ACT INTEGRITY COMMISSION

Special Report (Part 2)
Canberra Institute of Technology

An investigation into the allegations of corrupt conduct by Canberra Institute of Technology public officials in connexion with the procurement of organisational change consultancy services.

July 2025

Enquiries about this report can be directed to the
ACT Integrity Commission
GPO Box 1949
Canberra City
Australian Capital Territory 2601
or by email to info@integrity.act.gov.au

This publication is available on the Commission's website: www.integrity.act.gov.au

This publication should be attributed as:

Special Report (Part 2) – Canberra Institute of Technology
ACT Integrity Commission
Canberra, ACT

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.

Contents

ACT INTEGRITY COMMISSION

FROM THE OFFICE OF THE COMMISSIONER

Our Ref: R21/0123

Mr Mark Parton MLA
Speaker
Legislative Assembly for the ACT
CANBERRA ACT 2601

Dear Mr Speaker

SPECIAL REPORT – OPERATION LUNA (PART 2)

On 23 June 2022 the Commission announced its decision to investigate the circumstances surrounding the awarding of over $8.5 million worth of consultancy contracts by the Canberra Institute of Technology (CIT) to entities associated with Mr Patrick Hollingworth (including ThinkGarden and Redrouge Nominees Pty Ltd). The investigation is code-named Operation Luna.

A Special Report pursuant to s 206 of the *Integrity Commission Act 2018* (ACT) was provided to you on 27 June 2024. In that Special Report, the Commission considered several discrete matters that arose as part of Operation Luna, focusing on issues of the CIT's governance with respect to the procurement of the above-referenced contracts, and the relationship between the responsible Minister, the CIT Board, its Chair and the Chief Executive Officer.

The Commission's investigation has continued.

Enclosed is the Second Special Report pursuant to s 206 of the Act.

This second report focuses on whether corrupt conduct occurred in connexion with the negotiations concerning, the payment schedule agreed in, and the procurement documentation for the sixth contract entered between the CIT and Redrouge Nominees Pty Ltd on 28 March 2022. This contract provided for substantial amounts to be paid in advance of the services to be provided.

In the enclosed Second Special Report, I have made adverse findings, and concluded that serious corrupt conduct occurred in connexion with the procurement of the sixth contract entered into between the CIT and Redrouge Nominees Pty Ltd.

Yours sincerely

The Hon Michael F Adams KC
Commissioner

25 July 2025

Contact
P (02) 6205 9899
E info@integrity.act.gov.au

Postal Address
GPO Box 1949
CANBERRA ACT 2601

integrity.act.gov.au

Introduction

1. This is a second Special Report (**SR2**) relating to Operation Luna, made pursuant to s 206 of the *Integrity Commission Act 2018* (the **IC Act**) prepared for the Legislative Assembly. As required by s 212 of the IC Act, persons to whom the proposed Special Report relates and those having a direct interest in it, were provided with a copy to give them an opportunity to comment on it. Comments were made by Ms Leanne Cover, Mr Andrew Whale and Mr Patrick Hollingworth. In accordance with s 212A, they have been considered and some amendments to clarify certain points have made. Comments that appear to have warranted additional treatment are set out in this Report with the balance, in the Commission's view, being adequately answered by the text as it stands. In the result, the Commission was not satisfied, however, that it was appropriate to amend any of the adverse opinions expressed or findings made in the Report.

2. On 27 June 2024 the first Special Report (**SR1**) in respect of the Operation Luna investigation was provided to the Speaker of the Assembly in accordance with s 189 of the IC Act. That Report envisaged subsequent reports dealing with different aspects of the investigation into six contracts between the Canberra Institute of Technology (**the CIT**) and Mr Hollingworth or his associated entities (Think Garden and Redrouge Nominees Pty Ltd). These were the subject of extensive discussion in SR1, some of which needs to be repeated in this report. This report assumes familiarity with SR1, which provides important additional contextual detail. Mr Hollingworth is not the subject of adverse comment or opinion by the Commission in this report.

The focus of this investigation

3. The work undertaken under Operation Luna Part 2 focused on whether corrupt conduct occurred in connexion with the negotiations concerning and the payment schedule agreed in the sixth contract entered into between the CIT and Redrouge Nominees Pty Ltd. This schedule provided for substantial amounts to be paid in advance of the services to be provided. As ultimately agreed, of the total price of $4,999,990, one third was to be paid on execution of the contract on 28 March 2022, with ensuing instalments also payable in advance of the services to be provided, so that by 28 May 2023 (after 14 months and with 10 months still to run) over 80% of the

total price would have been paid and, by 28 November 2023, after 20 months (i.e., with slightly more than 80% of the contract period having been completed) 99% of the contract price would have been paid.

4. The substantial payments in advance requirements under the contract were unusual, particularly in light of the fact that the nature of this services contract did not require upfront investment of significant amounts in order for the contracted services to commence or to be undertaken. The circumstances surrounding how the payments in advance come to be agreed are the focus of this investigation and report.

5. It is important to note that, in negotiating the terms of the contract, Mr Hollingworth, on behalf of the contracting entity, was entitled to consult that entity's commercial interests without regard to those of the Territory. On the other hand, the relevant officials, namely Ms Cover, Mr Whale and Ms Cheryl Steff[1] were obliged to act solely in the interests of the Territory.

Key findings

6. The investigation identified a document, titled "Brief" that was provided on behalf of the Contract Negotiation Team by Mr Whale (then Executive Director Education and Training Services) to Ms Cover (then CEO and Delegate) when the contract negotiations were completed and recommended endorsement of the proposed contract. Ms Cover, on behalf of the CIT, relied on this document to authorize entry into and execution of the sixth contract. Amongst other things, the Brief stated –

> 5. Payments are being made in advance, which for small to medium sized business is a consideration to enable them to make the necessary acquisitions, put required resourcing and materials in place, as is the case with this contract.
>
> …
>
> 11. The value of the proposed engagement is indicative of the significance of the work for CIT, particularly at a time of major reform. As a complex adaptive system, CIT must become a system that learns to ensure adaptive capacity is built to enable the organisation to be situationally aware and respond appropriately to changing contexts. The service provided through this Agreement is innovative, contemporary and the full extent of the work may not be understood more broadly.
>
> 12. This connection between CIT's reform agenda under the Strategic Compass 2025 and this Agreement may lead to scrutiny or focus on the content of this Agreement by those internal and/or external to CIT who may be challenged by the different approaches and

[1] Ms Steff is not the subject of adverse comment or opinion by the Commission in this report.

> outcomes of the reform work. The Contract Negotiation team has ensured probity at all times emerging from the Procurement Process and relied heavily on advice from the GSO and ACTIA during negotiations to ensure decisions made to enable this Agreement are robust and provide value for money for the Territory.
>
> **Consultation and Communication**
>
> 13. Procurement ACT, the Government Procurement Board, the Senior Manager Procurement, Contracts and Records Management (CIT), the ACT GSO, ACTIA and members of the Evaluation Team and Contract Negotiation team have been consulted throughout the course of the procurement.

As the examination of the procurement documentation and the course of the negotiations demonstrated, in fact, it was never envisaged that the cost of acquisitions, resourcing or materials was required to be defrayed in advance to enable Mr Hollingworth to undertake the contract. He did not identify at any point any such needs or request any payment that related to them, and they were never mentioned in the course of the negotiations at all, let alone as justifying the advance payments. Mr Hollingworth himself gave an altogether different explanation as to why the prepayments sums were required, which was not disclosed in the Brief. Nor was it accurate to state that those agencies were consulted "*throughout* the course of the procurement" (emphasis added).

7. Mr Whale's evidence to the Commission was to the effect that, given the urgency of the work, Mr Hollingworth had, prior to the commencement of the contract, already arranged for staff to undertake preliminary work before the contract actually commenced to enable work to start immediately upon execution and that this was the reason for the payments in advance. As will be seen, this explanation is a fiction, quite apart from the obvious point (ultimately and inevitably accepted by Mr Whale) that such expenditure could not possibly have amounted to anything near the $1.66 million which was payable on execution of the contract, let alone the ensuing six-monthly advance instalments. In short, the justification given in the Brief for the advance payments was knowingly false. That this was the case was known also to Ms Cover. Not only did this amount to serious corrupt conduct but could also amount to criminal offences.

8. This **SR2** deals with that issue and it may be helpful to the reader to keep it in mind as the course of negotiations is followed.

Role of the Commission

9. The Commission is established under the IC Act, amongst other things, to investigate conduct that is reasonably suspected to be corrupt conduct, refer suspected instances of criminality or wrongdoing to the appropriate authority for further investigation and action and report the outcome of investigations to the Legislative Assembly. In order to make a finding that corrupt conduct occurred, the Commission must be satisfied to the necessary degree (see below) that it falls within at least one of the elements specified in each of ss 9(1)(a) and 9(1)(b). These are –

- *First limb*: the conduct could constitute
    - a criminal offence,
    - a serious disciplinary offence, or
    - reasonable grounds for dismissing a public official or dispensing with or terminating their services.

- *Second limb*: the conduct contravenes one of several standards, that include:
    - exercise of the public official's functions in a way that is not honest;
    - exercise of the public official's functions in a way that is not impartial;
    - conduct by the public official that constitutes a breach of public trust;
    - conduct by the public official that constitutes the misuse of information or material acquired in the course of performing their official functions;
    - conduct that adversely affects, either directly or indirectly, the honest or impartial exercise of functions by a public official or public sector entity, and that would constitute one of several criminal offences (such as fraud or bribery).

10. Although not every element specified in the two limbs of s 9(1) of the IC Act expressly involves moral turpitude or lack of probity, this is an inherent quality of the notion of "corrupt conduct" to which the section is directed. Mere ineptitude or carelessness, even negligence, would not suffice unless it reflected this element or, at least, amounted to recklessness (in the sense of indifference to the character of the conduct or whether it was legitimate or authorised or not). Section 9(1)(b)(i) includes in the definition of "corrupt conduct" conduct "that constitutes the exercise of a public official's functions … in a way that is not honest …". Conduct is "not honest" for the purpose of this meaning when it would be regarded as such according to the standards of

ordinary, decent people. It is not necessary that the official appreciated or realised that his or her conduct would be so regarded. A breach of public trust (s 9(1)(b)(ii)(A)), implicitly involves the dishonest, intentional or reckless misuse or abuse of a power or office reposed in the public official; mere ineptitude would not suffice. It matters not whether the official believes the conduct is in the public interest. The trust that is reposed in the official is that, whatever may be their personal opinions, they will act in conformity with their duty, which is what defines the public interest. It is obvious that permitting an official to breach their duty because of a personal view about what served the public interest would be destructive of the basic assumptions underlying the institutional integrity of government.

