the services given [their] current knowledge of the City to the Lake project, urban infill and the land release processes. In particular [their] current knowledge of the City to the Lake project gained from [their] work with the prior employments at the National Capital Authority and the LDA is invaluable. Given [their] considerable knowledge, experience and expertise it is considered that there is low risk to the Territory with a likely significant benefit to the Territory.
>
> Taking into account the need for high quality advice, the low risk to the Territory and the need to maintain the momentum of the City to Lake project, it is considered that the benefits of the exemption far exceed the benefit of compliance with the above procurement guidelines.

184. It was not suggested, nor could it be, that this did not justify the proposed employment, from which it necessarily followed, given the relatively unique skill-set of the intended consultant that would otherwise be lost, use of the single select method of procurement was at least reasonable[1]. The question whether the amounts paid for the consultancy constituted value for money could only effectively be answered by examining the details of the work actually performed, a matter about which no enquiries were made of the relevant witnesses, whose evidence, however, strongly implied that they were well satisfied with the consultants' work[2]. (The Commission has not needed to undertake this work and is unable to conclude, one way or another, that value for money was in fact achieved.)

185. There is obviously substantial room for differing reasonable opinions on the utility of particular procedures for the assessment of value for money in particular contexts, with no bright line of differentiation. The suggestion of the Auditor-General that a public

[1] In their comments on the proposed Special Report, the Auditor General pointed out that it was understood that at least five people were employed through the continued use of a single-select procurement process with these companies and that, whilst two were former executives of the LDA, three did not appear to have former employment or connection with the LDA. The Report refers only to those employees in the latter category.

[2] The Auditor General has also pointed out that the contractual arrangements (of one of the consultants) were subsequently terminated early at the instigation of the LDA due to unsatisfactory performance. It was not necessary for the purposes of this Report to engage with this issue. It is sufficient to observe that the issues which arose were complex and did not suggest that the retainer did not, at the time it was entered into, represent value for money.

tender in the impugned instances would have provided useful data for assessing value for money, aside from relying on an essentially speculative assumption about the likely response, does not engage with key relevant factors, such the nature of the market, the particular expertise required, the cost and administrative resources that would be taken up by the process, or the cost of losing the acquired Project knowledge[3]. At all events, not following the suggested course, even if valid, cannot sensibly give rise to any real apprehension of impropriety. Furthermore, the relevant records demonstrate that the alternatives of a competitive tender and a single select process were considered and the reasons for favouring the latter stated with adequate clarity.

186. More generally, the statement that "the continuing use of single select procurement processes for services, where the *Government Procurement Regulation 2007 requires* [emphasis added] three written quotes or a public tender process" is inconsistent with the exception provided by the regulation (reg 10), which specifically allows the relevant CEO to "exempt the entity … if satisfied, on reasonable grounds, that the benefit of the exemption outweighs the benefit of compliance with the requirement" of the competitive tender process, and gives, as an example, where the supplier has specialist knowledge, this describing the situation on the present case. Far from being in breach of the Regulation, the LDA/EDD complied with it, especially in light of the evidence of Mr Dawes as to the particular reasons for seeking the services of the individuals in question[4].

187. It is nevertheless appropriate, when considering issues of probity, to ask whether the cost of the services provided by E11even Consulting Pty Ltd constituted value for money: in practical terms, was the amount actually billed by the principal consultant reasonable, and was the apparently unquestioning payment by the client on those invoices prudent?[5]

[3] The Auditor-General has commented that the Audit Office had not asserted that that "a public tender in the impugned circumstances would have provided useful data for assessing value for money …" but did, however, conclude: "as the contracting arrangements relied on successive single-select non-competitive procurement processes there is no assurance that the services are an effective use of public money". The Auditor General commented that this reflected "the Audit Office's report on the probity of the continuous use of single-select procurement processes, including as a mechanism for engaging the services of former LDA executives".

[4] The Auditor-General, in commenting on the proposed Special Report, said that this sentence suggested that the Audit Office "questioned the legality of the processes ... [which was] incorrect". The conclusion was based on the characterisation of the Regulation as *requiring* three quotes or a competitive tender process, which the Commission understood to be a legal conclusion concerning the obligations created by the Regulation. That this was not the intention of the Audit Office is, of course, accepted without question.

