

ACT AUDITOR–GENERAL’S REPORT

**TENDER FOR THE SALE OF
BLOCK 30 (FORMERLY BLOCK 20)
SECTION 34 DICKSON**

REPORT NO. 3 / 2018

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Audit Team

Brett Stanton

Steven Vlahos (IPI Consulting Pty Ltd)

Hayley Tonkin

Erika Hudleston

David Kelly

Omer Farooq

Capital Valuers Pty Ltd

The support of Sophie Butler-Stratton is appreciated.

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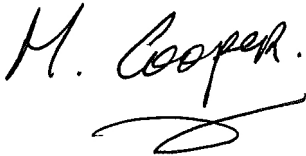
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The Speaker
ACT Legislative Assembly
Civic Square, London Circuit
CANBERRA ACT 2601

Dear Madam Speaker

I am pleased to forward to you a Performance Audit Report titled 'Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson' for tabling in the Legislative Assembly pursuant to Subsection 17(4) of the *Auditor-General Act 1996*.

Yours sincerely



Dr Maxine Cooper
Auditor-General
21 February 2018

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SUMMARY

On 15 December 2014 the Territory sold Block 30 (formerly known as Block 20) Section 34, Dickson to the Canberra Tradesmen's Union Club Ltd (the Tradies) for \$3.18 million excluding GST in an exchange of contracts following negotiations that resulted in the parties agreeing to payment occurring via a land swap arrangement. Settlement has yet to occur and, contractually can only take place within 30 days after a certificate of occupancy is issued in respect of improvement works affecting the nearby car park on Block 21 Section 30, Dickson.

A Request for Tender (RFT) was initiated and publicly advertised in the *Canberra Times* on 8 September 2012. Two tenders were received by the closing date on 26 November 2012: from the Tradies offering \$2.2 million excluding GST and Fabcot Pty Ltd, a solely owned subsidiary of Woolworths, offering \$1.6 million excluding GST.

The Tradies were identified as the preferred tenderer in December 2012 and protracted negotiations occurred over a two year period resulting in the land swap arrangement. Specifically, the Tradies agreed to pay the Territory \$3.18 million excluding GST for Block 30 Section 34 in return for the Territory agreeing to purchase from the Tradies:

- Block 6 Section 72 for \$3.55 million excluding GST; and
- Block 25 Section 72 for \$45,000 excluding GST.

The Territory will end up paying the Tradies approximately \$414,000, which is the difference in value arising from the land exchange.

Overall conclusion

The Economic Development Directorate did not conduct the tender process for Block 30 Section 34 effectively. It did not achieve the sale objective of pursuing an open, contestable and transparent market process and there are indications it did not achieve value for money from the sale. Significant weaknesses in the Directorate's management of the tender means there is a high risk it has relinquished considerable financial value to the Canberra Tradesmen's Union Club Ltd (Tradies). There is also a high risk that the Directorate sold Block 30 Section 34 to the Tradies in breach of the *Planning and Development Act 2007*.

There is no evidence that the decision to proceed with the transaction, in the circumstances, gave sufficient regard to these risks. Systems need to be implemented to prevent this occurring in the future; importantly, all staff involved in undertaking land transactions also need to have clarity regarding expected behaviours through well-articulated values, particularly with respect to managing the integration of probity and commercial considerations.

Chapter conclusions

ACHIEVEMENT OF SALE OBJECTIVES

The Economic Development Directorate did not achieve an open, transparent and contestable sale process for Block 30 Section 34 because of weaknesses in how it managed the tender process.

Specifically, the land swap transaction endorsed by the former Director-General is materially at odds with the RFT, the terms and sale process approved by government, and was achieved through a process that lacked probity and transparency.

The Directorate's decision to proceed with the sale in light of material departures, and without explicitly addressing obvious probity risks, was not prudent. This is because it had credible information before proceeding that departing from the RFT and the requirements of the *Planning and Development Act 2007* could compromise the validity of the sale.

There is no evidence the Directorate assessed or advised the government of these risks, or that it kept adequate records of its numerous tender negotiations to demonstrate adherence to probity. Consequently, the merit and rationale underpinning the sale is not evident. This means that the Directorate did not achieve the government's objective of ensuring the tender was 'open to all interested parties and is fully transparent'.

The Directorate's actions, post-selection of the Tradies as the preferred tenderer, demonstrate that there was a strong and ongoing focus on achieving a negotiated outcome with the Tradies. This was achieved with significant concessions being granted to the Tradies during the negotiation process and without evidence of probity and transparency risks being fully assessed. Along with improvements to governance and administrative processes, there is a need to give particular attention to clearly articulating, demonstrating and embedding organisational values to guide and influence staff behaviours.

VALUE FOR MONEY

The Economic Development Directorate did not rigorously assess the final negotiated land swap transaction and did not demonstrate the benefits to the Territory. There are indications that the outcome the Directorate has negotiated with the Tradies does not represent value for money; there is a high risk the Directorate has relinquished value up to an estimated \$2.4 million to \$2.65 million to the Tradies. This is due to significant inadequacies with how the negotiations and tender process were managed. There is a high risk that:

- the Territory sold Block 30 Section 34 to the Tradies for less than its value. The price the Tradies will pay at settlement for the block reflects the original 5 November 2012 MMJ Real Estate valuation produced for the RFT, which has not been adjusted to take account of the fewer replacement car parks offered by the

- Tradies in its tender and the resulting uplift in value from this and other changes during the negotiations; and
- the commercial terms of the sale of Block 6 Section 72 resulted in the Territory paying above valuation with conditions that offered no evident additional value to the Territory but benefited the Tradies.

The Directorate's decision to proceed with the sale in these circumstances was not soundly based because it did not consider and mitigate the risks arising from these circumstances. Post-selection of the Tradies as the preferred tenderer there was a strong and ongoing focus on achieving a negotiated outcome without a full understanding of the benefits, costs and risks.

Key findings

ACHIEVEMENT OF SALE OBJECTIVES

Paragraph

The RFT was advertised in the *Canberra Times* on 8 September 2012, prior to Cabinet's consideration of, and agreement to, the sale and there is evidence to indicate that the RFT documentation was made available through either the Land Development Agency or Economic Development Directorate website. The advertisement was not run in the *Australian Financial Review* as planned. Not advertising the RFT nationally as planned potentially limited the competitiveness of the sale process, raising 'the question as to whether the relevant markets were properly informed and tested'. However, the former Director-General of the Economic Development Directorate, Director, Sustainable Land Strategy and Chief Executive Officer of the Tradies indicated confidence that that there was sufficient opportunity for information on the sale to be disseminated more broadly due to business networks that operate to disseminate such information.

2.16

A Tender Evaluation Plan was established for the sale of Block 30 Section 34. The Tender Evaluation Plan identified criteria for the sale of Block 30 Section 34. These criteria were provided to prospective tenderers as part of the Request for Tender and, when communicated to prospective tenderers as part of this process, were assigned a weighting. The Tender Evaluation Plan identified a numerical rating that was to be applied to each of the criteria.

2.24

There was no guidance in the Tender Evaluation Plan on how to interpret the different criteria and apply the numerical rating. For example, on how the numerical rating was to be applied to the following criterion: 'Tenderers should provide a schematic development plan for the site showing the floor plans elevations and proposed uses within the development'. The lack of guidance on how to interpret the criteria and apply the numerical rating introduces risks of inconsistency in practice and assessment.

2.25

The analysis and commentary in the Tender Evaluation Panel's December 2012 *Tender Evaluation Report* to show how assessment criteria (the provision of schematic development plans for the site, compliance with the Dickson Centre

2.46

Master Plan and estimated timeframes for the redevelopment of the site) were applied and the tenders assessed was inadequately documented.

Not having adequate documentation is compounded by inadequate guidance in the Tender Evaluation Plan on how to interpret the different criteria and apply the numerical rating as there is no means by which the Tender Evaluation Panel decision to select the Tradies as the preferred tenderer can be substantiated. However, it would be inappropriate to assume that the Tradies tender was not the better one. 2.47

Following the selection of the Tradies as the preferred tenderer in December 2012, protracted negotiations for the sale of Block 30 Section 34 ensued over the following two years. The two-year negotiations with the Tradies resulted in numerous changes to the sale conditions that were originally advertised in the RFT. The changes to the sale conditions that the Economic Development Directorate agreed to during negotiations fundamentally and materially altered the sale conditions from those advertised with the RFT. Had these been agreed and communicated to prospective tenderers at the commencement of the tender process it may have led to: 2.56

- greater interest and thus increased competition;
- different proposals from those submitted based on the more restrictive clause; and
- a different outcome from the tender process.

Although it was open to the Tradies to propose amendments during the negotiations, it was incumbent on the Economic Development Directorate to set clear expectations on the scope of matters that could reasonably be negotiated in light of the advertised RFT process and, importantly, on which matters could not be negotiated because of the implications this would have for probity and the integrity of the tender. 2.73

There is no evidence that the Economic Development Directorate: 2.74

- set clear expectations with the Tradies on the scope of matters to be covered by the negotiations and the associated probity requirements;
- adequately assessed the risks or impacts of replacing the Project Delivery Agreement and security bond with conditions on the Crown lease for Block 30 Section 34 and amendments to the Precinct Code;
- sought the government's approval prior to dispensing with these RFT requirements; and
- assured that proposed changes to the RFT conditions were thoroughly scrutinised and properly approved by executive management.

The matters considered by agencies during negotiations, how they were assessed, and who authorised decisions (apart from the final outcome) are unclear. The paucity of the evidence trail around key tender decisions, negotiations and probity means the Economic Development Directorate did not comply with ACT procurement policy, or meet widely accepted standards of transparency and good practice in procurement. 2.91

The Economic Development Directorate's acceptance of the Tradies' requested changes calls into question the validity of using the RFT process as the basis for engaging with the Tradies for the sale of Block 30, Section 34, Dickson. The material changes to many of the advertised RFT conditions during the ensuing negotiations warranted careful and explicit consideration of the resultant probity risks, including the appropriateness of re-starting the tender process. However, this did not occur. Consequently, the Directorate engaged in a very different sale process with the Tradies than what was originally advertised to the market and offered to other prospective tenderers.

2.94

The former Land Development Agency Director of Sales, and Deputy Director-General, Economic Development Directorate were provided with advice by the ACT Government Solicitor's Office in October 2014 that indicated accepting the Tradies' requested concessions posed a risk as it could result in the transaction being so divergent from the RFT that it was a direct sale rather than the outcome of the tender process. Representatives from the ACT Government Solicitor's Office and the Land Development Agency met with the Director-General on 19 November 2014 to discuss the Tradies' requested concessions and how to proceed. Subsequently the Director-General agreed to the Tradies' requested concessions. There is no documentary evidence of how the risk of non-compliance with the *Planning and Development Act 2007* was reviewed by the Director-General and mitigated by the Economic Development Directorate at the time.

2.103

In advice to the ACT Audit Office, the Australian Government Solicitor advised that changes to the sale terms and conditions that were subsequently negotiated with the Tradies represented significant departures from the RFT and 'based on these departures from the RFT, it would be reasonable to conclude that the eventual sale to Tradies departed so far from the provisions of the RFT as advertised that it could reasonably be regarded as a direct sale rather than the outcome of the RFT. This poses a significant risk to the validity of the negotiated transaction as only the government has authority under section 240 of the *Planning and Development Act 2007* to approve a direct sale in these circumstances'. Such approval was not secured.

2.107

The former Director-General of the Economic Development Directorate advised 'the GSO had oversight of the tender process in its dual role of probity and legal adviser' and the former Director, Sustainable Land Strategy advised that ACT Government Solicitor's Office staff involvement 'was **routine and ongoing** ... [and] at no time did any of these legal advisers find that the process was conducted other than in the appropriate manner'. The ACT Government Solicitor's Office disagrees with the characterisation of its role as having 'oversight' of the tender process, noting that '[the] carriage of a tender process is a matter for the individual Directorate. The ACTGS provides legal and probity advice on an as needed basis and in response to specific requests for advice... The ACTGS provides advice on relevant matters which may inform the client, however we do not have the responsibility of guiding the every action of officers'.

2.111

The ACT Government Solicitor's Office has also advised that 'the involvement of the Probity Officer was limited and confined to responding to specific requests for

2.112

discrete advice from representatives of the client’ and that ‘the role of the ACTGS officers who were engaged as legal advisers was predominantly limited to the preparation and drafting of the applicable sale and purchase contracts, and other consequential legal documents’. It is apparent that there is a misunderstanding between participants in the tender process with respect to the role of the ACT Government Solicitor’s Office.

No codified roles and responsibilities were established for the sale of Block 30 Section 34 including the roles of executive management, Cabinet and the minister in decision-making and negotiation with the Tradies. The lack of codified roles and responsibilities has contributed to a lack of accountability in the ensuing negotiations with the Tradies. 2.119

The weaknesses in the Economic Development Directorate’s governance and administrative arrangements for the RFT highlight the need for Environment, Planning and Sustainable Development Directorate, City Renewal Authority and Suburban Land Agency executive management to give priority to identifying and addressing the risks associated with the future sale (and purchase) of Territory land. In doing so it will be important to clearly articulate and subsequently demonstrate, requisite organisational values to guide and influence staff behaviours. 2.127

VALUE FOR MONEY

Paragraph

The Economic Development Directorate used the November 2012 MMJ Real Estate valuation of Block 30 Section 34 of \$3.18 million (excluding GST) as the basis for setting a reserve price for the block for the purpose of the tender process. Subsequent negotiations between the Directorate and the Tradies were pursued with the intention of obtaining the Tradies’ agreement to pay the reserve price. 3.10

The assumptions on which the \$3.18 million valuation was based were stated in the valuation report, including the provision of a total of 445 car parks which includes 154 replacement public car parks for those to be ‘lost’ from the existing public car parking site. Subsequently, the two tenderers were evaluated against a requirement of 139 replacement car parks. Fewer replacement carparks increases the value of the land, but the valuation was not adjusted to reflect this. 3.12

As part of its December 2012 evaluation of tenders, the Tender Evaluation Panel recognised that the Tradies’ commitment to only replace 84 of the existing public car parks that were to be ‘lost’ due to the redevelopment (instead of the 139 assumed by the Economic Development Directorate in the RFT process or the 154 that formed the basis of MMJ Real Estate’s valuation of the land at \$3.18 million) would result in a higher value for the block. The *Tender Evaluation Report* noted that, after taking into account the reduced number of car parks and the earlier settlement date offered by the Tradies as part of its tender, ‘the MMJ Real estate revised valuation would be of the order of \$3.65 to \$3.7 million’. 3.18

In April 2013, Colliers International provided advice to the Economic Development Directorate after reviewing the assumptions and method underpinning the November 2012 MMJ Real Estate valuation and provided an ‘opinion of value for the 3.26

purposes of a direct sale to the Tradies Group'. The Colliers International advice was based on similar assumptions to those underpinning the MMJ Real Estate valuation. It also assumed that 'the use of car park will be added to the list of uses given that 154 spaces are to be reinstated on site and will be commercially leased'. Colliers International advised that the value of Block 30 Section 34 would be \$2,750,000 or 'closer to \$3,100,000 - \$3,150,000' if the developer did not have to contribute to the cost of constructing an easement road between Badham Street and Dickson Place.

The assumptions on which the Colliers International advice were based were stated in the advice, including the assumption that 154 car parking spaces were to be replaced. In advice to the Audit Office in response to the draft proposed report (4 December 2017), the State Chief Executive, ACT of Colliers International advised 'there were no instructions or information provided to Colliers International in March or April 2013 to show any negotiation of 84 replacement cars'. It is not clear why Colliers International was asked to value the block on the assumption that 154 car parking spaces were to be replaced, when it was apparent that the Economic Development Directorate were in negotiations with the Tradies on the basis of 84 publically available replacement car parking spaces. 3.27

Capital Valuers Pty Ltd advised that the following two factors have the greatest impact on the value of Block 30 Section 34: 3.29

- the Tradies proposal to include a special condition in the contract for sale permitting them to remove an easement on the land designed to ensure pedestrian access over and along the ground floor for no commensurate cost: and
- the Tradies offer to only provide 84 replacement car parks – i.e. 55 less than the 139 assumed by the Tender Evaluation Panel to underpin the reserve price.

Capital Valuers Pty Ltd estimated that the value to the Tradies of not having to construct an easement on Block 30 Section 34 as between \$200,000 to \$300,000. 3.33

Capital Valuers Pty Ltd estimated that the value to the Tradies of only having to provide 84 replacement public car parks (instead of 154) as part of the redevelopment of Block 30 Section 34 as approximately \$1,570,000. 3.43

The MMJ Real Estate valuation (5 November 2012) of Block 30 Section 34 was based on an assumption that all current publically available car parking on the site (i.e. 154 carpark spaces) was to be replaced. However, on 6 November 2012 the Economic Development Directorate advised prospective tenderers that it would support 'a minimum of 84 spaces' and the Tradies subsequently responded that its tender was predicated on the 'provision of 84 public parking spaces in the development as replacement parking as per the RFT'. Although the Director, Sustainable Land Strategy advised that the replacement car parking would be provided by the Tradies on its adjacent block(s) the Audit Office has not identified any documentation to support this claim. The number of replacement car parks is an important consideration affecting the value for money for the Territory from the transaction. 3.47

Taking into account the overall effects on value from reduced requirements for easement access and the replacement of only 84 car parking spaces Capital Valuers Pty Ltd advised of an estimated 'adjusted value range' for Block 30 Section 34 of between \$4,750,000 and \$5,000,000. This is approximately \$1.57 million to \$1.82 million more than the November 2012 MMJ Real Estate valuation of the block of \$3.18 million, which was used to establish the reserve price for the block, and which represented the final price that was agreed to between the Economic Development Directorate and the Tradies. If 154 publically available replacement car parking spaces (rather than the 84 offered by the Tradies as part of the tender) are provided for Block 30 Section 34, as part of any future development, this would ameliorate the loss in value to the Territory. This however is an uncertainty.

3.48

During negotiations between the Economic Development Directorate and the Tradies following the identification of the Tradies in December 2012 as the preferred tenderer for the sale of Block 30 Section 34, the Directorate agreed to the purchase of Blocks 6 and 25, Section 72. The Directorate obtained valuations for these blocks in April 2013 in order to guide its negotiations with the Tradies. An April 2013 valuation of Block 6, Section 72 (with a rent-free period of 18 months) by Colliers International valued the site at \$3.25 million. During negotiations between the Directorate and the Tradies the Directorate agreed to a rent-free period of 42 months. Capital Valuers Pty Ltd advised that by adopting the method outlined in the Colliers International April 2013 valuation of the block, a discount to the assessed value for a 42 month rent-free period would result in an estimated value of \$2.42 million for the site, which is approximately \$830,000 less than what the Territory agreed to pay the Tradies.

3.61

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

3.75

The Territory sold Block 30 Section 34 on favourable terms to the Tradies (estimated to be in the range of up to \$1.57 million to \$1.82 million less than the potential value of the block) and acquired Block 6 Section 72 from the Tradies for an estimated \$830,000 more than its potential worth. The lack of documentation associated with the assessment of the benefits, costs and risks associated with the land swap arrangement means that the value of the land swap arrangement to the Territory is not demonstrated.

3.76

A key document that formed the basis for decision-making on 17 December 2013 was a 13 December 2013 minute to the Director-General of the Economic Development Directorate from the Director, Sustainable Land Strategy. The minute misrepresented the value of Block 6 Section 72 by advising of a value of \$3,550,000 and implying that this value included 'a 40 month rent free component to the Tradies'. This was not the case, as the value of \$3,550,000 was on the basis of vacant possession. As the minute preceded the final transaction including further negotiations that occurred over the course of 2014, it also could not identify that

3.87

concessions given to the Tradies in the course of ensuing negotiations resulted in Block 30 Section 34 being potentially worth more than the November 2012 valuation of \$3.18 million. This highlights the opportunity cost to the Territory from the Economic Development Directorate's decision to proceed with the final exchange of contracts in the absence of an updated valuation and rigorous assessment of value for money.

Recommendations

RECOMMENDATION 1 REMEDY DEFICIENCIES IN THE TENDER PROCESS

Consistent with its administrative responsibilities since July 2017 the Environment, Planning and Sustainable Development Directorate should:

- a) brief the Minister administering the *Planning and Development Act 2007* and Cabinet on the implications of the risk to legislative compliance identified by this report and advise on options for remedying the deficiencies with the tender process; and
- b) develop and implement mechanisms to mitigate potential noncompliance.

RECOMMENDATION 2 STRENGTHEN PROBITY

Consistent with administrative responsibilities since July 2017 the Environment, Planning and Sustainable Development Directorate, City Renewal Authority and Suburban Land Agency should strengthen accountability for probity in procurement by:

- a) establishing clear standards of conduct and record-keeping for all staff engaged in tenders that, at a minimum, address communications with prospective and actual tenders, negotiations with preferred and winning bidders, and evaluations of both initially submitted and final bids;
- b) facilitating training on probity for all staff involved in procurement processes; and
- c) introducing controls and reporting requirements at key procurement (including tender) stages that assure and transparently demonstrate consideration of probity risks.

RECOMMENDATION 3 STRENGTHEN GOVERNANCE AND ASSURANCE

Consistent with administrative responsibilities since July 2017 the Environment, Planning and Sustainable Development Directorate, City Renewal Authority and Suburban Land Agency should strengthen governance and accountability arrangements for staff involved in land procurements by establishing and implementing controls to assure:

- a) consistent adherence to clearly defined roles and responsibilities for tender oversight, conduct and probity management;
- b) tender negotiations are transparent, appropriately documented and approved, and that they meet probity requirements; and

- c) tender decisions, particularly those arising from complex and lengthy negotiations, are independently reviewed and quality assured against defined procedural and probity requirements prior to approval.

RECOMMENDATION 4 REINFORCE ORGANISATIONAL VALUES

Consistent with administrative responsibilities since July 2017 the Environment, Planning and Sustainable Development Directorate, City Renewal Authority and Suburban Land Agency should reinforce organisational values by:

- a) clearly articulating their values and providing guidance to staff on how these are to be implemented; and
- b) implementing procedures that reinforce and infuse the values throughout the organisation.

Responses from entities

In accordance with subsection 18(2) of the *Auditor-General Act 1996* and consistent with administrative responsibilities since July 2017, the Environment, Planning and Sustainable Development Directorate was provided with various *proposed reports* (refer to paragraphs 1.64 to 1.67).

The Environment, Planning and Sustainable Development Directorate did not provide comments for inclusion in this Summary Chapter.

In accordance with subsection 18(3) of the *Auditor-General Act 1996* other persons who the Auditor-General considered had a direct interest in the report were also provided with *proposed reports* (or extracts thereof) (refer to paragraphs 1.68 to 1.73).

The substance of comments received from other persons who responded to *proposed reports* (or extracts thereof) have been incorporated in this report.

A statement from the former Director-General of the Economic Development Directorate is included below.

Statement from the former Director-General, Economic Development Directorate

In response to the third final proposed report (24 January 2018) the former Director-General of the Economic Development Directorate provided the following:

There is no doubt that the documentation relating to the Tender process was deficient. Those deficiencies have been addressed by actions arising out of previous audits and after the McPhee Review, which I instigated.

The report observes in particular that there is no evidence of how the "risk of non-compliance" with the Planning and Development Act 2007 was reviewed following discussions with EDD

officers and GSO representatives on 19 November 20014 regarding the Tradies' requested concessions and how to proceed. I do not recall that any concerns were put to me in those terms at that meeting or subsequently. I share the Auditor-General's disappointment that inadequate records of these discussions were kept by those present.

The conclusions in the report relating to value for money have not taken into account the overall value of the financial and social outcomes achieved by the totality of the land which the Territory acquired through the land swap with the Tradies. In particular, the purchase of Blocks 6 and 25 Section 72 provided the Territory with a large parcel of land to provide social housing and for other community uses. It appears that the assessment of the Auditor-General in relation to value for money is selective as she has not undertaken the same analysis of the purchase of Block 25 for \$45,000 plus GST, which was part of this transaction, which would have identified that the value of that site at the time was greater than \$45,000.

1 INTRODUCTION

Background

Overview of the transaction

- 1.1 On 15 December 2014 the Territory sold Block 30 (formerly known as Block 20) Section 34, Dickson to the Canberra Tradesmen's Union Club Ltd (the Tradies) for \$3.18 million in an exchange of contracts following protracted negotiations that resulted in the parties agreeing to payment occurring via a land swap arrangement. Settlement has yet to occur, and will take place within 30 days after a certificate of occupancy is issued in respect of improvement works affecting the nearby car park situated on Block 21 Section 30, Dickson.
- 1.2 The sale was the negotiated outcome of a lengthy process managed by staff of the former Economic Development stream of the Chief Minister, Treasury and Economic Development Directorate (CMTEDD).
- 1.3 The Request for Tender (RFT) was initiated and publicly advertised in the *Canberra Times* on 8 September 2012. The available evidence indicates that around 20 parties registered their interest in the sale and requested copies of the tender documentation.
- 1.4 Two tenders were received by the closing date on 26 November 2012: from the Tradies comprising an offer of \$2.2 million excluding GST and Fabcot Pty Ltd, a solely owned subsidiary of Woolworths, offering \$1.6 million excluding GST.
- 1.5 The RFT included special conditions that:
 - Block 30 Section 34 be developed in accordance with the 2011 Dickson Master Plan and that it include pedestrian access, open space parkland, and public car park access - especially while the nearby carpark on Block 21 Section 30 was being redeveloped;
 - the successful tenderer had to agree to enter into a Project Delivery Agreement (PDA) with the Territory, and provide a security bond of \$1 million; and
 - settlement on Block 30 Section 34 would not occur until after the adjacent car park on Block 21 Section 30 was complete to ensure availability of public car parking during its redevelopment.
- 1.6 The Economic Development Directorate set a reserve price for Block 30 Section 34 of \$3.18 million excluding GST based on a November 2012 valuation by MMJ Real Estate that the directorate commissioned for the RFT.¹ A December 2012 evaluation of the two tenders resulted in the Tradies being identified as the preferred tenderer. However, as the Tradies'

¹ The MMJ Real Estate valuation states 'This valuation is current at date of valuation only. The value assessed herein may change significantly and unexpectedly over a relatively short period of time (including as a result of general market movements or factors specific to the particular property)'.

offer was below the reserve, negotiations continued with the aim of bringing the Tradies up to the reserve.