11. This reasoning applies to the definition in s 10 of "serious corrupt conduct", which occurs where the corrupt conduct (necessarily already found) also has the likelihood of "threatening public confidence in the integrity of government or public administration". "Integrity" carries two major meanings: the first connotes moral rectitude or probity; the second, organisational soundness or compliance with requirements. Since s 10 specifies that the seriousness of the corrupt conduct depends, not on the degree to which it is wrongful, but on the negative consequences for public trust, there appears to be no reason to apply an artificial construction to the meaning of "integrity". On this basis, it is sufficient if a likely consequence of the identified corrupt conduct is to threaten public confidence in the soundness or efficacy, as distinct from probity, of government or public administration. The requirement of a lack of probity is satisfied by the character of the corrupt conduct whose effect is under consideration; whether the corrupt conduct is serious depends on the likelihood that the consequences of that wrongful conduct would adversely affect public confidence in the integrity of government or public administration. In the circumstances here, whilst the corrupt conduct ultimately found was itself likely to threaten public confidence in the integrity of government or public administration in the second sense of “integrity” identified above, there can be no doubt that it was also likely to threaten public confidence in the first sense of the probity of public administration, as the corrupt conduct inserted into an essential procedural step in the procurement a materially dishonest misstatement of critical facts, designed to excuse or justify a manifestly inappropriate procurement contrary to the interests of the Territory and mislead official (or, for that matter, public) questioning about it.

12. “Systemic corrupt conduct” is defined in s 11 as “instances of corrupt conduct that reveal a pattern of corrupt conduct in 1 or more public entities”. It has not been necessary to consider the possible application of this notion to this case.

13. Whether the identified corrupt conduct is likely to threaten public confidence in the integrity of government or public administration is a question of fact, not law. The likelihood is not required to be more probable than not but conveys the notion of a substantial – a "real and not remote" – chance regardless of whether it is less or more than fifty percent.

14. For the purposes of the Act a “public official” is defined in s 12 as a person who has public official functions for the Territory or is acting in a public official capacity for the Territory, and relevantly includes (but is not necessarily limited to) a person who is an employee of a public sector entity or a contractor or volunteer exercising a function of a public sector entity. A “public sector entity” is defined in s 14 to include an “entity of a public nature”, a term further defined to mean an entity whose functions are or include functions of a public nature when the entity is performing those functions for the Territory.

15. The Commission is not limited in the matters it may consider in determining whether a function of an entity is one of a public nature, but it is relevant to consider, amongst other things, whether the function is conferred on the entity under a Territory law and whether the entity is publicly funded to perform the function (s 18). The provision of public education is taken to be a function of a public nature (s 18(4)(iv)). The CIT is clearly an entity of a public nature, and its CEO, Board members and staff are public officials for the purposes of the Act.

Fact finding

16. In a conventional trial, conclusions are drawn by applying the rules concerning the onus (or burden) and standard of proof. An investigation under the Act is not a trial: there are no parties; and no legal or evidentiary burden is placed on anyone to prove or disprove any fact. There is an applicable standard of proof in the sense that the process of investigation and the ability to make any findings must be based on a rational assessment of the relevant and available evidence to an appropriate level of certainty. In respect of findings of corrupt conduct, this is accepted to be the civil, as

distinct from the criminal, standard of proof. The civil standard is conventionally stated to be reasonable satisfaction on the balance of probabilities or on the preponderance of evidence, whilst the criminal standard is satisfaction beyond reasonable doubt. When considering the balance of probabilities, attempting to undertake a mere mechanical or arithmetical comparison (say, 51% to 49%), even were it conceptually possible, is not appropriate. The Commissioner must be actually persuaded by the evidence, at least to the relevant degree, of the occurrence or existence of a fact before it can be found. In other words, the mere mechanical comparison of probabilities, independent of any belief in reality, cannot justify the finding of a fact, and actual persuasion means the reasonable satisfaction of the Commissioner that the fact occurred. At the same time, the difference between the criminal and civil standards of proof is of crucial significance and is no mere matter of words or semantics. Even in respect of very serious misconduct capable of amounting to a crime, it is only necessary that the Commissioner be satisfied to the requisite degree of the matter and is not required to reach the degree of certainty essential to ground a conviction. An adverse finding of corruption or serious corruption is not to be regarded as mere conjecture or surmise although it falls short of certainty.

17. Findings of corrupt conduct are serious conclusions that may well have grave repercussions and affect a person's reputation, professional standing and employment. It is conventionally perceived that it is inherently unlikely that persons of good character will knowingly act corruptly and this and the gravity of the consequences that flow from a particular finding are considerations that must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal, which should not be produced by indefinite testimony, inexact proofs or indirect inferences. This should not, however, be understood as directed to the standard of proof but, rather, as reflecting the understanding that people usually act rightly and, given the potentially serious consequences, a finding should not lightly be made, even on the balance of probabilities, that a person has been guilty of corrupt conduct. All adverse findings stated in this report are to be understood in this sense and not in the more rigorous sense of having been proved beyond reasonable doubt.

18. Another significant difference between the fact-finding exercise in criminal trials and that undertaken in an investigation concerns circumstantial evidence. In a criminal trial, the Crown must exclude any reasonably possible explanation or hypothesis consistent with an accused person's innocence. In civil proceedings or an investigation by the

Commission, the question is whether the evidence is sufficiently cogent or of sufficient probative force as to give rise to a reasonable satisfaction that the impugned conduct occurred and is corrupt within the meaning of the IC Act.

19. Although not connected by way of principle with the issues of the onus and standard of proof, it is useful to note three additional evidentiary issues that have arisen in the present case. These concern the problems of hindsight and recollecting conversations.

20. When considering the importance or significance of facts, matters or issues that affect the probity of impugned conduct, it will almost always be necessary to consider the potential outcomes of the conduct as known or ought reasonably to have been known to the official at the time. Drastic or extreme consequences will be relevant to considering the objective seriousness of the perceived misconduct, but it is important not to permit knowledge of the consequences to influence the examination of the character of the conduct at the time it occurred. The cliché is that everyone has 20-20 vision in hindsight, but it is obviously both unfair and inappropriate to use this view when looking at the situation as it faced the official. At the same time, the events that in fact followed the conduct in question may be either precisely or of the same class of the matters which relevant rules not followed were designed to avoid. Thus, it will be appropriate to consider whether the events that happened were reasonably predictable and ought to have been taken into account at the time. But this is to consider what should have been or was in view, not to bring into view something that could not be seen.

21. Another issue facing fact-finders concerns recollections of conversations.
Often precise words cannot be reliably recollected and the best that a witness can do is to state the substance or gist of what was said. This does not justify rejection of the witness' evidence: the lack of precision is simply to be taken into account as a matter of weight. Memory of what was said or not said in a conversation is fallible for a variety of reasons, and ordinarily does not improve with time, especially where disputes intervene, and can be overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should or could have been said. Very often, what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience. In this investigation several important conversations as to which recollections differ have required consideration. Assessing the reliability of the

differing accounts has been approached with considerable caution, with a focus on the insights available from objectively established facts or the logic of events.

Initial consideration of the sixth contract

22. As explained in SR1, work on a proposed sixth contract for services connected to organisational change had commenced by late October 2021. The purpose of this contract was, as stated by Ms Cover in the procurement initiation documentation, "[to] realise the full potential of the Strategic Compass aspirations and leverage the transformation work already done by CIT". The proposal was called "CIT Futures 2025". The description of the services being sought reflected this development –

> The Service Provider will:
>
> - guide the organisation in the application of appropriate tools and approaches, for dealing in complex environments using sciences based on systems of connectivity and complexity, appropriate feedback loops and making visible patterns/dynamics that hinder or enable organisation transitions; and
>
> - empower the organisation to evolve with the changing environment by being a system that learns, building adaptive capacity, and applying context appropriate responses in dealing with the opportunities and challenges of the future.

23. The task of guiding and empowering as described was nothing new. It was essentially providing a service along the same lines as, though with a wider scope and at an envisaged cost very much greater than, the previous successive five contracts. None of those contracts envisaged or entailed capital expenditure of any significance.

24. On 8 December 2021, a Procurement Plan was finalised, signed by the Senior Manager, Procurement and Contracts (**SMPC**)[2] and also by Procurement ACT (**PACT**). The Procurement Plan records that complete funding of $4.5 million had been allocated through the CIT budget. The initial term was two years with an extension of one year at $1.5 million per year. On 13 December 2021, Ms Steff (Acting Executive Director Corporate Services) addressed a minute to Ms Cover (who participated in its drafting) seeking approval "... as soon as possible following consideration of any feedback from GPB [Government Procurement Board]..." for approval for a "select procurement process" for CIT Futures 2025 with Redrouge (Mr Hollingworth's company), with an estimated value of $4.5 million (inclusive of GST) over two years.

[2] The SMPC is not the subject of adverse comment or opinion by the Commission in this report.

As was the position with each of the prior five contracts, the proposed contract did not contain any element of capital expenditure: it was justified as being "based on the previous contract with a value of $1,024,100 per annum, with an additional sum for the increased scope of work required in the next phase". To be clear, that contract had not involved any element of capital expenditure. Nor was there any indication that a substantial sum needed or might be needed to be paid in advance to provide Mr Hollingworth with resources to recruit staff or make acquisitions.

25. The Contract Management Plan provided to the GPB on 17 December stated –

> **12. Invoicing**
>
> **12.1 Invoice Terms**
> Invoicing payment terms are 30 days on receipt of invoice. XXX will provide invoices every month to the CIT Contact Officer, with *services billed monthly in arrears*. The CIT Contract Manager will process the invoice following CIT's established processes and procedures. [Emphasis added.]

