ACT INTEGRITY COMMISSION

Special Report – Acquisition of Block 24, Section 65, Canberra City

February 2022

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Acknowledgement of Country

The ACT Integrity Commission acknowledges the Ngunnawal people as the traditional owners and custodians of the Canberra region. We pay our respects to Elders past, present, and emerging and extend our respects to all Aboriginal and Torres Strait Islander people.

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Ms Joy Burch MLA
Speaker
Legislative Assembly
Canberra ACT 2601

Madam Speaker,

On 28 November 2019 the Standing Committee on Public Accounts ("Committee") tabled in the ACT Legislative Assembly its inquiry report ("Committee report") on Auditor-General Report No 7 of 2016: Certain Land Development Agency Acquisitions. A number of transactions were considered, including the lease of land adjacent to Glebe Park comprising Block 24, Section 65, City.

The Committee recommended that the Commission investigate this acquisition (amongst others) and any other matters raised in its Report. On 4 December 2019, the Chair of the Committee, Ms Vicki Dunne MLA wrote to the Commission to convey this recommendation and requested that the letter be dealt with by the Commission as a corruption complaint made on behalf of the Committee pursuant to s 57 of the *Integrity Commission Act 2018* ("Act"). The Chair also asked that the Commission "consider the concerns raised in the Committee's Report as specific grounds of the complaint".

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

The Hon Michael F Adams QC
Commissioner

Introduction

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

    (i) the lease of land adjacent to Glebe Park comprising Block 24, Section 65, City (referred to as "**Block 24**");
    (ii) Mr Spokes Bike Hire, lease and business, comprising Block 13, Section 33, Acton lease;
    (iii) Dobel Boat Hire, comprising Block 16, Section 33, Acton lease; and
    (iv) Lake Burley-Griffin Boat Hire.

2. Recommendation 13 of the Committee report was:

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

3. On 4 December 2019 the Chair of the Committee, Ms Vicki Dunne MLA wrote to the Commission to convey this recommendation and request that the letter be dealt with by the Commission as a corruption complaint made on behalf of the Committee pursuant to s 57 of the *Integrity Commission Act 2018* ("**Act**"). Ms Dunne also asked that the Commission "consider the concerns raised in the Committee's Report as specific grounds of the complaint".

4. This Special Report deals with the Commission's consideration of the first of the four listed acquisitions. The other acquisitions will be the subject of a subsequent Special Report.

5. Following the referral, the Commission commenced an investigation pursuant to s 100 of the Act: Operation Lyrebird. Consideration of the referral required detailed examination of the Auditor-General's Report as well as that of the Committee, together with the comprehensive documentary and oral evidence that was obtained by them. In the result, the Commission has determined that the investigation must be discontinued in accordance with s 112(1), on the

basis that, pursuant to s 71(3)(k), having regard to all the circumstances, further dealing with the corruption report is not justified. Detailed reasons for this decision are set out below.

6. To save unnecessary repetition, what follows assumes familiarity with both the Auditor-General's report and the Committee report, both of which are public documents, with reference being made only to those matters necessary to explain this decision.

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

The role of the Commission

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

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

10. The Commission is empowered (under s 100) to conduct an investigation on receipt of a corruption report where the Commission "suspects on reasonable grounds that the conduct in the corruption report may constitute corrupt conduct". "Corrupt conduct" is defined in s 9 of the Act as follows –

> (1) For this Act, **corrupt conduct** is conduct—
>
> (a) that could—
>
> (i) constitute a criminal offence; or
> (ii) constitute a serious disciplinary offence; or
> (iii) constitute reasonable grounds for dismissing, dispensing with the services of, or otherwise terminating the services of, a public official; and
>
> (b) that is any of the following:
>
> (i) conduct by a public official that constitutes the exercise of the public official's functions as a public official in a way that is not honest or is not impartial;
> (ii) conduct by a public official or former public official that—
> (A) constitutes a breach of public trust; or
> (B) constitutes the misuse of information or material acquired by the official in the course of performing their official functions, whether or not the misuse is for the benefit of the official or another person;
> (iii) conduct that adversely affects, either directly or indirectly the honest or impartial exercise of functions by a public official or a public sector entity;
> (iv) conduct that—
> (A) adversely affects, either directly or indirectly the exercise of official functions by a public official or public sector entity; and
> (B) would constitute, if proved, an offence against a provision of the Criminal Code, chapter 3 (Theft, fraud, bribery and related offences);
> (v) conduct that involves any of the following:
> …
> (C) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage;
> …
>
> (2) For subsection (1) (a) it does not matter if –
>
> (a) proceedings or action in relation to the conduct can no longer be taken; …
>
> (3) In this section:
> ***criminal offence*** means a criminal offence under the law of the Territory or under any other law relevant to the conduct in question.
> …
> ***serious disciplinary offence*** includes –
> (a) any serious misconduct; or
> (b) any other matter that constitutes or may constitute grounds for –
> (i) termination action under any law; or
> (ii) a significant employment penalty.
>
> (Original emphasis.)

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

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

12. Whether conduct of a public official who is a Minister (hence, necessarily a Member of the Assembly) could legally amount to a disciplinary offence or justify dismissal or termination of services is rather doubtful, since that language seems to reflect the situation of an employed public official rather than one who is elected. This interpretation would mean that the possibility of the commission of a criminal offence is an essential ingredient of the statutory notion of corrupt conduct, so far as a Minister (or, for that matter, a Member of the Legislative Assembly) is concerned. A "criminal offence" is not restricted to the *Criminal Code Act 2002* but comprehends, by virtue of sub s 9(3), any offence under the common law, which includes the law of Parliament. It follows that any intentional falsehood, for example, made to the Standing Committee on Public Accounts would satisfy the first requirement of the definition of corrupt conduct as being the common law offence of contempt of Parliament and likely one of the requirements in s 9(1)(b), for example, a breach of public trust or adversely affecting the honest or impartial exercise of the functions of a public official. The result of the narrow interpretation

is that conduct that would be corrupt if committed by a public servant would not be corrupt if committed by, say, a Minister, unless it also happened to be a criminal offence. This would appear to cut across the purpose of the legislation. Section 139 of the *Legislation Act 2001* provides that, in "working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation". Applying a purposive approach would allow s 9(1)(a)(ii) and (ii) to be interpreted as applying to Ministers as if they were public officials (which, by virtue of the definition of "public official" in s 12(1), they are) and, therefore, as if they were subject to the same the disciplinary regime. As will become clear, however, it is not necessary for present purposes to determine this issue.

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

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

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

16. In consequence, the analysis in this Report of the material relied on by the Committee in its Report (including that disclosed in the Report of the Auditor-General) to impugn the official conduct involved in this transaction may appear to undertake the task of critiquing those Reports. This is obviously not the Commission's legislative remit, as such but, however much this might appear, the Commission's detailed examination has been necessary in order to give appropriate consideration to the corruption report constituted by the Committee's referral to the Commission.

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

The role of the Auditor-General

18. Given the importance of the Auditor-General's report, it may be helpful to briefly describe the nature and purpose of a performance audit and associated performance audit report. Performance audits are conducted by the Audit Office under the *Auditor-General Act 1996*, which provides that a performance audit "means a review or examination of any aspect of the operations of … [an] entity". The objective of the audit, in accordance with the Standard on Assurance Engagements ASAE 3500 – Performance Engagements, is "to obtain reasonable

assurance about an activity's performance against identified criteria" and state the conclusion, including the basis for the conclusion, in a written report. Thus, it is not the purpose of the performance audit and resulting report to provide an opinion on whether there was corrupt behaviour by any participants.

19. The purpose of the performance audit resulting in Report No 7 of 2016 was to provide an independent opinion to the Legislative Assembly on the effectiveness of the Land Development Agency's management of the acquisition of the identified land and businesses in 2015. This required examination of whether the LDA had appropriate processes in place for the acquisitions and whether those processes ensured a high standard of integrity and complied with legislative and regulatory requirements. Key findings are set out together with the evidentiary basis for them. At the time of the audit any concerns with respect to corrupt conduct amounting to possible criminal offences would be referred to the Australian Federal Police, as distinct from inappropriate conduct or conduct not in accordance with the public sector management principles and practices referred to in the report which, if it could constitute corrupt conduct within the meaning of the Act, would now be referred to the Commission.

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

The role of the Land Development Agency

21. The Land Development Agency ("**LDA**") was established under s 31 (now repealed) of the *Planning and Development Act 2007* ("**PD Act**"). The LDA was abolished in 2017 and replaced by the Suburban Land Agency and the City Renewal Authority. Under s 32.1 (now repealed) of the PD Act, the LDA had the functions, amongst others, to develop land, carry out works with the development and enhancement of land, and carry out more complex urban development tasks. The LDA had to exercise its functions in accordance with a Statement of Intent, which stated a number of key outcomes amounting to exhortations that included making a positive contribution to the economic and social development of the ACT, acting in a commercially responsible, ethical and efficient manner, and balancing competing public and private sector development. Under its governance arrangements as determined by the ACT Government, the Chief Executive Officer and the Deputy Chief Executive Officer of the LDA were also respectively Director-General and Deputy Director-General of the then Economic Development Directorate ("**EDD**").

22. The LDA Board was the governing board of the LDA. Its functions, as provided by s 77 of the *Financial Management Act 1996* were, in substance, the same as those of a board of directors of a public company, details of which are not presently relevant. The Chief Minister, Mr Andrew Barr MLA told the Committee that, in his capacity as the responsible Minister at the relevant time, he was briefed annually by the LDA Board, would attend an LDA Board meeting perhaps twice a year, and that there was some engagement with the LDA through the Chief or Deputy Chief Executive Officer and/or staff members associated with particular projects.