1.7 The negotiations were conducted over a two year period and resulted in an agreement that modified the advertised sale terms including RFT conditions and the Tradies committing to paying the reserve of \$3.18 million excluding GST in return for the sale of some of its existing landholdings to the Territory.

1.8 The key terms of the final negotiated outcome included:

- sale of Block 30 Section 34, Dickson to the Tradies for \$3.18 million excluding GST. Contracts were exchanged on 15 December 2014 with settlement delayed until after the redevelopment of the adjacent car park which is yet to occur;
- purchase of Block 6 Section 72, Dickson by the Territory for \$3.55 million excluding GST, with a 42-month lease back to the Tradies at nominal rent (\$0 has been paid to-date). Settlement occurred on 19 December 2014 - four days after contracts were signed; and
- purchase of Block 25 Section 72, Dickson by the Territory for \$45,000 excluding GST, this being the rounded up difference in the estimated market value of the block (\$636,800) and payout of the concessional lease status of the Block (calculated at \$594,535). Settlement occurred on 19 February 2016 after the site, which was the location of the former Downer Club, was remediated by the Tradies.

Figure 1-1 Satellite image of blocks comprising the land swap transaction



Source: ACTmapi

- 1.9 During the negotiations the Territory relinquished a number of RFT conditions - specifically the need for a Project Delivery Agreement with the Tradies, the requirement for the security bond of \$1 million and other key restrictions on the Crown Lease. The Territory will end up paying the Tradies approximately \$414,000, which is the difference in value arising from the land exchange.

History of interest from the Tradies

- 1.10 The Tradies' interest in Block 30 Section 34 can be traced back to at least 2009 when it provided input into consultation on the development of the Dickson Centre Master Plan. Records from the former Economic Development Directorate indicate that the Tradies made three direct sale applications for Block 30 Section 34 in 2010. These were ultimately rejected in favour of pursuing a contestable market process:

- **January 2010** - The Tradies applied to the former Department of Land and Property Services for a direct sale under the contiguous land provisions of the *Planning and Development Act 2007* (the Planning Act). The application did not proceed as the Department determined it did not meet key eligibility criteria under the applicable regulations. Specifically, the Department concluded that:

... this application does not address or satisfy the objectives set out in section 240 (2) of the Planning and Development Act 2007.
- **August 2010** - The Tradies put forward a proposal to the Department of Land and Property Services to sell Block 25 Section 72 to the Territory, upgrade it with financial support from the Territory and temporarily transfer the Canberra Senior Citizens Club in exchange for the direct sale of Block 30 Section 34 to allow for its upgrade / expansion to eventually re-house the senior citizens club. The proposal did not proceed due to various concerns the Department had relating to the proximity of the senior citizens to gaming facilities.
- **November 2010** - The Tradies applied for a direct sale of Block 30 Section 34 via a land swap with Block 25 Section 72 as part of an arrangement to facilitate the development of affordable housing at the former Downer Club site. This proposal was strongly supported by the Department of Land and Property Services on the basis that it achieved a government policy objective (affordable housing) but was rejected by the government on 28 October 2011 in favour of going to market. The government requested a further submission be brought to Cabinet outlining the proposed sale terms.

Government resolution and key tender features

Government's resolution

- 1.11 The government resolved on 11 September 2012 to sell Block 30 Section 34 by tender. The approved sale process provided the sale objective for the subsequent Request for Tender (RFT):

The tender will be open to all interested parties and fully transparent.

1.12 Although approval for the RFT was provided on 11 September 2012, it was advertised four days prior in the *Canberra Times* on 8 September 2012.

1.13 The 11 September 2012 government resolution followed the government's earlier consideration, and rejection, of the Tradies' November 2010 direct sale application.

Economic Development Directorate support in October 2011 for the Tradies November 2010 direct sale application

1.14 Information from the October 2011 Cabinet submission proposing a direct sale is presented as it is relevant to the analysis in Chapter 2.

1.15 On 24 October 2011, the November 2010 direct sale application for Block 30 Section 34 was presented to Cabinet for its consideration. The proposed sale terms included the Tradies paying market value in accordance with the *Planning and Development Act 2007*, which was to be achieved, in part, through a land swap arrangement involving the Territory acquiring Block 25 Section 72 (the former Downer Club site) from the Tradies.

1.16 The October 2011 Cabinet submission initiated by the Economic Development Directorate in support of the application advised of the merits of the direct sale in meeting urban planning objectives:

The development proposal made by Dickson Tradies assists in meeting the vision of the Master Plan and thus provides for growth and change within the area to meet the needs of the community and ensure the group centre's ongoing viability.

1.17 The October 2011 Cabinet submission also advised, in support of the application, the merits in obtaining Block 25 Section 72 for the purpose of affordable housing:

Block 25 Section 72 is a well-located vacant Block, proximate to the Dickson Group Centre. The direct sale arrangement proposed will provide additional land for affordable housing and possible community use in the inner north in accordance with the Affordable Housing Action Plan. This is a unique opportunity for the Territory to access land that is suitably located to deliver good social outcomes for the Dickson area and community.

1.18 In emphasising the benefits of a direct sale over a competitive process the Chief Minister's Cabinet Brief accompanying the Cabinet submission stated that:

While Treasury has proposed a competitive process, this would more than likely jeopardise a number of key benefits and opportunities which are features of the Dickson Centre Master Plan. Additionally, the acquisition of the former Downer Club site as part of the proposal provides considerable opportunity for affordable housing and delivery of improved social outcomes for the community.

Any perceived financial advantage from the suggested competitive process would need to be balanced by the potential for delay or constraints to implementing the Dickson Master Plan, in particular should the Dickson Tradies not be the successful bidder.

1.19 On 24 October 2011, the government did not agree to the direct sale and decided that Block 30 Section 34 should be brought to market and auctioned in the 2011-12 financial year. It also requested further advice on the proposed development and lease conditions underpinning the sale.

1.20 Block 30 Section 34 was not brought to market and auctioned in 2011-12, but on 11 September 2012 a submission was provided to Cabinet:

- providing further information on the proposed development and lease conditions underpinning the sale; and
- seeking approval for the sale by tender.

1.21 As noted in paragraph 1.11, the government approved the sale on 11 September 2012.

Key tender features and conditions

1.22 In agreeing to the sale by tender on 11 September 2012, the government approved a process and key mandatory conditions designed to ensure appropriate use and development of the land in accordance with the Dickson Centre Master Plan.

1.23 In summary, the key features of the process approved by the government included:

- sale of Block 30 Section 34 via a fully transparent tender open to all interested parties;
- the successful tenderer being precluded from commencing construction until after the redevelopment of the carpark situated at Block 21 Section 30 is complete;
- the date for contract completion being 21 days from whichever is the later of:
 - two years from the date of the contract, or
 - the issue of a certificate of occupancy for Block 21, Section 30 (i.e. adjacent carpark). If not issued within four years of the date of the contract then either party could terminate the contract:
- the successful tenderer providing a temporary traffic management plan and short-term car parking strategy to demonstrate how the 'lost' public car parking on Block 30 Section 34 would be provided whilst it is being redeveloped; and
- the contract being contingent on the parties entering into a Project Delivery Agreement intended to assure the successful tenderer meets its obligations to develop Block 30 Section 34 in accordance with the Dickson Centre Master Plan.

Tender implementation

1.24 The RFT was advertised in the *Canberra Times* on 8 September 2012 with a closing date of 15 November 2012 – as previously stated this was approximately one week before the government considered and approved the sale by tender. Documentary evidence suggests that this was due to miscommunication amongst directorate staff and an early placement of an advertisement for the sale in the expectation that Cabinet would have approved the sale prior to 11 September 2012. This is discussed in paragraphs 2.6 to 2.16.

1.25 The tender closing date was later extended by the Economic Development Directorate to 26 November 2012.

- 1.26 The Economic Development Directorate supplied RFT documents to approximately 20 interested parties and received two submissions by the final closing date. Tenders were received from:
- the Tradies offering \$2.2 million (excluding GST) with a proposal to build a six storey mixed use development, including five storeys of residential apartments and ground floor commercial space. The Tradies also indicated their intention to 'integrate this site into the Tradies' wider adjacent land holdings and create an integrated master plan for the southern part of the Dickson Centre'; and
 - Fabcot Pty Ltd a wholly owned subsidiary of Woolworths Limited offering \$1.6 million (excluding GST) with a proposal to build a purpose-built Dan Murphy's liquor store and accompanying street level shops.
- 1.27 On 11 December 2012, the Tender Evaluation Panel finalised its report. The *Tender Evaluation Report* noted both offers were below the reserve price and recommended the Tradies be selected as the preferred tenderer and that negotiations continue with the goal of achieving the reserve price adjusted to match the Tradies' proposed settlement terms.
- 1.28 The Director-General, Economic Development approved the Tender Evaluation Panel's recommendation on 20 December 2012. The then Minister for Economic Development noted a brief that advised of the preferred tenderer for the sale on 21 December 2012.
- 1.29 The Director-General, Economic Development endorsed the financial reconciliation of the negotiated outcome for the sale on 17 December 2013 - almost one year after the Tradies were selected as the preferred tenderers and one year before negotiations on the commercial terms were finalised. Specifically, in doing so the Director-General agreed to the sale price for Block 30 being \$3.18 million excluding GST, and to purchasing Blocks 6 and 25 for the negotiated price of \$3.55 million excluding GST and \$45,000 excluding GST respectively.

Timeline of key events

- 1.30 Table 1-1 summarises key events and decisions associated with the sale of Block 30 Section 34 from the government's decision in October 2011 to reject a direct sale application for the site through to the settlement of Block 25 Section 72 in February 2016.

Table 1-1 Key events and decisions

Date	Event
24 October 2011	The government rejects the Tradies' November 2010 direct sale application and decides Block 30 Section 34 should be brought to market in 2011-12 and requests further advice on proposed sale conditions.
8 September 2012	Request for Tender for the sale of Block 30 Section 34 is first advertised in the <i>Canberra Times</i> .
11 September 2012	The government decides to sell Block 30 Section 34 via tender.
26 November 2012	Closing date for tender submissions. Two responses received - one from the Tradies, and one from Fabcot Pty Ltd.
11 December 2012	Tender Evaluation Panel recommends selection of Tradies as preferred tenderer and that negotiations commence.
20 December 2012	Director-General Economic Development (DG) approves Tender Evaluation Panel's recommendation.
4 June 2013	<p>Evidence of initial proposal from Tradies during negotiations to purchase Block 30 Section 34 on terms comprising:</p> <ul style="list-style-type: none"> • pay out of statutory charge to convert the Block 28 Section 34 concessional lease (i.e. the Tradies Club site) to a market lease; and • sale of Blocks 6 and 25 Section 72 to the Territory. <p>Economic Development decides not to deal with the 'deconcessionalisation' of Block 28, resulting in the Tradies removing this aspect from their offer.</p>
17 December 2013	Director-General Economic Development endorses the financial terms of the negotiated land swap.
20 January 2014	Evidence of continuing negotiations between Economic Development and the Tradies on the terms of the land swap endorsed by the Director-General Economic Development in December 2013.
30 May 2014	Director-General Economic Development agrees to relinquish the requirement for the Tradies to enter into a Project Delivery Agreement and provide \$1 million security bond as prescribed by the RFT.
25 July 2014	<p>Agreement evident between parties on key terms of sublease of Block 6 Section 72 to the Tradies, and the requirement for the Tradies to remediate Block 25 Section 72 following an environmental site investigation.</p> <p>Settlement on Block 25 delayed until this is complete.</p>
2 September 2014	<p>Tradies raise issues around the Crown Lease for Block 30 Section 34 asserting key terms are more restrictive than those it perceived underpinned the December 2013 land swap transaction endorsed by the Director-General.</p> <p>Tradies request a number of concessions that expand the permitted uses of the land from those advertised with RFT.</p>
19 September 2014	Director-General Economic Development rejects most claims noting the disputed items were prescribed either by the RFT or planning laws.
19 September 2014	<p>Tradies respond by questioning the relevance of the tender in light of the negotiations taking place.</p> <p>Tradies re-assert disputed items underpinned the December 2013 agreement on the land swap transaction.</p>

Date	Event
20 November 2014	Advice to Tradies that the Director-General Economic Development has agreed to accept almost all requested concessions.
6 December 2014	Tradies seek further concessions, requesting removal of remaining restriction on shop uses, and of easement affecting Block 30 Section 34 designed to regulate pedestrian access at no cost to Tradies.
11 December 2014	Director-General Economic Development agrees not to object to any application from the Tradies to remove easement and to not request payment for this.
15 December 2014	Contracts exchanged with the Tradies on Block 30 Section 34 and Block 6 Section 72.
19 December 2014	Parties settle on Block 6 Section 72 and execute sublease to Tradies for 42 months nil rent.
19 February 2016	Parties settle on Block 25 Section 72 after Tradies remediate the site.

Source: ACT Audit Office

Agency roles

Chief Minister, Treasury and Economic Development Directorate (CMTEDD)

- 1.31 The sale process, including the RFT and subsequent negotiations, was coordinated by the Chief Minister, Treasury and Economic Development Directorate through its Economic Development stream headed by the Director-General, Economic Development (the Director-General).
- 1.32 The Economic Development Directorate developed the RFT documents, managed the tender process and led the subsequent negotiations with the Tradies, resulting in the final exchange of contracts in December 2014.
- 1.33 Responsibility for overseeing the residual elements of the sale were transferred to the Environment, Planning and Sustainable Development Directorate in 2017.

Land Development Agency

- 1.34 Although the former Economic Development Directorate had overall responsibility for the tender, some aspects of the sale were operationally supported by the former Land Development Agency.
- 1.35 Specifically, the Land Development Agency had a role in performing due-diligence on the resulting land acquisitions and disposal, mainly in relation to site investigations including geotechnical studies.

- 1.36 The former Land Development Agency was an ACT Government agency within the Chief Minister, Treasury and Economic Development Directorate. On 1 July 2017 its functions were transferred to two new authorities - the City Renewal Authority to focus on transforming the Civic and Northbourne Avenue corridor, and the Suburban Land Agency dedicated to developing new suburbs. The Environment, Planning and Sustainable Development Directorate has also been given responsibility for undertaking the delivery of due diligence activities previously undertaken by the Land Development Agency.

Legislation

- 1.37 The statutory framework for procurement activities in the Territory is established by the *Government Procurement Act 2001* (the Procurement Act) supported by the *Government Procurement Regulation 2007* (the Procurement Regulation) and, where relevant, the *Planning and Development Act 2007* (the Planning Act). While the ACT Government Solicitor's Office has advised that the *Government Procurement Act 2001* did not apply to the sale as originally proposed, it is presented below for information on value for money principles.

Government Procurement Act 2001

- 1.38 Section 2A of the *Government Procurement Act 2001* sets out the definition of procurement which includes the disposal of property, goods or works including by sale. In particular section 2A states:

In this Act:

procurement—

- (a) means the process of acquiring goods, services, works or property by purchase, lease, rental or exchange; and
- (b) includes the process of disposing of goods, works or property including by sale.

- 1.39 Section 22A of the *Government Procurement Act 2001* requires all Territory entities to pursue value for money when undertaking procurement activities. Value for money is defined in the Act to mean the best available procurement outcome. In pursuing value for money, subsection 22A(3) of the Act states:

the entity must have regard to the following:

- (a) probity and ethical behaviour
- (b) management of risk
- (c) open and effective competition
- (d) optimising whole of life costs, and
- (e) anything else prescribed by regulation.

1.40 However, the Act does not apply to the grant of a licence or lease of land, or the sale of a lease of land under the *Planning and Development Act 2007*. The Territory's *Procurement Policy Circular PC06: Disposal of Assets* clarifies these circumstances as follows:

... Under the *Government Procurement Act 2001* (the Act), disposals are procurement activities. The Act prescribes that a Territory entity undertaking a procurement, including a disposal action, must pursue value for money for the Territory...

... The disposal of vacant land should be conducted in accordance with the *Planning and Development Act 2007* (the Planning Act). These disposals are not subject to the provisions of the Act. Where land is coupled with a business or building asset under an existing crown lease, the disposal of that asset should be conducted in accordance with the Act...

Planning and Development Act 2007

1.41 Section 238 of the *Planning and Development Act 2007* allows the Authority (i.e. the Land Development Agency at the time of the tender) to grant a lease by auction, ballot or direct sale.

1.42 In advice to the ACT Audit Office for the purpose of the audit, the Australian Government Solicitor stated:

Section 240 of the Planning Act provides that the Authority must not grant a lease by direct sale unless:

- For category (A) of prescribed leases, the lease is granted in accordance with the criteria prescribed in the regulations and the Executive [i.e. the government] approves the grant
- For category (B) of prescribed leases, the lease is granted in accordance with the criteria prescribed in the regulations and the minister approves the grant.

The Executive approves the grant of the lease...if it is a kind prescribed by the regulations as being permissible...[and]...where the grant meets 1 or more specified 'grant objectives'...[that]...include benefits to the ACT economy, contribution to social and cultural features or the achievement of major policy objectives.

The relevant statutory condition [to the sale of Block 30] is that the Authority cannot grant a lease by direct sale, unless the lease was offered by tender but not sold, and a new lease is proposed that includes conditions materially similar to the conditions of the lease that were offered by tender...

1.43 A direct sale application can typically take one of three forms - community, commercial or government. The community form caters predominantly to the not-for-profit sector. The commercial form is available for the profit sector. The government form is utilised for all ACT Government directorates requiring land.

1.44 All forms allow for an application to be made on contiguous land (i.e. land adjoining an existing lease that is not viable for separate sale).

1.45 All previous direct sale applications from the Tradies relating to Block 30, Section 34 fall under the commercial form.

Commercial form of direct sale

- 1.46 Although land for commercial purposes is normally sold by a competitive process (e.g. auction), the *Planning and Development Act 2007* provides for exceptional circumstances where an application for direct sale can be considered. These circumstances include situations where the applicant can do one of the following:
- demonstrate compliance with statutory eligibility criteria for a lease of contiguous unleased land; or
 - provide evidence that the sale would achieve one or more specific grant objectives under the *Planning and Development Act 2007*.
- 1.47 Specific grant objectives include benefiting the economy of the ACT or region, contributing to the environment, introducing new skills, technology or services in the ACT or facilitating the achievement of a major policy objective.
- 1.48 All direct sale applications at the time of the tender were processed by the Direct Sale Panel to assess eligibility, comprising officers from a number of ACT Government agencies including Economic Development, Treasury and the Environment and Planning Directorate. Where applicants were assessed as eligible, a recommendation was made to government for a direct sale.

Regulations affecting the disposal of land

- 1.49 Part 2 of the *Government Procurement Regulation 2007* (the Procurement Regulation) sets quotation and tender thresholds for the Territory's procurement activities. It also empowers the Chief Minister to give directions to Territory entities about the management of procurement activities.
- 1.50 Part 2 of the Procurement Regulation prescribes that a public tender process must be undertaken for all procurements, including land disposals conducted under the Act, with an expected value of \$200,000 or more - unless the sale occurs under the *Planning and Development Act 2007*.
- 1.51 Regulation 130(1)(b) of the *Planning and Development Regulation 2008* exempts certain direct sales of land from requiring government approval. However, this exemption only applies if the resultant lease includes conditions materially similar to the conditions of the lease of land offered by tender but not sold:

The direct sale of the following leases is prescribed:

- (a) a lease offered at auction but not sold;
- (b) a lease of land (the new lease) if—
 - (i) a lease of the land was offered by tender but not sold; and
 - (ii) the new lease includes conditions materially similar to the conditions of the lease offered by tender, other than any conditions relevant only to the tender process;

Representation to the ACT Audit Office

- 1.52 In May 2017 the Audit Office received information in relation to the former Economic Development Directorate's activities with respect to the sale of Block 30 Section 34 to the Tradies and the purchase of Block 6 and Block 25 Section 72 from the Tradies.
- 1.53 The ACT Audit Office conducted an initial review of the information, using the services of a professional services firm (IPI Consulting Pty Ltd). Following the conduct of the initial review, on 7 September 2017 the Auditor-General decided to conduct a performance audit in relation to the matters raised.

Audit objective and scope

Audit objective

- 1.54 The objective of the audit is to provide an independent opinion to the Legislative Assembly on whether the tender for the sale of Block 30 Section 34, Dickson was effectively conducted.

Audit scope

- 1.55 The audit examined the tender and related processes, including circumstances associated with the resulting exchange of ownership of three parcels of land, namely:
- Block 30 (also known as Block 20) Section 34 Dickson;
 - Block 6 Section 72, Dickson; and
 - Block 25 Section 72, Dickson.
- 1.56 Specific areas examined included:
- the planning and governance arrangements for the tender;
 - the conduct of the tender, including the Economic Development Directorate's compliance with the tender process, procedures and probity requirements; and
 - whether the tender process and associated procedures were consistent with ACT procurement policies, principles and better practice.
- 1.57 The audit primarily considered the activities of the former Economic Development Directorate between September 2012 and December 2014, which is the time between the issuing of the RFT for the sale of Block 30 (also known as Block 20) Section 34, Dickson and the exchange of contracts between the Territory and the Tradies for the sale. While this is the key period considered for the purpose of the audit, the audit report provides information on other events outside of this period, primarily for context and background. The audit also acknowledges contributions and activities of representatives from other

Territory entities, including the Land Development Agency and ACT Government Solicitor's Office.

- 1.58 *Administrative Arrangements No 1 (2017)* assigned the Environment, Planning and Sustainable Development Directorate with administrative responsibility for the City Renewal Authority and the Suburban Land Agency, including their enabling legislation. As part of machinery of government changes that supported the establishment of the entities, on 1 July 2017 the Environment, Planning and Sustainable Development Directorate also took on responsibility for a range of functions previously undertaken by the Economic Development Directorate relating to strategic land supply, policy and development.
- 1.59 The audit has not considered the governance and administrative arrangements or administrative processes of entities since July 2017.

Audit criteria, approach and method

- 1.60 The audit examined the tender process by examining the following questions/criteria:
- **Criterion 1:** Did the Economic Development Directorate achieve its procurement objectives for the sale of Block 30 Section 34, Dickson?
 - **Criterion 2:** Were there effective arrangements in place to assure the integrity and probity of the tender process?
 - **Criterion 3:** Was the decision to approve the transaction informed by a rigorous assessment of value for money?
 - **Criterion 4:** Were roles and responsibilities for tender management and decision-making clearly defined and effectively implemented?
- 1.61 The audit adopted the Office's Performance Audit Methods and Practices (PAMPr) and related Policies, Practice Statements and Guidance Papers. These policies and practices have been designed to comply with the requirements of the *Auditor-General Act 1996* and relevant professional standards (including *ASAE 3500 – Performance Engagements*).
- 1.62 The audit approach and method consisted of:
- examination of documentation relevant to the sale of Block 30 Section 34, Dickson to the Tradies and the purchase of Block 6 and Block 25 Section 72, Dickson from the Tradies, including documentation maintained by the former Economic Development Directorate and Land Development Agency;
 - interviews with key personnel from the former Economic Development Directorate and Land Development Agency, and other stakeholder agencies, including the Environment, Planning and Sustainable Development Directorate;
 - interviews with representatives from other entities and stakeholders associated with the purchases;

- the conduct of some interviews under oath or affirmation in accordance with section 14A of the *Auditor-General Act 1996*. These were recorded, transcribed and participants were given the opportunity to provide comment on the accuracy of the transcript;
- engagement of a subject matter expert in the field of property valuations, Capital Valuers Pty Ltd;
- engagement of the Australian Government Solicitor for the provision of legal advice;
- consultation with the Chief Minister with respect to the use of information that may be interpreted as ‘deliberative information’ for the purpose of section 20 of the *Auditor-General Act 1996*;
- an engagement quality control review;
- the provision of a *draft proposed report* (or extracts thereof) and *final proposed reports* (or extracts thereof) as described in the next section; and
- a review, by Mr Des Pearson AO, former Auditor-General of Western Australia and Victoria, of the Audit Office’s inclusion of the substance of comments received from the former Director, Sustainable Land Strategy in this audit report (refer to paragraphs 1.83 to 1.84).