The Contract Management Plan was a specific requirement of s 12 of the *Government Procurement Regulation 2007* (ACT), which required procurement proposals to the GPB to "include … the contract management arrangements to be applied to the procurement". On 17 December 2021 PACT sent the documentation for the procurement to the GPB in anticipation of its meeting on 22 December, with a copy to the CIT on 21 December. This included a Brief prepared by PACT that contained the following "observations" –

- The SOR is general in nature – no specific milestones, KPI details
- There is little to no qualitative guidance provided to the Respondent in what is required to be done at monthly report milestones.
- It appears that further scope definition will occur post contract commencement.
- Pricing (therefore future payments) are not based on deliverables.
- One milestone/output is required – the submission of a Summary Report.
- There is an annual fee/price to be submitted with an estimation of hours involved in providing the Summary Report.

It is clear that it was understood that the contract was for services only, with no significant acquisition of materials or resources by the contractor being envisaged.

26. Also included in the documents to the GPB was a draft Procurement Approval, which stated that the estimated total contract value as $4.5 million (including GST) for a two-year contract, the cost for each year being $2.25 million, again implying that the contract was for services alone. The Approval stated –

Estimated total contract value is based on the previous contract with a value of $1,024,100 per annum, with an additional sum for the increased scope of work required in the next phase.

27. The matter was considered by the GPB on 21 December 2021. On 23 December 2021 the CIT was notified of the GPB's advice and recommendations as follows –

Procurement Plan – CIT Futures 2025
There are no attendees for this item.
The Board thanks the proponents for the papers provided.
The Board noted this procurement proposal approach has already been approved by the CEO of CIT.

The Board **acknowledges** that:

- CIT has cited tight timeframes to achieve delivery dates by April and June 2022, which are reliant on the change management advice. It is not clear whether these deliverables and timeframes are new or have been brought forward from a previous plan.
- Given the reliance CIT have on this particular change management advisor and their particular science-based methodology, it would be difficult to construct a competitive tender process however this argument can't be relied upon without constant rigour and a nominated timeframe for when reliance on these consultancy services would end. The Board's advice is primarily aimed to assist in this area.

The Board also **notes**:

- This procurement proposal approach has already been approved by the CEO of CIT.
- Such an approach risks significant criticism as the full scope of these services have not previously been notified to the market and the current arrangements increase the current provider's remuneration significantly.
- The detail around both the market sounding process and basis for rates comparison to make an assessment about value for money is limited.
- There is no description in the Request for Quote of the services that CIT are expecting to be provided, and no defined deliverables or measures of performance.

28. The GPB went on to provide a number of recommendations (dealt with in SR1 but presently immaterial). It is clear that the proposed contract specifically envisaged payments to be made monthly in arrears of the services provided, with separate arrangements for the payment of disbursements and this was a condition of the procurement upon which the GPB's advice was sought. This is manifestly inconsistent with any proposal to pay the contract price, or any significant proportion of it, in advance of the services being provided: this, however, is what was ultimately proposed in Mr Whale's Brief and approved by Ms Cover. It is also inconsistent with payments being made for materials or capital items as distinct from services otherwise than by way of disbursements in addition to the contract price.

29. Following receipt of the GPB advice on 24 December 2021, Ms Steff responded to PACT indicating that Ms Cover had "not approved the procurement proposal approach", and that she was awaiting feedback from the GPB. Ms Steff's email stated that Ms Cover, "following receipt and consideration of the advice and recommendations from GPB, will now make her decision in relation to the procurement methodology to enable us to commence the process following the Christmas shutdown". This email had been reviewed by Ms Cover in draft before being sent. The documents, which are described or cited in paragraphs [305] to [325] in SR1 told a very different story about Ms Cover's decision to proceed by way of a single select process.

30. The GPB recommendations and the CIT responses were set out in SR1, together with commentary by the Auditor-General. It is not necessary to repeat them here.

31. On 10 January 2022, Ms Cover signed the Procurement Minute dated 13 December 2021, indicating that she did "not agree" with the proposed single select procurement of services from Mr Hollingworth, and instead directing that a public tender process be conducted. (She said in her comments on the proposed Special Report that this followed from her conversation of 22 December with Dr Jennifer Rayner[3] – as to which see SR1 at [331 ff])). The CIT subsequently formally responded to the advice of the GPB, advising that a public/open market approach would be undertaken using a Request for Proposal (RFP).

32. On 14 January 2022 Ms Cover signed the procurement approval for the open tender, and the RFP was released the same day.

Evaluation of tenders

33. The RFP went to market on 14 January 2022, when it was lodged on the Tenders ACT website. The draft service contract that was one of the attached documents contained the same pricing clause as that in the draft contract provided to the GPB and the Statement of Requirements provided (Section 6 Governance and Contract Management) –

[3] Dr Rayner is not the subject of adverse comment or opinion by the Commission in this report.

6.1.2 The Contract will be managed in accordance with the CIT contract management plan and any variations to the Contract will not be accepted without prior CIT written approval.

(As it happened, no contract management plan formed part of the published tender documentation but nothing depends on this. It was part of the CIT's procurements records.) The Statement of Requirements provided what was described as "background", the clear implication of which was that the contract covered only the provision of services, with additional materials being paid for by the CIT as disbursements. The contractual requirements, though described in general terms with no objectively determinable specifications, stipulated –

Services

1.1. Overview of the Requirements

1.1.1. CIT is seeking to engage a Service Provider to work in partnership with CIT over a 2 year term of the Agreement to enable it to function as a system that learns (as detailed in clause 1.2.2. and 1.3.6).

1. 1.2. To enable this, the Service Provider will be required to guide and codesign with CIT in:

a) developing system wide capabilities of situational awareness, early/weak signal detection and noise sorting;
b) developing both context-specific and generalised responses to the multitude of situations it encounters;
c) developing iterative capacity to cycle through adaptive/renewal processes across multiple spatial and temporal scales;
d) the utility and application of relevant knowledge, tools, artefacts and approaches in enabling CIT to become a system that learns; and
e) the utility and application of various organisational structures which promote better adherence to and governance of all the above practices.

2.1.1. (sic) Critically, the Service Provider's partnership with CIT must create an overarching learning context in which the above practices occur in visible, coherent ways to ensure alignment with all SC2025 initiatives and the ACT Government's reform objectives.

2.2 Knowledge and Skillset Requirements

2. 2.1. To successfully partner with CIT, the Service Provider must have the following:
a) in depth knowledge of sciences relating to complex adaptive systems, networks, socio-technical systems, and natural (ecological and evolutionary) and social (human and cognitive) systems; demonstrated leading practical application of the above sciences to organisational change contexts;
b) demonstrated understanding of and practical working experience with the VET sector at both state and national levels;
c) an understanding of CIT's strategic directions as described in the SC2025;
d) experience working with the nuanced/idiosyncratic operating and authorising environment of a statutory authority within government;
e) experience working with the broader ACT Public Service or comparable public service jurisdictions; and
f) understand the diversity, scales and interdependencies within and outside of CIT.

2.2.2. The deep partnership required by CIT with the Service Provider and the speed in with which reforms need to be integrated within the CIT system, means the Service Provider must be prepared to:

a) hit the ground running immediately upon selection;
b) engage at all scales within CIT as and when required;
c) ride both the highs and lows associated with an innovative approach to a large-scale transformation of a highly visible public institution; and
d) always work towards the greater vision for CIT articulated in the SC2025.

2.3. Deliverables

2.3.1. The adoption of a contemporary complex adaptive systems approach will require the Service Provider to have the ability to change and respond at different scales and speed as CIT learns and responds.

2.3.2. Each month contract meetings (as described at clause 6.1) will be held to review and assess the deliverables for the preceding period and set activities and outputs to be delivered and relevant measures for the proceeding period.

2.3.3. The Service Provider will be required to deliver the range of Services described above (in clause 2.1) through a range of mechanisms and approaches including:

2.3.3.1. Design, implementation, feedback and evaluation

a) a multi-disciplinary and multi-scaled approach to the codesign and implementation of appropriate practices for internal learning and knowledge exchange, for developing improved situational awareness, and for developing both context-specific and generalised responses to the situations CIT encounters;
b) a multi-disciplinary and multi-scaled approach which is underpinned by a deep understanding of and proven applied experience with sciences relating to complex adaptive systems, networks, socio-technical systems, and natural (ecological and evolutionary) and social (human and cognitive) systems;
c) a multi-disciplinary and multi-scaled approach which is designed and implemented to ensure that all CIT staff involved in this work can learn in a disciplined and coherent way, ultimately ensuring greater coordination of CIT's analysis and decision-making practices in relation to products, offerings and services;
d) a multi-disciplinary and multi-scaled approach to the design, construction and activation of digital and physical spaces in which this work is held;
e) a multi-disciplinary and multi-scaled approach creating an overarching learning context including embedding appropriate constraints; and
f) for formal and informal learning throughout the period of the contract to develop CIT's capacity to undertake the strategic initiatives and reform objectives in a coordinated, coherent and timely manner. These will include context appropriate feedback and evaluation methods and practices designed with CIT.

2.3.3.3. Strategic guidance

g) regular strategic guidance of nominated staff through teleconference, video, face-to-face meetings, and other digital communication platforms; and
h) representation and facilitation to progress and inform the work at strategic levels, including CIT Board, the Executive Management Committee and other governance structures.

2.3.3.3. Artefacts, resources and communication

(a) a multi-disciplinary and multi-scaled approach to the design and implementation of artefacts, resources and communication collateral that CIT can use to articulate the purpose of the work and its associated benefits to all CIT stakeholders and the broader

ACT community.

4. Methodology

4.1. Upon the initiation of Services, the Service Provider must provide CIT with a finalised outline of their methodology detailing how they will:

a) undertake the Services detailed at clause 2;
b) collaborate and communicate with CIT;
c) design the work; and
d) identify appropriate timelines.

The implications of the manner in which the desired services were described for the achievement of value for money in this procurement are explored in detail in SR1. The so-called key performance indicators (which did not, in fact, identify any substantive performance) are also set out in full in SR1. It is presently only necessary to point out that none of them refer to expenditure on making or providing any acquisitions.