[5] The Auditor General commented that, in its review of the contractual arrangements for the services, the Commission had "consistently expressed a view that the payment arrangements were reasonable or seemed reasonable" pointing out that, for its part, "the Audit Office did not seek to assess the 'value for money' of the

At no point has it been suggested that it would not have been appropriate for a qualified person of senior executive status to provide any of the services under scrutiny here, or that the invoiced work was not done. That function would have come at a high cost, not only in salary, but also in all the usual on-costs associated with recruitment and providing a remuneration package, office and other facilities plus administrative support personnel. As reported by the Auditor-General, Mr Xirakis, one of E11even's principals, acknowledged "I'm in the business of hiring out people … So there was a profit in it for me … I'll be quite honest. I was making a profit on their employment but that was my business. I had a consultancy …".

188. In the absence of clear documentation of the way E11even arrived at its invoiced sums (which it was not required to provide), the Auditor-General converted hourly rate and total contract price figures into an arithmetical equation, with the unsurprising conclusion that individual consultants would need to have worked more hours than a person could physically work. In fact, as is demonstrated below, the calculations were simply mistaken. In the following summary, text in italics shows the Commission's calculations based on reported facts.

Financial services

(i) From May 2012, it was agreed the first former executive would be engaged at the rate of $220 (including GST) per hour for the period 23 April to 31 August 2012 with an estimated contract price of $125,000.

$125,000 spread over 19 weeks (rounded) at $220 per hour equates to 30 hours per week. This is reasonable.

(ii) From June 2012, an additional consultant was added to the contract on an "as required" basis expected to be 2 – 3 days per week for 8 weeks at a rate of $130 (including GST) per hour. The estimated total price of the contract is reported to be $150,000. This suggests an additional $25,000 was attributable to this additional resource.

$25 000 divided by 8 weeks at $130 per hour equates to 24 hours or approximately 3 days per week. This seems reasonable.

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(iii) From September 2012, the second former executive was engaged for project

services provided by E11even Consulting ... [and that its] primary concern … was the continuing use of single-select procurement processes, including for the purpose of engaging the services of former LDA executives, and that this did not represent good public administration".

management services at the rate of $165 per hour for the period 20 September 2012 to 19 September 2013 (52 weeks). The contract was to be limited to $250,000.

Note: Assuming 37.5 hours per week 37.5 x 165 x 52 = $321,750 – well in excess of the expected contract cap.

(iv) From September 2013 the previous allocation of $250,000 was said to be exhausted, so an extension was sought for 4 weeks at the same rate and covering the period 19 September to 17 October 2013 (4 weeks). The effect of this was said to increase the contract limit to $340,000. The Auditor-General assumed this meant an additional cost of $90,000 and calculated that $90,000 divided by $165 per hour equates to 545 hours, which it would be impossible for one person to work in 4 weeks.

If the 4 weeks were added (as obviously it should be, even if it may not have been specifically so stated) to the previous 52 weeks, then at the hourly rate spread across the whole period for 37.5 hours per week the total cost would be:

37.5 x 165 x 56 = $346,500 which makes sense of the new $340,000 limit.

This also makes sense of the (apparently unreconciled) responses that the various former executives gave to the mathematical assertions of the Auditor-General to the effect that timesheets were attached to the invoices. There is no suggestion that the contracted consultancy work was not done by the individual concerned[6].

(v) From June 2014 a new contract was entered into for the services of 2 consultants—the second former executive and the principal of E11even Consulting Pty Ltd— for the financial year 2012-13 (52 weeks). The services were initially to be billed at the rate of 37.5 hours per week, but this was altered within a week of being proposed to 45 hours per week for 48 weeks (an additional 210 hours). This slight change increased the expected contract price from $650 000 to $715,000. It is not clear from the auditor-general's account, but it appears both consultants were charged out at the same rate.

A reverse calculation shows:

$715,000 divided by 48 weeks at 45 hours per week = $331 per hour which is almost precisely double the $165 per hour rate of the former executive. This seems reasonable.

(vi) Finally, from October 2014, an administrative support officer was added to the contract for 37.5 hours per week at $70 (excluding GST) per hour for the period 3 November 2014

[6] In its commentary, the Audit Office continues to maintain that the variation of the services agreement 'for one additional month for an additional cost of $90,000 [was] disproportionate and indicative of poor contracting practices'.

to 30 June 2015 (35 weeks – rounded). This brought the contract price up to $820,000, an increase of $105,000. The Auditor-General again suggested that this would have amounted to more hours than a person could work.

35 x 37.5 x 77 = $101,062.50. This is reasonably close to the $105,000 figure.

A planned extension of all three personnel to 31 December 2015 would have brought the overall contract price to $1,176,400 but, ultimately, the contract was terminated on 9 September 2015.