23. The *Planning and Development (Land Acquisition Policy Framework) Direction (No 1)* ("**Framework**") was promulgated in 2014 pursuant to s 37(1) (now repealed) of the PD Act. It set out the principles that governed the exercise of the LDA's functions under the PD Act. The Framework established how potential acquisitions were to be pursued and the principles to be applied in making decisions as part of this process. Clause 2.2.1 provided –

> 2.2.1 The following thresholds and decision-makers apply to **all** LDA land acquisitions:
>
> (a) below $5 million – agreement by the LDA Board with advice to the Minister for Economic Development or the Minister responsible for administering Chapter 4 of the *Planning and Development Act 1997*;
>
> (b) between $5 million and $20 million – agreement by the Chief Minister and Treasurer. LDA is to provide a business case to ACT Treasury for all such proposals; and

(c) above $20 million – agreement by the government.

2.2.2 The LDA Board may refer any acquisition below $5 million to the government should it consider it is appropriate.

2.3.1 Government agreement is required for any acquisition by the LDA that results in a cumulative annual total of $20 million in acquisition being exceeded. The cumulative annual total means all acquisitions within a financial year – one July to 30 June.

(Emphasis added.)

The Project

24. The inception of the Project occurred in March 2013. General managerial oversight of the Project was the responsibility of the Director, Office of the Coordinator-General (EDD) from March 2013 to early 2014 and the Director-Land Development of the LDA from early 2014 to June 2014. In July 2014 Mr Timothy Xirakis, an external consultant, was engaged as Project Director. His services were terminated in early September 2015 (for reasons that are not presently relevant), when he was replaced by an interim Project Director from the LDA and a permanent Project Director from the LDA in December 2015. Overall supervision of the Project was the responsibility of Mr Dan Stewart, at the time the Deputy Chief Executive Officer of the LDA, himself answerable to Mr David Dawes, then Chief Executive Officer.

Compliance with the Framework

25. None of the acquisitions which were the subject of the Committee's report and specified in the corruption report were approved by the LDA Board, despite the requirement in the Framework that all acquisitions for less than $5 million required its approval.

26. The LDA's then Chief Executive Officer, Mr Dawes explained that, despite the specific statement that the thresholds applied to all acquisitions, the understanding in the LDA was that the Framework was intended to apply to strategic acquisitions outside of the Indicative Land Release Program (ie not all acquisitions). The Chair of the LDA Board said that the Framework was never intended to apply to all acquisitions undertaken by the LDA. He also said that the Framework was developed in the context of giving the LDA the role of the strategic acquisition of land from willing non-Government lessees to further the Government's land development goals and without placing pressure on the Budget. The Chair pointed out that, in each of the financial years from 2013 to 2016, land acquisitions exceeded the cumulative total of $20 million by a substantial amount. In his view, a requirement to refer all acquisitions to

Government after the threshold of $20 million was reached would have been administratively unworkable. It will have been observed that, in fact, the Framework required every acquisition even those for less than $5 million to be referred to Government, one way or another, adding strength to the argument about administrative difficulties. However, this was (together with other reasonable contextual factors) *ex post facto* reasoning. It appears that the LDA Board had instigated or was one of the instigating parties in the development of the Framework and simply assumed that its understanding had been reflected in the final iteration when it was promulgated as a regulatory instrument. It is not at all impossible – at least so far as the evidence goes – that the use of the unqualified "all" was an administrative error rather than the result of informed instructions. Had the LDA's interpretation of the Framework been correct, the Project's individual acquisitions did not require Board approval. Nevertheless, however the language of the Framework was derived, it should have been appreciated that its literal meaning did not coincide with the LDA's contextual interpretation, and the issue should have been taken up with Government and the situation made clear. There is no basis, however, for supposing that the Board's interpretation was anything other than conscientious, and no question of corrupt conduct arises from preferring a contextual to a literal approach. It may be that, in the result, Mr Dawes, to whom the Board's powers had been delegated, was not legally authorised to enter into the transaction for the purchase of the lease of Block 24. However, this also does not raise any question of corruption and it is not necessary to take the matter any further from the Commission's perspective.

The significance of Block 24

27. Prior to the Territory's acquisition of it, Block 24 was leased by four individuals through various legal structures. Glebe Park Pty Ltd was essentially the corporate embodiment of a partnership whose members had an interest in the land, and who might be informally considered the "owners" (referred to as such in this Report). Block 24 was the remnant remaining after a subdivision on which residential units were constructed. As time went on, the owners had apparently considered redevelopment options for the site.

28. What follows has been gathered from the reports of the Auditor-General and the Committee, augmented by reference to evidence given in interviews and hearings and documents supplied to those bodies.

29. An important aspect of the Project involved a realignment and widening of Parkes Way which, amongst other things, was expected to create additional land development opportunities on adjacent land. This required the relocation of Coranderrk Pond. Engineering analysis produced two options for this relocation: Block 24 and "Parkes 3", a site adjacent to Parkes Way. Using the latter would prevent valuable development, so attention turned to the former. There is no doubt that both the engineering and commercial cases for relocating Coranderrk Pond on Block 24 were overwhelming (see the Auditor-General's Report under the heading *Relocation of Coranderrk Pond*). It is not necessary to deal with that aspect here.

Block 24's owners are notified of the Government's emerging plans

30. The *Glebe Park Wetland Draft Discussion Paper*, prepared in March 2014 by the Project Team, included a map described as "Proposed scope of a 'master plan' for Glebe Park Wetlands and adjacent land", and a drawing of a pond on the site, located mostly in Block 24 and partially in Glebe Park itself. This was circulated to the Block 24 owners, and to staff within both the LDA and the EDD. That same month, a member of the Project Team met with a representative of the owners of Block 24. In an email of 4 March 2014, an approach to dealing with the site was proposed, which included the construction by the EDD of a "new water quality control Pond and parkland improvements and … [the provision of] services to the … future development site". On 1 April the owners' representative indicated agreement with moving "to the next stage".

31. Consultants were engaged by the EDD in April 2014 to prepare master plan drawings for Block 24 which, in addition to a wetland for the northern part of the site, were to identify six different options for the southern part, one for no residential development and five for residential development ranging from 20 to 271 residential units.

32. By early May 2014 a "design options" document, titled *Glebe Park Wetlands* was obtained by the EDD. This included six design options, ranging from development of 271 residential units in three eight-story blocks through to an option which did not envisage any residential development. The lease, as it then stood, was restricted to parkland, a restaurant and bar to a maximum gross floor area of 650 m², and public car parking. However, the development included in the design was permissible under the *Territory Plan 2008* ("**Territory Plan**"). At the same time, the residential schemes envisaged in the designs presented significant urban development improvements of a general kind for the precinct. The possibility of compulsory

acquisition in the absence of obtaining agreement with the owners about development was raised as a possible option.

The 'valuation' of Block 24 and initial purchase negotiations

33. In preparation for an approach to the owners to ascertain whether they were willing to sell the land, Mr Xirakis, the former Project Director, intended at first to obtain three valuations which, he understood, reflected government policy on purchases. (There was no evidence that this was in fact a policy and it seems likely that it was not, at least not formally.) Mr Stewart told him that only one was necessary to start the negotiation process. Accordingly, on 25 August 2014 a valuation was obtained from Opteon Property Group ("**Opteon**"). It stated that it was prepared "for negotiation purposes" on the basis of "market value 'as is' (subject to all present lease conditions)". These conditions did not permit residential development. A key valuation assumption, in accordance with instructions (and reflecting Mr Xirakis' opinion), was "that there [was] no prospect of a change to the zoning or Lease Purpose Clause of the lease]" to permit residential development.

34. This became significant because the estimated value of the Block 24 lease was between $950,000 and $1.05m excluding GST, whilst the price ultimately paid was $3.8m plus $380,000 GST.

35. It appears that Mr Xirakis' instruction as to the restrictions on development was based on a statement made to the Legislative Assembly in June 2011 by the then Minister for Planning, Mr Simon Corbell MLA, which ruled out residential development or "any other development beyond that which had already been granted under the lease" for Block 24. As the evidence showed, however, the instruction to Opteon, in effect, to disregard the potential for residential development, was the triumph of deference to political announcement over commercial reality.

36. Mr Richard Swinbourne, the Principal of Capital Valuers, was consulted by the Auditor-General about the Opteon valuation. His opinion was that "the instructions by which the Opteon Valuation was undertaken appear inappropriate for the stated purpose of the valuation … A prudent buyer or seller would not disregard the alternate more valuable potential use of the site". There was nothing in the Territory Plan, the Crown Lease or the City Precinct Code that categorically stated that residential development of the site would not be permitted. He further opined that "a prudent buyer would be entitled to assume that residential use of at least part of the subject site is a possibility". He confirmed that Opteon's was a conventional valuation

consistent with the client's instructions and followed appropriate standards although, in normal circumstances, it would have been usual to have regard to the potential for the land. It was quite clear, however, that Opteon had been instructed to exclude future potential use. Mr Swinbourne pointed to the lease variation system applying in Canberra, which makes it customary to exclude potential use "in the theoretical sense", but he thought "it was most unusual to have instructions along these lines for the purpose for which these valuations were required". He said it should have been clear to anyone reading the valuation that it was not a market value report.