34. Think Garden's tender did not provide a pricing breakdown into identified tasks but provided a single lump sum figure of $5.68 million. The pricing schedule was explained as follows –

> Think Garden operates on a value-add pricing structure, rather than a time and cost structure. We believe that time and cost pricing structures for strategic services are not in the best interests for procuring organisations, as it naturally encourages suppliers to take more time to deliver the same value. We therefore adopt a structure that encourages both us—as the supplier—and the purchasing organisation to deliver the most value within a fixed temporal scale and is therefore most beneficial for all parties. Our fee for the two year program described in detail in this proposal is $5.68 million, including GST but excluding disbursements. Further, we are pleased to offer CIT a preferred client discount of 12% should CIT agree to upfront payment of our fees, reducing the total fee payable to $4,999,990 including GST but *excluding disbursements* (emphasis added).
>
> We understand that CIT prefers the deconstruction of the lump sum fee into categories. The table below illustrates an example of how our fees can be reverse-engineered to fit a time and cost structure, although please note that as our fees are not typically decomposable – meaning that they cannot be broken down – taking these day rates out of context and using them in another way – such as for comparative evaluation purposes – is not permissible. It is likely that our conservative estimate of the number of days required is less than what will be required, however note that changes to the number of days will not result in a change to our fee.
>
> *Disbursements are a difficult thing to predict when working in complexity across multiple spatial and temporal scales. For reference, our average monthly disbursement cost over a previous contract (2018-2020) was $986, including $540 for travel, $274 for accommodation and $96 for food. In a more recent contract (2020-2021) disbursement costs dropped as a result of Covid lockdowns and digital delivery. Assuming no further lockdowns and border interruptions, this two-year contract will require some inter-state air travel for our WA-based staff.*
>
> *As with any air travel, we book flexible economy fares.*
>
> *Think Garden intends to have at least four staff present in Canberra for a week at the*

beginning of each trimester. This is likely to involve, at a minimum, six Perth-Canberra return flights for two staff. As per previous contracts, some digital tools have additional costs, namely network mapping software and micro/at-source narrative-capture software. However, as these tools commoditise their costs are decreasing substantially. All disbursements will include a 7.5% processing fee, and will be invoiced monthly. (Emphasis added.)

35. The reference to "digital tools" software is the only reference to costs that might be regarded as having the character of a resource that required acquisition, and it is clear that it is envisaged that these would be paid for as a disbursement on a monthly invoice basis following the expense having been incurred *in addition* to the payments for services. Mr Hollingworth's explanation for the bid price was that it "operates on a value-add pricing structure, rather than a time and cost structure" so that the fee was set "to reflect the potential for an order of magnitude return on the investment over a ten-year timeframe (i.e. a longer temporal scale)". This is meaningless. The table referred to was –

[Item/Deliverables/Milestones]	Personnel Involved/Positions	Estimated Days	1st Year Unit Price	2nd Year Unit Price	Total Price (Incl GST)
Six trimesters (and recovery/learning months in between) and all other necessary services	Chief Executive Officer and Chief Pioneer Patrick Hollingworth @ $10,000/day (inc GST)	230			2,300,000
Six trimesters (and recovery/learning months in between) and all other necessary services	Chief Settler (for Organisations) [REDACTED] @ $5,000/day (inc GST)	300			1,500,000
Six trimesters (and recovery/learning months in between) and all other necessary services	Chief Settler for (Individuals) [REDACTED] @ $2,500/day (inc GST)	335			840,000
Six trimesters (and recovery/learning months in between) and all other necessary services	Chief Town Planner [REDACTED] @ $2,500/day (inc GST)	335			840,000
Six trimesters (and recovery/learning months in between) and all other necessary services	Chief Scientist Dr [REDACTED] @ $5,000/day (inc GST)	40			200,000
TOTAL COST		1,240 days/9,920 hours			5,680,000

36. It was proposed by Mr Hollingworth that the tender price of $5.68m would be reduced to $4,999,990 if the whole of that amount were paid in advance on execution of the contract.

37. The proposal that a discount would be afforded were the whole of the contract price paid in advance is manifestly inconsistent with ordinary commercial practice and principles of government contracting for services. The risk assessment in the Tender Evaluation Report (Clause 9) commented –

> Paying the total fee upfront as detailed in the pricing assumptions, whilst providing CIT with a reduced fee, may impose a significant risk. It is suggested by the Evaluation Team that this is negotiated with Think Garden.

38. The "significant risk" was neither identified nor evaluated, which meant that no basis was provided for proposed negotiation directed to obviating or reducing the risk. The Evaluation Report contained a clause with the heading: "Pricing Assessment". This comprised a table setting out what the tenders had provided in respect of pricing (quoting Think Garden's as set out above). There was no analysis at this stage. The only comment was –

> The price submitted by Think Garden is $1,360,000.00 over the anticipated project budget. [However, the anticipated budget was $4.5m, so the difference was actually $1.18m.]. The Evaluation Team believes that the amount may be able to be reduced through contract negotiation on the discount offered.

39. It will be seen that there is no suggestion that the basis for the payments in advance envisaged expenditure that was needed for any aspect of the provision of the contracted services, whether for recruitment or acquisitions, let alone to enable prompt commencement of the contract. Nothing in the evaluation of "value for money" or, for that matter, elsewhere in the report gave rise to any suggestion of a need to pay any part of the contract price in advance.

Contract negotiations

40. On 4 March 2022, Mr Hollingworth was informed by Ms Cover of the decision to enter negotiations as the preferred respondent to the RFP to be led by the acting Executive Director Corporate Services (Ms Steff), but which was ultimately led by Mr Whale. In part, the letter stated that, whilst the CIT wished to commence contract negotiations with Think Garden, "no legal obligations arise … until CIT has executed a contract *substantially in the form of the contract listed in the RFP*" (emphasis added), which –

as pointed out – did not envisage in any way that there might be any, let alone substantial, payments in advance. Ms Steff's evidence, in substance, was that the Evaluation team did not do any analysis of the price submitted by Think Garden in respect of the proposed negotiation to reduce the tender price (which was noted to be above budget by a substantial margin). She did not feel confident to negotiate the contract on her own and obtained Ms Cover's approval to put together a contract negotiation team comprising herself, Mr Whale and Mr Gregory Tong[4]. Although the accounts given by Ms Steff, Mr Whale and Mr Tong in their evidence about the extent of their involvement in or knowledge of the negotiations differ somewhat, it is not necessary for present purposes to attempt to reconcile these differences. Mr Tong's evidence, in effect, was that he was not involved in the negotiations in any way but that he had been consulted by Ms Steff and Mr Whale about the prepayments some two or three weeks before execution of the contract and advised that "it would not be the norm" but "it could be appropriate for a given circumstance, which might be if the supplier needed to deploy additional or engage additional resources to meet the demand" and it was necessary to be mindful that prepayment transferred the financial risk to government. Ms Steff said that all the team were uncomfortable about the payments and recollected that Mr Tong was "adamantly opposed".

41. On 7 March 2022, Mr Hollingworth met with Ms Cover and Ms Steff. (Ms Cover commented that this was not a meeting, as such, but took place by conversation on Ms Steff's mobile phone on speaker from her car. Her evidence about this is set out below.) Mr Hollingworth's first amended draft contract had been provided.
In accordance with his tender, the payment clause provided for payment of the price (not specified) in one instalment payable "on contract execution" and for disbursements to be paid monthly in arrears. Of significance is the change proposed by Mr Hollingworth to the following clause which, in its original form, was –

> **Effect of payment**
>
> 4.3 Payment in part or in total of the Contract Price does not constitute an acceptance by CIT of the Services and does not amount to a waiver of any right or action which CIT may have at any time against the Consultant.

Mr Hollingworth proposed that the clause should read –

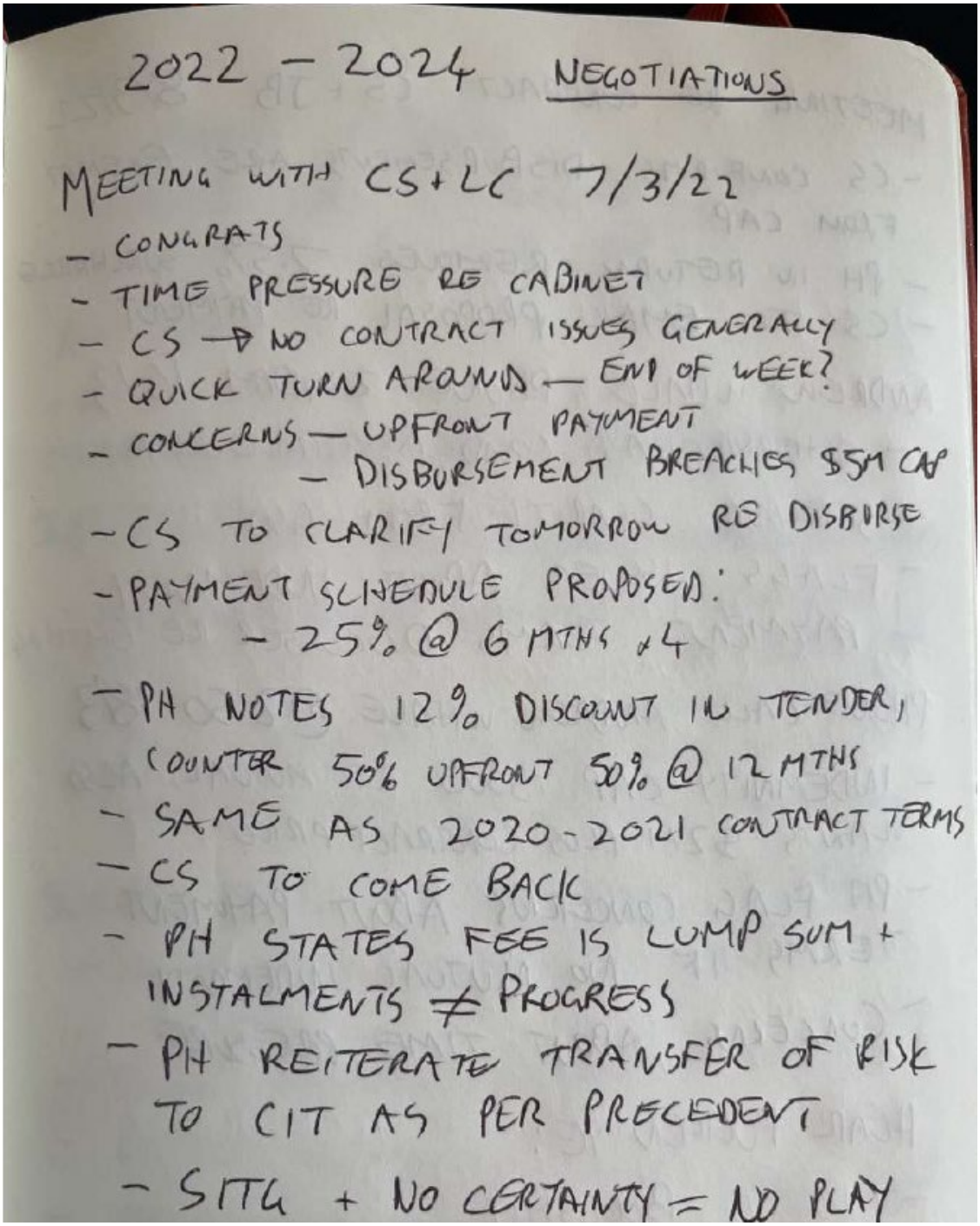
> 4.3 Payment in part or in total of the Contract Price constitutes an acceptance by CIT of the Services.