Provision of proposed reports (or relevant extracts)

1.63 As part of the audit process, the Auditor-General provided the *draft proposed report* and *final proposed reports* to the Director-General of the Environment, Planning and Sustainable Development Directorate (consistent with administrative responsibilities since July 2017). Other people who the Auditor-General considered had a direct interest in the report were also provided with the *draft proposed report* (or relevant extracts) and *final proposed reports* (or relevant extracts).

Reports for Director-General of the Environment, Planning and Sustainable Development Directorate

1.64 In accordance with paragraph 18(2)(a) of the *Auditor-General Act 1996*, and consistent with administrative responsibilities since July 2017, the Auditor-General provided the Director-General of the Environment, Planning and Sustainable Development Directorate with:

- a *draft proposed report* for comment (issued on 17 November 2017 with comments requested by 10:00 am, 4 December 2017).

1.65 The *draft proposed report* was provided for a period of time in accordance with the 14 days’ notice required under paragraph 18(5)(a) of the *Auditor-General Act 1996*.

1.66 By virtue of subsection 18(6) of the *Auditor-General Act 1996*, the Auditor-General need only provide a *proposed report* notice, including a minimum fourteen day period, once in

relation to a report or extracts thereof. However, in addition to the *draft proposed report* the following *proposed reports* were provided:

- a *first final proposed report* for further comment (issued on 6 December 2017 with comments requested by 11:00 am, 13 December 2017);
- a *second final proposed report* for further comment (issued on 5 January 2018 with comments requested by 11:00 am, 15 January 2018); and
- a *third final proposed report* for comment (issued on 22 January 2018 with comments requested by 10:00 am, 24 January 2018).

1.67 The Directorate was asked to confirm that there were no factual errors to bring to the attention of the Auditor-General and advise of any comments to be considered for inclusion in the final report. All comments provided by the Directorate on each report were considered and the substance of any comments included in this report.

Reports for other entities

1.68 In accordance with subsection 18(3) of the *Auditor-General Act 1996* the Auditor-General provided others who the Auditor-General considered had a direct interest in the report with:

- a *draft proposed report* (or relevant extracts) for comment (issued on 17 November 2017 with comments requested by 10:00 am, 4 December 2017).

1.69 The *draft proposed report* (or relevant extracts) was provided for a period of time in accordance with the 14 days' notice required under paragraph 18(5)(a) *Auditor-General Act 1996*.

1.70 By virtue of subsection 18(6) of the *Auditor-General Act 1996*, the Auditor-General need only provide a proposed report notice, including a minimum fourteen day period, once in relation to a report or extracts thereof. However, in addition to the *draft proposed report* the following were provided:

- a *first final proposed report* (or relevant extracts) for further comment (issued on 6 December 2017 with comments requested by 11:00 am, 13 December 2017);
- a *second final proposed report* (or relevant extracts) for further comment (issued on 5 January 2018 with comments requested by 11:00 am, 15 January 2018); and
- a *third final proposed report* (or relevant extracts) for comment (issued on 22 January 2018 with comments requested by 10:00 am, 24 January 2018).

1.71 Where a person was provided with the *draft proposed report* (or extracts thereof) and the *first final proposed report* (or extracts thereof) and did not provide comments on either of these reports, and information of relevance to the entities remained fundamentally the same, these people were not provided with the second final proposed report or third final proposed report.

- 1.72 Paragraphs 1.76 to 1.82 provide information on the how the substance of the former Director, Sustainable Land Strategy's comments have been included in this audit report. As a result of the former Director, Sustainable Land Strategy's comments received in response to the *third final proposed report* (24 January 2018) the report was further amended. In light of those amendments, the Auditor-General determined that it was appropriate to provide extracts of the report to an entity who previously had not been provided with any extracts. This was provided on 2 February 2018, with a response requested by 10:00 am, 19 February 2018. A response was provided on 6 February 2018, no further comments were received by 19 February 2018.
- 1.73 All comments provided by entities who were provided with *proposed reports* were considered, and the substance of their comments included in this report.

Direction under section 35 of the Auditor-General Act 1996

- 1.74 Where the Auditor-General issued a *proposed report* (or extracts thereof) or related audit material for comment the Auditor-General issued a direction under section 35 of the *Auditor-General Act 1996*. Directions issued under section 35 of the *Auditor-General 1996* prohibited a person from disclosing the provided material. (Where a person requested that they be allowed to consult with other persons for the purpose of responding to the report this was granted by the Auditor-General and appropriate additional directions under section 35 of the *Auditor-General Act 1996* were issued).
- 1.75 The Auditor-General considered that issuing directions under section 35 of the *Auditor-General Act 1996* was a means by which to protect the integrity of the audit, including the confidentiality of information obtained and disclosed, and in so doing was a means by which to promote the purpose of the *Auditor-General Act 1996*.

Comments from former Director, Sustainable Land Strategy

- 1.76 The former Director, Sustainable Land Strategy was provided with extracts of the *draft proposed report*, by virtue of subsection 18(3) of the *Auditor-General Act 1996*, on 17 November 2017, with comments requested by 10:00 am, 4 December 2017.
- 1.77 The former Director, Sustainable Land Strategy was subsequently provided with extracts of the *first final proposed report* on 6 December 2017. The former Director, Sustainable Land Strategy requested that they be given the opportunity to read a full copy of the first final proposed report; this was granted. The former Director, Sustainable Land Strategy subsequently provided a 32 page statement in response.
- 1.78 The former Director, Sustainable Land Strategy was subsequently provided with extracts of the *second final proposed report* on 5 January 2018. In addition to being provided with extracts of the second final proposed report the former Director, Sustainable Land Strategy was offered the opportunity to read a full copy. The former Director, Sustainable Land Strategy declined this offer and provided a 16 page statement. The Audit Office requested

to meet with the former Director, Sustainable Land Strategy to discuss this material and this request was declined.

1.79 The former Director, Sustainable Land Strategy was subsequently provided with extracts of the *third final proposed report* on 22 January 2018. The former Director, Sustainable Land Strategy provided a 16 page statement in response.

1.80 Along with other persons who provided comments on the *proposed reports* (or extracts thereof), the comments of the former Director, Sustainable Land Strategy on the various *proposed reports* were considered and the substance of these comments has been included in the relevant parts of this report.

1.81 In a response to the *third final proposed report* (24 January 2018) the former Director, Sustainable Land Strategy asserted that the Audit Office was in breach of subsection 18(4) of the *Auditor-General Act 1996*. The Audit Office is not in breach of subsection 18(4). Subsection 18(4) states:

... if the auditor-general must give all or part of the proposed report to a non-public sector entity under subsection (2)(b)(i), the auditor-general must not give the report, or the part of the report, to anyone else under subsection (2) or (3) until after—

- (a) the time for comments under the non-public sector entity's proposed report notice has ended; and
- (b) the auditor-general has considered any comments received from the non-public sector entity.

1.82 Subsection 18(4) of the *Auditor-General Act 1996* operates in relation to audits of non-public sector entities conducted under the authority of section 13C or section 13D of the *Auditor-General Act 1996*. This audit was not an audit of a non-public sector entity conducted under the authority of section 13C or section 13D of the *Auditor-General Act 1996*, but was conducted under the authority of section 12 of the *Auditor-General Act 1996*.

Publishing of comments from the former Director, Sustainable Land Strategy

1.83 The former Director, Sustainable Land Strategy requested that all of the material that they provided be published in full.

1.84 As previously mentioned (paragraph 1.80) the substance of comments from the former Director, Sustainable Land Strategy has been included in this audit report. Furthermore, the Audit Office engaged Mr Des Pearson AO, former Auditor-General of Western Australia and Victoria, to:

... undertake an independent assessment of how the Audit Office has acquitted comments provided by one party [the former Director, Sustainable Land Strategy] in relation to the ... performance audit report titled 'Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson'. In particular, the Consultant [Mr Des Pearson] will provide an opinion on whether the Audit Office has adequately included the substance of the comments provided by this party.

- 1.85 Mr Pearson advised 'in my opinion the audit has adequately included the substance of the comments provided by this party'. Mr Pearson further advised:

I endorse the approach of identifying the 'substance of comments' and including them where relevant in the body of the report.

Including the comments in their entirety is not warranted given their volume, inclusion of views which do not appear to be related to an authoritative framework or recognisable criteria and which, judging by responses so far received to the 29 January 2018 request for comments from other parties, are variously considered to include unfounded assumptions, would mislead, that they include some incorrect sections, many of the comments are expressed in an inflammatory tone and are thereby gratuitous and unnecessarily prejudicial, incorrect and adverse and that many of the assertions and assumptions are not agreed with.

In these circumstances I consider it would be irresponsible to include the comments in their entirety. There is a clearly indicated unreliability of the comments overall, notwithstanding that this party sincerely holds these beliefs.

The public interest test is to include in the report only what is germane to addressing the audit objective in a reasoned, logical and factual manner.

- 1.86 In addition to engaging Mr Pearson, the Audit Office provided relevant extracts from the former Director, Sustainable Land Strategy submissions to those people mentioned by the former Director. These people were consulted on whether the material about them should be published. In providing relevant extracts the Auditor-General issued a direction under section 35 of the *Auditor-General Act 1996* in relation to the material (refer to paragraphs 1.74 to 1.75).

- 1.87 Responses from people consulted regarding publishing the material in full included, for example:

Not to publish

... I believe it would be misleading to include/publish the comments ... in the final Performance Audit report and therefore consider the material should not be published.

...the material provided ... does not appear to add relevant information to the report, and has the risk of being misinterpreted by readers. Inclusion of these lengthy materials may also be interpreted as tacit endorsement, by you, of their contents.

I observe that many of the comments in the Material are expressed in an inflammatory tone and are thereby gratuitous and unnecessarily prejudicial. ... a number of references made in the Material ... incorrect and adverse. If the Material is to be published in its entirety, even with a notation that the Auditor-General does not accept it, there remains a risk that the Material will be given greater weight than is merited, and as you have addressed the material in the body of the report, I question the utility of publishing the Material.

... it would be my preference that the direct reference to myself be redacted ...

... [entity] strongly objects to the publication of the extracted material in its current form for a number of reasons including: matters of fact, interpretation, imputation and tone.

No comment

I have no comment on the proposal to publish the material provided to me.

...I have considered the additional documentation that you provided last week and I wish to advise that I have nothing further to add to the comments I have provided previously.

No objection

... no objection to the publication of material ... I don't agree with many of the assertions and assumptions apparent in the material, but accept the author's right to publicly express his/her personal views.

- 1.88 Although the former Director, Sustainable Land Strategy requested that all of the material they provided be published in full, this has not been done. Publishing in full is not in the public interest and the substance of their comments is included in this report.

Disclosure of deliberative information

- 1.89 Section 20 of the *Auditor-General Act 1996* (the Act) provides for the disclosure of 'deliberative information' in Audit Office reports. Section 20 of the *Auditor-General Act 1996* provides that the Auditor-General may only include 'deliberative information' in a report:

- if the Auditor-General considers that it is in the 'public interest' to do so; and
- after consulting with the Chief Minister.

- 1.90 'Deliberative information' is defined in the Act as 'information that discloses a deliberation or decision of the Executive.'

Reference to documents provided to Cabinet

- 1.91 This report includes references to Cabinet documentation. The material is included to provide background and contextual information for the sale of Block 30 Section 34 Dickson, including identifying the government's intention for the sale of the block. This is discussed in paragraphs 1.11 to 1.23 of this report, and this is then referred to elsewhere in this report.

Reasons why the Audit Office considers that the inclusion of the Cabinet material in the report is in the 'public interest'

- 1.92 Cabinet documentation used to support the findings and conclusions of this audit has been referenced and sometimes quoted. This was done in the public interest because the Cabinet documentation represents:
- the only available evidence, or the most reliable and accurate evidence, that the Audit Office was able to locate; and
 - important evidence that was considered by the Auditor-General in forming an independent opinion. Such evidence needs to be transparent to hold the ACT Government to account, and also the Auditor-General for the audit opinion. Its inclusion also promotes public understanding on an important issue.

Consultation with the Chief Minister

1.93 The Chief Minister was consulted regarding information to be included in the report. On 17 November 2017 the Chief Minister was provided with extracts of the draft proposed report that referenced Cabinet material.

1.94 The Chief Minister advised:

Noting the primacy of Cabinet documents in establishing the Government's policy in relation to the subject of the audit I have no specific comments on the release of the Cabinet material identified.

1.95 Following the receipt and inclusion of comments from the former Director, Sustainable Land Strategy in response to the third final proposed report (24 January 2018), the Chief Minister was consulted regarding information to be included in the report that referenced Cabinet processes. On 2 February 2018 the Chief Minister was provided with extracts of the report.

1.96 The Chief Minister made no comment.

2 ACHIEVEMENT OF SALE OBJECTIVES

2.1 This chapter considers the Economic Development Directorate's management of the Request for Tender (RFT) for the sale of Block 30 Section 34 and subsequent negotiations, including consideration of:

- the identification and management of probity risks during the tender and ensuing negotiations; and
- governance and oversight arrangements that were in place for the sale.

Summary

Conclusions

The Economic Development Directorate did not achieve an open, transparent and contestable sale process for Block 30 Section 34 because of weaknesses in how it managed the tender process.

Specifically, the land swap transaction endorsed by the former Director-General is materially at odds with the RFT, the terms and sale process approved by government, and was achieved through a process that lacked probity and transparency.

The Directorate's decision to proceed with the sale in light of material departures, and without explicitly addressing obvious probity risks, was not prudent. This is because it had credible information before proceeding that departing from the RFT and the requirements of the *Planning and Development Act 2007* could compromise the validity of the sale.

There is no evidence the Directorate assessed or advised the government of these risks, or that it kept adequate records of its numerous tender negotiations to demonstrate adherence to probity. Consequently, the merit and rationale underpinning the sale is not evident. This means that the Directorate did not achieve the government's objective of ensuring the tender was 'open to all interested parties and is fully transparent'.

The Directorate's actions, post-selection of the Tradies as the preferred tenderer, demonstrate that there was a strong and ongoing focus on achieving a negotiated outcome with the Tradies. This was achieved with significant concessions being granted to the Tradies during the negotiation process and without evidence of probity and transparency risks being fully assessed. Along with improvements to governance and administrative processes, there is a need to give particular attention to clearly articulating, demonstrating and embedding organisational values to guide and influence staff behaviours.

Key findings

	Paragraph
<p>The RFT was advertised in the <i>Canberra Times</i> on 8 September 2012, prior to Cabinet’s consideration of, and agreement to, the sale and there is evidence to indicate that the RFT documentation was made available through either the Land Development Agency or Economic Development Directorate website. The advertisement was not run in the <i>Australian Financial Review</i> as planned. Not advertising the RFT nationally as planned potentially limited the competitiveness of the sale process, raising ‘the question as to whether the relevant markets were properly informed and tested’. However, the former Director-General of the Economic Development Directorate, Director, Sustainable Land Strategy and Chief Executive Officer of the Tradies indicated confidence that that there was sufficient opportunity for information on the sale to be disseminated more broadly due to business networks that operate to disseminate such information.</p>	2.16
<p>A Tender Evaluation Plan was established for the sale of Block 30 Section 34. The Tender Evaluation Plan identified criteria for the sale of Block 30 Section 34. These criteria were provided to prospective tenderers as part of the Request for Tender and, when communicated to prospective tenderers as part of this process, were assigned a weighting. The Tender Evaluation Plan identified a numerical rating that was to be applied to each of the criteria.</p>	2.24
<p>There was no guidance in the Tender Evaluation Plan on how to interpret the different criteria and apply the numerical rating. For example, on how the numerical rating was to be applied to the following criterion: ‘Tenderers should provide a schematic development plan for the site showing the floor plans elevations and proposed uses within the development’. The lack of guidance on how to interpret the criteria and apply the numerical rating introduces risks of inconsistency in practice and assessment.</p>	2.25
<p>The analysis and commentary in the Tender Evaluation Panel’s December 2012 <i>Tender Evaluation Report</i> to show how assessment criteria (the provision of schematic development plans for the site, compliance with the Dickson Centre Master Plan and estimated timeframes for the redevelopment of the site) were applied and the tenders assessed was inadequately documented.</p>	2.46
<p>Not having adequate documentation is compounded by inadequate guidance in the Tender Evaluation Plan on how to interpret the different criteria and apply the numerical rating as there is no means by which the Tender Evaluation Panel decision to select the Tradies as the preferred tenderer can be substantiated. However, it would be inappropriate to assume that the Tradies tender was not the better one.</p>	2.47
<p>Following the selection of the Tradies as the preferred tenderer in December 2012, protracted negotiations for the sale of Block 30 Section 34 ensued over the following</p>	2.56

two years. The two-year negotiations with the Tradies resulted in numerous changes to the sale conditions that were originally advertised in the RFT. The changes to the sale conditions that the Economic Development Directorate agreed to during negotiations fundamentally and materially altered the sale conditions from those advertised with the RFT. Had these been agreed and communicated to prospective tenderers at the commencement of the tender process it may have led to:

- greater interest and thus increased competition;
- different proposals from those submitted based on the more restrictive clause; and
- a different outcome from the tender process.

Although it was open to the Tradies to propose amendments during the negotiations, it was incumbent on the Economic Development Directorate to set clear expectations on the scope of matters that could reasonably be negotiated in light of the advertised RFT process and, importantly, on which matters could not be negotiated because of the implications this would have for probity and the integrity of the tender. 2.73

There is no evidence that the Economic Development Directorate: 2.74

- set clear expectations with the Tradies on the scope of matters to be covered by the negotiations and the associated probity requirements;
- adequately assessed the risks or impacts of replacing the Project Delivery Agreement and security bond with conditions on the Crown lease for Block 30 Section 34 and amendments to the Precinct Code;
- sought the government's approval prior to dispensing with these RFT requirements; and
- assured that proposed changes to the RFT conditions were thoroughly scrutinised and properly approved by executive management.

The matters considered by agencies during negotiations, how they were assessed, and who authorised decisions (apart from the final outcome) are unclear. The paucity of the evidence trail around key tender decisions, negotiations and probity means the Economic Development Directorate did not comply with ACT procurement policy, or meet widely accepted standards of transparency and good practice in procurement. 2.91

The Economic Development Directorate's acceptance of the Tradies' requested changes calls into question the validity of using the RFT process as the basis for engaging with the Tradies for the sale of Block 30, Section 34, Dickson. The material changes to many of the advertised RFT conditions during the ensuing negotiations warranted careful and explicit consideration of the resultant probity risks, including the appropriateness of re-starting the tender process. However, this did not occur. Consequently, the Directorate engaged in a very different sale process with the Tradies than what was originally advertised to the market and offered to other prospective tenderers. 2.94

The former Land Development Agency Director of Sales, and Deputy Director-General, Economic Development Directorate were provided with advice by the ACT Government Solicitor's Office in October 2014 that indicated accepting the Tradies' requested concessions posed a risk as it could result in the transaction being so divergent from the RFT that it was a direct sale rather than the outcome of the tender process. Representatives from the ACT Government Solicitor's Office and the Land Development Agency met with the Director-General on 19 November 2014 to discuss the Tradies' requested concessions and how to proceed. Subsequently the Director-General agreed to the Tradies' requested concessions. There is no documentary evidence of how the risk of non-compliance with the *Planning and Development Act 2007* was reviewed by the Director-General and mitigated by the Economic Development Directorate at the time.

2.103

In advice to the ACT Audit Office, the Australian Government Solicitor advised that changes to the sale terms and conditions that were subsequently negotiated with the Tradies represented significant departures from the RFT and 'based on these departures from the RFT, it would be reasonable to conclude that the eventual sale to Tradies departed so far from the provisions of the RFT as advertised that it could reasonably be regarded as a direct sale rather than the outcome of the RFT. This poses a significant risk to the validity of the negotiated transaction as only the government has authority under section 240 of the *Planning and Development Act 2007* to approve a direct sale in these circumstances'. Such approval was not secured.

2.107

The former Director-General of the Economic Development Directorate advised 'the GSO had oversight of the tender process in its dual role of probity and legal adviser' and the former Director, Sustainable Land Strategy advised that ACT Government Solicitor's Office staff involvement 'was **routine and ongoing** ... [and] at no time did any of these legal advisers find that the process was conducted other than in the appropriate manner'. The ACT Government Solicitor's Office disagrees with the characterisation of its role as having 'oversight' of the tender process, noting that '[the] carriage of a tender process is a matter for the individual Directorate. The ACTGS provides legal and probity advice on an as needed basis and in response to specific requests for advice... The ACTGS provides advice on relevant matters which may inform the client, however we do not have the responsibility of guiding the every action of officers'.

2.111

The ACT Government Solicitor's Office has also advised that 'the involvement of the Probity Officer was limited and confined to responding to specific requests for discrete advice from representatives of the client' and that 'the role of the ACTGS officers who were engaged as legal advisers was predominantly limited to the preparation and drafting of the applicable sale and purchase contracts, and other consequential legal documents'. It is apparent that there is a misunderstanding between participants in the tender process with respect to the role of the ACT Government Solicitor's Office.

2.112

No codified roles and responsibilities were established for the sale of Block 30 Section 34 including the roles of executive management, Cabinet and the minister in decision-making and negotiation with the Tradies. The lack of codified roles and

2.119

responsibilities has contributed to a lack of accountability in the ensuing negotiations with the Tradies.

The weaknesses in the Economic Development Directorate's governance and administrative arrangements for the RFT highlight the need for Environment, Planning and Sustainable Development Directorate, City Renewal Authority and Suburban Land Agency executive management to give priority to identifying and addressing the risks associated with the future sale (and purchase) of Territory land. In doing so it will be important to clearly articulate and subsequently demonstrate, requisite organisational values to guide and influence staff behaviours. 2.127

Sale objectives

- 2.2 As stated in paragraph 1.11, the government resolved on 11 September 2012 to sell Block 30 Section 34, Dickson by a Request for Tender (RFT) and in so doing established the sale objective to be a process '... open to all interested parties and fully transparent'.
- 2.3 Achieving this sale objective depended heavily on the Economic Development Directorate effectively managing probity and any related risks that emerged during the tender process including negotiations.
- 2.4 Probity relates to the fairness, impartiality and integrity of a process and is important to the achievement of value for money. Consistency and transparency in decision-making and in all dealings by Territory officials with tenderers is fundamental for avoiding actual or perceived bias, and for encouraging participation and public confidence in competitive processes.
- 2.5 Effective tender governance and oversight is similarly essential for ensuring adherence to probity standards, and that land sales arising from public tender processes comply with relevant legislation.

Managing risks to probity

Tender advertisement

- 2.6 The RFT for the sale of Block 30 Section 34, Dickson was advertised in the *Canberra Times* on 8 September 2012. This preceded Cabinet's consideration of, and agreement to, the sale. Documentary evidence suggests that this was due to miscommunication amongst directorate staff and an early placement of an advertisement for the sale in the expectation that Cabinet would have approved the sale prior to 11 September 2012.

2.7 The Economic Development Directorate also intended to advertise the RFT nationally in the *Australian Financial Review*. The directorate did not run the national advertisement as planned. There is evidence that the RFT documentation was available through either the Land Development Agency or Economic Development Directorate website.

2.8 The former Project Manager for the tender advised the following under oath or affirmation:

Audit Office

And do you recall why the ad in the Australian Financial Review didn't run?

Project Manager

No. You would have to ask [the Director, Sustainable Land Strategy] and [the Deputy Director-General, Economic Development Directorate]. The instruction came from them.

Audit Office

That's to not run in the Australian Financial Review?

Project Manager

Yes.

Audit Office

Did they provide any reasons to you for that?

Project Manager

No.

Audit Office

And were the probity implications of not advertising in the national press ever discussed internally to your knowledge?

Project Manager

No. No.

2.9 When interviewed under oath or affirmation in relation to not advertising the RFT nationally in the *Australian Financial Review*, the former Director, Sustainable Land Strategy advised that he could not recall the circumstances associated with advertising as scheduled:

In my defence for my memory on that, I mean, we had a lot of ads for a lot these big sale processes that were happening. There was the - with the Woollies car park site, for instance, which was about the same time, I mean we could have advertised all over the country for that, I can imagine. So - so I can't recall making - there being - certainly not me making a decision that it be done differently.

2.10 In a response to the third final proposed report (24 January 2018) the former Director, Sustainable Land Strategy provided additional lengthy information on the circumstances associated with the RFT advertisement. This is included at Appendix A.

2.11 Not advertising the sale nationally may give rise to risks associated with the competitiveness of the sale process. In advice to the Audit Office, the Australian Government Solicitor advised that:

The fact that the disposal was not advertised nationally raises the question as to whether the relevant markets were properly informed and tested (which may explain why the tendered prices were so far below the valuation).

2.12 In advice to the Audit Office in response to the draft proposed report (4 December 2017) the former Director-General of the Economic Development Directorate advised:

Press advertising is only one available means of attracting national interest in sales processes. Increasingly, advertising through electronic channels is the most efficient and effective method (website, contact lists etc) and these methods were adopted by the EDD in advertising the Tender. The report should acknowledge this fact, noting that there was interest from approximately 20 bodies (both local and national) in the tender process. I would be confident that advertising in the Financial Review would not have generated any greater interest in the tender.