37. In the result, therefore, the Opteon valuation did not reflect actual market value, else it would have included an assessment of the (significant) likelihood that a variation to the conditions of the lease would be granted, despite the Ministerial statement to the contrary. The obvious point is that buyers and sellers operating in the real world would, as a matter of course, take into account the possibility of the expansion of uses. As will be seen, this was in fact the position taken by the owners.

38. The Opteon valuation, described as being for "negotiation purposes" was provided to the owners as the basis of an offer on 26 August 2014 (the day after it was obtained). It was peremptorily rejected by the owners as not being genuine. They not unreasonably suggested that a valuation reflecting the site's "highest and best use" (conventional valuation language) should be obtained. One of the owners, Mr Barry Morris, regarded the Opteon valuation as "totally ridiculous, it hasn't taken into consideration the potential development value of the land". Mr Xirakis was informed of this and, in turn, suggested that the owners should get a valuation. Mr Morris's attitude was that the current suggested price was so far away from what might be acceptable, there was no point in further engagement. He described a number of development possibilities which led to a land value, net of the lease variation charge, of $3.75m before profit "as if a development application had been approved to put residential units on that land". He explained that "residential is an allowable use under the Territory Plan for that land, so the Territory or [ACT Planning and Land Authority] would have to accept a development application and deal with it in the normal processes". He said that, in the owners' experience as developers, approval would be forthcoming at some point of time and, ultimately, a development approval would be obtained. There is no reason to doubt the reasonableness of this opinion, although Mr Morris said that he was unaware of the statement in late 2011 by Mr Corbell (referred to above) that the Government had no intention of permitting the land to be developed for residential purposes.

39. Mr Graham Potts (another of the owners) told the Committee that the owners did not have set plans for developing the site, although they had arranged for an architect to prepare a scheme as to what might be put there in terms of residential development; there were a number of differing schemes, but the owners had not got to the stage of deciding which to adopt. Although this would have required a change in the conditions to the Crown lease, Mr Potts expressed considerable confidence that eventually they would get a favourable outcome. He also had no recollection of Mr Corbell's statement but said, if the owners had been aware of it, they would have adopted the robust response: "Well, he is entitled to his opinion. We have got the block and we will treat it the way we treat it."

40. On 26 August 2014 the owners rejected the Opteon offer as not genuine and (not unreasonably) suggested that the value reflecting the site's "highest and best use" (conventional valuation language) should be ascertained. Mr Xirakis' response was, in effect, to threaten compulsory acquisition. However, the *Lands Acquisition Act 1994* ("**LA Act**") only permits acquisition for a public purpose on just terms. In that context, "market value" is defined in s 46 of the LA Act in conventional language as "the amount that would have been paid for the interest if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer". Mr Xirakis was quite mistaken if he thought (as he suggested to the Committee) that a compulsory purchase could have been procured at a price that reflected the proposed use of the land merely for a pond relocation and subject to the current limits on development.

41. More broadly, the Committee received substantial evidence about the problems associated with compulsory acquisitions, which it is not presently necessary to detail. The gist of this evidence was, as stated in substance by the Solicitor-General, if the owner agreed to sell, it did not matter if the government used the processes set out in the LA Act or proceeded by way of private treaty. The latter was preferable, as the terms were identified and the sale could proceed quickly once the price were agreed, whilst the formal elements of compulsory acquisition "were not conducive to a swift resolution". If the owner did not agree to sell, the process was cumbersome and litigation added to uncertainty and cost. There was no evidentiary basis for the suggestion that the land, either for policy or price reasons, should preferably have been acquired by compulsory process.

42. At all events, proceeding by way of private treaty as distinct from compulsory acquisition in this case was not capable of amounting to improper, let alone corrupt, conduct.

43. Following the rejection of the offer by the owners, negotiations ceased until June 2015.

44. For present purposes, it is sufficient to note that, even if it had been intended (as to which there is no evidence) to do so, there was no impropriety in Mr Xirakis, or the LDA for that matter, attempting to obtain Block 24 at a price that reflected less than what might have turned out to be, by another measure, its true market value, however futile this was likely to be, providing of course no dishonesty or misrepresentation were involved.

Aquis Entertainment are told about the pond and Block 24

45. Block 24 is conterminous with the site of the Canberra Casino. On 16 December 2014 Mr Rob Purdon, a consultant retained by the owner of the Casino, Aquis Entertainment Ltd ("**Aquis**"), met (as recorded in a minute he made on 18 December 2014) with representatives from Territory and Municipal Services ("**TAMS**") and the EDD to discuss road access to the Casino and adjacent stormwater issues. Amongst others present were Mr Xirakis and a Mr Rod Baxter (then, it appears, Senior Manager, Infrastructure and Capital Works CMTEDD). Mr Purdon outlined what he described as "work being done on the Casino, and the need for some clarity around the access and development issues". There was a discussion about the scope of the existing Right of Way ("**ROW**") and the availability of other access routes. It was pointed out that, as the ROW traversed private land – namely Block 24 – approval would be required from the lessee for any construction work onsite (eg road and a *porte cochere*). Mr Purdon reported that "Mr Baxter and Tim Xirakis supported the concept of an increased entertainment precinct in the vicinity of the Casino and would welcome any initiatives from the Casino, including new activities as well as better amenity along the extension of City Walk through the site". There was discussion about ownership of the fountain and management of it, and the associated canopy awnings as well as about amenity improvements along the public walkway. TAMS advised that stormwater management would not directly affect the Casino site. Mr Purdon further noted in his minute –

> … EDD advised that there has [sic] been on-going discussions with the owners of Block 24 (adjacent to the Casino) which extends either side of the ROW. The Territory has been considering a new stormwater retention pond north of the ROW and is also considering compulsory acquisition of Block 24 from the existing private lessees. It is understood that the private lessees only have development approval for about 600m² of space on Block 24, and that the ownership of the site is held by several parties without common agreement as to future development of the site.

46. Mr Purdon stated that he understood "a Cabinet paper is being prepared to consider compulsory acquisition of Block 24 … [and it seemed] from my discussions with the above there would be some possibility of a negotiated outcome between the Territory from [sic] the adjacent private lessee and the Casino regarding a win-win outcome for a substantial development Project should Aquis want to get involved".

47. Mr Xirakis was not asked and gave no evidence about this matter, but it seems reasonably clear that Mr Purdon's information about government discussions with the owners of Block 24 came from him, as did the information about the limited development approval and the possibility of compulsory acquisition. It is apparent, however, as to this latter matter, that whilst Mr Xirakis, and possibly Mr Dawes and Mr Stewart, had compulsory acquisition in mind as potentially available, no decision had yet been made about it and certainly no work done which would have permitted a proposal to go to Cabinet (even if a Cabinet submission were being drafted). It also seems obvious that Aquis did not at this time have any proposal (at least of which Mr Purdon was aware) that involved any use of Block 24. There is nothing that suggests Mr Xirakis' disclosures to Mr Purdon were inappropriate. To the contrary, it would seem both reasonable and appropriate to inform Aquis of the proposed Coranderrk Pond relocation onto land adjacent to its Casino. It appears from the language of Mr Purdon's ultimate suggestion that the possibility of a 'win-win' outcome involving substantial development was his own idea. It did not imply that Mr Xirakis had provided the information for the purpose of instigating any interest by Aquis in the acquisition of rights of whatever kind over Block 24 and, even if he had done so, there was nothing improper involved, particularly in light of the speculative future development raised in the *Glebe Park Wetlands* design options document, providing this was a mere personal opinion and not suggested to represent some formal approach. On the whole, it appears that the discussion was informal and understood as such.

48. A further update was provided by officials to Aquis a few months later. In a written communication with the Committee by in-house counsel for Aquis, the Committee was informed that, in early March 2015, Ms Jessica Mellor (the Casino's Executive Director, Strategy & Project Development) exchanged emails with Mr Stewart about the "Existing Convention Centre". Amongst other things, Ms Mellor referred to an exchange of the previous day and expressed the hope that –

> we can work towards solidifying some ideas in relation to the expansion of the Convention Centre sooner rather than later and [we] have briefed… [architects] to consider some further

> alternatives following our discussion … I also look forward to hearing from you in relation to any progress on the acquisition of the APG site next door [i.e. Block 24].

This was far from suggesting any interest in acquiring an interest in Block 24; indeed, if anything, it implies the opposite. Mr Stewart responded on 5 March 2015 that, "conversations on the additional site are underway and, so far at least, are progressing well".

49. It is clear from the evidence of Mr Potts that, in fact, conversations – at least with the owners – were not occurring at all, but the possibility that Mr Xirakis had not kept Mr Stewart up-to-date cannot be excluded. This, however, is inconsequential. Ms Mellor told in-house counsel that "she did understand, in general terms, that the ACT government had commenced taking steps to acquire Block 24, Section 65, City (Adjoining Block), as part of the City to the Lake Project" but "given the time that has passed, she [did] not recall the specific terms of the discussions she had with Mr Stewart in and around early March 2015". Furthermore, having reviewed her records at that point, "she [did] not recall any other specific conversations with officials from the ACT government in relation to the adjoining block in the lead up to the Casino lodging the Redevelopment Proposal". Whether the Casino had some notion at this time that it might, if it wished, be able to itself acquire Block 24 or obtain some useful rights over it is not known, but the lack of any recollection of conversations with officials about the block strongly suggests the negative. Certainly, this justifies the inference that the Casino had not and was not, engaged in negotiations related to its acquisition. At all events, of course, it would not have been improper for the matter to have been raised with government. An interest in what might happen to an adjoining property is sensible in commercial, private and, indeed, public environments.