[4] Mr Tong is not the subject of adverse comment or opinion by the Commission in this report.

The proposed clause made explicit the complete separation between the payment of the contract price and compliance with the provision of the services. Not surprisingly, following the meeting of 7 March, Ms Steff's email to Mr Hollingworth in respect of the contract stated –

> Clause 4.3 Effect of payment – with payments in advance this clause would need to remain as it was in the original draft contract.

42. Mr Hollingworth's record of the 7 March "meeting" is reproduced below –



43. In her comments, Ms Cover contests certain key elements of this note –

> … [The] purpose of the telephone call was to congratulate Mr Hollingworth and to emphasise the need for timely negotiation of the sixth contract. I did not have discussions with Ms Steff about the 25% offer prior to the telephone call at about 5 pm on 7 March 2022. As I have indicated above, the telephone call at 5 pm on 7 March 2022 did not get into other specifics of contract negotiation because I regarded that as a job for the contract negotiation team. While I also was carefully monitoring the timeliness of the progress of the contract negotiations, I did not regard it as my role to give feedback on each step of the negotiations.

44. In Ms Cover's examination of 8 April 2025, she said –

> *COVER'S COUNSEL: Okay. And then you also said in your answer that you were not actively participating in the conversation at the lower bullet points, or the lower dot points, on this note [as to the payment schedule]. Can you describe to me, or to the Commission, what, if anything, you did while those discussions were happening?---A. Commissioner, I didn't have – I didn't have a – a notebook or anything then. Ms Steph was leading the conversation as I recall. I do recall I felt somewhat uncomfortable in the meeting and that was – that's perhaps why I don't recollect the detail of this if – if Ms Steph and Mr Hollingworth were engaging in conversation with this detail that's in Mr Hollingworth's note. I do recall that I was trying to wind the meeting up because I felt that wasn't an appropriate – it wasn't appropriate for the conversation that Mr Hollingworth was trying to pursue about details of the contract without the presence of the broader negotiation team that I had actually tasked with being – giving me as independent and honest advice as possible, and that this was a level of detail that wasn't – I hadn't anticipated before our current conversation.*
>
> *THE COMMISSIONER: You said that you instigated – sorry, you think that either you or Ms Steph instigated the call?---A. Correct.*
>
> *Q. For what reason?---A. Because of the time pressures that we were both conscious of to keep progressing the contract, then the negotiations needed to continue and that this was, to the best of my recollection, a sort of a keep – keep the pressure on and let Think Garden know that we were under pressure to – to get to an outcome as quickly as possible.*
>
> *Q. So who did this come from, this suggestion about 25 per cent at six month intervals?---A. I know it didn't come from me and I don't know - - -*
>
> *Q. Are you suggesting that came from Ms Steph then?---A. No, I'm saying it did not come from me and I believe that, given it was discussed by the negotiation team, that it came from one of them.*
>
> *Q, So, it was a complete surprise to you or you just don't remember it being discussed at all? ---A. No, I remember it did not come from me and - - -*
>
> *Q. So, you recall that it was discussed at this meeting or at this conversation?---A. No.*
>
> *Q. You don't recall that?---A. I don't but I know I didn't raise it. But – yes, I know I didn't raise it.*
>
> *Q. Had you previously raised this with Ms Steph?---A. I think it's fair to say that Ms Steph would have mentioned a proposed negotiation position on payments.*
>
> *Q. With you?---A. Yes.*
>
> *Q. So you must have agreed with this?---A. Yes.*
> *…*

Q. And in this conversation involving Ms Steph, there was also no reference whatever to the need to put resources into place to commence to undertake the services?---A. Not that I recall.

Q. Are you prepared to accept – well, I won't ask you that question. You do not mean to suggest, just to be clear, that that might have been mentioned and you have forgotten it? Sorry, Commissioner, can you repeat the question?

Q. By saying you don't recall, do you mean to suggest that it may have been mentioned by Mr Hollingworth that he needed the payments in advance to put resources into place to undertake the contract in a timely way had not occurred – I'll rephrase it. It's a lengthy question. You say you don't recall that subject at all being mentioned?---A. I don't recall the detail of this note.

Q. Perhaps I prefer an answer, direct answer to my question. You don't recall that this matter, that is, the reason for the payments in advance be raised. Is that right?---A. No, but I note that that's correct.

Q. It wasn't being raised?---A. No, but the – the reference at the bottom gives me a recollection of – of this consistency that Mr Hollingworth had about a particular type of payment schedule.

Q. Well, if you have a look, the fourth line from the bottom, instalments, that is crossed through, the equal, means instalments do not refer or relate to progress?---A. M'mm.

Q. Do you agree that's what that is intended to convey?---A. Yes.

Q. And that was his consistent view?---A. Yes.

Q. Indeed, it was his view pretty well throughout the entire relationship with CIT?---A. Yes.

Q. And it was important to him, and indeed he emphasised if you – I take it you recall something like what is in the last line? That was consistent, as you say, with "skin-in-the-game" is what, "SITG", he used that phrase quite frequently, I think. Do you agree?---A. Yes.

Q. Plus "no certainty" means he's not going to contract, in effect, "no play"?---A.I agree.

Q. And the certainty was provided by his being paid in advance of the services being provided?---A. Yes, that's – that's what I understand it.

45. Since, as Ms Cover accepted, the reference to "certainty" is plainly Mr Hollingworth's justification for the advance payments as a prerequisite to his agreeing to the contract and it was conveyed to Ms Cover one way or another, it does not matter very much whether she was present at the time it was said by Mr Hollingworth or to Ms Steff (or Mr Whale) on this occasion or some later time. However, accepting Ms Cover's evidence that she was very concerned about the timeframe for the commencement of work and, hence, the completion of negotiations as soon as possible, it is not credible that she was not concerned to understand the key point being made by Mr Hollingworth that the fixed sum paid in advance and not dependent on progress was an essential condition for his entry into the contract if this were discussed on this

occasion on 7 March 2022. It is also clear that the 25% instalments proposal was to and not from Mr Hollingworth, who countered with the 50% instalment proposal. Ms Steff's evidence was that it did not come from her should be accepted and she said it did not come from Ms Cover, which is consistent with Ms Cover's claim that it did not arise at this meeting since, if it did, it could only have come from Ms Cover. Whether it was raised at this conversation or some other time with Ms Steff, it is inevitable that it was conveyed to Ms Cover, who agrees that it was discussed with her (necessarily, then, at some earlier time). On balance, considering that Mr Hollingworth's note refers specifically to matters of vital concern to him as necessary to be understood for the purpose of the negotiations, it is very likely reliable, both as to the date of conversation and the record of the issues discussed. The important, indeed critical, element of this conversation is that Mr Hollingworth gave an explanation for the advance payments which not only did not refer either to any need for preparatory work or acquisitions, but was inconsistent with either of those matters having any relevance from his perspective and that, one way or another, this must have been conveyed to Ms Cover. It does not really matter whether this occurred on 7 March or another occasion in the course of the negotiations but, since the note refers coherently to foundational matters that would have been important to Mr Hollingworth at the outset as the basis for negotiating the contract terms, and as they logically stood at that point along the documented course of negotiations, (e.g., Ms Steff did revert on 8 March concerning the disbursements being additional to the contract price) it is reasonable to accept that it was a contemporaneous and likely reliable note of the conversation on 7 March, which Ms Cover agrees certainly occurred, and dealt with matters of substance. (I note that it is headed "2022-24 Negotiations" but the most reasonable explanation for this is that it was a heading added when it became material to the litigation with the CIT over the contract, where it was produced on discovery.) Whether or not Ms Cover wished to engage at this time, the fact is that she was present and, it should be inferred, would have been paying close attention to Mr Hollingworth's demands, given that she was anxious that the negotiations be completed as soon as possible.

46. Reporting on progress necessarily involved being aware of the toing and froing about the payment schedule. What it would not have entailed was any suggestion that the advance payments were linked either to recruitment or acquisitions, since this was never stated by Mr Hollingworth even as a need, still less as an explanation of why they were necessary.

47. Arising from this record, it is clear that (as confirmed in Mr Whale's evidence to the Commission) Mr Hollingworth's final price of $4,999,990 was accepted without further negotiation and the outstanding issue in this respect concerned only the payment schedule. Furthermore, the proposed contract price had been specified at $10 less than $5 million because it was understood that a $5 million "cap" applied (the issue of effectively bypassing the process for obtaining GPB advice on these contract terms is discussed in SR1) and that the additional cost of disbursements was identified as a risk that this "cap" might be exceeded. (This is compelling evidence that Ms Cover's evidence to the effect that she thought the price of $4,999,990 may have merely been the outcome of negotiation, discussed in SR1 [418-9] was untrue.) Of immediate relevance, however, is that, whilst the time pressures are noted, no reference is made to any need to start preparatory work before the contract was finalised, even though the "upfront payment" is noted as a "concern", let alone to any such work having commenced. Neither, again, is there reference to the need or possible need for any acquisitions or resourcing to be put in place to enable to contract to proceed either immediately or at all. (Ms Steff's evidence was that she had no idea why Mr Hollingworth was seeking an upfront payment.) Although it is necessary to be cautious about drawing positive inferences from a negative, the circumstances demonstrate that no such need was contemplated by any party.