2.13 The lack of documentation and record-keeping associated with the sale process means that the Audit Office cannot verify the accuracy of the assertion that electronic methods were adopted by the Economic Development Directorate in advertising the RFT, although there is evidence to indicate that the RFT documentation was available through either the Land Development Agency or Economic Development Directorate website. In advice to the Audit Office in response to the draft proposed report (1 December 2017) the Chief Executive Officer of the Tradies advised:

Our long experience in commercial real estate matters on a national level indicates national exposure is not compromised by limiting advertising of the RFT to only local media. Most national commercial real estate companies are represented in Canberra by local offices. Further, national commercial real estate companies access national media news/advertising clipping services daily.

2.14 In advice to the Audit Office in response to the second final proposed report (15 January 2018) the former Director, Sustainable Land Strategy provided the following reasons as to 'why advertising in the AFR was not decisive':

- the prevailing market conditions;
- the decision of the Tradies to issue a media release not long after the advertisement and prior to the tender closing noting its intentions for the block and expressing its concern about the prospect of it being developed by someone other than itself;
- the fact that an embargo on developing the block for several years, and the methodology for the sale process itself increased the risk to all potential bidders, which they would all factor into their pricing; and
- the particular advantage the Tradies had over all other potential bidders by virtue of an earlier planning decision to allow them to build to the northern boundary of their existing block.

2.15 The former Director, Sustainable Land Strategy also advised 'the contemporaneous RFT for the nearby Block 21, which *was* advertised in the AFR received no more expressions of interest than did the RFT for Block 30'. While the Audit Office notes the advice provided by the former Director, Sustainable Land Strategy, the Audit Office did not test the assumptions underpinning the advice or the effect they may have on the responses to the RFT.

2.16 The RFT was advertised in the *Canberra Times* on 8 September 2012, prior to Cabinet's consideration of, and agreement to, the sale and there is evidence to indicate that the RFT documentation was made available through either the Land Development Agency or

Economic Development Directorate website. The advertisement was not run in the *Australian Financial Review* as planned. Not advertising the RFT nationally as planned potentially limited the competitiveness of the sale process, raising ‘the question as to whether the relevant markets were properly informed and tested’. However, the former Director-General of the Economic Development Directorate, Director, Sustainable Land Strategy and Chief Executive Officer of the Tradies indicated confidence that that there was sufficient opportunity for information on the sale to be disseminated more broadly due to business networks that operate to disseminate such information.

Initial tender evaluation

- 2.17 The Economic Development Directorate established a Tender Evaluation Panel for the sale. The four-person Tender Evaluation Panel was chaired by the former Project Manager and comprised members from the former Economic Development Directorate, Environment and Sustainable Development Directorate and Treasury. The panel was also supported by a Probity Officer from the ACT Government Solicitor’s Office.
- 2.18 In advice to the Audit Office in response to the draft proposed report (4 December 2017) the ACT Government Solicitor’s Office has advised:

... the involvement of the Probity Officer was limited and confined to responding to specific requests for discrete advice from representatives of the client. From our records ... there was no involvement of the Probity Adviser during the tender evaluation phase, and only very limited involvement in the tender negotiation phase.

Tender Evaluation Plan

- 2.19 A Tender Evaluation Plan was established for the sale of Block 30 Section 34. The Tender Evaluation Plan outlined:
- the Tender Evaluation Panel and its roles and responsibilities;
 - various administrative processes for the tender evaluation process; and
 - processes for the assessment of tenders, including evaluation criteria.

Assessment processes

- 2.20 In relation to the assessment of tenders, the Tender Evaluation Plan stated:

All compliant Tenders will be evaluated against the assessment criteria.

...

Tenders will be reviewed ... against each criterion. The Evaluation Team will then agree on a consensus score out of 10 for each Tender against each criterion in accordance with the scoring regime. Any Proposal that is rated as marginal or less against any of the Evaluation Criteria may be excluded from further consideration.

The agreed Evaluation Team score will then be multiplied by the criteria weighting to obtain a weighted score for each criterion for each offer. The individual weighted scores for each criterion will then be summed to obtain a total weighted score for each Tender.

The preferred Tenderer with the highest weighted score, offering best value for money having regard to all relevant factors, might not necessarily be the lowest priced Tender. In cases where the scores do not clearly differentiate between the leading tenderers (within one point), they shall be evaluated comparatively against two highly weighted criteria Technical Skills and Methodology.

The Evaluation Team will recommend to the Delegate that the Tender with the highest overall weighted score, having regard to all relevant factors, be declared the preferred tenderer.

...

Post tender negotiations will take place solely with the preferred tenderer until such time as: (i) a contract is agreed, (ii) the preferred tenderer withdraws their tender (iii) the capacity to negotiate is exhausted or (iv) the LDA decides to accept no tenders and elects to recall tenders.

2.21 The Tender Evaluation Plan identified the 'mandatory assessment criteria' as shown in Table 2-1.

Table 2-1 Tender Evaluation Plan criteria

Mandatory Assessment Criteria		Complies Yes/No
MC 1	Tenderers should provide a schematic development plan for the site showing the floor plans elevations and proposed uses within the development	Y/N
MC 2	Tenderers shall provide estimated timeframes for redevelopment of the site.	Y/N
MC 3	Tenderers shall demonstrate the compliance of their proposed development with the proposed master plan.	Y/N
MC 4	Tenderers shall provide details of proposed purchase price for the site and payment terms.	Y/N
MC 5	Tenderers shall demonstrate their financial capacity to undertake the development.	Y/N

Source: ACT Audit Office, based on Economic Development Directorate documentation

2.22 For the purpose of the tender evaluation, these criteria were subsequently assigned a weighting (refer to Table 2-4). The weighted evaluation criteria were communicated to prospective tenders as part of the RFT.

2.23 The Tender Evaluation Plan identified a numerical scoring regime for the assessment of tenders. The plan stated:

The Evaluation Team will meet, discuss and reach a consensus score for each tender against each project-specific criterion.

If a consensus score cannot be agreed for a tenderer's response to a particular criterion, the individual scores will be averaged to determine the consensus score.

Table 2-2 Tender Evaluation Plan scoring regime

Rating	Description	Score (example)
Excellent	Exceeds requirements in all ways, with very little or no risk	10
Very Good	Meets requirements in all ways, exceeds it in some, little risk involved	8-9
Good	Meets the requirement and is workable, acceptable risk	6-7
Marginal	Nearly meets requirement, workable but may be deficient or limited in some areas, some element of risk	4-5
Poor	Offer is difficult to assess against criteria, high risk	1-3
Non-compliant	Tenderer has either stated non-compliance, demonstrated non-compliance, or there is insufficient information to assess	0

Source: ACT Audit Office, based on Economic Development Directorate documentation

- 2.24 A Tender Evaluation Plan was established for the sale of Block 30 Section 34. The Tender Evaluation Plan identified criteria for the sale of Block 30 Section 34. These criteria were provided to prospective tenderers as part of the Request for Tender and, when communicated to prospective tenderers as part of this process, were assigned a weighting. The Tender Evaluation Plan identified a numerical rating that was to be applied to each of the criteria.
- 2.25 There was no guidance in the Tender Evaluation Plan on how to interpret the different criteria and apply the numerical rating. For example, on how the numerical rating was to be applied to the following criterion: ‘Tenderers should provide a schematic development plan for the site showing the floor plans elevations and proposed uses within the development’. The lack of guidance on how to interpret the criteria and apply the numerical rating introduces risks of inconsistency in practice and assessment.
- 2.26 In advice to the Audit Office in response to the draft proposed report (4 December 2017) the former Director-General of the Economic Development Directorate advised:
- The tender criteria were deliberately broad to encourage innovation in development outcomes. Applying an interpretation to the criteria could have the effect of stifling creativity by placing boundaries on what is acceptable, noting that all of the normal planning controls would automatically apply to the proposals.
- The members of the Tender Evaluation Team were highly experienced and abundantly capable of assessing proposals against the criteria without the need of additional guidance or interpretation.
- 2.27 Accordingly, the former Director-General of the Economic Development Directorate advised:
- There is no evidence provided in the audit report to support the assertion that [guidance in the Tender Evaluation Plan] would contribute to the evaluation process. In fact, such interpretation could inhibit the evaluation process.
- 2.28 These comments are noted. However, risks of inconsistency in practice and assessment associated with the lack of guidance on how to interpret the criteria and apply the numerical

rating were subsequently compounded by the lack of documentation associated with the assessment of the tenderers (refer to paragraphs 2.33 to 2.53). While not ideal, the lack of guidance may have been subsequently mitigated by more appropriate documentation associated with the tender evaluation, but this did not occur.

Tender responses

2.29 Two tenders were received by the tender closing date of 26 November 2012. The main features of the two resulting tenders from the Tradies and Fabcot Pty Ltd are summarised in Table 2-3.

Table 2-3 Key features of submitted tenders

Feature	Tradies	Fabcot
Summary of proposed development	<ul style="list-style-type: none"> • Six storey mixed use development: <ul style="list-style-type: none"> – 130 residential apartments – 1,240 m² of ground floor commercial space – two-level basement for public and private parking 	<ul style="list-style-type: none"> • 1,250 m² Dan Murphy's store • 440 m² for three other retail spaces • two levels of basement car parking
Tendered price for Block 30 (ex GST)	\$2.2 million	\$1.6 million

Source: ACT Audit Office, based on Economic Development Directorate documentation

2.30 As part of its response, the Tradies advised of its intention to integrate the site into its 'wider holdings and create an integrated master plan for the southern part of the Dickson Centre':

The Tradies are the only organisation that can effectively implement a substantial part of the Dickson Centre Master Plan adopted by the ACT Government following extensive community and business consultation. Successful implementation depends on combining Block 20 with adjacent land holdings to create a critical mass for a substantial mixed use development on Section 34 that will generate new residential apartments, entertainment, hotel accommodation and other land uses. This consolidated redevelopment will represent a major investment over time for Dickson and provide substantial new jobs as well as revenue to the Territory.

2.31 In advice to the Audit Office in response to the draft proposed report (1 December 2017) the Chief Executive Officer of the Tradies advised:

The Tradies responded to the RFT in November 2012 offering a price of \$2.2m.

- Our offer was based on best available valuation and other professional advice and included a premium reflecting the importance of the block to our overall business.

...

I presume other potential tenderers would have undertaken their own valuation and analysis and decided whether to respond or not. Your report states there was only one other response which was Woolworths and they placed a purchase price of \$1.6m.

In November 2012, it is fair and reasonable to conclude the market valued the block between \$1.6m and \$2.2m.

2.32 On 10 December 2012 the panel completed its initial assessment of submitted tenders and produced a *Tender Evaluation Report* recommending the selection of the Tradies as the preferred tenderer.

Tender Evaluation Report

2.33 The December 2012 *Tender Evaluation Report* identified that both tenderers – i.e. the Tradies (referred to in the *Tender Evaluation Report* as the Club) and Fabcot Pty Ltd (referred to in the *Tender Evaluation Report* as Woolworths) lodged fully conforming responses to the RFT. The *Tender Evaluation Report* assessed the responses from the respective tenderers against the weighted criteria as shown in Table 2-4.

Table 2-4 Assessment of tenderers against the evaluation criteria

Assessment criteria		Weighting (per cent)	Woolworths (score)	Tradies (score)
C1	Tenderers shall provide details of proposed purchase price for the site	40	25	35
C2	Tenderers shall demonstrate their financial capacity to undertake the development.	20	18	15
C3	Tenderers should provide a schematic development plan for the site showing the floor plans, elevations and proposed uses within the development.	20	15	18
C4	Tenderers shall demonstrate the compliance of their proposed development with the Dickson Centre Master Plan.	10	6	8
C5	Tenderers shall provide estimated timeframes for redevelopment of the site.	10	7	7
Total		100	71	83

Source: ACT Audit Office, based on Economic Development Directorate documentation

2.34 The December 2012 *Tender Evaluation Report* stated:

The panel concluded that the proposal from the Club was superior in terms of the tendered price and overall solution for the site. While the panel rated Woolworths slightly superior in terms of financial capacity on the basis of relative size of the two respondents, the panel concluded that the Club had sufficient financial capacity to raise the necessary finance to undertake the proposed development. The panel noted the Club's financial statements showed \$49 million in equity, significant cash reserves and strong operating cash flows.

Price

2.35 In relation to the price criterion (*Tenderers shall provide details of proposed purchase for the site*), the December 2012 *Tender Evaluation Report* stated:

Woolworths Limited offered a price of \$1,600,000 excluding GST with settlement in 2015 consistent with the terms of the sale contract.

It should be noted that the schematic plans for the Woolworths proposal only appears to provide 100 replacement car spaces but this was not conditioned as part of its offer and therefore they would be bound to provide the full replacement car parking as assessed. The value of the shortfall in the car parking would equate to \$350,000 excluding gst if they sought to contract with only 100 replacement car parks.

The Canberra Tradesmen's Union Club Limited (the Club) offered a price of \$2,420,000 inclusive of GST (\$2,200,000 exclusive of GST) with settlement 30 days after exchange of contracts. Its offer was conditional on only being required to provide 84 replacement car parks.

2.36 The December 2012 *Tender Evaluation Report* further stated:

Both offers are below the MMJ Real Estate valuation commissioned for the RFT which valued the land at \$3.180 million exclusive of GST based on a settlement due in 2015 and a requirement to provide 139 replacement car parks.²

2.37 The December 2012 *Tender Evaluation Report* further stated 'in order to fairly evaluate both offers the offers need to be standardised to a common position, taken as a presumed settlement 30 days after exchange adjusted for any reduction in car parking'. The report stated:

MMJ Real estate has indicated that it would discount the purchase price by 5% compounded over two years to equalise the settlement terms and MMJ Real Estate values the reduction to 84 spaces in requirement for car parking at around \$500,000 and to 100 car parks at around \$350,000.

On an standardised basis, the offers would then be Woolworths Ltd \$1,101,247 ex gst and The Club \$1,700,000 ex gst.

Any consideration of The Club offer would also need to be adjusted for the loss of revenue to the Territory over the two year period unless they agreed to the Territory retaining this income.

Schematic Development Plan

2.38 In relation to the schematic development plan criterion (*Tenderers should provide a schematic development plan for the site showing the floor plans, elevations and proposed uses within the development*), the December 2012 *Tender Evaluation Report* stated:

Both parties submitted schematic plans with the Woolworths Ltd proposal showing a single storey retail development comprising mainly of a Dan Murphy liquor store and two levels of basement car parking.

The Club proposal depicted a six storey building with retail uses on the ground floor and residential units on the upper floor.

2.39 No further analysis was provided, including how the Tradies proposal was rated higher than the Woolworths proposal for this criterion.

² This is incorrect. The MMJ Real Estate valuation was based on an assumption that 154 replacement car parks would be provided.

Compliance with the Dickson Master Plan

2.40 In relation to the Dickson Master Plan criterion (*Tenderers shall demonstrate the compliance of their proposed development with the Dickson Centre Master Plan*), the December 2012 *Tender Evaluation Report* stated:

Both respondents addressed the merits of their proposal against the Dickson Masterplan.

2.41 No further analysis was provided, including how the Tradies proposal was rated higher than the Woolworths proposal for this criterion.

Estimated timeframes for the development

2.42 In relation to the redevelopment timeframes criterion (*Tenderers shall provide estimated timeframes for redevelopment of the site*), the December 2012 *Tender Evaluation Report* stated:

Both parties acknowledged that they would not commence development until the development of Block 21 Section 30 was completed to a stage that replacement car parking was available on that site.

Woolworths estimated it would take 10 to 12 months to construct its scheme from the time a contractor took possession of the site for construction.

The Club advised that the development of [Block 30 Section 34] would be rolled into a comprehensive master plan of all the adjoining sites that are owned by the Club which would result in a comprehensive redevelopment of the whole of that Section within the Dickson Group Centre.

2.43 No further analysis was provided on this criterion, importantly nothing on the potential implications for the timing of redevelopment to be impacted by the Tradies' intention to combine the redevelopment of Block 30 Section 34 into a broader redevelopment of its Dickson land holdings.

Tender Evaluation Report

2.44 After noting that neither tender offer met the reserve price of \$3.18 million, the December 2012 *Tender Evaluation Report* recommended:

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

2.45 The Tender Evaluation Panel's recommendations were given 'divisional approval' by the former Director, Sustainable Land Strategy on 11 December 2012 and 'delegate approval' by the former Director-General on 20 December 2012.

- 2.46 The analysis and commentary in the Tender Evaluation Panel's December 2012 *Tender Evaluation Report* to show how assessment criteria (the provision of schematic development plans for the site, compliance with the Dickson Centre Master Plan and estimated timeframes for the redevelopment of the site) were applied and the tenders assessed was inadequately documented.
- 2.47 Not having adequate documentation is compounded by inadequate guidance in the Tender Evaluation Plan on how to interpret the different criteria and apply the numerical rating as there is no means by which the Tender Evaluation Panel decision to select the Tradies as the preferred tenderer can be substantiated. However, it would be inappropriate to assume that the Tradies tender was not the better one.
- 2.48 In a response to the Audit Office on the first final proposed report (13 December 2017), the former Director, Sustainable Land Strategy advised:
- The Evaluation Panel was comprised of highly expert public servants from other agencies, including Treasury and the Planning Authority, who had been chosen precisely because of their experience in making nuanced assessments of complex planning and development criteria.
- ...
- There was nothing wrong or inappropriate in the way the tender evaluation panel went about its task – indeed it provided an exemplar of how such processes should be run.
- 2.49 In a response to the Audit Office on the second final proposed report (15 January 2018), the former Director, Sustainable Land Strategy advised:
- In relation to C3 and C4, the Auditor-General's complaint that the Evaluation Report does not fully document the reasoning behind the values given, overlooks a crucial factor about governance in the ACT Public Service – at least as it then applied. That is the Planning Authority is – was – independent. The Planning Authority did not debate planning judgements – it made them. The various members of the Evaluation Panel may have expressed an opinion about the planning merits of a proposal (C3) and its compliance with the Dickson Master Plan (C4) but the decision about these criteria was entirely a matter for the Planning Authority to determine. If the Planning representative on the Evaluation Panel said that one proposal had greater planning merit than another proposal that would be decisive; and if they said one proposal was more compliant with the Dickson Master Plan than the other and by how much – that would be unarguable.
- The Planning Authority would have considered it neither necessary *or appropriate* to have explained to the Chief Executive of the LDA the basis for its judgement. Putting the Authority's reasons in a report seeking the approval of the Chief Executive of the LDA would have been regarded as an infringement on the Planning Authority's prerogative in planning matters. The Authority didn't need to explain itself to the Chief Executive of the LDA – doing so would be akin to him sitting in judgement on their planning assessment. Of course, had the LDA Chief Executive decided *not* to agree with the Authority's judgement on these planning criteria, the Auditor-General may well have had a reason to question his decision – to do so would look suspiciously like he was shopping for a planning assessment he wanted. But, of course, the LDA Chief Executive did no such thing.
- 2.50 The Audit Office notes this response, but also notes that nowhere in the Tender Evaluation Plan was it documented that the Environment, Planning and Sustainable Development Directorate representative on the Tender Evaluation Panel would be providing advice and

information on planning matters associated with the future development of Block 30 Section 34 on behalf of the ACT Chief Planning Executive as part of a tender evaluation process.

- 2.51 In a response to the Audit Office on the third final proposed report (24 January 2018), the former Director, Sustainable Land Strategy advised:

We picked people for the Evaluation Panel who were experts in their areas of finance and planning. They didn't need guidance to make the judgements they needed to make, especially as there were only two conforming tenders. As for the instances where the Audit Office says there was a lack of documentation, I have explained that the Planning Authority would not have seen it as appropriate to explain itself to the LDA Chief Executive on the two planning criteria. If this insistence on its independence is a weakness, I expect the Audit Office will find the same lack of documentation of the Planning Authority's reasoning in many other Evaluation reports.

As for the timing criteria, as I said – and presuming my recollection is correct – the Evaluation Panel decided after the fact that this criterion wasn't actually very useful because of the embargo on developing the site. If there has to be criticism of this, I guess it could be said that the Evaluation Panel should have made this explicit; or perhaps there could be criticism for the fact that this criterion was included in the RFT in the first place. I think it was initially included because of our concerns to make sure that whoever won the bid would be someone who fully understood the imperative of including a long delay before they could actually start developing the site. But with hindsight, it proved to be 10% of weighting wasted which could have been allocated to other criteria.

In responding to the report's criticism of the Evaluation report in my previous comments, I said that the Auditor-General seemed to want to replace professional judgement with bureaucratic rigidities. It needs to be recognised further that providing 'guidance' to a panel of professional arbiters is not without its problems. Providing guidance to such a panel always runs the risk of being seen as an inappropriate infringement on – and an insult to – the professional judgement of the Panel members. This is particularly the case where the members of the Panel are from an agency which has statutory independence. What guidance, for example, could the EDD/LDA provide on questions of planning criteria which would not have been regarded as inappropriate?

- 2.52 In a response to the Audit Office on the first final proposed report (13 December 2017), the former Director General of the Economic Development Directorate advised:

The tender assessment was undertaken by a highly experienced team with relevant expertise who were eminently capable of assessing the merits of the tender proposals (a fact not noted or considered by the audit).

Contrary to the assertion ... that a lack of guidance on how to interpret evaluation criteria "introduces risks of inconsistency in practice and assessment", there is no evidence that either the absence of such guidance or appropriate documentation created, as a matter of fact, inconsistencies and other deficiencies in this evaluation process.

- 2.53 These comments are noted. However, while paragraphs 2.17 to 2.28 highlight the lack of guidance on how to interpret and apply the different criteria, paragraphs 2.33 to 2.53 highlight the lack of documentation associated with the evaluation of tender responses and highlight the difficulty in demonstrating the merits of one tenderer's responses over another.

Negotiated departures from RFT

Implications of departures from the originally advertised sale terms offered by tender

- 2.54 Following the selection of the Tradies as the preferred tenderer in December 2012, protracted negotiations for the sale of Block 30 Section 34 ensued over the following two years.
- 2.55 The two-year negotiations with the Tradies resulted in numerous material changes to the sale conditions that were originally advertised in the RFT. Table 2-5 shows the resulting changes agreed between the Tradies and the Territory in the final negotiated outcome.

Table 2-5 Material departures from sale conditions in the RFT

Item: Project Delivery Agreement	
Description	Implications of departure from RFT
<p>The Project Delivery Agreement required the successful tenderer to:</p> <ul style="list-style-type: none"> obtain endorsement from the Land Development Agency, prior to lodging a development application with ACT Planning and Land Authority in respect of Block 30, Section 34 that it complies with the Project Delivery Agreement and approved tender; establish a publicly accessible park on the north-west corner of Block 30, Section 34 in accordance with terms set out in the Project Delivery Agreement; establish a pedestrian access way from Badham street to Dickson place in accordance with terms set out in the PDA <p>The RFT also required tenderers to agree to providing a bond or guarantee in the sum of \$1 million as security for performance of their obligations under the Project Delivery Agreement should they be selected as the 'buyer'.</p>	<p>The agreement to relinquish the Project Delivery Agreement was a significant departure from the advertised RFT.</p> <p>The Project Delivery Agreement and security bond provided the Territory with control and influence over the development of Block 30 and capacity to enforce compliance by tenderers with the RFT, their related submission and applicable precinct codes.</p> <p>Whilst the removal of the Project Delivery Agreement and bond results in a significant departure from the advertised RFT, it materially weakens the Territory's capacity to enforce compliance and remedial actions by the tenderer.</p>
Item: Special conditions	
Description	Implications of departure from RFT
<p>The special conditions advertised with the RFT in November 2012 were materially changed from those attached to the final contract for sale with the Tradies in December 2014.</p> <p>Material changes / deletions from those attached to the RFT are:</p> <ul style="list-style-type: none"> Sale deposit: <ul style="list-style-type: none"> The RFT stated that interest on the deposit would be paid to the party who becomes entitled to the deposit, but this was deleted in the final contract for sale. 	<p>These changes, both individually and especially in combination, constituted material departures from the RFT as they fundamentally altered the obligations on both parties.</p> <p>Implications of these changes are as follows:</p> <ul style="list-style-type: none"> Sale deposit: <ul style="list-style-type: none"> The removal of sale deposit clause means the Territory is no longer explicitly entitled to the interest under the new conditions.