Further valuation advice is obtained

50. The following account as to the recommencement of negotiations to purchase Block 24 is taken largely from evidence given by Mr Stewart and Mr Dawes to the Auditor-General and the Committee. In about late April or early May 2015 (most likely in April) there was a briefing by Mr Stewart of the urban renewal subcommittee of Cabinet. The purpose of that briefing was to provide a full update on the Project, with particular emphasis on the options that had been generated for the realignment of Parkes Way. The Commonwealth Government was at the time supportive of road funding and this was seen as a strong candidate for a business case, given the opportunities that the proposed realignment would create in terms of additional land development opportunities. It was decided to pursue a business case through Infrastructure Australia to obtain Federal Government funding for Parkes Way.

51. Following the subcommittee's meeting, Mr Dawes and Mr Stewart discussed the need to resolve the issue of the relocation of Coranderrk Pond. At that stage, the business case for the purchase of Block 24 had been proposed (and, it appears, regarded) as by far the preferable solution over the other identified site at Parkes 3. It was decided to approach the State Chief Executive of Colliers International, Mr Paul Powderly (who was then also President of the Australian Property Institute) for advice. Colliers was also on an ACT Government procurement panel for valuation services.

52. It was suggested during the Committee hearings that, rather than purchase Block 24, consideration should have been given to resuming the lease on the ground that a condition requiring the creation of a park had not been complied with. The lease provided –

> [The lessee was required,] within 12 months from the date of the commencement of the lease [16 May 2007] or within such further time as may be approved in writing … commenced, to erect an approved parkland within the lease at a cost of not less than the sum of $1 million in accordance with plans and specifications prepared by the lessee and previously submitted and approved …

It seems clear that no consideration was given to this possible course of action at the time. As the evidence on this issue ultimately stood, however, whether or not the condition had in fact been complied with was most uncertain. Accordingly, it does not appear to be presently relevant and is mentioned only for completeness.

53. A number of the dates of communications between Mr Powderly and Mr Stewart mentioned in the Auditor-General's Report were taken from an interview with Mr Powderly who, unfortunately, did not have his contemporaneous notes available at the time, and are mistaken. What follows relies on those notes and is plainly the more reliable account. (The differences do not appear to matter.) Mr Stewart contacted Mr Powderly on 11 May 2015 and asked about "getting some advice or guidance on Glebe Park … and outlined some key issues". Mr Powderly asked for a copy of the (Opteon) valuation advice, which was provided. Part of the information provided to him was that "the site was an unusual block, which was key to a larger proposal". On 21 May, he met Mr Stewart and discussed the valuation and the "highest and best use", handing him a paper "with my thoughts, headed 'Valuation considerations May 2015'" ("**Valuation considerations**"). Mr Powderly explained to the Committee that this "document was done for the LDA to look at the comparison to the current valuation of a million dollars and what were the options". He said this was "market advice": "they had a valuation [and] they could not understand why they should be paying more than a million dollars" – which, it will be recalled, was the figure put by Mr Xirakis in reliance on the Opteon valuation

and peremptorily rejected by the owners. Mr Powderly told the Committee that he went through the paper with Mr Stewart and talked about a number of sales that "gave some credence to some of the numbers we were talking about".

54. The Valuation considerations commenced with a brief outline of the property details noting, in particular, its current use and a zoning (CZ6) which permitted uses such as commercial accommodation and serviced apartments, and that the permitted residential use was changed (ie, excluded) in 2008. The Opteon valuation of $1 million "on the basis that current uses cannot be varied" was described as "essentially a 'Before' Value not a Market Value between willing buyer and willing seller". Calculations (which it is not necessary to set out here) dealt with the development options of hotel and serviced apartments. The respective values were $3.8 million and $3.75 million. Calculations for residential use, noted as "not permitted", resulted in a value of $4.185 million. Mr Powderly, who knew the owners (though he had not acted and was not acting for them), advised that they were developers and would not sell "at a value that reflects restaurant use etc" and had already rejected offers in 2009 and 2012 of $3 million by the owner of a nearby development. He pointed out that the current use allowed commercial accommodation and serviced apartments and that the owners could apply to vary the lease, as could any leaseholder in the ACT. Mr Powderly told the Committee that he knew of many instances where planning ministers had ruled out rezoning particular parcels of land but later it had taken place. He warned Mr Stewart (referencing the possibility of compulsory purchase) that, if the ACT government said it would only value on the basis that it would block the rights of any leaseholder to vary the lease, a court would look badly, in any challenge by the owners, on using its monopoly position to drive down value. It followed that the assessment of value needed to be a "market-based approach, not what is the lowest value". He said the "current value with 50% LVC regime is in the range of $3.6m to $3.8m and if LVC was 75%, value range would be $2.3m to $2.5m". He commented that the owners thought the "value was $4m to $4.5m and will wait for a few years". His recommended range for purchase was $3.6m to $3.8m GST exclusive.

55. Following in-house discussions, Mr Stewart told Mr Powderly he wanted to see whether the owners would consider selling and Mr Powderly offered to set up a meeting. On 16 June 2015, Mr Powderly provided to Mr Stewart a "Discussion Paper" that suggested a "range of current values to settle the matter" of $2.8m to $4.6m, with a recommendation of $3.6m to $3.8m. The Auditor-General thought it significant that this paper stated that the site was available for residential use. This was a misinterpretation of the paper. Mr Powderly explained to the

Committee that the document was directed to informing Mr Stewart, for the purpose of his meeting with the owners, that they were going to be looking at the negotiation from a development outcome perspective and he needed to go into the meeting "well armed with what their views would be in terms of residential". He told Mr Stewart about the valuation considerations from the owners' point of view and the numbers they would be minded to start with. He said, "It was a discussion between [Mr Stewart] and the owners. It basically set out the residential numbers and what they would be thinking so that from his perspective he had a bit of a handle on it". As already mentioned, the Valuation considerations previously provided to Mr Stewart had noted that residential use was currently unavailable.

56. The Discussion Paper noted –

> **Proposed Development**
>
> The proponents of the land wish to develop part of the land with a residential apartment complex which occupies 2500m² of the footprint of the site with the balance being public open spaces and interface.
>
> The current scheme provides for an eight level building above basement car parking and is to yield some 122 units.
>
> Value per unit site has been derived from available sales evidence. The most comparable with the recent sales at Section 5, Campbell, sites in Braddon and Kingston Foreshore.
>
> An indicative value of site approved and LVC paid is set out below.
>
> | | | |
> |---|---|---|
> | 122 units x $85,000 per unit | | $10,370,000 |
> | | **As** | **$10,400,000** |

57. The Discussion Paper stated, "market value of the site will represent the existing value of the site plus a percentage of the development rights resulting from a lease variation in payment of LVC". It contained calculations relative to a development "to highest and best use as permitted in CZ6 table less the LVC" and concluded that the "development value is assessed at $10.4 million once expenditure is applied to achieving a DA and the LVC is paid". Further calculations were included, varied with a 50% LVC and a 75% LVC, including with an indication of the "range of current value to settle matter as $2.8–$4.6 million, with a recommendation of $3.6–$3.8 million". Although the data were not justified by calculations reflecting comparable sales or other information conventionally relied on for a formal valuation, the basis for the numbers plainly depended on Mr Powderly's considerable experience; there was no evidence that suggested he was or was likely to be mistaken.

58. Mr Powderly demurred with the description of what he had given Mr Stewart as "valuation advice", preferring (fairly) the term "market advice". He surmised that Mr Stewart's relative inexperience with the area might have led him to think, mistakenly, that he had provided a valuation. This could well be correct but, in point of substance, it matters little in the present context, since it could not fairly be doubted that Mr Powderly's advice on value was reliable. Considering his depth of experience and familiarity with the Canberra market, it was reasonable for Mr Stewart (and Mr Dawes) to have placed considerable weight on his opinion.

59. (The Auditor-General commented that there was no evidence of the Discussion Paper in the LDA's records. The failure to keep proper records of the course of negotiations and decision-making was (rightly) the subject of criticism both by the Auditor-General and the Committee. There is no reason to doubt Mr Powderly's records or, for that matter, his evidence. This issue, however, does not require or justify further investigation by the Commission.)

60. Mr Powderly set up a meeting for 19 June 2015 in Colliers' office (described by Mr Powderly as "mutual territory") with Mr Stewart and the owners' representative. Further details of this meeting are set out below. This, in essence, concluded Mr Powderly's involvement in the matter. He neither sought nor received any payment or commission for his assistance.

61. On the face of it, it may seem somewhat strange that the government should seek and Colliers should provide significant and obviously valuable advice without payment. However, Mr Powderly informed the Committee –

> We are asked on multiple occasions to provide informal advice as to the marketability, the value, of something [they] are looking to buy. We do that as an agent under the panel arrangement, and we do not necessarily charge for that. I could probably cite 30 or 40 instances where I and other agents have been asked to provide that advice to the LDA as part of a proprietary process to pitch for business. It is not uncommon. … [We] do a lot of work on the commercial advisory panel where we are asked by the LDA to give advice on Molonglo, Gungahlin or other bits and pieces. We do that as part of our panel arrangement. If we were asked to charge them, we would, but in most instances it is informal market advice, which is what we thought we were providing in respect of this property. They had a valuation; they could not understand why they should be paying more than a million dollars. We gave them this advice as to what its market value would be.