48. Prior to the conversation of 7 March, there must have been discussions, involving at least Ms Steff and Ms Cover, as to the offer that was to be made to Mr Hollingworth. Ms Steff's evidence was that the discussions about the 25% offer involved herself, Mr Whale and Mr Tong, but not Ms Cover. Whatever may have been the position as to the former two, given that Ms Cover was party to the conversation with Mr Hollingworth, she would have been aware of and approved the proposed offer (as she agreed in her evidence). It may well be that Mr Whale was party to the discussions (as his evidence implies) but it appears that he was not a part of the 7 March conversation itself. Ms Steff's evidence also was that Mr Hollingworth had never suggested that the amount to be paid in advance was necessary for him to pay staff. (It is useful to note here that Ms Steff also agreed that it was fair to say that, from everything she knew, there was no necessary acquisition, no required resourcing, no materials that needed to be put in place before the commencement of the contract.)

49. The instalment schedule proffered at this point by the CIT was four equal payments of 25% of the price payable each 6 months. Since the contract was to run for two years,

this meant that each payment was in advance of the succeeding six months' work, as understood by Mr Hollingworth. In her evidence to the Commission, Ms Steff said she could not recall where the first suggestion of the instalments being four at 25% of the price came from but it did not come from Ms Cover, who "wasn't part of those discussions" and certainly did not come from her. However, this recollection is evidently mistaken, as the note plainly indicates otherwise, in particular that Mr Hollingworth countered with the proposal of two instalments, each 12 months in advance, as had occurred in connection with the fourth contract, as to which, Ms Steff was to "come back". (In connection with this contract also, there was no suggestion that the advance payment was required for resourcing purposes.) Mr Hollingworth specified that the price was payable as a lump sum plus instalments, not related to progress. He said that this was "the transfer of risk to CIT". The "risk" here is clearly financial risk. The "certainty" must be a reference to the certainty of payment, as confirmed by Mr Hollingworth's proposed version of clause 4.3. Thus, the reference to "skin in the game" ("SITG" in Mr Hollingworth's note reproduced above) is a reference to the CIT's investment in the contract *by way of the advance payments*. This understanding is confirmed in a later conversation with Mr Hollingworth on 28 March 2022, in the course of the final negotiation of the price schedule on the brink of execution of the contract (see note set out at [77] below).

50. Part of the context in which the negotiations for the sixth contract was taking place was the 2020 FOI application made by the ABC on 28 August 2020 and sent to Mr Hollingworth on 2 October 2020 (seeking staff surveys from June 2016, "all information regarding Patrick Hollingworth, the Patrick Hollingworth Trust, activities conducted by Patrick Hollingworth or his team held in the strategic compass reporting dashboard … all reports or presentations given to the CIT Board from June 2016 to date that include references to activities conducted by Patrick Hollingworth or his team … all communications between executive members in regards to re-negotiations of contracts awarded to Patrick Hollingworth/the Patrick Hollingworth trust or requests to re-negotiate those contracts from Jan 2018 to date") and the Minister's[5] letter of February 2021, clearly expressing skepticism as to the utility of the Hollingworth contracts. There was also the intimation from Dr Rayner (the Minister's then-Chief of Staff) in conversation with Ms Cover in late December 2021 that a further contract with Mr Hollingworth would not "pass the pub test" (see SR1 [337] ff). In addition to that

[5] The Minister is not the subject of adverse comment or opinion by the Commission in this report.

context, rendering it all the more remarkable that Ms Cover persisted in progressing the tender process at all, there can be no doubt that, for his part, Mr Hollingworth was concerned that government or the Board might cancel the proposed resulting contract (see, in particular his later conversations with Mr Whale about reputational risk, government and Board decisions and media disclosures by staff in connection with the risk of cancellation referred to below).

51. On 8 March, Ms Steff informed Mr Hollingworth that disbursements were in addition to the "cap", and the latter, in return, agreed to remove the 7.5% surcharge he had proposed for disbursements. On the same day, she sent an email to Mr Hollingworth, which stated –

> CIT are excited to enter negotiations with Think Garden as the Preferred Respondent to guide CIT and work in partnership to co-design in:
> - developing system wide capabilities of situational awareness, early/weak signal detection and noise sorting;
> - developing both context-specific and generalised responses to the multitude of situations it encounters;
> - developing iterative capacity to cycle through adaptive/renewal processes across multiple spatial and temporal scales;
> - the utility and application of relevant knowledge, tools, artefacts and approaches in enabling CIT to become a system that learns; and
> - the utility and application of various organisationa! structures which promote better adherence to and governance of all the above practices.
>
> We are confident that this work will create an overarching learning context for practice and structures to enable coherence and alignment with the Strategic Compass 2025 - CIT Futures initiatives and the ACT Government's reform objectives.
>
> Following discussions today, CIT would like to include the following terms in the contract:
>
> - $4,999,990 for a two year contract, with the first payment being on contract execution (March 2022 - with normal payment terms i.e. 30 days), periodical
> - payments every 6 months with 20% of the final payment to be retained until completion of the contract.
> - Disbursements would be paid in addition, as per the terms of the contract, with no additional processing fee.
>
> I appreciate that you will need to consider this offer. As discussed, I will come back to you tomorrow with specific clauses for amendment in the draft contract.
>
> If you have any questions, please don't hesitate to contact me.
>
> Thanks
> Cheryl

52. On the afternoon of the following day, 9 March, Mr Hollingworth responded –

> Thanks Cheryl for your email … [above]. We too are very excited about the potential of this work.
>
> Can we please suggest the following, which is what you've described … [in the above email], but with further reduction in potential ambiguity:
>
> - March 2022 – 25% of total fee in advance
> - September 2022 – 25% of total fee in advance, plus all disbursements to date in arrears
> - March 2023 – 25% of total fee in advance, plus Sept-Feb disbursements in arrears
> - September 2023 – 20% of total fee in advance, plus March-Aug disbursements in arrears
> - March 2024 - 5% of total fee in arrears, plus all remaining disbursements in arrears
>
> I would also prefer shorter payment terms than 30 days. We currently work off 10 days. Can we agree to 10 days?
>
> I'm standing by to receive the draft contract-are you able to give me any indication of what time today I can expect it?
>
> Thanks
> Patrick

53. Later on 9 March, Ms Steff responded to this email –

> Hi Patrick
>
> Further to our discussion yesterday, I have been through the draft contract submitted by you with your response and attach it with some additional comments.
>
> The document is still in track changes. The areas highlighted blue are areas that we believe are reasonable.
>
> The areas highlighted in green are clauses we believe should remain in their original/different wording, and mainly relate to:
>
> - Clause 4.3 Effect of payment – with payments in advance, this clause would need to remain as was in the original draft contract.
> - Clause 9.3 Consultant's Secure Local Jobs responsibilities – does not apply to this contract (as identified in Schedule1, Item 9) – any changes to this standard clause would need to go to the Secure Local Jobs Registrar.
>
> We will need to seek advice from the Government Solicitors' Office in relation to some of the new clauses you have suggested so that we understand any implications prior to finalising a position on them (these are highlighted in yellow in the document). They mainly relate to:
>
> - Ownership and Use of Material – including Licence of material, Infringement claims and Intellectual Property Rights
> - Consequential loss
>
> (There are a couple of yellow highlights on numbers on page 43 that I can't get rid of – formatting not flagging anything to seek advice on.)
>
> I have requested a quick turn around by the GSO (24 hours) although that is dependent on

their capacity, I will keep you updated.

As discussed today, I am happy to attend a discussion with you on Friday at 11.30 a.m. to understand our common ground on these issues and progress as soon as we can. Please don't hesitate to contact me if you would like to discuss this further.

Thanks
Cheryl

54. For present purposes it is unnecessary to deal with the clauses highlighted in blue, green (except to note that the proposed changes were highlighted in green) or yellow. In its original form, the contract did not specify the amount or mode of payment. However, in the draft sent to Mr Hollingworth, Schedule 1, Item 3, stated the contract price as $4,999,990 (GST inclusive) and provided for the first instalment of $1,249,997.50 to be paid on contract execution, the second in the same amount on an invoice to be rendered in September 2022, the third for the same amount on an invoice to be rendered in March 2023, the fourth of $999,998 on an invoice to be rendered in September 2023 and the final instalment of $249,999.50 upon completion of the contract. Disbursements of less than $1,100 were payable on invoices monthly in arrears whilst disbursements in excess of that sum payable "as soon as the expense is incurred by the Consultant". Additional subclauses provided for travel disbursements, with a general provision as to others –

(5) CIT may be charged for additional professional services/tools/diagnostic costs. Additional costs will not be incurred without prior approval by CIT.

(6) Except if otherwise stated in this Agreement, the Contract Price is:
(a) payable within 30 days of receipt by CIT of an Invoice;
(b) inclusive of GST and all other taxes, duties and charges; and
(c) inclusive of all disbursements, including out-of-pocket expenses incurred by the Consultant.

55. It is worth noting, at this stage, that the contract price is explicitly directed to payment for the delivery of services, with no reference to equipment or licenses or materials that the Consultant might need to provide, which was covered by a disbursements clause. This distinction is both obvious and fundamental: it was never expected – and was never put to or envisaged by PACT or the GPB, and certainly not by Ms Steff, Mr Whale or Ms Cover, in particular – that the cost of digital tools or equipment (including software) would come out of Mr Hollingworth's pocket. All disbursements for appropriate acquisitions (which first needed CIT approval) were payable in addition to the contract price and then only with CIT's prior approval.

56. On the evening of 9 March, Ms Steff informed Mr Hollingworth, in effect, that his proposed payment schedule was agreed. On 10 March, Ms Steff forwarded these emails to Mr Whale. In his evidence Mr Whale said that these matters were discussed with Ms Cover, who was updated with the variations to the instalment schedule: "I was giving her updates as we went".