<ul style="list-style-type: none"> – The RFT required tenderers to submit a 10 per cent deposit with their tender. Revised conditions changed this by allowing the buyer to submit a deposit by instalment being (a) 5 per cent on date of contract; and (b) the balance of the 10 per cent paid on settlement. • Date for completion of contract: <ul style="list-style-type: none"> – The RFT stated this was 21 days from later of either a Certificate of Occupancy being issued on Block 21, or two years from date of contract. It also allowed the buyer and seller to terminate the contract if a Certificate of Occupancy was not issued within 4 years of the contract. The termination clause was deleted in the new contract for sale. – The completion (or settlement) date was changed to ‘within 30 days of the seller serving the Crown Lease on the buyer’. • Associated works: <ul style="list-style-type: none"> – The RFT special conditions allowed the buyer and seller to terminate the contract if the agreed ‘associated works’ differed from those prescribed by the specimen lease. This clause and associated reference in the specimen crown lease with the final transaction were removed (see below). – The RFT required the tenderer to sign a Deed of Unconditional Undertaking committing to supply funds for the ‘associated works’ when requested by the Territory, but this was removed in the new conditions. • Easement: <ul style="list-style-type: none"> – A new provision was added to the revised special conditions (at the request of the Tradies) permitting it to apply to ACTPLA to remove an easement designed to ensure pedestrian ‘access over and along the ground floor’ of any development on Block 30 and to amend their Deposited plan without objection from the Territory. 	<ul style="list-style-type: none"> – Changing the conditions associated with the 10 percent deposit is contrary to the advertised RFT and results in a more favourable arrangement for the Tradies than was offered to prospective tenderers. • Date for completion of the contract: <ul style="list-style-type: none"> – The deletion of the termination clause means the Territory can no longer terminate the agreement if the adjacent carpark remains unfinished after four years. – Changing the completion (or settlement) date to ‘within 30 days of the seller serving the Crown Lease on the buyer’ has the effect of further de-coupling the development of Block 30 from Block 21. • Associated works: <ul style="list-style-type: none"> – Removing the opportunity for the parties to the contract to terminate the contract if the agreed ‘associated works’ differed from those prescribed by the specimen lease, weakens the ability of the parties to enforce compliance with the contract. • Easement <ul style="list-style-type: none"> – The additional provision associated with the easement for pedestrian access could, in effect, materially reduce the obligations of the buyer on the degree of pedestrian access along the ground floor required by the development.
Item: Completion Covenant	
Description	Implications of departure from RFT
<p>The RFT required the development to be completed within 36 months from the later of either a Certificate of Occupancy being issued on Block 21 Section 72 or commencement of the Crown lease on Block 30.</p>	<p>The Tradies were given an extra 12 months to complete the development than what was offered to all other prospective tenderers.</p>

The revised special conditions extended the term to 48 months and absorbed it into the commencement covenant.	
Item: Associated works	
Description	Implications of departure from RFT
<p>The Specimen Crown Lease issued with the RFT made reference to:</p> <ul style="list-style-type: none"> prescribed associated works that had to be completed by the Lessee within 36 months from the later of the date of Lease or issue of a Certificate of Occupancy on Block 21. These works covered water supply, sewerage stormwater, driveways footpaths and other ancillary works; the lessee indemnifying the Territory for all actions, claims, suits etc arising from the associated works. <p>This clause was removed in the 'final' special conditions.</p>	<p>Removal of this explicit obligation and associated indemnity:</p> <ul style="list-style-type: none"> reduces certainty regarding the lessee's obligations for delivering these works exposes the Territory to potential future costs associated with any failure by the lessee to deliver the associated works as originally required.
Item: Restrictions on commercial accommodation	
Description	Implications of departure from RFT
<p>The Specimen Crown Lease issued with the RFT restricted the commercial accommodation to "hotel" use only.</p> <p>The Tradies sought and received a concession to eliminate this restriction.</p>	<p>This changed the permitted commercial uses of the land from that advertised in the RFT.</p>
Item: Restrictions on community use	
Description	Implications of departure from RFT
<p>The Specimen Crown Lease issued with the RFT restricted community uses to "Community activity centre" use only.</p> <p>The Tradies sought and received a concession to eliminate this restriction.</p>	<p>This changed the permitted community uses of the land from that advertised in the RFT.</p>
Item: Restrictions on the size of shops selling food	
Description	Implications of departure from RFT
<p>The specimen Crown Lease issued with the RFT restricted the gross area of any supermarket or shop selling food to less than 300 square metres.</p> <p>The Tradies sought and received a concession to eliminate this restriction during negotiations, thereby facilitating agreement between parties on the mutual understanding that shops of size greater than 300 square metres would be permitted to sell food.</p> <p>ACTPLA did not enact this change when amending the Crown lease as it was inconsistent with the Commercial Development Zone.</p>	<p>The agreement to concede this change altered the tenderer's understanding of shop uses permitted on the land.</p> <p>This was a change that the Economic Development Directorate agreed to accept prior to concluding the tender.</p> <p>ACTPLA decided not to enact this change, but the Economic Development Directorate's agreement to this concession during negotiations nevertheless altered the course of tender deliberations and underpinned the final agreement between the parties.</p>

Item: Crown lease clause restricting use of the ground floor	
Description	Implications of departure from RFT
<p>The specimen Crown Lease issued with the RFT restricted the use of floors above the ground floor of the development. Specifically, only 'hotel, 'office' and residential uses' were permitted above the ground floor.</p> <p>Further, it permitted only the following uses to the ground floor:</p> <ul style="list-style-type: none"> • club • drink establishment • hotel • indoor entertainment facility • indoor recreation facility • restaurant • shop <p>The Tradies sought and received a concession to eliminate the restriction on permitted ground floor uses, thereby significantly increasing the available options for permitted uses on the ground floor.</p>	<p>This concession, in combination with the other concessions noted above, constitutes a significant departure from the RFT.</p> <p>This change had the effect of significantly increasing the options of permitted uses for the ground floor from those initially advertised with the RFT.</p>

Source: ACT Audit Office

2.56 Following the selection of the Tradies as the preferred tenderer in December 2012, protracted negotiations for the sale of Block 30 Section 34 ensued over the following two years. The two-year negotiations with the Tradies resulted in numerous changes to the sale conditions that were originally advertised in the RFT. The changes to the sale conditions that the Economic Development Directorate agreed to during negotiations fundamentally and materially altered the sale conditions from those advertised with the RFT. Had these been agreed and communicated to prospective tenderers at the commencement of the tender process it may have led to:

- greater interest and thus increased competition;
- different proposals from those submitted based on the more restrictive clause; and
- a different outcome from the tender process.

2.57 The following section examines in further detail the implications arising from the decision to remove the Project Delivery Agreement and the \$1 million security bond.

Removal of Project Delivery Agreement and security bond

2.58 The RFT included a key condition that the successful tenderer must enter into a Project Delivery Agreement with the Land Development Agency to develop Block 30 Section 34 in the manner set out within the agreement.

- 2.59 Specifically, the Project Delivery Agreement required the successful tenderer to:
- obtain endorsement from the Land Development Agency, prior to lodging a development application with the ACT Planning and Land Authority in respect of Block 30 Section 34, that it complies with the Project Delivery Agreement and approved tender;
 - establish a publicly accessible park on the north-west corner of Block 30 Section 34 in accordance with terms set out in the Project Delivery Agreement;
 - establish a pedestrian access way from Badham Street to Dickson Place in accordance with terms set out in the Project Delivery Agreement; and
 - provide a bond or guarantee in the sum of \$1 million as security for performance of its obligations under the Project Delivery Agreement.
- 2.60 The Project Delivery Agreement was an important mechanism designed to assure the Territory's interests were protected by any development proposed by the successful tenderer.
- 2.61 It achieved this by affording the Land Development Agency significant rights to prescribe and enforce the inclusion of any matters it deemed necessary within the successful tenderer's development application. Specifically, relevant provisions within the agreement stated:
- 3.1 The Developer [i.e. successful tenderer] must develop the Land in accordance with the provisions of this Agreement.
- ...
- 4.1 Prior to lodging any Development Application with the Planning and Land Authority the Developer must:
- (a) consult with the LDA in accordance with ... [this agreement]
 - (b) obtain the endorsement of TAMSD in respect of all improvements to the Parkland that are required as part of the Developer's Works and its agreement to accept responsibility for the Parkland following subdivision of the Land;
 - (c) submit the draft of the Initial Development Application to the LDA for endorsement; and
 - (d) make all changes to the draft Initial Development Application that are required by the LDA.
- ...
- 4.2 The LDA will endorse the Developer's draft Initial Development Application if it:
- (a) complies with this Agreement and all applicable laws;
 - (b) is substantially in accordance with the schematic development plan for the Land provided by the Developer to the Territory in the Tender;
 - (c) contains written endorsement from TAMSD as required under...[this agreement]
 - (d) includes all changes to the draft Initial Development Application that are required by the LDA.

Implications for removal of Project Delivery Agreement and security bond

2.62 The Economic Development Directorate's decision to relinquish the Project Delivery Agreement and security bond was at odds with the advertised sale conditions. This has implications for:

- the Territory's leverage and capacity to enforce compliance; and
- the probity of the process, specifically with respect to Fabcot Pty Ltd.

2.63 The examined evidence suggests that the former Director-General of the Economic Development Directorate agreed to the removal of the Project Delivery Agreement and security bond after the Tradies was selected as the preferred tenderer and during the ensuing negotiations because:

- the Tradies did not see the value of the Project Delivery Agreement and raised concerns about the financial burden associated with paying the \$1 million bond; and
- the parties initially agreed to amend the Crown lease for Block 30 Section 34 and related Precinct Code to include conditions that incorporated some elements of the Project Delivery Agreement.

2.64 Risks associated with the removal of the Project Delivery Agreement and bond were identified by the ACT Government Solicitor in April 2014. On 22 April 2014, when providing advice on the pedestrian plaza (park) and pedestrian access, the ACT Government Solicitor's Office advised Land Development Agency officers working with Economic Development Directorate staff on the sale that:

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

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

- There is no security for what are essentially off site works (the PDA contained a \$1M unconditionally guarantee);
- There is no surveyed line setting out where the Park and Access route will be.

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

2.65 The ACT Government Solicitor's Office then provided advice on alternative mechanisms by which to manage these risks.

2.66 Risks associated with the removal of the Project Delivery Agreement and bond were identified by an Economic Development Directorate officer on 2 May 2014, in an email to the ACT Government Solicitor's Office and other Land Development Agency staff assisting Economic Development Directorate staff on the sale:

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

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

The meeting resolved that the required 1300m park to be constructed on the land was to be handed back to the Territory following issue of a certificate of occupancy.

This is consistent with the Questions and Answers submitted by the Tradies during the RFT process.

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

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

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

2.67 The Economic Development Directorate officer further advised:

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

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

2.68 On 6 May 2014 the ACT Government Solicitor's Office provided further advice to Land Development Agency officers assisting the Economic Development Directorate with the sale on alternative options for securing the developer's obligations. However, in doing so, it noted practical challenges with implementing the alternatives, and although the Project Delivery Agreement and bond were expensive for the buyer, they offered protection for the Territory.

Tradies advice

2.69 The Audit Office sought to understand the Tradies' views associated with the Project Delivery Agreement and security bond.

2.70 The former Chief Financial Officer of the Tradies advised under oath or affirmation that the Tradies did not see the value of the requirement for the Project Delivery Agreement and security bond when it submitted its tender. The former Chief Financial Officer of the Tradies advised of concerns associated with the quantum and potentially long period of time that the security bond would be 'locked up', noting:

Well, it would lock up a lot ... of capital for no return and for no real purpose that I understood.

2.71 The former Chief Financial Officer of the Tradies advised under oath or affirmation that, despite reservations associated with the Project Delivery Agreement and security bond, the Tradies understood the need to submit a tender as per the requirements of the RFT:

Well, we were advised that you had to lodge the tender as per the tender, otherwise you weren't in the tender.

...

So that's not to say – we lodged the tender as per the tender request. That's not to say we were happy with the conditions of the tender.

2.72 The former Chief Financial Officer of the Tradies further advised under oath or affirmation that he raised these concerns with the Economic Development Directorate officers managing the RFT process 'I mentioned that to both [the Director, Sustainable Land Strategy] and [the Project Manager]'. In this respect, the following exchange took place in the interview under oath or affirmation:

Former Chief Financial Officer of the Tradies

So I expressed the view to them along the lines of, "well we're not happy with that". The million dollars deposit was particularly discussed – or the bond – particularly discussed. And I was just told that, "look, you know, when we get – if you're the winner of the tender, things can be done with that once we get into legal negotiations."

Audit Office

Okay. So they indicated, as the tender was going in, that – that's sort of tacitly saying, "We can discuss it later"?

Former Chief Financial Officer of the Tradies

Yeah.

2.73 Although it was open to the Tradies to propose amendments during the negotiations, it was incumbent on the Economic Development Directorate to set clear expectations on the scope of matters that could reasonably be negotiated in light of the advertised RFT process and, importantly, on which matters could not be negotiated because of the implications this would have for probity and the integrity of the tender.

2.74 There is no evidence that the Economic Development Directorate:

- set clear expectations with the Tradies on the scope of matters to be covered by the negotiations and the associated probity requirements;
- adequately assessed the risks or impacts of replacing the Project Delivery Agreement and security bond with conditions on the Crown lease for Block 30 Section 34 and amendments to the Precinct Code;
- sought the government's approval prior to dispensing with these RFT requirements; and
- assured that proposed changes to the RFT conditions were thoroughly scrutinised and properly approved by executive management.

2.75 Such actions were warranted given the significance of the departures from the tender process approved by the government, and the advice from the ACT Government Solicitor's Office at the time about the likely risks of dispensing with the PDA and bond.

Probity implications of departures from RFT

2.76 Negotiations on the commercial terms of the transaction with the Tradies took place over the course of 2014. Existing records indicate that questions around probity emerged at an early stage during these negotiations. Specifically, various email communications in April and May 2014 show that Land Development Agency staff assisting the Economic

Development Directorate with the sale queried the probity risks associated with relinquishing key RFT requirements, namely:

- the Project Delivery Agreement and associated \$1 million security bond;
- the special condition of 'delayed completion'; and
- the completion covenant in the Crown Lease to ensure that the time required by the Tradies to develop Block 30 does not run out while they are required to keep the car park open.

2.77 On one occasion a query was directed to the Probity Officer assigned by the ACT Government Solicitor's Office from another solicitor within the ACT Government Solicitor's Office. The Probity Officer advised:

I confirm that I have no probity concerns in relation to what is proposed. In the case of this particular sale by tender process, there was only one tenderer. Had there been other tenderers we would have needed to analyse more closely to what extent what is proposed differs in substance from what was set out in the RFT, and to consider those other tenderers' expectations to be invited to tender again on the basis of substantively revised provisions.

In any event I would think that the RFT include very broad-ranging discretions for the Territory including to negotiate with any entity.

2.78 The Probity Officer's response appears to show a misapprehension that there was only one tenderer, not two. However, there is no evidence that this information was conveyed to Economic Development Directorate / Land Development Agency officers involved in the transaction. The response does, however, provide an important insight into the process that could have been followed had there been more than one tenderer - as there was in this case.

2.79 In advice to the Audit Office in response to the draft proposed report (4 December 2017) the former Director-General of the Economic Development Directorate noted that the Probity Officer advised 'I would think that the RFT include very broad-ranging discretions for the Territory including to negotiate with any entity' and that:

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

Australian Government Solicitor advice

2.80 The removal of the Project Delivery Agreement and security bond also has implications for the probity of the sale process and the treatment of potential and actual tenderers. In relation to the interests of Fabcot, in advice to the Audit Office for the purpose of the audit, the Australian Government Solicitor questioned the legal right of the Economic Development Directorate to remove the requirements for the Project Delivery Agreement and security bond:

In the absence of a clear and explicit right to delete these requirements under the RFT conditions, it is doubtful that [the Economic Development Directorate] has the legal right to do this. This is because the RFT conditions create a 'process contract' that can only be varied with

the consent of all parties in the process ie removal of these conditions may have needed the consent of Fabcot – who should have been given the opportunity to reprice their bid on the basis of the changed conditions. At the very least ED would owe a duty of good faith to both Fabcot and Tradies which requires that they be given an equal opportunity. It is debatable that good faith has been afforded to Fabcot when the change to the RFT conditions (and the right to reprice their bid) was only afforded to Tradies.

2.81 In this respect, while it is noted that the RFT stated ‘LDA (sic) may at any time ... cancel, add to or amend the information, requirements, terms, procedures or processes set out in this RFT’ it is noted that it only did so for one tenderer (the Tradies) and did not offer a similar opportunity to the other tenderer (Fabcot Pty Ltd). These circumstances meant the Economic Development Directorate should have carefully considered the need to cancel and restart the tender, but this did not occur.

2.82 In advice to the Audit Office in response to the draft proposed report (4 December 2017) the former Director-General of the Economic Development Directorate advised that they were not copied into any emailed legal advice from the ACT Government Solicitor’s Office with respect to any concerns associated with the probity of the process. The former Director-General further advised:

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

I repeat my earlier statement that I would reasonably expect that had the [ACT Government Solicitor’s Office] concerns been of such gravity that there was a possibility that the Tender process was contrary to the legislative framework, it would be raised with me or those who worked for me by the officers within [ACT Government Solicitor’s Office] who had provided advice or other [ACT Government Solicitor’s Office] officers subsequently. The [ACT Government Solicitor’s Office] was present at and providing advice during every critical juncture of the RFT process and could have raised any concern regarding the validity of the process with me.

2.83 The ACT Government Solicitor’s Office and its role in providing advice is discussed further in paragraphs 2.108 to 2.112.

Negotiated outcome

Documentation and record-keeping

2.84 For the purpose of conducting the audit, the Audit Office sought relevant documents and records associated with the sale process. In doing so, the Audit Office accessed and examined available electronic records and documentation held on directorate servers, including the emails of former key Territory officials involved in the tender.

- 2.85 In obtaining this documentation the Audit Office sought the assistance of current Environment, Planning and Sustainable Development Directorate officers, as the Audit Office was advised that any relevant documentation previously maintained by the Economic Development Directorate or Land Development Agency currently resided with the directorate. While some documentation associated with the sale process was obtained through this process the Audit Office found no documentation associated with the negotiations the Economic Development Directorate led with the Tradies over the 12 month period from when the Tradies were selected as the preferred tenderers and the former Director-General endorsed the financial reconciliation of the negotiated outcome on 17 December 2013. In particular no documentation was found with respect to:
- how the merits of concessions sought by the Tradies were evaluated by the Economic Development Directorate prior to acceptance;
 - consideration of the probity risks arising, including implications for the integrity of the tender; or
 - direct discussions between the former Director, Sustainable Land Strategy, Project Manager and the Tradies and any resulting agreements.
- 2.86 The lack of documentation was subsequently confirmed by the Acting Executive Director, Urban Renewal, Environment, Planning and Sustainable Development Directorate.
- 2.87 The former Chief Financial Officer of the Tradies advised the Audit Office under oath or affirmation that he estimates he met with Territory officials during negotiations, either in person or by telephone, in excess of 40 times. However, the Audit Office's inquiries and examination of available documents did not identify any records of the protracted negotiations conducted between Economic Development Directorate officers and the Tradies.
- 2.88 Although December 2013 marks the agreement between the parties on the broad terms of the transaction and resultant land swap, including the financial aspects of the transaction, negotiations on the commercial terms of the transaction continued for a further 12 months up until just before the final exchange of contracts on 15 December 2014. Email communications obtained by the Audit Office provide limited insight into the concessions sought by the Tradies and those which were accepted by the Economic Development Directorate. However, the email communications do not show how the Economic Development Directorate assessed these matters internally, or that executive management properly reviewed and transparently authorised the resulting departures from the RFT conditions.
- 2.89 Available records indicate that the former Director-General expressed a desire for the transaction to proceed and for any "issues" to be resolved through a "sit-down" with the Tradies rather than through the exchange of documents. The former Director-General clarified that his intent was to encourage staff involved in the negotiations to efficiently resolve emerging issues through early discussion rather than engage in unnecessary email exchanges or correspondence.

- 2.90 There is no record of executive management review and approval of the final negotiated commercial terms of the land swap transaction. Existing records indicate that the former Director-General and Deputy Director-General of the Economic Development Directorate were directly involved in face-to-face discussions with the Tradies. The only documented approval by the former Director-General is of the financial reconciliation of the negotiated outcome agreed to between the parties 12 months earlier.
- 2.91 The matters considered by agencies during negotiations, how they were assessed, and who authorised decisions (apart from the final outcome) are unclear. The paucity of the evidence trail around key tender decisions, negotiations and probity means the Economic Development Directorate did not comply with ACT procurement policy, or meet widely accepted standards of transparency and good practice in procurement.

Negotiated outcome compared with the RFT terms and conditions

- 2.92 The departures of the final negotiated outcome from the terms and conditions originally offered in the RFT, as shown in Table 2-2, were significant, meaning that the resultant sale terms differed materially from the offering that was originally put to market. The outcome, including the resulting land swap the Economic Development Directorate negotiated with the Tradies, bore little resemblance to the approved RFT conditions and the Tradies tender submission.
- 2.93 The agreement negotiated between the Economic Development Directorate and the Tradies now arguably resembled the Tradies' November 2010 direct sale application, which similarly proposed a land swap with Block 25 Section 72 (one of two sites purchased by the Territory in the final transaction). As noted in paragraph 1.19, this direct sale application was previously rejected by the government.
- 2.94 The Economic Development Directorate's acceptance of the Tradies' requested changes calls into question the validity of using the RFT process as the basis for engaging with the Tradies for the sale of Block 30, Section 34, Dickson. The material changes to many of the advertised RFT conditions during the ensuing negotiations warranted careful and explicit consideration of the resultant probity risks, including the appropriateness of re-starting the tender process. However, this did not occur. Consequently, the Directorate engaged in a very different sale process with the Tradies than what was originally advertised to the market and offered to other prospective tenderers.

ACT Government Solicitor's Office advice

- 2.95 Throughout September 2014 and October 2014 negotiations for the land swap arrangement were underway between the Territory and the Tradies' legal representative. In relation to the Tradies' requested concessions, on at least two occasions the ACT Government Solicitor's Office indicated accepting all the Tradies' requested concessions posed a risk as it could result in the transaction being so divergent from the RFT that it could be considered a direct sale rather than the outcome of the RFT process.

2.96 The ACT Government Solicitor's Office advice also indicated that should this scenario materialise the sale could not proceed without the government's approval as it would no longer satisfy the exemption from doing so afforded by Regulation 130(1)(b) of the *Planning and Development Regulation 2008* for a direct sale of land offered under a tender but not sold because the conditions of sale now differed so materially from the tender.

2.97 On 24 October 2014, in an email to an Economic Development Directorate officer and the former Land Development Agency Director of Sales, the ACT Government Solicitor's Office advised:

It appears there is a misunderstanding of what was offered to the Tradies. Whether or not this misunderstanding is justified is irrelevant, the question remains what the LDA is willing to offer.

We note our previous advice that the concessions they are seeking are at odds with the Minister's brief signed by [the former Director-General of the Economic Development Directorate] and the content of the RFT. We would expect that any changes inconsistent with [the former Director-General of the Economic Development Directorate] briefing would need to be cleared through him or the Minister.

It appears that the options at this stage are either they agree with our position, we agree to negotiate a new price or we terminate this arrangement and start the negotiation process again.

Any further concessions at this stage may contaminate the RFT process to the point that there may be a significant probity issues in selling the Land on that basis. If you wish for further advice on this matter please instruct us accordingly.

We look forward to your instructions on this matter.³

2.98 On 28 October 2014, in an email to the former Land Development Agency Director of Sales, former Deputy Director-General, Economic Development Directorate and an Economic Development Directorate officer the ACT Government Solicitor's Office advised:

...

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

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

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

³ In a response to the Audit Office on the third final proposed report (24 January 2018), the former Director, Sustainable Land Strategy (whose role in the project concluded in early 2014) advised 'The clear implication from [the ACT Government Solicitor's Office advice of 24 October 2014] is that the content of the Minister's brief previously signed by the former D-G of the EDD was **not** at odds with the content of the RFT. So, in other words, the advice which I provided and the recommendations which I put forward did not potentially "contaminate the RFT process" as the ACTGS suggests the concessions being sought by the Tradies as per [the] 24 October 2014 advice now did'.

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

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

Please advise of your position and we will respond appropriately to [the Tradies’ legal representative].

We look forward to your instructions.

2.99 In advice to the Audit Office in response to the draft proposed report (4 December 2017) the former Director-General of the Economic Development Directorate advised:

... I had not seen a copy of the [ACT Government Solicitor’s Office] advice before my [interview under oath or affirmation]. I note however that the extract of the [ACT Government Solicitor’s advice] in the report ... states that whether the terms of the negotiated outcome are materially similar “is a matter of degree and judgement”. I endorsed the eventual negotiated outcome on the basis of advice and information provided to me by my senior staff. I do not recall any of my staff putting to me that concerns identified by the GSO rose to the level of there being “significant risk” in relation to the negotiations or the validity of the tender process. Further, no officer in the [ACT Government Solicitor’s Office] ever contacted me directly with concerns regarding the negotiations. If the [ACT Government Solicitor’s Office] had concerns of that nature, I would reasonably expect that they would be brought to my attention and if such concerns had been raised, I would have carefully considered them.

2.100 In advice to the Audit Office on the first final proposed report (13 December 2017) the former Director-General of the Economic Development Directorate further advised:

... I would have carefully considered re-advertising the RFT if I had formed the view that the changes to the tender conditions represented a significant departure from the RFT. I did not have the benefit of either the [ACT Government Solicitor’s Office] internal email or the [Australian Government Solicitor] advice at the time and relied on the information and advice provided to me by senior [Economic Development Directorate] staff.

...

As with all tender processes, there was a period of negotiation with the preferred tenderer to arrive at an agreed outcome. In acknowledging the terms proposed by the Tradies, I called a special meeting on around 19 November 2014 to consider what should happen with the RFT. I did so as I considered this would be the most efficient way of dealing with the issues and getting all relevant advisers together in one location. I expected that the relevant people at the meeting would make and keep reasonable records of the meeting. This included members of the [ACT Government Solicitor’s Office] who were present at, and providing advice during, every critical juncture of the RFT. Following careful consideration of the verbal advice and information that I received from my senior staff, I agreed to proceed with the RFT.