62. The LDA was criticised both by the Auditor-General and the Committee for failing to obtain a formal valuation of the market value of Block 24 once the readiness of the owners to sell was ascertained. There was no evidence of an applicable formal rule as to obtaining valuations, though it is obvious that no purchase or sale could properly, or at least prudently, proceed without an adequate appreciation of value. As it happened, Mr Dawes' evidence was that, at

the time, he thought Mr Powderly had provided a valuation although he accepted that, in fact, it was not a formal valuation. As discussed above, there can be no serious doubt that Mr Powderly was highly qualified to provide the advice that he did, even though this was not in the form of a valuation and did not comply with the standard requirements that such a process entailed. There was no evidence to suggest that his advice was not reasonably accurate and reliable, let alone that it was other than conscientious. Mr Swinbourne advised the Auditor-General (and gave evidence to the Committee to the same effect) that, "subject to the opportunity to prepare formal valuation advice based on appropriate instructions for the purpose, the Colliers International assessment is likely to reflect more closely [than the Opteon valuation] the market value of the subject property".

63. The documents produced by Mr Powderly were (as is obvious on their face) not valuations strictly so-called. That did not mean, however, that it was improper, let alone corrupt, to rely on them. To the contrary, although it may not have met the standards of best practice, it was not unreasonable to do so. It should be noted, in fairness, that Mr Powderly advised Mr Stewart to obtain a formal valuation if he wished to proceed to a purchase. Neither Mr Dawes nor Mr Stewart thought this was necessary. Of the shortcomings in relying on Mr Powderly's advice, perhaps the most significant is that, being voluntary, it was not subject to any contractual obligation of adequacy. However, that is not to say that there would have been no recourse in the event of a negligent misstatement. In sum, though not a formal valuation, there is good reason to accept that Mr Powderly's opinion as expressed in the documents he provided to Mr Stewart was soundly based and reliable.

64. For present purposes it is sufficient to state that the omission to obtain a formal valuation and to rely, instead, on Mr Powderly's expert opinion does not, by itself, or in the circumstances as a whole, raise a reasonable suspicion of corrupt conduct.

65. (It should be mentioned that, as part of the aftermath, a Freedom of Information ("**FOI**") request was sent to the LDA on 5 November 2015, which sought documentation in terms that required disclosure of the Powderly documents. The LDA did not have the Discussion Paper and asked Colliers to provide a copy. Mr Powderly said that he was asked to change the title of the Discussion Paper to say "Valuation Considerations" or "Valuation Advice" and, because it was not a formal valuation, he was happy to assist, given this was the title on the first paper. In the result it was attached to an email describing it as "a copy of the advice provided to [Mr Stewart (who had by then left the LDA)] in respect to the values of the Glebe Site" and headed "Valuation Advice". Subsequently, the document was provided again, following another FOI

request, and that version reverted to the description “Discussion Paper”. The first production was misleading in that, because of its title, it was not actually a copy of the document it purported to be. Mr Powderly was then of the view that, in substance, the document was indeed valuation advice and, as I mentioned above, it was so regarded by the LDA. As the Auditor-General observed, submitting manipulated information in response to a FOI request is unacceptable. However, this sheds no light on the purchase process and does not, by itself, amount to corrupt conduct at all events.)

Agreement is reached

66. As mentioned, on 19 June 2015, Mr Stewart met with Mr Potts at Colliers’ offices. Mr Powderly said that he thought the meeting was simply to trade details so the parties could have later conversations. Mr Stewart’s evidence to the Committee was that his purpose was to ascertain whether the owners were willing sellers. He and Mr Powderly discussed the Valuation considerations and the Discussion Paper before the meeting and then Mr Stewart was introduced to Mr Potts, who was acting for the owners. Mr Powderly left them in a meeting room and played no role in those or any subsequent discussions. Mr Potts said Mr Powderly had asked him “would I be interested in going to a meeting with Dan Stewart on the thought of the purchase and sale of the block” and he agreed to do so. He said Mr Powderly introduced them in the front foyer and left them alone for their meeting.

67. Mr Stewart said that, once alone, Mr Potts indicated the owners were willing to sell and it was agreed to have a follow-up conversation. He said that no negotiation occurred at the meeting. Mr Potts gave evidence to the Committee of a somewhat more extensive conversation. His evidence was that, once it had been established that a sale might be agreed, Mr Stewart suggested a price of $3m, to which Mr Potts responded that they would not be interested as this was “not anywhere near what it is worth” and suggested $5m. Mr Stewart demurred and proffered $3.5m. Mr Potts proposed $4m, to which Mr Stewart responded that he did not think the LDA “can get to four”. The meeting then ended. A day or so later Mr Stewart telephoned Mr Potts and offered $3.8m, which Mr Potts agreed to take to the other owners if there were to be quick exchange and settlement. This might have taken several telephone calls. There is nothing in this difference of recollections that is presently significant.

68. The Auditor-General commented that “it is not clear to the Audit Office why the principal of Colliers International, a valuations and real estate marketing company, should have arranged a

negotiation meeting on their premises. The [LDA] should have either arranged such a meeting itself or engaged an appropriate body (e.g. the ACT Government Solicitor) to assist". In their evidence to the Committee, neither Mr Powderly nor Mr Stewart could recall precisely how the location came to be selected except, in substance, that it was mutually convenient. For both Mr Powderly and Mr Stewart, the purpose of the meeting was to introduce the latter to the owners and ascertain whether they might be interested in selling Block 24. In the result, it may well have been that there was an inconclusive discussion about price, but this is inconsequential. It is difficult to see why, at this early stage, the assistance of the ACTGS was either necessary or desirable, since the issues were commercial and relatively simple, though it may have been desirable for Mr Stewart to have had another person present. The offer of Mr Powderly to facilitate a meeting was in the context of discussions about how to proceed and accepted by Mr Stewart. Whatever the purport of the Auditor-General's opinion, it is difficult to see that arranging to meet at Colliers' office as distinct from at the LDA was inappropriate, let alone sinister. Nor is it self-evident why the meeting "should" have been arranged by the LDA rather than by Mr Powderly. At all events, this raises no issue, either by itself or together with all the other evidence, of corrupt conduct.

69. A few weeks after the June 2015 meeting, the owners' position crystallised. Mr Morris, one of the owners, said that in August 2015 he was informed by Mr Potts of the LDA's offer of $3.8m, which he told Mr Potts was acceptable to him. He had never seen the Colliers' valuation advice and had not received any substantiation explaining how the LDA had arrived at $3.8m.

70. A Deed of Surrender of Crown Lease was executed on 27 August 2015 and it appears that settlement effected on 8 September 2015 for $3.8m plus GST.

The interest of Aquis

71. The transaction occurred apparently without the owners being aware of the emerging Aquis plans for redevelopment of the adjoining site. However, little ultimately turns on this, as the account below explains.

72. A member of the Committee referred Mr Potts to his evidence that, during the initial meeting with Mr Stewart he was told that the reason for the purchase of Block 24 was for the Project, and asked whether he had ever thought there might be another reason that the LDA wanted that block of land. Mr Potts answered that he did not care what the reason was and, in effect, it

never occurred to him that there might be some other reason. Mr Potts said that he had not had any discussions with the owners or operators of the Casino about the block. If there had been an approach, he would have remembered it and had no recollection of it happening. He did not recall any conversations with either Crowne Plaza (which operates the hotel on the Casino site) or Aquis but thought it possible that some took place when the owners were exploring opportunities for development. Mr Potts was asked by a member of the Committee whether he had ever discussed anything related to his ownership or sale of the block with Mr Barr or any of the ministers, to which he made the robust response: "Never. Why would I?" The question was not answered.

73. Mr Xirakis was asked by a member of the Committee whether he was aware of any talk or documentation about a Casino expansion on Block 24 at the time that its acquisition by the Government was being considered. He said that he did not think so. It was understood that the Casino had a "sliver of land" (i.e., the right of way) that gave it street access. Mr Xirakis said he was involved in a meeting with an architect (presumably on behalf of Aquis) looking at what might be done with Block 24, shortly after Aquis had purchased the Casino. (This timing is unclear but obviously well before the LDA's interest in acquiring Block 24 arose.) He said that he pointed out that government did not own the block, "so it ended pretty much there". He doubted that the owners of Block 24 were aware of the Casino's interest in expansion. Mr Powderly told the Committee that he was unaware of any intention of the government to sell Block 24 to the Casino and the subject had not come up at all in the discussions about the acquisition. The focus was on the relocation of the retention pond. Mr Dawes told the Committee that Block 24 was not bought for the purposes of the Casino but "always for the [relocation of] Coranderrk Pond".

Aquis' proposal for redevelopment

74. On 21 August 2015 Aquis lodged an unsolicited Proposal, dated August 2015, with the ACT government "for a refurbished Casino Canberra and entertainment district". It seems that Aquis, at least in verbal form, had previously approached the Government with the proposal in May 2015. This is on the basis that, under the heading "Previous approaches to Government", the Proposal stated: "This proposal was presented to Chief Minister Andrew Barr and advisors on 21 May 2015". No document of or about that date has been produced and it is unclear whether what had been presented was in detail the same as the August 2015 Proposal. The reference in the August 2015 Proposal to the "recent acquisition of Block 24 by the

government" (see below) could not have been made in the previous May, since the agreement with the owners was arrived at in late August. From Mr Stewart's evidence (see below) it is reasonable to infer that, at this stage, the possibility of gaining rights in respect of Block 24 was not involved. (To be clear, the Proposal produced to the Committee as the Proposal of August 2015 was called a "Draft". It is reasonable to act on the basis that the "draft" Proposal was in fact either the document lodged or identical to it as, indeed, the Committee assumed.)