57. On 10 March 2022 an urgent Request for Legal Advice was sent by Ms Steff to the ACT Government Solicitor, informing them that a meeting with Mr Hollingworth's lawyers had been arranged for the following day. (The matter involved various solicitors from the office of the ACT Government Solicitor but, as it is unnecessary to identify any particular lawyer, for convenience they are referred to collectively in this report as "the **GSO**", the same term as used in many of the source documents.)
The Request attached the draft contract already negotiated with Mr Hollingworth and said the "areas for advice are highlighted in yellow", which were the changes sought by Think Garden. Ms Steff's email which attached the Request also had specifically limited the scope of the advice being sought to "the implications of additional clauses requested … [in the] draft contract". These did not include the price or the payment schedule, nor clause 4.3 which still accorded with Mr Hollingworth's amendment, despite Ms Steff's indication that it was not accepted. (As it happened, this clause was not the subject of any further reference, and the final contract adopted Mr Hollingworth's redraft.) In substance, the issues about which the CIT sought advice about related to the ownership and use of material (including license of material, infringement claims and intellectual property rights) and consequential loss.
The original clauses in the proposed contract provided only for indemnification of CIT by the consultant against liabilities or claims caused in connection with the provision of the services. The clauses proposed by Think Garden concerning such consequential loss applied the obligations mutually. Think Garden also wished to insert a new clause 10.4 which limited the aggregate liability of either party "to the total amount of fees for the Services in the preceding 12 months" in respect of loss otherwise than caused by unlawful, fraudulent or negligent act or omission, death or personal injury, damage to real or personal property or loss of data or IP breaches. These clauses later assumed a significance which was not at first evident (and is of no present importance as such).

58. In response to the CIT, the GSO made the point (amongst others) that, although legal advice was sought only in relation to a "couple of clauses, to provide sound advice, we need to review the agreement in its entirety", which would take some days, rather than

the one-day response requested. Ms Steff explained that the CIT was subject to tight timeframes and expressed reluctance to postpone the meeting. The GSO (quite rightly) advised that the CIT should not attend a meeting unrepresented by the GSO when the other side was represented by their lawyers. Ms Steff told GSO she did not see a problem with attending without representation because the parties "are on the same side" and she perceived the meeting to be about "clarifying/solidifying intentions of parties which are already in sync" (thus demonstrating an extraordinary degree of naivete about commercial and legal realities, for which the Territory was to pay the price). In her evidence, Ms Steff said that the instruction to go ahead with the meeting came from Ms Cover.

59. It appears that, in the result, a telephone conference took place between GSO and Mr Whale, shortly before the foreshadowed meeting, during which advice as to the particular (yellow highlighted) clauses was given. The meeting then took place involving Mr Whale and Mr Hollingworth's lawyers, when those clauses were discussed. Nothing was said about the payment schedule, or any suggestion made that Mr Hollingworth might have made or needed upfront resourcing requiring compensation.

60. On 16 March, Ms Steff sent to Mr Whale a draft Brief addressed to Ms Cover "to update … [her] on the outcome of contract negotiations", recommending that she "consider and endorse the proposed Service Agreement with Redrouge Nominees" with Mr Hollingworth. She expressed doubts to Mr Whale about paragraph 9. The material part of the Brief was as follows –

> **Background**
>
> 1. On 4 March 2022 you were provided with a report from the Evaluation Team … following assessment of proposals received in relation to the GS3003590 – CIT Futures 2025 procurement process. The report recommended that the preferred Respondent for the required Services was Think Garden. As the Delegate in the process, you accepted the Evaluation Team's recommendation and requested contract negotiations commence with the preferred Respondent, with the outcome of negotiations to be reported back to you for approval.
> 2. The required Services are to be administered through a Service Agreement; the term of engagement is proposed to be two years commencing on 21 March 2022 and concluding on 21 March 2024.
>
> **Issues**
>
> 3. To assist in considering the final recommendation of the Evaluation Team, a contract negotiation team was formed comprising Ms Cheryl Steff (A/g Executive Director, Corporate Services/Chair, Evaluation Team), Mr Andrew Whale (Executive Director,

Education and Training Services) and Mr Greg Tong (Chief Finance Officer). This team was engaged to provide input through the provision of guidance and/or advice in assisting the contract negotiation proceedings.

4. Endorsing the recommendation as to the preferred Respondent, commits CIT to expenditure approximating $5 million over two years from March 2022. Dependent on actual costs of disbursements/incidentals the committed expenditure is summarised as follows:

Payment No.	**Payment Amount Services (GST incl)**	**Services Payment Date**
1	$1,249.997.50	March 2022 – upon contract execution
2	$1,249.997.50 plus disbursements in arrears	September 2022
3	$1,249.997.50 plus disbursements in arrears	March 2023
4	$999,998.00 plus disbursements in arrears	September 2023
5	$249,999.50 plus disbursements in arrears	March 2024
Total	$4,999,990 plus disbursements	

[In a side comment, Ms Steff noted in respect of the highlighted entries:
"This needs to change".]

5. The Service Agreement will provide for prepayments to be made to Think Garden as detailed in the schedule above.

6. Even though prepayments are provided for, CIT will regularly engage with Think Garden through monthly contract meetings to progressively assess outputs; agree on work to be undertaken in the coming month, including scheduling and disbursements; and provide feedback on performance.

7. The Contract Negotiation team confirms that through the performance obligations articulated in the contract, best value for money to the Territory will be realized throughout the course of the engagement. The contract provides for early termination by either party (where for example performance obligations have or are not being met).

8. A proposed Service Agreement is provided at … Advice as to certain elements of the contract was provided by the ACT Government Solicitor.

Risks/Sensitivities

9. The value of the proposed engagement is indicative of the significance of the work for CIT, particularly at a time of major reform. As a complex adaptive system, CIT must become a system that learns to ensure adaptive capacity is built to enable the organisation to be situationally aware and respond appropriately to changing contexts. The service provided through this Agreement is innovative, contemporary and the full extent of the work may not be understood more broadly.

Consultation and Communication

10. Procurement ACT, the Government Procurement Board, the Senior Manager Procurement, Contracts and Records Management (CIT), the ACT Government Solicitor

and members of the Evaluation Team and Contract Negotiation team have been consulted throughout the course of the procurement.

61. Three aspects of this draft Brief are worth noticing. First, paragraph 10 is significantly misleading as it fails to mention that contact with the Board and PACT had ceased well before the procurement was finalised; they had no role after the RFP went to market and, thus, in relation to the evaluation process of the tender proposals, let alone the negotiations. The scope of GSO advice (correctly but uninformatively said in paragraph 8 to be in respect of "certain elements") was expressly limited by the CIT, in particular, to exclude consideration of the instalment schedule and clarification of the service requirements, which were the two most controversial and problematic aspects of the contract. The statement that consultations had occurred "*throughout* the course of the procurement" (emphasis added) could only be true if it meant "on occasion during the course of the procurement", which it plainly did not (even with the exception in paragraph 8). The clear implication here is that confidence could be taken from overall endorsement by the consulted entities and even that the final agreement had been considered by those parties. This was misleading, at least as to PACT and the GPB (with which process Ms Steff was closely involved). Secondly, there is no attempt to justify the advance payments. And, thirdly, there is no reference to Mr Tong's negative opinion about the payment schedule, though he was member of the Contract Negotiation Team (he was not copied into Ms Steff's email). There is no further information about Ms Steff's concerns as stated in paragraph 9 but, it is significant as referencing, in substance, the obvious real risk that those outside the CIT would not appreciate (a substantial understatement) the importance of Mr Hollingworth's work. Mr Whale's evidence was that the risk identified was that "there may be concerns raised by other parties about the contract because of the complexity of the services it's seeking and the inability for us to clearly articulate the value of the proposition of the contract".

62. Also on 16 March, Mr Whale informed Mr Hollingworth that, as Ms Steff was unwell, he would take over negotiations with Think Garden. He said he was seeking clarification from the GSO about the indemnity clauses. They discussed the four six monthly instalments. Later that day, GSO advised (in effect), amongst other things: the indemnity clause should not be amended as the CIT appeared to be carrying the greater risk; any limitation to liability should be rejected on the basis that, in the event of litigation, CIT would accept the court's assessment of damages and apportionment; if there were to be a cap, the CIT would require it to reflect the commercial risk,

pointing out that the "value of fees … bears no relationship to the commercial risk to CIT should the contract fail"; and loss of data was not a significant factor.

63. Mr Whale passed Think Garden's responses on to the GSO and on 17 March, Mr Hollingworth's solicitors responded with his instructions as to the issues of the license of material, and the clauses dealing with indemnity and consequential loss. With respect to the contract price, Think Garden "agrees" to payment by five instalments, the first, second and third of 25%, the fourth of 22.5% and the last of 2.5 %, payable respectively on execution of the contract, then 6, 12 and 18 months after execution and on completion. As to this aspect, the GSO noted (in a response of 21 March) that this was "a commercial matter for CIT" (in accordance with the CIT's written instructions).

64. On 18 March the GSO advised Mr Whale that he should "start looking at … the wording of Schedule 2", which described the services to be provided. As an example, cl 2.3.1 was referred to –

> The adoption of a contemporary complex systems approach will require the Consultant to have the ability to change and respond and different scales and speed as CIT learns and responds.

It was suggested that should be changed to –

> In the adoption by CIT of a contemporary complex systems approach the Consultant must change and respond at different scales and speed as CIT learns and responds.

The following point was made –

> You want Schedule 2 to be very clear about what they need and deliver to you – no ambiguity (noting it is a design and this cannot always be concrete). You want a particular outcome, and they need to deliver x, y and z to achieve this. I don't think it would require much tweaking – but likely a bit time consuming.

65. This advice was repeated on 21 March. It appears that the particular example suggestion was accepted, but no further advice was sought on the drafting of the service requirements, which remained obscure and indefinite and, in the absence of key performance indicators that related to actual achievement, rendered the problems of ever being able to sue for substantive non-compliance very difficult if not entirely unsurmountable, especially in light of clause 4.3.

66. According to a note of Mr Hollingworth, he spoke to Mr Whale on 18 March. They discussed the "indemnity cap issue". He noted that he "flag[ged] concerns about

payment terms if no mutual indemnity [was agreed]".

67. The original proposed clause 10.2 provided –

> The Consultant indemnifies CIT, its employees and agents against liability in respect of all claims, costs and expenses in relation to all loss, damage, injury or death to persons or property caused by the Consultant in connection with the provision of the Services, except to the extent that CIT caused the relevant loss, damage or injury.

68. The change proposed by Mr Hollingworth was that each party would indemnify the other in respect of all "reasonable claims" etc. The advice of the GSO was that the CIT was carrying the greater risk and should be the indemnified party, apparently on the view that the risk might involve failure to deliver the contracted outcomes (if any could be discerned). It is unnecessary to consider the validity of this approach. The dispute is presently relevant only because Mr Hollingworth linked its resolution to the payment terms without seeking to justify them by, for example, the need for preparatory or resourcing costs.