... at no time during the meeting with [the ACT Government Solicitor’s Office] ... (or on any other occasion) were concerns put to me that there was “significant risk” regarding the terms being negotiated with the Tradies or the legality of the tender process. This is likely because the [ACT Government Solicitor’s Office] had never (to my knowledge) expressed its view to officers at the [Economic Development Directorate] in those terms. If the [ACT Government Solicitor’s Office] had concerns of such gravity, I would expect that they would be brought to my attention at the meeting or at some other time and if such concerns had been raised, I would have carefully considered them.

- 2.101 The ACT Government Solicitor's Office and its role in providing advice is discussed further in paragraphs 2.108 to 2.112.
- 2.102 In a response to the Audit Office on the first final proposed report (13 December 2017), the former Director, Sustainable Land Strategy (whose role in the project concluded in early 2014) advised:
- ... during my time dealing with the land swap action I was never advised that the land swap was, per se, a contravention of due process; and at no time do I ever recall being told that considering a land swap instead of cash was not in accord with the Government's wishes. After all, the terms of the payment were not as important as the payment. If the Government wanted payment in cash and rejected the land swap idea that was of no concern to me either way. Land swaps had been a part of other transactions entered into by the ACT Government; and land is usually a very good currency. Although it wasn't my idea that a land swap would form a part of the negotiation, I had no reason to believe that land properly valued wasn't as good as cash. It wouldn't have mattered who had won the tender.
- 2.103 The former Land Development Agency Director of Sales, and Deputy Director-General, Economic Development Directorate were provided with advice by the ACT Government Solicitor's Office in October 2014 that indicated accepting the Tradies' requested concessions posed a risk as it could result in the transaction being so divergent from the RFT that it was a direct sale rather than the outcome of the tender process. Representatives from the ACT Government Solicitor's Office and the Land Development Agency met with the Director-General on 19 November 2014 to discuss the Tradies' requested concessions and how to proceed. Subsequently the Director-General agreed to the Tradies' requested concessions. There is no documentary evidence of how the risk of non-compliance with the *Planning and Development Act 2007* was reviewed by the Director-General and mitigated by the Economic Development Directorate at the time.

Australian Government Solicitor advice

- 2.104 The ACT Audit Office sought advice from the Australian Government Solicitor with respect to the implications of the negotiated outcome and its divergence from the terms and conditions outlined in the RFT.
- 2.105 The Australian Government Solicitor advised:

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

Tender negotiations are common in clarifying tender responses before acceptance. Clarifications are typically in relation to matters that have arisen during the tender evaluation, or variations or alternatives identified by the tender in its tender response, or some other matter referable back to the RFT (eg occasional specifications identify essential and desirable requirements. For budgetary reasons desirable requirements may not be required, in which event it is common to negotiate adjustments to the offered price for the deletion of these 'desirable requirements'.) Tender negotiations can be complex, especially where complex services or equipment are being acquired.

In the context of the sale of freehold or leasehold title, the scope of tender negotiations is usually much lower. The types of things that are occasionally negotiated include:-

- delayed completion dates
- tenders submitted subject to zoning changes
- tenders submitted subject to development approval
- tenders submitted subject to detailed due diligence

The key constraint on tender negotiation in any context is that the items of negotiation are identified as part of the tender evaluation. This enables the evaluation board to take these matters into account as part of their tender evaluation and recommendation to the delegate. None of the matters identified ... appears to have been identified as qualifications or alternatives in Tradies tender response. They appear to be 'after the event' changes designed to secure the valuation.

2.106 The decision to materially depart from the tender process approved by the government in September 2012 posed a significant risk to achievement of its sale objective. In particular, the Australian Government Solicitor advised that the final negotiated terms of sale were now so divergent from the RFT that it could reasonably be considered a direct sale rather than the outcome of the RFT. This poses a significant risk to the validity of the negotiated transaction as only the government has authority under section 240 of the *Planning and Development Act 2007* to approve a direct sale in these circumstances.

2.107 In advice to the ACT Audit Office, the Australian Government Solicitor advised that changes to the sale terms and conditions that were subsequently negotiated with the Tradies represented significant departures from the RFT and 'based on these departures from the RFT, it would be reasonable to conclude that the eventual sale to Tradies departed so far from the provisions of the RFT as advertised that it could reasonably be regarded as a direct sale rather than the outcome of the RFT. This poses a significant risk to the validity of the negotiated transaction as only the government has authority under section 240 of the *Planning and Development Act 2007* to approve a direct sale in these circumstances'. Such approval was not secured.

Role of the ACT Government Solicitor

2.108 In a response to the Audit Office on the first final proposed report (13 December 2017), the former Director-General of the Economic Development Directorate advised:

There is no discussion [in the report] of the GSO's characterisation of its involvement in the tender negotiations which is at odds with documentary evidence referred to elsewhere in the report which indicates that the GSO provided significant advice to some officers of the EDD on the progress of negotiations in October 2014, as well as my own recollection that representatives of the GSO were present at critical junctures of the tender process. While the Probity Officer may not have been involved at all times, the GSO had oversight of the tender process in its dual role of probity and legal adviser.

2.109 In a response to the Audit Office on the first final proposed report (13 December 2017), the former Director, Sustainable Land Strategy similarly noted that at no time did the Probity Officer 'issue an instruction ... to cancel the tender or otherwise excuse themselves from the process ...' and further advised:

... while there may have only been very limited involvement of the Probity Advisor ... the involvement of staff of the [ACT Government Solicitor's Office] was **routine and ongoing**.

Indeed, officers of the [ACT Government Solicitor's Office] were actually embedded within EDD/LDA to facilitate easy access to their legal advice and guidance. Yet at no time did any of these legal advisers find that the process was conducted other than in the appropriate manner. Had they done so they would have alerted the Probity Advisor. This did not happen when I was managing the tender and the negotiation. Had they ... ever made such a finding or recommended alternative actions to the ones that were proposed, I would have followed their advice **without hesitation**.

2.110 The ACT Government Solicitor has advised, with respect to its role:

[ACT Government Solicitor records] broadly disclose that the involvement of the Probity Officer was limited and confined to responding to specific requests for discrete advice from representatives of the client. From our records, and as disclosed in the Schedule of Documents, there was no involvement of the Probity Adviser during the tender evaluation phase, and only very limited involvement in the tenderer negotiation phase.

Further, these records also reflect that the role of the ACTGS officers who were engaged as legal advisers was predominantly limited to the preparation and drafting of the applicable sale and purchase contracts, and other consequential legal documents. A further review of our records, including electronic time records, shows there was only limited involvement by our office in the time period between the Request for Tender closing and instructions being received to prepare the relevant documentation for negotiation.

[The former Director, Sustainable Land Strategy] also contends that the involvement of ACTGS staff was routine and ongoing, with some ACTGS staff being outposted to the Land Development Agency (**LDA**). It is true that an outposted retainer arrangement has existed with the LDA at various times. However, those outposted officers were there to assist in relation to specific matters upon which they received requests/instructions, noting the full scope of the LDA's activities involved a vast range of matters. While the arrangement may have created an impression in the mind of some LDA officers that ACTGS had oversight of all matters that was clearly not the position, with the outposted officer's role being limited to providing advice on individual matters as requested.

Finally, I note that it is an incorrect characterisation of the ACTGS's role to state that we had 'oversight of the tender process' ... The carriage of a tender process is a matter for the individual Directorate. The ACTGS provides legal and probity advice on an as needed basis and in response to specific requests for advice... The ACTGS provides advice on relevant matters which may inform the client, however we do not have the responsibility of guiding the every action of officers.

2.111 The former Director-General of the Economic Development Directorate advised 'the GSO had oversight of the tender process in its dual role of probity and legal adviser' and the former Director, Sustainable Land Strategy advised that ACT Government Solicitor's Office staff involvement 'was **routine and ongoing** ... [and] at no time did any of these legal advisers find that the process was conducted other than in the appropriate manner'. The ACT Government Solicitor's Office disagrees with the characterisation of its role as having 'oversight' of the tender process, noting that '[the] carriage of a tender process is a matter for the individual Directorate. The ACTGS provides legal and probity advice on an as needed basis and in response to specific requests for advice... The ACTGS provides advice on relevant matters which may inform the client, however we do not have the responsibility of guiding the every action of officers'.

2.112 The ACT Government Solicitor's Office has also advised that 'the involvement of the Probity Officer was limited and confined to responding to specific requests for discrete advice from representatives of the client' and that 'the role of the ACTGS officers who were engaged as legal advisers was predominantly limited to the preparation and drafting of the applicable sale and purchase contracts, and other consequential legal documents'. It is apparent that there is a misunderstanding between participants in the tender process with respect to the role of the ACT Government Solicitor's Office.

Governance

Roles, responsibilities and authority

2.113 The former Land Development Agency Director of Sales and Senior Manager, Sales advised that the tender was led and solely managed by the Economic Development Directorate in a 'bespoke' way, and that it was unusual for the Economic Development Directorate to lead such a tender.

2.114 The terms of the sale negotiated with the Tradies have arguably exceeded the parameters of the negotiation authority given to the Economic Development Directorate for the sale. There is no evidence of authorisation of Economic Development Directorate officers to deviate from (or relinquish) RFT requirements, or enter into a complicated transaction requiring significant due-diligence that was analogous to a direct sale previously rejected by Cabinet.

2.115 While it is apparent that Cabinet and the minister authorised the RFT and reacted to early agency briefs, there is no evidence that they were advised by executive management of the departures from the process Cabinet approved, or asked to review and approve the final outcome.

2.116 When asked if he had ever sought and / or received permission from Cabinet or the minister for the changes to the original RFT sale terms and conditions he approved during the negotiations, the former Director-General advised under oath or affirmation:

... I would never have, in those cases, gone to Cabinet. They wouldn't have made any commentary on that. They would have let the process go through...

2.117 On 28 April 2017 the Minister for Planning and Land Management similarly advised the Legislative Assembly, in response to its 29 March 2017 resolution requesting information on the land swap, that:

There was no legislative or other requirement to formally advise the then Chief Minister or Cabinet of the purchase.

2.118 In a response to the Audit Office on the third final proposed report (24 January 2018), the former Director, Sustainable Land Strategy advised:

... the tender development, RFT advertisement, evaluation assessment and negotiations up to the decision by the Director-General to accept the terms outlined to him in a brief I wrote on

13 December 2013, were the logical outcome of the decision by Cabinet in late 2011, early 2012 and then again in September 2012. These terms were within the scope established by those Cabinet decisions, and delivered the best outcome for the Territory from that Cabinet decision.

- 2.119 No codified roles and responsibilities were established for the sale of Block 30 Section 34 including the roles of executive management, Cabinet and the minister in decision-making and negotiation with the Tradies. The lack of codified roles and responsibilities has contributed to a lack of accountability in the ensuing negotiations with the Tradies.

Organisational values

- 2.120 This audit report has identified a series of inadequate administrative practices for the tender for the sale of Block 30 Section 34 Dickson and the subsequent negotiations for the land swap for Blocks 6 and 25 Section 72. These include poor:

- articulation of evaluation criteria and guidance for the RFT for Block 30 Section 34;
- documentation of the Tender Evaluation Panel's evaluation of tender responses for the RFT for Block 30 Section 34;
- recognition and consideration of risks associated with proceeding with the land swap transaction, in light of legal and probity risks being identified by the ACT Government Solicitor's Office; and
- documentation and record-keeping associated with the negotiation with the Tradies, including documentation of the merits of the transaction and value for money for the Territory.

- 2.121 Chapter 3 of this report discusses the value for money for the Territory arising from the sale of Block 30 Section 34 and the resulting land swap with the Tradies for Blocks 6 and 25 Section 72. It concludes that there are indications that the outcome the Directorate negotiated with the Tradies did not represent value for money; there is a high risk the Directorate relinquished an estimated value with an upper range of \$2.4 million to \$2.65 million to the Tradies.

- 2.122 When discussing the negotiations that ensued between the Tradies and the Economic Development Directorate following the initial tender evaluation in December 2012, in an interview under oath or affirmation in October 2017 the former Director, Sustainable Land Strategy discussed the November 2012 valuation provided by MMJ Real Estate and efforts aimed at ensuring the Tradies agreed to the reserve price of \$3.18 million. The former Director, Sustainable Land Strategy advised that there was no interference in the tender process by the government but that there were perceived risks associated with the negotiations and not reaching an agreement with the Tradies:

Former Director, Sustainable Land Strategy

... The more I think about it now, the – I seem to recall worrying that we were going to be in a real pickle if [the Tradies] didn't agree, because – because there was – there was so much, well, politics around it. And I seem to recall thinking that, well, what if – what if someone, like Woolworths, comes in and actually beats them? Heck, that's going to really ...

Audit Office

Why would that have created a problem?

Former Director, Sustainable Land Strategy

Not for us, I mean, and we would ... we were doing everything we could to get the best price we possibly could ... but, I mean, we don't have to be naive here. I mean, it was clear that the government wanted the Tradies to win. So if it turned out that the commercial process – I mean ... they only knocked back the direct sale because of the optics of it. I mean, they – in telling us to get on with a – a commercial process, they still wanted the Tradies there, yeah.

...

Audit Office

How do you know that? I'm going to have to – this is where I'm going to have to really sort of say – “clearly the government wanted the Tradies to win.” How do you know that?

...

But you've made a statement – “it was clear the government wanted the Tradies to win.” Is there something in the media? Is there something somewhere where I can go to say, “Hmm. It is clear that the government wanted the Tradies to win.”

Former Director, Sustainable Land Strategy

Well, as far as – I mean, the reality was that the Tradies were close allies of the ... government and the Labor Party... I was aware that the Tradies had meetings – had had meetings with the government.

Audit Office

In relation to the tender?

Former Director, Sustainable Land Strategy

No. Well, I can't say, but I know that ... the head of the Tradies, was very confident that he had the government on side.

Audit Office

When we say “government”

...

Which minister was in at that particular stage?

Former Director, Sustainable Land Strategy

I think it was ... the Minister for Economic Development, and – and he was Treasurer. And the – and Minister for Planning.... But in any event, I mean, you can't – there's no document to find which says there's political influence. But the - I think it was common knowledge that the Tradies, the union running the Tradies, were allies of the government and that they hoped they'd win. But in terms of what you probably want to know is that, I mean, there's no evidence to prove – or that I'm aware of – even in terms of meetings, phone calls, anything like that, which would say the government exerted pressure or in some way.

Audit Office

So would you characterise it more as a belief ... an unsubstantiated belief, or was there more credence to it than that?

Former Director, Sustainable Land Strategy

Well, I think it was just – it's a belief, but it's based on, you know, what is understood to be the political climate. There were – the government had allies and it had enemies. Woolworths were certainly no friend of the government.

- 2.123 The Audit Office found no evidence to substantiate this belief. With respect to the above statement by the Director, Sustainable Land Strategy, the Audit Office consulted the Chief Minister. The Chief Minister advised that neither he nor, to his knowledge, other members of the government subscribed to the views expressed by the former Director in the transcript quoted above and at no time did the government signal a preference for the Tradies to be the successful tenderer to Territory officials either formally or informally. The Chief Minister also emphasised and reiterated the government's intentions for the sale, which were to maximise value through an open and contestable process. In a response to the third final proposed report (24 January 2018) the Chief Minister advised that the Government maintains a very positive relationship with Woolworths.
- 2.124 The strong and ongoing focus on achieving a result with the Tradies post-selection of the Tradies as the preferred tenderer is reflected in information provided in an interview under oath or affirmation with the former Director, Sustainable Land Strategy:

Former Director, Sustainable Land Strategy

... we would have told [the State Chief Executive, ACT for Colliers International], "well, you know, we've – the scope for this is – you know, we can't." If we can't – well, what would have happened if we didn't – I'm speculating now, but I'm pretty sure I know what would have happened if they wouldn't have come to the party on the \$3.18 million. They would have come back with a figure and we would have sought ministerial agreement to a lower figure than the valuation. But in the event, I don't think that happened. Well, no, it didn't happen, as ...

Audit Office

Sorry. I'm just clarifying, and I know we're asking you. But Colliers were called in --- to position arguments around the valuations? They weren't called in and told, "Get the price up"?

Former Director, Sustainable Land Strategy

No, no. They were told that – almost – and it wouldn't have been the first or only time we had a situation where we had to bring in another party to say, "Well, you know, is there any way we can get closer together? What's the problem? You know, why is your valuation so different to our valuation?" And, yeah, and now that I think about it, I think I was relieved, because I did think – just to go back to some of the earlier points I was making – I was thinking, well, this is going to be very awkward because if we can't get it, we're going to have to do what Treasury always hates, which is to seek, you know, ministerial approval for something outside the – beyond, or after commercial process.

You know Treasury's view invariably was put it back in the marketplace, you know, do it again, you know.

Audit Office

Mm.

Former Director, Sustainable Land Strategy

... And it was – so – so it would have been a relief that we didn't have to go through that.

2.125 In a response to the second final proposed report (15 January 2018), the former Director, Sustainable Land Strategy advised:

It wouldn't have mattered who would have been the preferred tender, we were going to be "in a pickle" if we didn't finalise the deal because – for reasons I have outlined previously – it would have been difficult to restart the process given the various risks that were involved in doing so.

2.126 There is a risk that the strong and ongoing focus on achieving a result with the Tradies post-selection of the Tradies as the preferred tenderer occurred to the detriment of appropriate administrative processes. To mitigate this risk in an organisation where staff are required to integrate probity and commercial considerations it is important to have well-articulated values supported by guidance on how these are to guide actions.

2.127 The weaknesses in the Economic Development Directorate's governance and administrative arrangements for the RFT highlight the need for Environment, Planning and Sustainable Development Directorate, City Renewal Authority and Suburban Land Agency executive management to give priority to identifying and addressing the risks associated with the future sale (and purchase) of Territory land. In doing so it will be important to clearly articulate and subsequently demonstrate, requisite organisational values to guide and influence staff behaviours.

RECOMMENDATION 1 REMEDY DEFICIENCIES IN THE TENDER PROCESS

Consistent with its administrative responsibilities since July 2017 the Environment, Planning and Sustainable Development Directorate should:

- a) brief the Minister administering the *Planning and Development Act 2007* and Cabinet on the implications of the risk to legislative compliance identified by this report and advise on options for remedying the deficiencies with the tender process; and
- b) develop and implement mechanisms to mitigate potential noncompliance.

RECOMMENDATION 2 STRENGTHEN PROBITY

Consistent with administrative responsibilities since July 2017 the Environment, Planning and Sustainable Development Directorate, City Renewal Authority and Suburban Land Agency should strengthen accountability for probity in procurement by:

- a) establishing clear standards of conduct and record-keeping for all staff engaged in tenders that, at a minimum, address communications with prospective and actual tenders, negotiations with preferred and winning bidders, and evaluations of both initially submitted and final bids;
- b) facilitating training on probity for all staff involved in procurement processes; and
- c) introducing controls and reporting requirements at key procurement (including tender) stages that assure and transparently demonstrate consideration of probity risks.

RECOMMENDATION 3 STRENGTHEN GOVERNANCE AND ASSURANCE

Consistent with administrative responsibilities since July 2017 the Environment, Planning and Sustainable Development Directorate, City Renewal Authority and Suburban Land Agency should strengthen governance and accountability arrangements for staff involved in land procurements by establishing and implementing controls to assure:

- a) consistent adherence to clearly defined roles and responsibilities for tender oversight, conduct and probity management;
- b) tender negotiations are transparent, appropriately documented and approved, and that they meet probity requirements; and
- c) tender decisions, particularly those arising from complex and lengthy negotiations, are independently reviewed and quality assured against defined procedural and probity requirements prior to approval.

RECOMMENDATION 4 REINFORCE ORGANISATIONAL VALUES

Consistent with administrative responsibilities since July 2017 the Environment, Planning and Sustainable Development Directorate, City Renewal Authority and Suburban Land Agency should reinforce organisational values by:

- a) clearly articulating their values and providing guidance to staff on how these are to be implemented; and
- b) implementing procedures that reinforce and infuse the values throughout the organisation.

Statement from the Tradies

2.128 In advice to the Audit Office in response to the draft proposed report (1 December 2017) the Chief Executive Officer of the Tradies provided information and context for the Tradies in relation to the negotiation process that occurred between late 2012 and December 2014. An extract of this is included in this report in Figure 2-1.

Figure 2-1 Statement from the Tradies

From December 2012, the Tradies entered a protracted (2 year) negotiation phase with the Government. This negotiation phase was complex and frustrating. Many issues contributed to the Tradies frustration.

- We didn't agree with the Government valuation of Block 30 Section 34. The market processes (RFT responses) indicated an aspirational/inflated Government value (reserve of \$3.18m).
- Notwithstanding the above point, the Tradies was prepared to match the Government's reserve of \$3.18m and immediately settle. However, the Government was not prepared to settle.
- The Government was steadfast in negotiations that it wanted to maintain control of the block (car park) and associated revenues until other developments in the Dickson precinct had been completed.
- The Tradies was placed in an invidious position. Simply put, a piece of land was offered for sale, a sale price was offered (**buyer**), the offer was rejected by the vendor (**seller**) because it did not meet their reserve price, the offer was recalibrated (buyer) to meet the vendor's (**seller**) reserve price, the vendor (**seller**) responded and indicated they would accept the reserve price, but the sale would be deferred until such times the vendor (**seller**) felt comfortable in completing the transaction.
- Notwithstanding considerable frustration, the Tradies took the view it was better to secure the purchase of the block irrespective of the restraints being placed upon it by the Government.
- While determining how the transaction might be completed both the Government and the Tradies suggested a range of potential possibilities. From the Tradies perspective, it was commercially unwise to pay for something which we could not use for several years. The Government understood the Tradies position.
- At this point the negotiation process broadened. It was clear to the Tradies the Government had a strong interest in eventually securing Blocks 6 and 25 Section 72. The Tradies placed a significant strategic and monetary value on this land holding as longer term these blocks represented an enormous potential development value. Specific opportunities could relate to residential development and or other commercial use.
- It was also clear the Government saw great value in Blocks 6 and 25 Section 72 and an opportunity to acquire these blocks may not arise again.
- Consequently, the Government and the Tradies agreed to progress negotiations towards the Tradies securing Block 30 Section 34 Dickson and the Government securing Blocks 6 and 25 Section 72.
- Both the Government and the Tradies were legally represented during the course of negotiations.

- Some 2 years after the initial RFT for the sale of Block 30 Section 34 Dickson the Government and the Tradies reached agreement on the sale.

Conclusion

1. The Tradies acquired Block 30 Section 34 Dickson and clearly paid above the value as determined by the market.
2. The Government acquired Blocks 6 and 25 Section 72 at a value which was probably less than fair value. The Tradies could have pursued de concession, lease variation and change of use of these blocks – the Tradies did not.
3. The Government through their own processes and at no cost could make immediate change to lease purposes for Blocks 6 and 25 Section 72 and achieve a significant financial “windfall”. It is clear the Government knew this and considered the overall transaction to be very favourable to them.
4. The impression that the Tradies may have received favourable treatment in the overall transaction is unequivocally wrong.

3 VALUE FOR MONEY

3.1 This chapter considers the value for money for the Territory arising from the sale of Block 30 Section 34 and the resulting land swap with the Tradies for Blocks 6 and 25 Section 72.

Summary

Conclusions

The Economic Development Directorate did not rigorously assess the final negotiated land swap transaction and did not demonstrate the benefits to the Territory. There are indications that the outcome the Directorate has negotiated with the Tradies does not represent value for money; there is a high risk the Directorate has relinquished value up to an estimated \$2.4 million to \$2.65 million to the Tradies. This is due to significant inadequacies with how the negotiations and tender process were managed. There is a high risk that:

- the Territory sold Block 30 Section 34 to the Tradies for less than its value. The price the Tradies will pay at settlement for the block reflects the original 5 November 2012 MMJ Real Estate valuation produced for the RFT, which has not been adjusted to take account of the fewer replacement car parks offered by the Tradies in its tender and the resulting uplift in value from this and other changes during the negotiations; and
- the commercial terms of the sale of Block 6 Section 72 resulted in the Territory paying above valuation with conditions that offered no evident additional value to the Territory but benefited the Tradies.

The Directorate's decision to proceed with the sale in these circumstances was not soundly based because it did not consider and mitigate the risks arising from these circumstances. Post-selection of the Tradies as the preferred tenderer there was a strong and ongoing focus on achieving a negotiated outcome without a full understanding of the benefits, costs and risks.

Key findings

	Paragraph
The Economic Development Directorate used the November 2012 MMJ Real Estate valuation of Block 30 Section 34 of \$3.18 million (excluding GST) as the basis for setting a reserve price for the block for the purpose of the tender process. Subsequent negotiations between the Directorate and the Tradies were pursued with the intention of obtaining the Tradies' agreement to pay the reserve price.	3.10
The assumptions on which the \$3.18 million valuation was based were stated in the valuation report, including the provision of a total of 445 car parks which includes 154 replacement public car parks for those to be 'lost' from the existing public car	3.12

parking site. Subsequently, the two tenderers were evaluated against a requirement of 139 replacement car parks. Fewer replacement carparks increases the value of the land, but the valuation was not adjusted to reflect this.