75. Mr Barr told the Committee that he met once with Aquis on 21 May 2015. No question was asked as to what transpired at the meeting and, from the answers to the Committee's questionnaire of October 2018, it appears nothing of importance occurred. Mr Stewart told the Committee, in effect, that he had been present at the meeting. He said that his understanding at the time was that "the Casino's interest was only in developing on their own land" and that "they only developed an interest in expanding their design post the public discussions around the Glebe Park land". He added, "whether it crept into the adjacent block I could not tell you, but the conversation that I had with representatives of Aquis subsequently was … when this information about the Government acquiring this land first came to public light, that was the first time they had seriously considered a large development on that block". He said that "[the Casino's] initial design for the Casino, at least the one that was discussed in the early part of 2015, or their early thinking, was an expansion of the existing Convention Centre, with them assuming management rights of the Convention Centre, and that was to be largely confined to their existing land right". He was unable to put a time on this. In substance, he was given to understand that Aquis, "were watching these events unfold publicly, the point made at the time was that their initial thinking and initial designs for their expansion had only ever taken in the land that they had control of, which is the land behind the Casino". He added that he was not aware of any rights that the Casino ever had over Block 24 other than the right to submit an application for direct sale (which never occurred). (Mr Stewart left government employment in August 2015 and since has done some work for Aquis.)

76. The available evidence indicates that the Proposal was not considered at the Cabinet sub-committee meeting held around April/early May 2015 (to which reference has been made) because the Casino meeting only occurred subsequently. Any possible significance the 21 May 2015 meeting might have is speculative. Ms Mellor said, through in-house counsel to the Committee, she recalled no discussions with officials after March 2015. The most reasonable view of the evidence is that the Aquis proposal did not, in its initial form, encompass the possibility of acquiring an interest in Block 24 and its construction of the

Coranderrk Pond. Furthermore, the lack of any follow-up by Aquis strongly supports the inference that there was no support indicated by Government at the meeting for the proposal. This, together with the absence of anything that realistically suggests that government at any relevant level was contemplating any proposal involving Block 24 and the Casino, removes any proper basis for using the Commission's coercive powers to undertake what would, in substance, be no more than a fishing exercise. It is manifest that the mere prior presentation of an unsolicited proposal for development, even if it did suggest the acquisition or use of Block 24, raises no issue of corrupt conduct. It would have been both lawful and proper for such a communication to be made and no impropriety in the Chief Minister being aware of Aquis' aspirations. There is simply no evidence that it had or might have had any influence on any decision pertinent to the acquisition of Block 24 by the Territory. Rather, the evidence implies that it did not.

77. The Proposal noted that the Aquis project "will only be possible if the ACT government provides the assistance and legislative framework (including legislative certainty) required to present to equity and debt financiers, a commercially viable and bankable Project in order to meet their investment criteria". Stage 1 of the Proposal included relocating the Coranderrk Pond "to a new upstream site so that work may commence on the reconfiguration of Parkes Way, facilitating the delivery of the City to the Lake vision, which Aquis strongly supports and looks forward to contributing to in years to come". Aquis sought "modernisation" of the Territory's gaming laws, its wish list comprising authorisation to operate Fully Automated Table Games, an increased number of table games and authorisation to operate slot machines. It also sought management rights for the National Convention Centre and "as well as ensuring it has appropriate property rights of [*presumably,* over] the land known as Block 24, Section 65 … which we understand the Government has recently acquired. Aquis will work with the Government to find a mutually acceptable way forward". What was meant by "appropriate property rights" over Block 24 was never made clear in the Proposal but the language seems to fall short of acquisition. It appears almost certain, at all events, that Aquis did not itself wish to acquire Block 24 unless it could be sure that it would be, one way or another, part of the ambitious proposed development. It may not be too cynical to suggest that, for the Casino, the major benefit hoped for was the substantial expansion of gambling opportunities, which would have provided significant profit at little cost.

78. As already mentioned above, the meeting in December 2014 and the emails of March 2015 demonstrate that Aquis was well aware of the Government's intentions concerning the acquisition of Block 24 for the purpose of relocating Coranderrk Pond. Yet at no point did it

approach the owners to attempt its acquisition. Aquis was asked by the Committee (in the questionnaire summarised below) why it wished to build the replacement stormwater pond. Not to put too fine a point on it, it was obviously to sweeten the Proposal in the hope of obtaining Government approval for the development. Naturally enough, this was not quite how the answer was cast, but reference to an aspiration to help fulfil the Government's own plans was, to use the vernacular, "greasing the wheels". This was neither unreasonable nor improper.

79. Following receipt of Aquis' Proposal, a briefing paper was prepared for the Chief Minister. The paper made no reference to the May meeting. It commenced its brief chronology with 21 August 2015, when the Proposal was submitted as an unsolicited private investment bid, and ended with 27 August 2015 when it was formally presented to senior ACT Government Officials as per Phase 1 of the *Investment Proposal Guidelines for Investors* ("**Investment Guidelines**") process. The Proposal's redevelopment plan was summarised. It was noted that Aquis was seeking ACT government support "in the form of" changes to gambling rules, revised gaming taxation rates, management rights for the National Convention Centre Canberra and, "property rights for Block 24". The paper noted that the Proposal was considered to be suitable for progression through the Investment Guidelines process, and Aquis was invited to make a presentation to the relevant Directors-General to provide further information for the purpose of enabling an informed decision to be made. Following this, an Assessment Panel consisting of senior executives from relevant directorates would be established to negotiate a non-binding Participation Agreement with Aquis, consider its business case and recommend to the Government whether the Proposal should progress. A number of risks which required management were identified, including the need to appoint a probity advisor, for an independent evaluation to verify the economic and financial case, and also:

> Community consultation will be important particularly with the residents in the nearby area and the users of Glebe Park. In particular, concerns by residents affected by Aquis **rights** to Block 24 Section 65. (Emphasis added.)

80. The Chief Minister reviewed this briefing note on 7 November 2015, and placed ticks next to the risks mentioned above, with two ticks next to the quoted risk. The language in which this risk is cast is ambiguous, in that it is consistent, taken alone, with the implication that Aquis already possessed rights to Block 24. Indeed, questions were put to Mr Barr by a member of the Committee that relied on this interpretation. Mr Barr responded that he was not aware of any Aquis rights in respect of Block 24. He was asked, "Did the government acquire this block

for the Casino?" His answer was "No" and referred to earlier evidence about the need for the land to enable the relocation of Coranderrk Pond. The question was pressed, asserting that the "document … says the Casino has rights to the block acquired by the government. Is all this a big coincidence?" Mr Barr answered, "I am not aware of any rights that the Casino has to that block. There has been no decision of government to give the Casino any rights". It is clear, on reading the Briefing Note as a whole, that the reference was to the rights *being sought* as part of the Proposal (see [71] above). The Committee's questions were therefore based on a misreading of the description of the risk. When read with the Proposal, which clearly indicates that Aquis had *no* rights to or over Block 24 and that these were being sought for the purpose of the relocation of Coranderrk Pond and other potential (unspecified) uses, the matter is not susceptible to doubt: the quoted risk was about potential concerns *in the event* that Aquis acquired the rights over Block 24, which it was seeking, and was not a reference to any *existing* rights. The Proposal also made it clear that the exact nature of those future rights was a matter for further negotiation, if the Proposal were acceptable to government. There is no evidence that suggests that Mr Barr's evidence was otherwise than truthful. Rather, both the contemporaneous documents and the effect of the evidence of the other relevant actors corroborate it.

81. Mr Barr told the Committee, in effect, that he first became aware "when [Aquis] released their initial proposal, [that] they were interested in taking over the Convention Centre together with the land adjacent to it … [but] the government determined not to support that particular element of the proposal". The Chair asked, "When?" Mr Barr answered –

> Again, I would need to check the time on that. Cabinet has had a number of discussions in relation to the unsolicited proposal. We made public our position in relation to that, particularly in relation to the land surrounding the Convention Centre, so, the land that is owned by the government surrounding their lease.

82. On 29 November 2017 Mr Barr answered the question –

> In May 2016 the Director-General Economic Development advised Aquis Entertainment that consideration of its unsolicited proposal would not include the National Convention Centre. For clarity, the ACT government has not allocated any rights to Block 24 Section 65.

Committee questionnaire to Aquis

83. On 10 October 2018, the Committee sent a lengthy questionnaire to Aquis concerning its communications with the ACT Government about Block 24. The Committee pointed to the

request in the Proposal for "appropriate property rights of the land known as Block 24 Section 65 … which we understand the Government has recently acquired" and asked why this request was made. Aquis' response, through its solicitor, was that, as the Casino had decided to incorporate the stormwater pond as part of its Proposal and it was proposed that the pond would be located on Block 24, it followed that the Casino would need to acquire "appropriate property rights" to that land. It added that the Casino did not know the exact status of the acquisition and did not consider that it needed to be more specific about this element of the Proposal at this point in the process, referring to the indication that "Aquis will work with the government to find a mutually acceptable way forward". Aquis thought it "very relevant" for the Committee to note that the Casino was prepared to do a Casino redevelopment without the stormwater pond, noting that the vehicular/frontage issues could be addressed by making appropriate use of the (existing) right-of-way over Block 24.