189. Perhaps it would have been better if the relevant approver (in this case CEO of the LDA) had documented in advance the factors justifying the commercial reasonableness of the contract sums, but the relevant inputs were well known in a broad sense and it did not bespeak a lack or probity that they were not precisely enumerated. As Mr Xirakis told the Auditor-General –

> Both [former executives] were valuable to the EDD/LDA. On cessation of [the first former executive's] role, it was made known to me by [the Chief Executive Officer of the Land Development Agency and the first former executive] that due to [their] unique and valuable knowledge [they were] too important to lose.
>
> … it is true that the cost would be higher per hour than if [they were] employed but there was no executive position for [them] to be appointed to; the role may not have been required beyond the initial period; [they] certainly represented significant value … as the only other people with the knowledge required were big four accountants at $650 plus per hour.
>
> Similarly, with [the second former executive], [their] executive employment finished, but given there was still an interest to progress some of the vision of the City to the Lake Project to determine feasibility etc., [they] had a unique skillset that no one else had. Again, given the uncertain longevity of the appointment at the time, I was asked, by [the first former executive] I think, if [the second former executive] could be contracted through E11even Consulting Pty Ltd. The cost to the LDA was higher than in his previous executive role, but that was to cover a range of other expenses like worker's compensation, superannuation, Public Holidays, sick days etc. plus a small margin.
>
> There is a big difference between cost and value. I was asked if [the former executives] cost more as consultants than as employees and I said yes. … It wasn't through my contacts or [the former Deputy Chief Executive Officer of the Land Development Agency's] contacts that [the former executives] were appointed as consultants after [their] executive appointments, but that also doesn't mean those appointments did not represent value to the Government, although they cost more than if they had been employed.

There is no reason to doubt the legitimacy of this explanation, which appears to be both candid and reasonable.

190. More generally, Mr Xirakis made the reasonable (and obvious) observation –

> There is no easy way to just create new positions within the Public Service. Most of the time there is significant scrutiny over the number of FTE employees. The gap between the number of FTE's and the work load is filled with consultants.

191. For its part, the Committee adopted the criticism, so far as it went, of the Auditor-General and concluded –

> 10.53 Regarding the use of consultants from E11even Consulting, the hiring of staff recently separated from the LDA as consultants to the LDA is a further element in an overall climate of below-standard practice revealed in the Audit Report and in evidence provided to the present inquiry.
>
> 10.54 Such practices undermine the principle of achieving value for money for expenditure of public funds, and contribute to a broader climate in which failure to follow due process is an accepted part of everyday practice. This is to be avoided, and the ACT Government should send a positive signal by ensuring that such practices are no longer followed in the ACT public sector.

192. The tension between the need to undertake and complete in a timely way the ever-expanding work of government on the one hand and the adequacy on the other of resources required to enable this to be done is, to risk stating the obvious, as old as government itself. The response of the LDA/EDD to the resourcing challenges presented by the Project, comprising an *ad hoc* but, by all accounts, a well-tried solution specifically permitted by the relevant regulation, does not appear to provide an appropriate vehicle for a general policy reconsideration which, plainly enough, cannot account for the multifarious circumstances in which resource adjustment is necessary or desirable. More broadly, however, incumbent procurements are common and there are good reasons for considering that the significant probity issues they represent are often inadequately addressed. At the same time, whilst accepting the Auditor General's view that there was an "an overall climate of below-standard practice", as should be clear from the above discussion this is not the appropriate test for the exercise by the Commission of its powers.

Conclusion

193. There is nothing in the reports either of the Auditor-General or the Committee that give rise to a suspicion on reasonable grounds that corrupt conduct has occurred. Nor, having regard to the scope of the evidence collected by the Auditor-General and the Committee (although left untested in some significant respects) is there an adequate basis for supposing that any further enquiries by the Commission would be reasonably likely to

uncover new material facts. It is accordingly sufficient to state, for present purposes, that nothing in the reports of the Auditor-General or the Committee concerning the issue of the E11even consultancy contracts raises a reasonable suspicion of corrupt conduct. As with the acquisitions, the Commission has therefore determined that the investigation must be discontinued in accordance with s 112(1) of the Act on the basis that, pursuant to s 71(3)(k), having regard to all the circumstances, further dealing with the corruption report is not justified[7].

[7] The Auditor General commented: "While the LDA may have used single select processes 'legally', the circumstances and way in which these were used does not accord with better governance, procurement or workforce management practices that are expected in the ACT Public Service.