As part of its December 2012 evaluation of tenders, the Tender Evaluation Panel recognised that the Tradies' commitment to only replace 84 of the existing public car parks that were to be 'lost' due to the redevelopment (instead of the 139 assumed by the Economic Development Directorate in the RFT process or the 154 that formed the basis of MMJ Real Estate's valuation of the land at \$3.18 million) would result in a higher value for the block. The *Tender Evaluation Report* noted that, after taking into account the reduced number of car parks and the earlier settlement date offered by the Tradies as part of its tender, 'the MMJ Real estate revised valuation would be of the order of \$3.65 to \$3.7 million'.

3.18

In April 2013, Colliers International provided advice to the Economic Development Directorate after reviewing the assumptions and method underpinning the November 2012 MMJ Real Estate valuation and provided an 'opinion of value for the purposes of a direct sale to the Tradies Group'. The Colliers International advice was based on similar assumptions to those underpinning the MMJ Real Estate valuation. It also assumed that 'the use of car park will be added to the list of uses given that 154 spaces are to be reinstated on site and will be commercially leased'. Colliers International advised that the value of Block 30 Section 34 would be \$2,750,000 or 'closer to \$3,100,000 - \$3,150,000' if the developer did not have to contribute to the cost of constructing an easement road between Badham Street and Dickson Place.

3.26

The assumptions on which the Colliers International advice were based were stated in the advice, including the assumption that 154 car parking spaces were to be replaced. In advice to the Audit Office in response to the draft proposed report (4 December 2017), the State Chief Executive, ACT of Colliers International advised 'there were no instructions or information provided to Colliers International in March or April 2013 to show any negotiation of 84 replacement cars'. It is not clear why Colliers International was asked to value the block on the assumption that 154 car parking spaces were to be replaced, when it was apparent that the Economic Development Directorate were in negotiations with the Tradies on the basis of 84 publically available replacement car parking spaces.

3.27

Capital Valuers Pty Ltd advised that the following two factors have the greatest impact on the value of Block 30 Section 34:

3.29

- the Tradies proposal to include a special condition in the contract for sale permitting them to remove an easement on the land designed to ensure pedestrian access over and along the ground floor for no commensurate cost: and
- the Tradies offer to only provide 84 replacement car parks – i.e. 55 less than the 139 assumed by the Tender Evaluation Panel to underpin the reserve price.

Capital Valuers Pty Ltd estimated that the value to the Tradies of not having to construct an easement on Block 30 Section 34 as between \$200,000 to \$300,000.

3.33

Capital Valuers Pty Ltd estimated that the value to the Tradies of only having to provide 84 replacement public car parks (instead of 154) as part of the redevelopment of Block 30 Section 34 as approximately \$1,570,000. 3.43

The MMJ Real Estate valuation (5 November 2012) of Block 30 Section 34 was based on an assumption that all current publically available car parking on the site (i.e. 154 carpark spaces) was to be replaced. However, on 6 November 2012 the Economic Development Directorate advised prospective tenderers that it would support 'a minimum of 84 spaces' and the Tradies subsequently responded that its tender was predicated on the 'provision of 84 public parking spaces in the development as replacement parking as per the RFT'. Although the Director, Sustainable Land Strategy advised that the replacement car parking would be provided by the Tradies on its adjacent block(s) the Audit Office has not identified any documentation to support this claim. The number of replacement car parks is an important consideration affecting the value for money for the Territory from the transaction. 3.47

Taking into account the overall effects on value from reduced requirements for easement access and the replacement of only 84 car parking spaces Capital Valuers Pty Ltd advised of an estimated 'adjusted value range' for Block 30 Section 34 of between \$4,750,000 and \$5,000,000. This is approximately \$1.57 million to \$1.82 million more than the November 2012 MMJ Real Estate valuation of the block of \$3.18 million, which was used to establish the reserve price for the block, and which represented the final price that was agreed to between the Economic Development Directorate and the Tradies. If 154 publically available replacement car parking spaces (rather than the 84 offered by the Tradies as part of the tender) are provided for Block 30 Section 34, as part of any future development, this would ameliorate the loss in value to the Territory. This however is an uncertainty. 3.48

During negotiations between the Economic Development Directorate and the Tradies following the identification of the Tradies in December 2012 as the preferred tenderer for the sale of Block 30 Section 34, the Directorate agreed to the purchase of Blocks 6 and 25, Section 72. The Directorate obtained valuations for these blocks in April 2013 in order to guide its negotiations with the Tradies. An April 2013 valuation of Block 6, Section 72 (with a rent-free period of 18 months) by Colliers International valued the site at \$3.25 million. During negotiations between the Directorate and the Tradies the Directorate agreed to a rent-free period of 42 months. Capital Valuers Pty Ltd advised that by adopting the method outlined in the Colliers International April 2013 valuation of the block, a discount to the assessed value for a 42 month rent-free period would result in an estimated value of \$2.42 million for the site, which is approximately \$830,000 less than what the Territory agreed to pay the Tradies. 3.61

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

The Territory sold Block 30 Section 34 on favourable terms to the Tradies (estimated to be in the range of up to \$1.57 million to \$1.82 million less than the potential value of the block) and acquired Block 6 Section 72 from the Tradies for an estimated \$830,000 more than its potential worth. The lack of documentation associated with the assessment of the benefits, costs and risks associated with the land swap arrangement means that the value of the land swap arrangement to the Territory is not demonstrated. 3.76

A key document that formed the basis for decision-making on 17 December 2013 was a 13 December 2013 minute to the Director-General of the Economic Development Directorate from the Director, Sustainable Land Strategy. The minute misrepresented the value of Block 6 Section 72 by advising of a value of \$3,550,000 and implying that this value included 'a 40 month rent free component to the Tradies'. This was not the case, as the value of \$3,550,000 was on the basis of vacant possession. As the minute preceded the final transaction including further negotiations that occurred over the course of 2014, it also could not identify that concessions given to the Tradies in the course of ensuing negotiations resulted in Block 30 Section 34 being potentially worth more than the November 2012 valuation of \$3.18 million. This highlights the opportunity cost to the Territory from the Economic Development Directorate's decision to proceed with the final exchange of contracts in the absence of an updated valuation and rigorous assessment of value for money. 3.87

Procurement context

3.2 Information on the *Government Procurement Act 2001* is presented in the audit report for context, in order to demonstrate principles of better practice procurement. Subsection 22A(2) of the *Government Procurement Act 2001* provides that 'value for money means the best available procurement outcome' and subsection 22A(3) provides:

In pursuing value for money the entity must have regard to the following:

- (a) probity and ethical behaviour
- (b) management of risk
- (c) open and effective competition
- (d) optimising whole of life costs, and
- (e) anything else prescribed by regulation.

3.3 Achieving and maximising value from a competitive tender requires that the process be competitive and open to all eligible interested parties. It also demands strict adherence to probity, and careful attention to weighing up the benefits, costs and risks of alternative proposals to ensure that decision-makers are fully informed, and that the benefits to the Territory from the resulting transaction can be clearly demonstrated.

3.4 Chapter 2 of this report discusses significant inadequacies with the Economic Development Directorate's management of probity and administrative requirements of the tender.

- 3.5 In particular it highlighted that the Economic Development Directorate did not:
- effectively identify or manage the probity risks arising from the sale as it did not:
 - recognise and seek approval for material departures it permitted from the RFT process the government approved;
 - give all prospective tenderers the same opportunity to bid on the materially different sale terms that were conceded to the Tradies during tender negotiations; and
 - satisfactorily document its actions and decisions relating to the tender; and
 - achieve transparency and open competition, including maintaining adequate records of the negotiations and the basis of related decisions.
- 3.6 Chapter 2 raises doubts with respect to compliance with the *Planning and Development Act 2007* and *Planning and Development Regulation 2008* because the sale occurred without government approval with conditions materially different from the advertised tender.
- 3.7 The following section of this report examines the merits of the commercial terms that the Economic Development Directorate negotiated in the resulting land swap transaction, and the Directorate's related assessment of value for money.

Block 30 Section 34 considerations

- 3.8 As stated in paragraph 1.8 of this report, the final price for Block 30 Section 34 underpinning the exchange of contracts between the Land Development Agency and the Tradies in December 2014 was \$3.18 million excluding GST. This reflected:
- the price the parties agreed to a year earlier in December 2013; and
 - the November 2012 MMJ Real Estate valuation of Block 30 Section 34, which the Economic Development Directorate used to set the reserve price for the purposes of the tender.

MMJ Real Estate valuation

- 3.9 On 5 November 2012 MMJ Real Estate provided a valuation for Block 30 Section 34 to the Economic Development Directorate. The valuation was provided on the basis of 'Market Value – Subject to Dickson Masterplan – 'Draft variation 311''. The block was valued at \$3.18 million (GST exclusive).
- 3.10 The Economic Development Directorate used the November 2012 MMJ Real Estate valuation of Block 30 Section 34 of \$3.18 million (excluding GST) as the basis for setting a reserve price for the block for the purpose of the tender process. Subsequent negotiations between the Directorate and the Tradies were pursued with the intention of obtaining the Tradies' agreement to pay the reserve price.

3.11 The valuation was based on a number of assumptions including:

- a hypothetical 'mixed use' development of retail, restaurants and bars on the ground floor and 108 residential units on the upper floors; and
- the provision of a total of 445 car spaces in underground car parking structures, comprising:
 - 154 replacement car parks for those to be 'lost' from the existing public car parking site⁴; and
 - 291 additional car parks to be generated from the development (139 attributable to the ground floor and 152 attributable to the residential units).

3.12 The assumptions on which the \$3.18 million valuation was based were stated in the valuation report, including the provision of a total of 445 car parks which includes 154 replacement public car parks for those to be 'lost' from the existing public car parking site. Subsequently, the two tenderers were evaluated against a requirement of 139 replacement car parks. Fewer replacement carparks increases the value of the land, but the valuation was not adjusted to reflect this.

December 2012 Tender Evaluation Report

3.13 The potential for Block 30 Section 34 to be worth more than the November 2012 valuation, due to a reduction in the number of publically available car parks, was recognised as early as December 2012, following the evaluation of tenders received in response to the RFT.

3.14 As noted in Table 2-3, as part of its response to the RFT the Tradies identified its intention to utilise the land for a six-storey mixed use development comprising ground floor commercial space and 130 residential apartments on five upper levels. The Tradies also advised of its intention to integrate the site into its 'wider holdings and create an integrated master plan for the southern part of the Dickson Centre'. The Tradies also advised of its intention to provide '84 public parking spaces in the development as replacement parking as per the RFT'.

3.15 In relation to the Tradies offer the *Tender Evaluation Report* stated:

The Canberra Tradesmen's Union Club Limited (the Club) offered a price of \$2,420,000 inclusive of GST (\$2,200,000 exclusive of GST) with settlement 30 days after exchange of contracts. Its offer was conditional on only being required to provide 84 replacement car parks.

⁴ The requirement to replace 154 car spaces 'lost' due to the redevelopment was subsequently interpreted as 139 for the purpose of the tender evaluation. The MMJ Real Estate valuation was not adjusted to take this into account.

3.16 The December 2012 *Tender Evaluation Report* recognised that, should the successful tenderer only replace 84 public car park spaces, then the value of the land would be higher. This is because the successful tenderer would not incur as much expenditure in constructing car parking on the site. Accordingly, the December 2012 *Tender Evaluation Report* stated:

The MMJ Real estate revised valuation would be of the order of \$3.65 to \$3.7 million.

3.17 Along with recommending that the Tradies be recognised as the preferred tenderer, the December 2012 *Tender Evaluation Report* recommended that ‘MMJ Valuers be requested to provide an updated valuation on the basis that settlement occurs 30 days after exchange and only 84 car spaces are replaced’. This did not occur.

3.18 As part of its December 2012 evaluation of tenders, the Tender Evaluation Panel recognised that the Tradies’ commitment to only replace 84 of the existing public car parks that were to be ‘lost’ due to the redevelopment (instead of the 139 assumed by the Economic Development Directorate in the RFT process or the 154 that formed the basis of MMJ Real Estate’s valuation of the land at \$3.18 million) would result in a higher value for the block. The *Tender Evaluation Report* noted that, after taking into account the reduced number of car parks and the earlier settlement date offered by the Tradies as part of its tender, ‘the MMJ Real estate revised valuation would be of the order of \$3.65 to \$3.7 million’.

3.19 As discussed in paragraph 2.44, the Tender Evaluation Panel recommended (and the former Director, Sustainable Land Strategy and former Director-General approved):

- ‘MMJ Valuers be requested to provide an updated valuation on the basis that settlement occurs 30 days after exchange and only 84 car spaces are replaced’; and
- ‘[Economic Development Directorate] be given authority to negotiate with the [Tradies] to achieve a sales price consistent with the updated valuations’.

Colliers International review of the November 2012 MMJ Real Estate valuation

3.20 The Economic Development Directorate engaged Colliers International in April 2013 to review MMJ Real Estate’s November 2012 valuation, and to provide an opinion of value. The Colliers International advice noted that it referred to ‘your instructions to provide a review of the valuation and assumptions provided by MMJ Valuers in respect to [Block 30] Section 34, Dickson’ and in so doing it had agreed to:

... review the requirements of the RFT including the following:

- 1) Settlement timing
- 2) Commence and completion clause
- 3) Reinstatement of car parking
- 4) Construction of park and hand back
- 5) Development rights and site constraints

3.21 The Colliers International advice noted ‘after reviewing the above and MMJ report, Colliers International will provide [an] opinion of value for the purposes of a direct sale to the Tradies Group’.

3.22 The Colliers International advice stated:

The provided valuation report completed by ... [MMJ Real Estate] is a comprehensive assessment of the development opportunities available to Block 21 (sic) Section 30, Dickson and has been based on the information contained in the tender and site plan completed by Indesco.

The valuation report accords with normal valuation practice and an assessment of value has been based on both the direct comparison and hypothetical feasibility approach.

3.23 The Colliers International advice stated:

... we do not materially disagree with the comprehensive report provided by [MMJ Real Estate] other than the degree to which the site is impacted upon by the significant amount of car parking, park and part of the road costs.

3.24 In this respect the Colliers International advice provided a value for the land of \$2.75 million using a direct comparison method but noted that 'if the developer of this site does not have to make any contribution to the cost of the road between Dickson Place and Badham Street, the value will be \$3,150,000'.

3.25 The Colliers International advice stated:

The preceding valuation calculations by Colliers International and [MMJ Real Estate] show that the market value of [Block 30] Section 34, Dickson to be in the range of \$2,750,000 - \$3,180,000 based on the requirements of the RFT.

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

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

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

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

3.26 In April 2013, Colliers International provided advice to the Economic Development Directorate after reviewing the assumptions and method underpinning the November 2012 MMJ Real Estate valuation and provided an 'opinion of value for the purposes of a direct sale to the Tradies Group'. The Colliers International advice was based on similar assumptions to those underpinning the MMJ Real Estate valuation. It also assumed that 'the use of car park will be added to the list of uses given that 154 spaces are to be reinstated on site and will be commercially leased'. Colliers International advised that the value of Block 30 Section 34 would be \$2,750,000 or 'closer to \$3,100,000 - \$3,150,000' if the developer did not have to contribute to the cost of constructing an easement road between Badham Street and Dickson Place.

3.27 The assumptions on which the Colliers International advice were based were stated in the advice, including the assumption that 154 car parking spaces were to be replaced. In advice to the Audit Office in response to the draft proposed report (4 December 2017), the State

Chief Executive, ACT of Colliers International advised 'there were no instructions or information provided to Colliers International in March or April 2013 to show any negotiation of 84 replacement cars'. It is not clear why Colliers International was asked to value the block on the assumption that 154 car parking spaces were to be replaced, when it was apparent that the Economic Development Directorate were in negotiations with the Tradies on the basis of 84 publically available replacement car parking spaces.

Factors impacting the value of properties subject of the negotiations

Capital Valuers Pty Ltd advice

- 3.28 The Audit Office sought to understand what factors have the greatest impact on the value of the properties that were the subject of negotiations between the Tradies and the Economic Development Directorate. In doing so the Audit Office engaged Capital Valuers Pty Ltd to review the valuations commissioned by the Economic Development Directorate for the sale and resultant land swap, including the effect on market value from the negotiated departures from the RFT.
- 3.29 Capital Valuers Pty Ltd advised that the following two factors have the greatest impact on the value of Block 30 Section 34:
- the Tradies proposal to include a special condition in the contract for sale permitting them to remove an easement on the land designed to ensure pedestrian access over and along the ground floor for no commensurate cost: and
 - the Tradies offer to only provide 84 replacement car parks – i.e. 55 less than the 139 assumed by the Tender Evaluation Panel to underpin the reserve price.

Easement

- 3.30 The specimen Crown Lease initially advertised with the RFT provided for an easement on Block 30 Section 34 that was designed to ensure pedestrian access over and along the ground floor in respect of any development proposed on Block 30.
- 3.31 During the negotiations, the Tradies sought and received a concession from the Economic Development Directorate to insert a special condition within the contract permitting it to apply to ACTPLA to remove the easement by amending its deposited plan without objection from the Territory. As noted in Table 2-5 of this report, this change materially reduced the obligations of the Tradies on the degree of pedestrian access along the ground floor required by its development – a risk further heightened by the removal of the Project Delivery Agreement and \$1 million bond, also conceded during the negotiations.
- 3.32 Capital Valuers Pty Ltd described the impact of this concession to the Tradies as follows:
- Subject to Town Planning/Architectural advice, the opportunity contained in the Contract for Sale for the buyer to request that the easement for access be removed prior to settlement is seen as a significant benefit to most purchasers, but particularly to the Tradies.

Removal of the easement before issuing the final Crown Lease and before settlement avoids the requirement to lodge a Development Application after settlement for a Lease Variation which would require approval and the payment of a Lease Variation Change. Furthermore, without the easement in place it is likely that the developable area of the site is increased and development costs reduced.

From the ACT Government's online mapping the depicted easement from (but excluding) the access drive to the Tradies car park to Badham Street totals approximately 240 square metres. Additional areas might become available for development if verge works to this land were not required.

Subject to Town Planning advice on the utilisation of this land the value of the site might be enhanced by \$200,000 to \$300,000 and possibly more.

3.33 Capital Valuers Pty Ltd estimated that the value to the Tradies of not having to construct an easement on Block 30 Section 34 as between \$200,000 to \$300,000.

3.34 In response to the third final proposed report (24 January 2018) specifically with respect to the 'particular advantage the Tradies had over all other potential bidders' the former Director, Sustainable Land Strategy further advised:

Because the Planning Authority planned to put a road between the Tradies existing site and block 30, this put a severe limit on the building envelope. However, the MMJ valuation did not factor in this limitation. Hence, the valuation was always inflated. In other words, the land was never worth what the MMJ valuation said it was worth. This is way, way more important when considering the issue of why bidders did not meet the price, than its non-appearance in the AFR!

3.35 The Audit Office notes the advice of the former Director, Sustainable Land Strategy with respect to the MMJ Real Estate valuation and also notes that the \$3.18 million figure identified in the valuation continued to be the reserve price that the Economic Development Directorate sought to achieve through negotiations with the Tradies. It is further noted that, should the Director, Sustainable Land Strategy have had reservations associated with the MMJ Real Estate valuation it was incumbent on the former Director to seek clarification and amendment from MMJ Real Estate on the valuation as necessary. There is no evidence that this occurred.

Replacement car parks

3.36 As discussed in paragraph 3.10, the RFT reserve price of \$3.18 million for Block 30 Section 34 established by the November 2012 MMJ Real Estate valuation was determined in part on the requirement for the purchaser to replace the number of car parks on site. MMJ Real Estate adopted a figure of 154 replacement public car parks in determining the valuation. Subsequent traffic studies commissioned by the Economic Development Directorate and included with the RFT documentation show that this figure was initially revised to 133 replacement car parks during the tender period, and later to 139 replacement car parks, being the benchmark used by the Tender Evaluation Panel for the purposes of standardising and evaluating submitted tenders.

3.37 The Economic Development Directorate did not keep adequate records to explain the changes in benchmarks used. Furthermore, as discussed in paragraph 3.17, an updated valuation to reflect the lower number of publically available car parks (i.e. the provision of only 139 replacement car parks which would be a less-costly option for the purchaser than a requirement to provide 154 replacement car parks) used as the benchmark for evaluating submitted tenders was not requested from MMJ Real Estate. Both the Tradies and Fabcot Pty Ltd submitted tenders proposing solutions involving basement car parking that would occupy the land underneath the park. As discussed in paragraph 3.46 the Tradies' tender was based on the provision of 84 replacement car parking spaces.

3.38 In relation to the reduced car parking requirements Capital Valuers Pty Ltd advised:

Based on the assumption that all car parking (including replacement spaces) would be provided on site then such a reduction of 70 spaces would result in a benefit to the land purchaser and accordingly increase the value of the land as a development site. This arises due to the value of the completed car parks being less than the cost of construction.

3.39 In relation to 'the basis upon which the Tradies was allowed to reduce the number of car spaces specified in the RFT' in response to the second final proposed report (15 January 2018) the former Director, Sustainable Land Strategy advised:

... they were able to convert existing private spaces they possessed into public spaces. I have noted further that the Planning Authority approved this arrangement.

...

The private car spaces the Tradies were offering were at least equivalent in value (and probably higher given that most of them were underground spaces).

3.40 There is no evidence of the ACT Planning and Land Authority's approval for the Tradies to convert carparks on its existing adjacent sites for use as publically available carparks associated with the future development of Block 30 Section 34.⁵ A 13 December 2013 minute to the Director-General of the Economic Development Directorate and Deputy Director-General, Land Strategy and Finance from the Director, Sustainable Land Strategy identified that 'the Tradies raised three issues requiring clarification' one of which related to replacement car parking due to the mandatory creation of a 'pocket park':

That there would be no requirement to replace 36 car spaces lost due to the mandatory creation of a 'pocket park' would not need to be replaced. [Former Environment and Planning Directorate officer] has confirmed that the additional parking provided by the Tradies in their existing basement can be used to account for these.

⁵ There was, however, discussion between the Economic Development Directorate and the Tradies with respect to making some of its existing carparking publically available, as part of a temporary parking strategy for Dickson while Block 30 Section 34 and Block 21 Section 30 were being developed. There is no indication that this was intended to be a long-term arrangement.

- 3.41 The Audit Office could find no evidence to support the assertion that the Environment, Planning and Sustainable Development Directorate or an officer of the directorate had approved this arrangement. In a response to the third final proposed report (24 January 2018) the former Director, Sustainable Land Strategy:

I am certain I received email confirmation of this approval from the transport specialist officer (i.e. it wasn't just advice over the phone or in a meeting), and that this could be found in my emails, or the emails of my colleague assisting me with the negotiation.

- 3.42 The Environment, Planning and Sustainable Development Directorate was requested to examine its records to identify any advice provided by the former Environment and Planning Directorate officer regarding parking associated with this block. None was found. There was also no evidence found by the Audit Office in a review of emails of key participants in the sale process.

- 3.43 Capital Valuers Pty Ltd estimated that the value to the Tradies of only having to provide 84 replacement public car parks (instead of 154) as part of the redevelopment of Block 30 Section 34 as approximately \$1,570,000.

- 3.44 In a response to the Audit Office on the third final proposed report (24 January 2018), the former Director, Sustainable Land Strategy advised:

The number of car parks to be replaced in the development was reduced by 15 spaces from 154 to 139 without the MMJ valuation being updated. As noted in the report ... this was *not* a question of preference to the Tradies because the revised figure was "included in the RFT documentation", which was made available to all parties who registered an interest. Using the valuation for each car space estimated by Capital Valuers ... we get a figure of a bit under \$22,500 per space, (i.e. 70 spaces = \$1.57m); and 15 of them would be worth about \$337,500. This seems to me, as an estimate of the costs of Dickson car spaces in 2012-13, to be highly inflated. I think it should be peer reviewed. Certainly, it would not equate with anything like the value of surface spaces in 2012-13 and probably not even first level basement spaces; and when you consider that the reduction was introduced largely because the pocket park was shown to reduce the number that could be put on the site, then we are probably talking about surface car parks, which were more like \$8000-\$9000 per space, if memory serves me correctly. 15 spaces at \$9,000 would be \$135,000. On reflection, we – I – should have asked MMJ to update their valuation to factor in this change. I can only assume that I must have reasoned at the time that, as the MMJ valued the land without the road easement, the value of the reduction in car parking (the \$135,000) was going to fall within the overvaluation of the block without the road easement.

... the Tradies had originally sought to have the car spaces reduced because the Planning Authority's requirement for a public 'pocket park' on the Badham street/Dickson Place corner of the block, reduced the area available on Block 30 for car spaces by some 36 surface spaces; the Tradies further claimed that trying to provide car spaces under a park with tree roots was highly problematic and probably not safe. As I recall what happened was that, on the advice of the Planning Authority, we were able to explain to the Tradies that the pocket park would not have deep-rooted trees and so they could still build car spaces underneath the park. We further said that the 139 spaces were a mandatory requirement of the RFT. However, as the Tradies were still concerned about digging beneath the pocket park, they suggested converting 55 of their existing underground spaces into public spaces and reducing the total accordingly. While I can see that accepting the Tradies suggestion was useful to the Tradies by reducing their engineering costs – though they did insist that any savings came at a cost to them in terms of member satisfaction, because substituting the car spaces would not be popular with members denied their previously exclusive underground parking – I don't recall

that we ever waived the need for the 139 spaces, when I was negotiating the deal. While not revaluing the reduction in spaces from 154 to 139 discussed under point 1 above might be criticised, the substitution of the 55 private spaces did not lose the Territory any value ... If the value of the 55 spaces were given away ...I can see no evidence that it happened during my tenure in the negotiation.