84. As to the ownership and possible uses of Block 24, Aquis relied on Mr Purdon's information of December 2014 (his minute was attached to the Casino's response) with the understanding that "approved uses" of land were able to be changed and were not "fixed" for all time. The Committee asked: "On what basis Aquis expected the property rights to Block 24, Section 65 would be granted to it by the ACT government?" Aquis answered: "The Casino did <u>not</u> consider that rights in the Adjoining Block would definitely be granted to it by the ACT government" (emphasis in original). Rather, it expected that the acquisition of any rights over Block 24 would be closely tied to the overall fate of the Proposal. In addition, the Casino considered that incorporating the relocation of the stormwater pond into the Proposal enhanced the prospects of its being seen to be consistent with government guidelines, whilst also addressing frontage/regular access issues; assuming the ACT Government was in a position to grant property rights to the Casino over Block 24 –

> at the time the Casino lodged this proposal with the ACT government, the Casino considered there to be reasonable prospects (*if* the redevelopment proposal was viewed favourably) that: [amongst other things] the ACT government may move onto negotiating appropriate property rights over the Adjoining Block as part of the Redevelopment Proposal process; and the Casino may be able to obtain those rights. (Emphasis in original.)

The response to the question, "Why did the Casino consider there to be reasonable prospects of this", made it clear that it relied on the claimed "inherent value of the proposed infrastructure", which was aligned with what was described as a "key priority of the ACT government" (namely the City to the Lake Project) in the context of a $300m development that,

it was submitted, would deliver significant jobs and growth to the ACT and "revitalise an area of the city that…[was] long overdue for revitalisation".

85. As to how it came about that Aquis understood "the government has recently acquired" Block 24, it was Ms Mellor's recollection that she was informed of this by one of the Casino's consultants shortly before lodging the Proposal but had no specific recollection of the conversation or who among the Casino's consultants, spoke to her about it. There was nothing further to add to the information provided about communications with ACT Government regarding the Government's acquisition of Block 24.

86. The Committee concluded, on the basis of the answers to its questionnaire, that the Proposal was not unsolicited but lodged "after discussion with – and encouragement from – the ACT government". It appears that "after" is not a mere reference to chronology but was intended to mean "induced by". What precisely is encompassed by the phrase "ACT government" is unclear. There is no evidence that indicates any Ministerial encouragement of any kind for any proposal, let alone one that involved Block 24. The only evidence that provides some support for the conclusion is contained in Mr Purdon's minute. His description of what was said by Mr Xirakis and Mr Baxter could not fairly be described as soliciting, or even approaching a solicitation of, a development proposal. The purpose of the meeting was to discuss road access to the Casino and adjacent stormwater issues, not any major development involving the Casino. The officials appropriate for such a discussion were Mr Xirakis and Mr Baxter, both of whom were, without intending any offence, secondary officials and neither of whom had any responsibility in respect of any major Casino development. Nor did they have any role in decision-making in connection with the acquisition of Block 24 (Mr Xirakis was charged only with the negotiations for an acquisition that had already been decided on). Even if they had expressed support for Mr Purdon's suggestions or perhaps even made suggestions themselves, this could not and almost certainly was not regarded as done in the capacity of agents for or on behalf of the ACT Government. And it is apparent that Mr Purdon did not think they were, hence his reference to "win-win" being only a possibility. The description of an "unsolicited private investment bid" is used by the Investment Guidelines for the purpose of identifying the applicable assessment process. A proposal, even if made after informal support or encouragement for an aspirational possibility in a discussion with secondary officials acting without authority is, with respect, simply incapable in ordinary parlance of being described as have been made with "encouragement from the ACT government". The description of the Proposal in the Briefing Note to the Chief Minister as "submitted under the [Investment

Guidelines] program for unsolicited private investment bids" was accurate and appropriate. So far as any relevant purpose was concerned, the Proposal was indeed unsolicited.

87. There is nothing that suggests that anything done in relation to Block 24 by the officials at that time, or at any relevant time thereafter, concerned or involved Aquis in any way. Rather, the evidence indicates the opposite. The evidence, such as it is, about the meeting in May 2015, which included the Chief Minister and Mr Stewart, amongst others, is inconsistent with any encouragement or positive feedback having been given to the Aquis proposal. That said, it is not impossible (and entirely proper) that Aquis was told at some juncture to put in a bid consistent with the Investment Guidelines. As already pointed out, Mr Stewart's recollection was that, at that point, the proposal did not include expansion into Block 24. Whether this recollection is correct or not matters little. Aquis was legally entitled to put a proposal to government, whether in relation to its own land or any other parcel of land in which it might hope to obtain some interest. Nor could any encouragement for it to do so be improper, providing of course, there was no commitment or implied promise that the proposal would be likely to succeed. The evidence of what transpired at the sub-committee meeting of Cabinet that instigated the recommencement of negotiations with the owners in respect of Block 24 is also, in substance, inconsistent with any consideration of the possible interest of Aquis in the land. This is particularly so as the Cabinet sub-committee was very likely to have occurred before the initial Aquis verbal pitch/proposal in late May 2015. At the end of the day, the question is whether there is any evidence that raises as a real possibility that the purchase of Block 24 was in any way influenced by, let alone resulted from, an apprehension that Aquis might in some way be interested itself in obtaining from the Government some interest in it. The only reasonable answer is in the negative.

88. The Committee made three other points in connection with the Aquis interest in Block 24, which, it suggested, "raise further questions about probity": first, "that it was unwise of the ACT Government to make the acquisition rather than leaving it to Aquis to deal directly with [the owners of Block 24]"; secondly, the Government was at the same time considering whether to change the constraints on gaming machines at the Casino which "created a likely conflict of interest on the part of the government as both a facilitator and regulator of the Casino's business"; and, thirdly, there was "a possibility that the price paid for Block 24 was less than market value, particularly taking into account: Aquis development plans" and "the ACT government acquired it with a view to supporting Aquis' development proposal … [as an] additional concession, shielding Aquis from the much higher price it would have paid in the

open market". Although these points are characterised as "questions about probity", they rest on highly doubtful conclusions of fact.

89. As to the first, the purchase of Block 24 was essential to permit relocation of Coranderrk Pond and the continuing development of the larger scheme which was part of the Project. The reasoning of the Committee appears to be that, since the ACT government "was aware of and indeed encouraged Aquis' plans for the development on [Block 24] … [this raised] the question of why the ACT government would intervene by acquiring the land when a transaction could have taken place directly between Aquis … and the then leaseholders … without involvement by government". The supposition that, at any material time, the Government in fact encouraged Aquis plans for the Block, has already been dealt with and dismissed. Even if the Proposal, as it then was as at May 2015 (hence, prior to finalisation of negotiations with the Block 24 owners), referred to acquiring rights in Block 24, there was no ground for the LDA to have speculated that this was actually proposed, still less that the LDA was acting merely as an intermediate purchaser between the owners and Aquis. There is no evidence that this possibility was ever considered by anyone in the LDA, let alone in government. The suggestion also overlooks the broader context of the Project, which, as noted above, involved the realignment and widening of Parkes Way, itself depending on Coranderrk Pond being relocated. In short, the Government had its own reasons for needing to "solve" the Coranderrk Pond problem, and it was reasonable for it to want to take charge of its resolution (which, as it transpired, was by acquiring Block 24). It would have been quite inappropriate for it to have done so *via* an intervening purchase by Aquis. Finally, there was nothing that prevented Aquis at any time from attempting to purchase Block 24 had it wished to do so and, if it thought it worthwhile, to have outbid the Territory. The purchase by the Territory was not undertaken in an underhanded or secretive way. The owners were at all times free agents, well able to negotiate with whom they wished and to ensure they obtained what they considered to be a fair price. It would have been very strange indeed had the LDA suggested to the owners that they should instead sell to Aquis, and it is clear that this approach, for obvious reasons, never occurred to anyone. Neither did the owners (rightly) ever regard Aquis as in the market for Block 24. Even accepting, on its face, the supposition that there was a realistic possibility that Aquis was actually interested in purchasing Block 24 (despite its never having attempted to do so), whether the Territory should have ceased its own negotiations was, at all events, merely a question of tactics directed to how best to achieve the relocation of Coranderrk Pond and devoid of any probity content. The Committee did not explain its opinion that the Government should have left it to Aquis to purchase Block 24. It is difficult to see how the public interest

could possibly have been served by the government leaving the acquisition of Block 24 to the happenstance of Aquis deciding to acquire it and then, if Aquis happened to be successful, having to negotiate with Aquis for the Pond's relocation. The scenario suggested by the Committee is not based on evidence, would have been contrary to the public interest, and raises no question of probity and certainly none of corrupt conduct.

90. As to the second point, Aquis sought the gaming variations as part of its Proposal, which was subject to an inquisitory process (described briefly above), the outcome of which could not be predicted. The fact that the Government was the regulator necessarily entailed consideration of any proposal to change the gaming rules (whether in the context of a proposed development or not), just as its other responsibilities required it to deal with moving the Project forward. Even if the issues were interconnected and a decision on one might have impacted (for good or ill) on a decision about the other, this was not a conflict of interest in any material sense. It would simply have raised the need to decide between competing considerations, a task which governments are elected to undertake. In a sense, the structure of licencing and regulating gaming does facilitate its being undertaken in specific settings, but the function of the structure is to control how gaming is undertaken and considering how that structure might be adjusted. either to enlarge the opportunities for gaming or to restrict them raises no conflict of interest, as distinct from the need to weigh the competing relevant considerations.

91. The Committee suggested, more broadly, that "an apprehended conflict of interest on the part of the ACT government" arose from the combination of its being the current owner of the land adjacent to Glebe Park, decision-maker on planning and lease conditions, and regulator of gaming in the Territory, together with unresolved questions over the future of the land. In fact, these issues do not raise any conflict of interest or apprehended conflict of interest, and this is so even if a decision about one might impact on a decision as to one or more others. Competition between desirable outcomes simply needs to be resolved. The lack of an ideal solution is an endemic problem and compromise is thus often inevitable. This is a continual issue for governments and an inherent task of governing to resolve.