- 3.45 The Audit Office notes the assertions from the former Director, Sustainable Land Strategy and, in doing so, notes that the MMJ Real Estate valuation was based on the assumption that ‘for the purpose of this [valuation] we have assumed that the parking for the entire site will have to be replaced in a basement structure unless further documentation suggests otherwise’. The Audit Office also notes that the replacement of only 84 car parks was first flagged in a response to prospective tenderers from the Economic Development Directorate during the RFT. In response to the following question from a potential tenderer ‘Addendum #1 issued on 5 October requires replacement of existing car parking on the site and DV311 refers to retaining existing level of car parking. Exactly what number of car spaces are required to be available for public use following development of the site?’ the former Project Manager advised the following to prospective tenderers on 6 November 2012:

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

- 3.46 As discussed in paragraph 2.30, the Tradies advised of its intention to integrate the site into its ‘wider holdings and create an integrated master plan for the southern part of the Dickson Centre’ and that its tender was predicated on the ‘provision of 84 public parking spaces in the development as replacement parking as per the RFT’. This was noted by the Tender Evaluation Panel in its *Tender Evaluation Report*.
- 3.47 The MMJ Real Estate valuation (5 November 2012) of Block 30 Section 34 was based on an assumption that all current publically available car parking on the site (i.e. 154 carpark spaces) was to be replaced. However, on 6 November 2012 the Economic Development Directorate advised prospective tenderers that it would support ‘a minimum of 84 spaces’ and the Tradies subsequently responded that its tender was predicated on the ‘provision of 84 public parking spaces in the development as replacement parking as per the RFT’. Although the Director, Sustainable Land Strategy advised that the replacement car parking would be provided by the Tradies on its adjacent block(s) the Audit Office has not identified any documentation to support this claim. The number of replacement car parks is an important consideration affecting the value for money for the Territory from the transaction.

Impacts on value

- 3.48 Taking into account the overall effects on value from reduced requirements for easement access and the replacement of only 84 car parking spaces Capital Valuers Pty Ltd advised of an estimated ‘adjusted value range’ for Block 30 Section 34 of between \$4,750,000 and \$5,000,000. This is approximately \$1.57 million to \$1.82 million more than the November 2012 MMJ Real Estate valuation of the block of \$3.18 million, which was used to establish

the reserve price for the block, and which represented the final price that was agreed to between the Economic Development Directorate and the Tradies. If 154 publically available replacement car parking spaces (rather than the 84 offered by the Tradies as part of the tender) are provided for Block 30 Section 34, as part of any future development, this would ameliorate the loss in value to the Territory. This however is an uncertainty.

Blocks 6 and 25 Section 72 considerations

- 3.49 The RFT did not request or envisage that the sale of Block 30 Section 34 would involve a land swap arrangement. This proposal emerged after the Tradies were selected as the preferred tenderer and during the Economic Development Directorate's ensuing negotiation with them.
- 3.50 The Economic Development Directorate's decision to consider this proposal created an imperative for it to carefully assess the related whole of life risks, costs and benefits – particularly of the proposed acquisition by the Territory of Blocks 6 and 25 Section 72.
- 3.51 The Economic Development Directorate engaged Colliers International in April 2013 to provide a market valuation of both Blocks 6 and 25 Section 72 to guide its negotiations with the Tradies in the proposed land swap transaction.

Colliers International valuation of Block 25 Section 72 Dickson

- 3.52 The price for Block 25 Section 72 underpinning the exchange of contracts between the parties in December 2014 was \$45,000 excluding GST. This reflected:
- the price the parties agreed to a year earlier in December 2013; and
 - Colliers International's April 2013 valuation of Block 25 Section 72.
- 3.53 On 23 April 2013 Colliers International valued Block 25 Section 72 at \$45,000 (GST exclusive) for direct sale and land swap purposes.
- 3.54 The valuation report identifies the concessional status of the Crown Lease as a significant factor influencing the valuation. The valuation report states:
- We understand the Crown lease is at least part concessional having been granted to the original owners at nil consideration. The original Block 2 had an approximate area of 5,768 square metres and included the majority of the current improvements. Block 2 was consolidated with adjoining car park land to become Block 25. Our file records show this adjoining land of about 1,200 square metres was transferred at 75% of market value.
- 3.55 The valuation report further states 'We assume there has still been no amount paid and that this proportion of the land remains as 100% concessional'. The valuation report identifies that subsection 263(1) of the *Planning and Development Act 2007* identifies a method for calculating the amount payable to discharge a concessional lease. Using this method the valuation report identifies a market value for the land of \$636,680 and a cost to pay out the concessional amount of the lease as \$594,535. This led to a 'current market

value “as is” of \$42,265, which was rounded up to \$45,000 for the purpose of the valuation report.

Colliers International valuation of Block 6 Section 72 Dickson

- 3.56 The price for Block 6 Section 72 underpinning the exchange of contracts between the parties in December 2014 was \$3,250,000 excluding GST. This reflected:
- the price the parties agreed to a year earlier in December 2013; and
 - Colliers International’s April 2013 valuation of Block 6 Section 72.
- 3.57 On 23 April 2013 Colliers International valued Block 6 Section 72 for direct sale and land swap purposes. The valuation report noted Colliers International was ‘specifically requested to provide valuation advice based on the following scenarios’:
- leaseback with 18 months net rent free period; and
 - vacant possession.
- 3.58 The block was valued at \$3,250,000 for the first scenario and \$3,550,000 for the second scenario.

Capital Valuers advice

- 3.59 Capital Valuers Pty Ltd assessed the impact on the value of Block 6 Section 72 arising from the more favourable 42 months rent-free lease afforded the Tradies, as opposed to the 18 months rent-free period assumed by the lower valuation scenario described in Colliers International’s April 2013 valuation report. Capital Valuers Pty Ltd did so using the method outlined in the Colliers International valuation report.
- 3.60 Capital Valuers Pty Ltd advised that:
- The Colliers assessment of the property’s value with an 18 month rent free period was **\$3,250,000**. By re-working those figures to reflect 42 month rent free period a “value” of **\$2,420,000** results.
- 3.61 During negotiations between the Economic Development Directorate and the Tradies following the identification of the Tradies in December 2012 as the preferred tenderer for the sale of Block 30 Section 34, the Directorate agreed to the purchase of Blocks 6 and 25, Section 72. The Directorate obtained valuations for these blocks in April 2013 in order to guide its negotiations with the Tradies. An April 2013 valuation of Block 6, Section 72 (with a rent-free period of 18 months) by Colliers International valued the site at \$3.25 million. During negotiations between the Directorate and the Tradies the Directorate agreed to a rent-free period of 42 months. Capital Valuers Pty Ltd advised that by adopting the method outlined in the Colliers International April 2013 valuation of the block, a discount to the assessed value for a 42 month rent-free period would result in an estimated value of \$2.42 million for the site, which is approximately \$830,000 less than what the Territory agreed to pay the Tradies.

3.62 In an interview under oath or affirmation the State Chief Executive, ACT of Colliers International advised that had they been asked to provide a valuation on the basis of a 42 month rent-free period the valuation would have been substantially lower.

Documentation of value for money

3.63 There is no evidence that the economic benefits to the Territory of the proposed land swap and related commercial terms were ever assessed. There was no documented assessment or reporting to executive management and the government on the:

- social, economic and environmental benefits of the proposed land swap arrangement resulting from the negotiations;
- risks and financial implications arising from the land swap arrangement, including any potential loss in car parking revenue to the Territory arising from the final transaction; or
- the merits, risks and probity issues arising from departures from the RFT.

3.64 The former Director, Sustainable Land Strategy has asserted that the resulting transaction with the Tradies represented an appropriate outcome for the Territory. In an email provided to the Audit Office on 17 October 2017, the former Director, Sustainable Land Strategy advised:

... I recall more clearly that the negotiation primarily revolved around the scope for the Tradies to be granted peppercorn rent at [Block 6 Section 72]. At the start of the negotiation we (with me doing the negotiating) would have been proposing to accept the valuation on the main ... block as per the Colliers figure of \$3.25 mil plus the rent free period (about 18 months initially I think), instead of the higher figure (\$3.55m without the rent free period). However, agreement on this aspect of the deal got the two parties nowhere in terms of the \$1m shortfall between our price of \$3.2m for Block 30 and the Tradies winning bid (of around \$2.2m).

The Tradies argued – and they were correct – that the MMJ valuation was inflated because the \$3.2m figure was based on there being no road separating the Tradies existing block on Section 34 (the Club site). Although the Tradies, unlike any other developer, would have been able to build right across the block and up to the boundary of their existing club site – and thereby been able to realise the full development potential that MMJ assessed the block as having – they said they had no intention of blocking their existing basement carpark and main club entrance and so fully intended to have a road (just as would have been mandated by ACTPLA had anyone other than the Tradies been the successful bidder).

We (me in particular) continued to insist that to sell the block we had to secure the MMJ valuation figure, otherwise we would probably have to cancel the sale and put it back up for tender. Faced with this impasse the Tradies suggested they could pay the full amount in exchange for the Territory paying the full valuation for [Block 6 Section 72] and an extended period of peppercorn rental at that property. This looked to me then – as it does now – like a good deal. If my memory serves me correctly, the deal left us on the good side of the ledger in terms of the shortfall. According to MMJ 18 months worth of rent was about \$300k. On that basis we would have said, OK so 36 months would be roughly \$600 i.e. still about \$400k on the good side of the \$1m gap between the parties (the 36 months was later upped to 40 but still the rough balance was on the Territory's side). Although I believe the Tradies did at one stage offer to increase their bid to around \$2.7m, they were only willing to go all the way to \$3.2m if they were granted the lengthier peppercorn rent. So while it might look theoretically like we

should have been adding the \$670k to the \$2.7 rather than \$2.2, the negotiation just didn't work that way. As I recall it now, the Tradies were willing to pay either \$2.7m with no rent free period or they were willing to pay \$3.2m with the extended rent period – and as the first was not acceptable to us, I agreed to put the latter option [to the former Director-General of the Economic Development Directorate] as the basis for a settlement, which I did in writing. (As I mentioned I can't recall for sure whether this was also the subject of a brief to the Minister or Cabinet but I would be surprised if it wasn't. I am almost certain we would have done a brief to the Minister though at this late remove I can't remember drafting one.)

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

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

3.65 Furthermore, while these comments are noted, however, paragraphs 3.59 to 3.61 provide further detail on the value of the 42 months rent-free that was eventually agreed with the Tradies, including Capital Valuers Pty Ltd advice that by adopting the method outlined in the Colliers International April 2013 valuation of the block, a discount to the assessed value for a 42 month rent-free period would result in an estimated value of \$2,420,000 for the site, which is approximately \$830,000 less than what the Territory agreed to pay the Tradies. These comments also do not take account of the Tradies only providing 84 replacement public car parks (instead of 154) as part of the redevelopment of Block 30 Section 34, for which Capital Valuers Pty Ltd has provided an estimated value of approximately \$1,570,000.

3.66 In a response to the Audit Office on the third final proposed report (24 January 2018), the former Director, Sustainable Land Strategy further advised:

[Granting the Tradies a rent-free period] was put forward as an option because the negotiation was going nowhere, and it looked at that point as if there was no scope for agreement. I had insisted that the negotiation would be terminated if the Tradies did not increase their offer for Block 30 to \$3.18 million as per the MMJ valuation; and the 40-month rent-free option was their suggestion as the basis for agreement. Their bid at auction had been \$600,000 more than the next closest bid, and by them increasing their bid by almost \$1 million and the Territory giving them the rent-free concession – that margin would be extended by the difference between \$1m and the value of the 40- month rental period, which I estimated to be an additional \$330,000. This would take the difference between two bids we had received to around \$930,000, a margin which more than justified not starting the whole process again, in light of the full spectrum of risk factors I have outlined.

... at that juncture, I was aware that along with the generally depressed state of the commercial market in Canberra at that time that:

- the MMJ valuation was in fact inflated given that it hadn't factored in the road easement, and that if we had to go and get another valuation we would have to include the easement (and thereby the valuation would be significantly less than \$3.18 million);
- any new valuation would also take account of the process we had just gone through and would be bound to factor in the obstinate fact that the market reckoned the site was worth no more than \$2.2 million; and
- the proposed settlement on our estimates gave the Territory an *additional* \$330,000 (i.e. \$1m upfront in exchange for around \$670,000 in rental concessions), over and above the \$600,000 that was the difference between the Tradies bid and the next, and only, conforming bid.

3.67 These comments are noted, including the assertion that the MMJ Real Estate valuation was considered to be too high by the Director, Sustainable Land Strategy (this is also mentioned in paragraph 3.64). However there is no evidence that MMJ Real Estate was requested to update its valuation. The Economic Development Directorate continued to use the \$3.18 million MMJ Real Estate valuation as the basis for negotiation with the Tradies.

3.68 In relation to value for money considerations and potential options associated with the sale process arising from the initial tender bids, in a response to the Audit Office on the first final proposed report (13 December 2017), the former Director, Sustainable Land Strategy identified a series of risks associated with not proceeding with the negotiations with the Tradies, including:

- The fact that the market price offered for the block was likely to drag down the price in any future tender.
- The changed market conditions which had deteriorated which meant the unlikelihood of achieving a higher price.
- The potential reputational damage to the Territory from restarting the process.
- The sunk costs of a process which had been going for more than 2 years.

Of these the most significant was certainly the implications of the price received in the tender we had just gone through. It was almost certain to be the case that if we had sought a new valuation it would have been **lower and potentially significantly so** – because of the process we had just gone through, and the depressed commercial conditions which were being felt in Canberra at the time. Whatever else, the fact that the highest price received was only \$2.2 million would have meant that a new valuation would have made this a central determining factor in assessing the value.

... there was no justification or indeed sensible rationale, for seeking a new valuation for the purpose of getting a valuation which more closely resembled the Tradies offer! While getting another valuation would certainly have been in the Tradies' interests it would *not* have been in the Territory's.

3.69 In a response to the Audit Office on the third final proposed report (24 January 2018), the former Director, Sustainable Land Strategy further advised with respect to decision-making at the time:

... I believe these recommendations were justifiable by being less than what we were getting in return from the Tradies (i.e. the additional \$1 million); better value for the Territory than restarting the process; and, as such, not contrary to proper administrative process.

Settlement terms

- 3.70 The merits of the Territory's agreement to the final settlement terms for the blocks is not evident. In particular, the final terms for Block 6 Section 72, on balance, appear to provide significant benefits to the Tradies (e.g. 42 months rent-free and immediate cash payment) for no evident additional value to the Territory.
- 3.71 The former Director-General of the Economic Development Directorate could not recall under oath or affirmation why it was considered necessary at the time of the negotiations to enter into the arrangement on Block 6 with the Tradies, but indicated that the imperatives of reaching a final transaction with the Tradies were significant motivating factors. The former Director, Sustainable Land Strategy advised, in providing a response to the second final proposed report (15 January 2018):
- ... it was considered necessary because after a protracted period of no movement in the negotiations, agreeing to consider the rent-free option was the only way forward in those negotiations.

Affordable housing benefits

- 3.72 The former Director-General of the Economic Development Directorate has advised that a key consideration in the decision to acquire the sites formerly owned by the Tradies (i.e. Blocks 6 and 25 Section 72) was the benefits this offered the government to further develop Section 72, Dickson and create affordable housing options particularly for the aged. In an interview under oath or affirmation, the former Director-General of the Economic Development Directorate stated:
- ... it was attractive for us ... it was quite a developable area,...we wanted to do some affordable housing, some affordable aged accommodation for older women in the inner north. That was a government sort of commitment at the time.
- 3.73 In response to the first final proposed report (13 December 2017) the former Director-General of the Economic Development Directorate also advised:
- The agreement reached with the Tradies will deliver significant financial and social outcomes for the Territory. In addition to the cohesive development of Block 30 Section 34 Dickson, the transaction enables development of a significant part of Section 72 Dickson, including for much needed community facilities, public housing and supportive housing.
- 3.74 However, there is no evidence of how the Economic Development Directorate documented and analysed the nature of these perceived benefits, or valued these benefits, in order to support the land swap arrangement that was negotiated by the Economic Development Directorate and the Tradies.
- 3.75 There is no evidence that the economic benefits to the Territory of the final land swap arrangement and related commercial terms were ever assessed. While it is asserted that the acquisition of Blocks 6 and 25 Section 72 will provide land for future affordable housing, there is no evidence of how the Economic Development Directorate analysed the nature of these perceived benefits, or valued these benefits, in order to support the land swap arrangement.

3.76 The Territory sold Block 30 Section 34 on favourable terms to the Tradies (estimated to be in the range of up to \$1.57 million to \$1.82 million less than the potential value of the block) and acquired Block 6 Section 72 from the Tradies for an estimated \$830,000 more than its potential worth. The lack of documentation associated with the assessment of the benefits, costs and risks associated with the land swap arrangement means that the value of the land swap arrangement to the Territory is not demonstrated.

3.77 In advice to the Audit Office in response to the draft proposed report (4 December 2017) the former Director-General of the Economic Development Directorate advised that the Audit Office's basis for estimating the Territory's foregone proceeds from the transaction was flawed and misleading:

The true value of any property can only be established by the market. Although valuations are a critical tool on determining negotiation parameters, the property is only ultimately worth what someone is willing to pay. In the case of the land in question, the two tenders received were substantially below the valuation, indicating that the market value was lower than the valuation. This is further reinforced given the two tenderers owned blocks adjacent to the land and would be expected to gain the highest value from development of the block.

Similarly, although it is reasonable to attribute a value to car park replacement, it is overly simplistic to present that value as separate from the other aspects of the negotiated outcome.

The figures of \$2.7m to \$2.95m appear to have been estimated by the Audit Office based on adding separate elements of the final negotiated outcome. To have legitimacy, the full negotiated outcome should be reviewed by a valuer with expertise in complex commercial negotiations. Alternatively, the estimates should be removed.

I have not had an opportunity to review the advice to the Audit Office from Capital Valuers Pty Ltd regarding the estimated value of the concessions made to the Tradies. It is not clear how the estimated value of those concessions has been calculated, in particular whether the estimate is based on the value of those concessions at the time the advice was prepared or at the time the concessions were granted during negotiations.

3.78 This comment is noted. However independent advice from Capital Valuers Pty Ltd was sourced to illustrate how changes in factors impact the valuation.

Advice to decision-makers

3.79 A key document that formed the basis for decision-making on 17 December 2013 was a 13 December 2013 minute to the Director-General of the Economic Development Directorate and Deputy Director-General, Land Strategy and Finance from the Director, Sustainable Land Strategy.

3.80 The purpose of the minute was to:

To secure your formal endorsement to the financial reconciliation of the negotiated outcome for the sale of [Block 30] Section 34. Your formal agreement is required for the LDA's record to enable the sale to be transacted.

3.81 The minute set out, in brief, the actions taken to date in relation to the sale of Block 30 Section 34 and the ensuing negotiations for the resultant land swap arrangement. The minute sought, and received, the agreement of the Director-General, Economic

Development Directorate on the financial terms for the land swap arrangement, i.e. prices to be paid.

3.82 In relation to Blocks 6 and 25 Section 72, the minute stated:

Based on your instructions that these sites could be considered as payment, their value was considered within the negotiation. To arbitrate on the valuations you also agreed to the appointment of ... Colliers International Ltd to assist in EDD's negotiation with the Tradies. There was agreement between the respective valuers, Colliers and Knight Frank, that the total value of the two sites is \$3,595,000 (Block 25 at \$45,000 and Block 6 at \$3,550,000). The purchase of Block 6 includes a 40 month rent free component to the Tradies.

3.83 As discussed in paragraphs 3.56 to 3.58, the \$3,550,000 valuation of Block 6 Section 25 was for a vacant possession scenario (a \$3,250,000 valuation was provided for an 18-month rent-free scenario). The December 2013 minute to the Director-General misrepresented the value of the property by advising of a value of \$3,550,000 and immediately following with the statement 'The purchase of Block 6 includes a 40 month rent free component to the Tradies'. This statement did not acknowledge that this price reflected Colliers' higher valuation scenario that assumed no rent-free period and vacant possession by the Territory.

3.84 As noted in paragraph 3.60, Capital Valuers Pty Ltd's review of Colliers International's April 2013 valuation of the block on the basis of the 42 month rent-free period agreed to in the final transaction resulted in a lower value of \$2.42 million for the site.

3.85 In relation to Block 30 Section 34, the minute stated:

The original valuation by MMJ was \$3.18 million (exclusive of GST). This was considerably higher than the Tradies' initial offer ... of \$2.2 million (GST exclusive). Consistent with market practice, EDD commenced negotiations with the preferred tenderer to achieve the reserve price.

3.86 As the minute preceded the final transaction by 12 months including further negotiations that occurred over the course of 2014, it could not discuss or recognise the full range of concessions given to the Tradies in the course of these negotiations, which resulted in the land being worth more than the November 2012 valuation of \$3.18 million. This highlights the opportunity cost to the Territory from the Economic Development Directorate's decision to proceed with the final exchange of contracts in the absence of an updated valuation and comprehensive assessment of value for money that advised decision-makers on the risks, costs and benefits of the final negotiated outcome.

3.87 A key document that formed the basis for decision-making on 17 December 2013 was a 13 December 2013 minute to the Director-General of the Economic Development Directorate from the Director, Sustainable Land Strategy. The minute misrepresented the value of Block 6 Section 72 by advising of a value of \$3,550,000 and implying that this value included 'a 40 month rent free component to the Tradies'. This was not the case, as the value of \$3,550,000 was on the basis of vacant possession. As the minute preceded the final transaction including further negotiations that occurred over the course of 2014, it also could not identify that concessions given to the Tradies in the course of ensuing negotiations resulted in Block 30 Section 34 being potentially worth more than the

November 2012 valuation of \$3.18 million. This highlights the opportunity cost to the Territory from the Economic Development Directorate's decision to proceed with the final exchange of contracts in the absence of an updated valuation and rigorous assessment of value for money.

APPENDIX A: RFT ADVERTISEMENT

In relation to the advertisement of the RFT in the *Australian Financial Review*, in a response to the third final proposed report (24 January 2018) the former Director, Sustainable Land Strategy advised:

In the lead-up to the caretaker period prior to the 2012 election, which commenced sometime in mid-September 2012, Cabinet had been meeting more than once a week ... The Cabinet decision to give the final approval to the sale of Block 30 was scheduled for one of these additional meetings I believe, originally on Thursday 6 September 2012.

The advantage of the *Canberra Times* was that we could schedule the ad for the real estate section on Saturday 8 September 2012, just two days after the scheduled Cabinet decision but if for some reason the decision was not made on that date, we could still pull the ad late on Thursday or even on the Friday morning. This wasn't possible with the *AFR*. Being a national paper, its advertising was locked down a few days in advance and you couldn't pull ads at the last minute as you could with the *Canberra Times*. So, initially we went with the *Canberra Times* for that Saturday, thinking this was the best way to respond efficiently to the Cabinet decision we anticipated by having it appear at the first opportunity. I believe we still intended at that stage to go with the *AFR* as well, not because we thought doing so was especially efficacious in advertising terms but just because that is what you were expected to do.

However, we got word at some stage on the Thursday that Cabinet was going to reschedule its consideration of the sale for the following Tuesday 11 September; and we asked LDA Sales to pull the ad, and to schedule it for the next real estate editions (Wednesday and Saturday). However, the advertisement wasn't pulled for the Saturday as I had requested. I think I only learnt about this when I got to work on Monday (10 September) and was told that we were already getting requests for the tender documentation from prospective buyers. The appearance of the ad was embarrassing given that it preceded Cabinet's consideration of the final RFT but we figured that the approval would happen on the Tuesday and that would put things right and not too much damage would be done. ...

However, we got a bit of a scare on the Tuesday when it looked as if Cabinet was again going to defer the decision to the next, and I think last, Cabinet meeting prior to the caretaker period; which again meant that we had to pull the ad if we didn't want to risk a repeat of what had just happened. In something of a panic, I asked, somewhat peremptorily, for LDA Sales to pull that ad too. A bit later however, it transpired that the Cabinet approval did happen at the Tuesday 11 September meeting as scheduled. I then said late on the Tuesday to LDA Sales that, if it happened to be the case that they hadn't managed to pull the ad (as had happened with the previous Saturday's ad fiasco), not to worry, it would be OK as the Cabinet approval had indeed gone through. But I was assured by LDA Sales, somewhat ironically, that this time the ad had indeed been pulled.

Either late on Tuesday 11 September or early on Wednesday 12 September, the LDA pressed the send button issuing notices about the Block 30 sale to its extensive network of agents and advertised the sale on its website. As noted above, the inquiries had already begun coming in pretty quickly and from interstate as well, as I recall; and with all the electronic means available to us we just thought advertising the *AFR* was a bit of a waste of time, and more especially, money. ...

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