92. Generally speaking, a conflict of interest only arises when some personal gain or loss is at stake for a decision-maker and could be affected by a decision he or she has a duty to make. The mere fact that a decision-maker might need to make choices between conflicting or competing outcomes does not give rise either to a conflict of interest or an issue about probity: it is of the very essence of government that such choices need to be made. Furthermore, as

distinct from judicial or quasi-judicial proceedings, the probity question is almost never whether a reasonable person might think that a decision-maker has a conflict of interest, but whether there is, in fact, a conflict of interest. Overall, however, there is a fundamental public interest in encouraging and not undermining trust in government processes, so that apprehended conflicts of interest in settings where adverse perceptions about probity might arise should be avoided as a matter of good governance where it is reasonably possible to do so. It is important, as a precautionary note, also to recognize that the significance of a conflict or apprehended conflict of interest is context controlled, and thus to appreciate that general rules may in particular circumstances need qualification. It is often the case that a conflict of interest can be managed so that the decision in question is not affected by it, whilst an apprehended conflict might be allayed by an explanation. Returning to the apprehended conflict of interest identified by the Committee, for the reasons given, the differing responsibilities described do not give rise to any conflict of interest, actual or apprehended, but merely the need to resolve competing demands and outcomes. Undertaking this task does not itself raise any question of probity, let alone corruption.

93. As to the third point, Mr Powderly's "market advice" (which the LDA treated as a valuation) did not take into account any possibility that Aquis might wish to utilise Block 24, if it could acquire it, for redevelopment of the Casino site. In the circumstances, this is scarcely surprising. Even the owners, themselves developers, were unaware of this hypothetical possibility. The suggestion that the real purpose of the Government's acquisition of Block 24 might not, in fact, have been to relocate Coranderrk Pond, but in order to assist a private commercial concern to cheaply acquire a desirable asset is very serious and, if it were the fact, almost certainly would amount to corrupt conduct. But it is not supported by any evidence. Indeed, the evidence provided both to the Auditor-General and the Committee shows that it was not the case or, at least, there is no basis for reasonably suspecting that it might be. Nor is there evidence that supports the hypothesis that part, however small, of the reasons for the Government's acquisition of Block 24, either at Ministerial or official level, involved the notion of a possible subsequent arrangement, however inchoate, with Aquis to enable it to acquire an interest in it. As to shielding Aquis from the higher price it would have to pay in the open market, there is no evidence that supports the supposition that Aquis would have had to pay a higher price had the Territory not been interested in Block 24. Moreover, the market was always open until the contracts were exchanged, with nothing to prevent Aquis from making an offer. Nor is there any evidence, at all events, that the price ultimately paid was less than market value. The suggestion is speculation, not only with no basis in fact, but contrary to the evidence. The

"probity question" must be answered "no": nor is there any basis for a reasonable suspicion of any corrupt conduct.

Involvement of Chief Minister

94. The Committee's report raised for consideration the issue of the extent to which Mr Barr, in his then capacity as the responsible Minister, was aware of the transaction as it went on. Mr Barr's evidence was to the effect that his "engagement was, as it should be, at the policy level in relation to both policy frameworks and planning frameworks for the Project". He was briefed that –

> there would be land acquisition and it would be the subject of the LDA's processes around negotiation, appointment of a negotiator, valuers, etc but not on the commercial nature of the negotiation. It would not be appropriate for a Minister to be engaged in the commercial negotiations with the LDA, who are delegated to undertake that responsibility.

Mr Barr said he had a weekly meeting with the people from the EDD, with the agenda items varying week to week. The Project was not one of the standing agenda items. So far as land acquisitions were concerned, he would not be informed of a particular acquisition as a matter of course, depending on value in accordance with the Framework. He met the LDA Board once a year, and otherwise relied on Mr Dawes and Mr Stewart or other staff members associated with particular projects for information on the LDA's activities. He denied giving any instructions to speed up the acquisition process of Block 24 (or, indeed, any of the other Project acquisitions).

95. Mr Barr told the Committee, by way of answer on notice, that neither he, nor his office, received LDA Board agendas and minutes, adding –

> My office received briefings, through formal minutes and weekly updates, in relation to LDA business activities. This included advice about upcoming land releases, the result of land sales and Project updates. Briefings were also provided in the lead up to Assembly Sittings, Committee Hearings and through Budget and annual reporting.

96. In substance, Mr Barr distinguished, on the one hand, between receiving information about the Project and, on the other, being involved in decisions about any particular transaction. His evidence, in essence, was that the former occurred and the latter did not. The actual content of his briefings was only referred to in general terms, such as "Project updates".

97. Mr Xirakis gave evidence to the Committee to the effect that there was a "large volume of briefing and reporting done by the City to the Lake team … [accounting for] the output of two full-time positions, senior officers in the team who were constantly involved in providing briefs

to Cabinet and the responsible minister …". He said there were also weekly face-to-face meetings for about an hour with one of Mr Barr's advisers to review "topical issues for the Project". Mr Xirakis claimed that he "consistently briefed senior staff of the LDA … and the responsible minister". Mr Xirakis did not say (and, to be fair, was not asked whether), the Minister was indeed informed of details of the Block 24 purchase, as distinct from those relating to other acquisitions. However, Mr Xirakis did not suggest that Mr Barr was involved in any decisions about the negotiations for the Block and his evidence, in effect, was inconsistent with his being aware of any such involvement.

98. The Committee appears to have doubted the correctness of Mr Barr's evidence denying both his involvement in and any connection between the acquisition of the land adjacent to Glebe Park and the Aquis development aspirations. Although the language was not altogether clear, I have understood, nevertheless, that this was part of the corruption report which the Committee asked to the Commission to consider.

99. Had Mr Barr or his staff merely received frequent updates from Mr Xirakis and those updates informed him, directly or indirectly, of the progress of negotiations for the acquisition of Block 24 and the possibility of Aquis' interest (had there been any), this would not amount to corrupt conduct. There was a substantial public interest in the progress of the Project, and it was the responsibility of the Minister to ensure it was moved forward with all appropriate speed. The possibility of obtaining a substantial contribution from the Commonwealth also entailed a need for supervision. The extent to which any Minister considers that he or she ought be informed of any particular transaction must depend on the judgment of the Minister in the particular circumstances. Leaving aside accepted rules or practices governing the matter, such as the necessity to avoid a conflict of interest or the roles of independent actors, the Minister must be entitled to judge what best serves the public interest in any particular case. After all, in the end, Ministers are responsible to the Assembly and the wider community for the performance of the tasks with which they have been entrusted. Whilst minds might differ as to the extent to which ministerial supervision accords with best practice, there is no reasonable basis for suspecting corrupt conduct merely from the Minister being informed, even at a granular level, of significant transactions, of which the acquisition of Block 24 may reasonably to be regarded as one.

100. Being informed is one thing; making or influencing decisions to be made by responsible agencies is another. In point of actual administration, it appears that Mr Dawes had a delegation from the LDA Board to approve purchases of up to $10 million and approved the

purchase of Block 24. He did so, without reference to the LDA Board or Government. There is no evidence that suggests that Mr Barr made any decision concerning the purchase of Block 24 or attempted to influence that decision. Indeed, the evidence as to the process is all the other way and supports the conclusion that the decision was indeed made, in substance, by Mr Dawes and Mr Stewart.

Conclusion

101. The evidence does not provide grounds for a reasonable suspicion that the Chief Minister, Mr Dawes, Mr Stewart or any other official acted corruptly in connection with the acquisition of Block 24. (It is noted, for completeness, that there is also no evidence that suggests that Mr Powderly acted otherwise than appropriately.)

102. As was mentioned at the outset, the coercive powers of the Commission pursuant to an investigation are not available at large simply because the Commissioner considers that the examination of particular circumstances might be worthwhile: the statutory criteria must be satisfied. For the purpose of considering whether that is so and an investigation ought to be undertaken, in particular to ascertain whether there are reasonable grounds for suspecting the commission of corrupt conduct, s 89 of the Act enables the Commission to request relevant information from the head of a public sector entity and, under s 90, to issue a preliminary inquiry notice requiring a person to produce a document or other thing "if production of the document or other thing is necessary to decide whether to dismiss, refer or investigate a corruption report, or investigate a matter on its own initiative … and it is reasonable to do so".

103. Since, as the evidence stands at present, there are no reasonable grounds for the relevant suspicion (so that there is no room to exercise the investigative powers of the Commission), it was necessary to consider whether exercising the more limited powers under s 89 and s 90 to obtain further information were justified. In this respect, there needed to be some basis for inferring that there was a reasonable likelihood that there is relevant information available to be requested or some document or thing able to be produced which was reasonably likely to shed light on the questions that require to be answered before an investigation can be conducted, namely in this case, that might give rise to a reasonable suspicion that corrupt conduct occurred.

104. Here, the Auditor-General and the Committee examined the facts surrounding the purchase of Block 24. So far as they were able to be gathered, the relevant documents were considered and the relevant witnesses questioned. The totality of that evidence has been taken into account by the Commission. As to the possibility that corrupt conduct was committed, that evidence not only does not give rise to any reasonable suspicion that it did so but is inconsistent with any such conclusion. It may be that some relevant documents, as yet unidentified, remain to be collected, but this is speculative. In any event, they are unlikely to be forensically probative. The only reasonable conclusion is that it is most unlikely that further inquiries will disclose any additional useful information. Accordingly, the Commission's use of coercive powers in searching for such material is not appropriate.

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