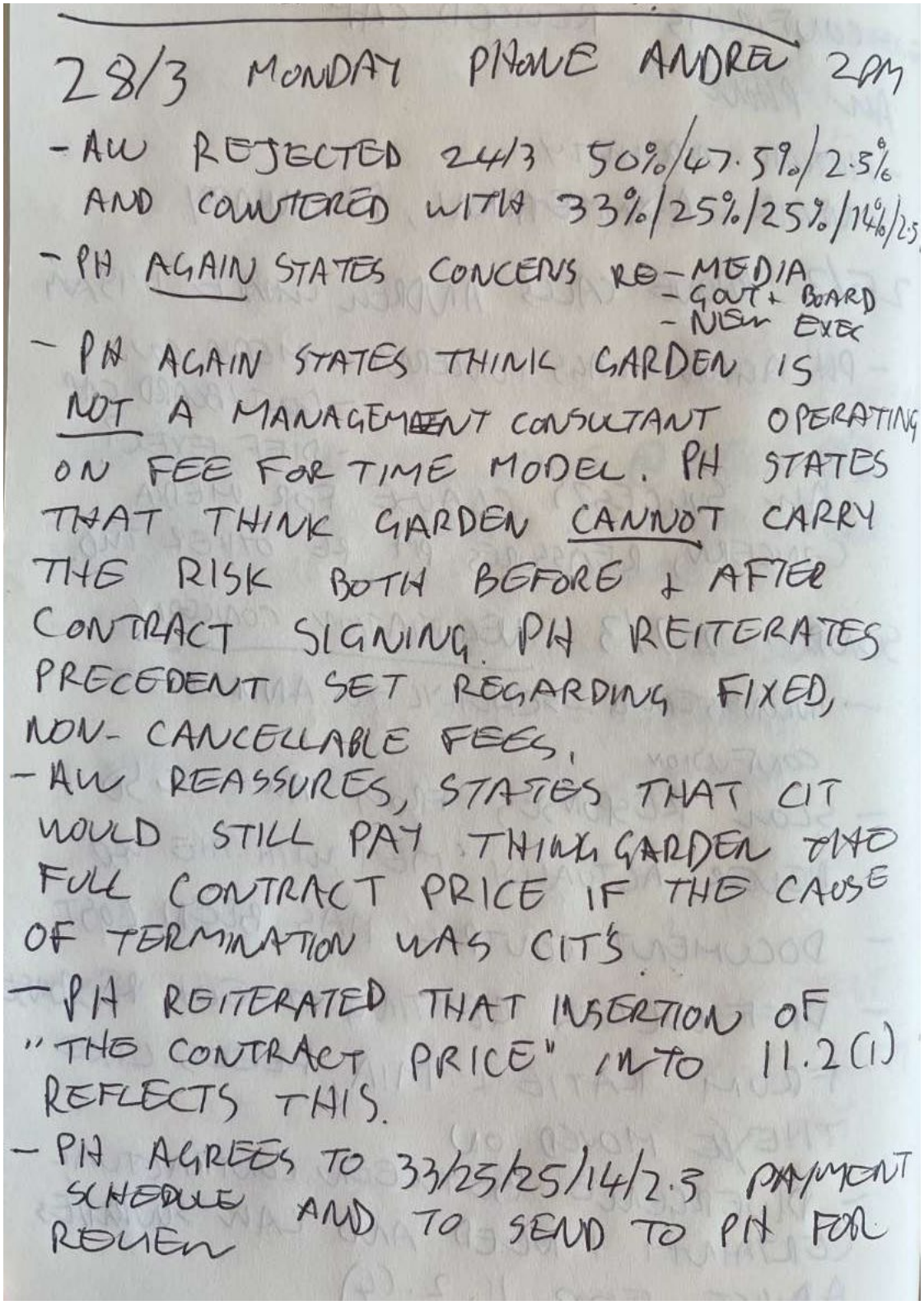
69. On 23 March, Mr Whale emailed Mr Hollingworth with the response (as advised by GSO) to the issues concerning the licensing of material and the indemnity cap. It seems that this outcome had been discussed between them around this time, as evidenced by a note of the call by Mr Hollingworth. As to the issue of mutual indemnity, Mr Hollingworth noted – and presumably informed Mr Whale – that the CIT response was "unfair and asymmetrical" and that he was "unhappy". This theme was later repeated. On 24 March, Mr Whale emailed Mr Hollingworth – apparently without reference to the GSO – a copy of the then proposed contract, which reinstated the original clause 10.2 and varied the payment instalments to 50% on execution (expected to occur on 27 March), 47.5% on 27 March 2023, and 2.5% plus outstanding disbursements on 25 March 2025, upon completion.

70. It appears from a GSO file note of a conversation with Mr Whale on 25 March, that his conversations with Mr Hollingworth mentioned above were passed on. The note records him as saying, in effect, that Mr Hollingworth was "emotional" about the claim that the risks referred to in clause 10.2 were not mutual and, in return for agreeing to return to the original wording, he wanted 50% of the contract price paid upfront, 47.5% in twelve months and 2.5% on completion. The note indicates the understanding that this was an "issue for CIT" (i.e., and not for the GSO to advise about) and that Mr Hollingworth had mentioned the FOI application by the ABC, "hidden risk", "media scrutiny, and "reputational risk" arising from the CIT staff going to the media and

(it seems) the Cabinet review possibly resulting in job losses. GSO responded by email later that day that the ability for the CIT to control reputational damage to either Think Garden or the CIT was outside the CIT's control, the "nature of the work undertaken by Think Garden would appear to lend itself to media scrutiny" and Think Garden "did not have to accept the work". The GSO agreed to consider what Think Garden proposed to deal with the issue.

71. Also on 25 March 2022, Mr Hollingworth's solicitor emailed Mr Whale with her client's instructions as to the contentious terms of the proposed contract. The details are not presently relevant, except as to clause 10.2, in respect of which it was said that, since Mr Hollingworth had accepted the CIT's position that the indemnity was unilateral, he "would like to split the Contract Price into 3 payments, with 50% upfront, 47.5% on 27 March 2023 and 2.5% upon completion of the services, adding "*[our] client requests this to mitigate its risks in accepting the indemnity above and in good faith for its relationship with CIT*" (emphasis added, again with no reference to prepayment for costs of staff or acquisitions).

72. On 28 March, GSO informed Mr Whale of the state of negotiations. Following this email, Mr Whale and Mr Hollingworth spoke by telephone, the latter making a note of what they discussed. This note is reproduced below –



28/3 MONDAY PHONE ANDREW 2PM
- AW REJECTED 24/3 50%/47.5%/2.5% AND COUNTERED WITH 33%/25%/25%/14%/2.5
- PH AGAIN STATES CONCERNS RE – MEDIA – GOVT + BOARD – NEW EXEC
- PH AGAIN STATES THINK GARDEN IS NOT A MANAGEMENT CONSULTANT OPERATING ON FEE FOR TIME MODEL. PH STATES THAT THINK GARDEN CANNOT CARRY THE RISK BOTH BEFORE & AFTER CONTRACT SIGNING. PH REITERATES PRECEDENT SET REGARDING FIXED, NON-CANCELLABLE FEES.
- AW REASSURES, STATES THAT CIT WOULD STILL PAY THINK GARDEN THE FULL CONTRACT PRICE IF THE CAUSE OF TERMINATION WAS CIT'S.
- PH REITERATED THAT INSERTION OF "THE CONTRACT PRICE" INTO 11.2(1) REFLECTS THIS.
- PH AGREES TO 33/25/25/14/2.5 PAYMENT SCHEDULE AND TO SEND TO PH FOR REVIEW

73. It is apparent that the refusal by Mr Whale to accept Mr Hollingworth's revised offer and the offer of a smaller initial instalment led the latter to repeat his already expressed concerns about the perceived risk that the "government and Board and a new executive" might veto or cancel the new contract, as reflected in the point that "Think Garden … cannot carry the risk both before and after contract signing" (emphasis in original). It is apparent that it was this risk that led Mr Hollingworth in the first place to seek payment of the whole of the contract price in advance.
The reassurance "… that CIT would still pay Think Garden the full contract price if the cause of cancellation was CIT's" is a reference to the balance after the initial payments in advance but, again, echoes the concern about unilateral cancellation.
(Mr Hollingworth's 'reiterat[ion] that insertion of "the contract price" into clause 11.2(1) reflects this' is mistaken, but this is presently immaterial.) The note ended with recording Mr Hollingworth's ultimate agreement with the instalments proposed by Mr Whale.

74. Taken with the previous discussion about reputational risk, it is clear that Mr Hollingworth was very concerned about the possibility of media controversy and that Government or Board intervention might forestall the making of the proposed contract or that it could be cancelled after commencement, hence his insistence on lump sums to be paid in advance without reference to the services actually performed. In short, the reason – as already mentioned in connection with his initial meeting with Ms Cover on 9 March 2022 – for his insisting on the payments in advance was as a form of insurance against the risk of early cancellation of the contract. In his comments on the proposed SR2, Mr Hollingworth's lawyers state that his instructions were that "he was concerned about the termination of the contract because of what he perceived was, and what he was told by Ms Cover and Mr Craig Sloan[6], were the dysfunctional relationships between the Minister and the members of CIT's Board and CIT's Executive, not reputational risk [and that this] is corroborated by Mr Hollingworth's file note of 28 March 2022". However, the "media controversy" is linked in Mr Hollingworth's file note of 28 March as a "concern", together with the Government, the Board and a new Executive. The potential media controversy was inextricably linked to questions bound to be asked about the value of Mr Hollingworth's services and the justification for his contracts. Mr Hollingworth was indeed very much concerned about the risk of cancellation, but that risk arose at least in significant part

[6] Mr Sloan is not the subject of adverse comment or opinion by the Commission in this report.

because of the controversial character of his work and, in the circumstances, the highly irregular arrangements for payment of the contract price, although this does not exclude the likelihood that an additional (and possibly connected) reason was the dysfunctional relationships to which he referred.

75. There is also the obvious point that, once having paid one third of the contract price, the CIT would have a powerful inducement to continue to the contract's end (on the, perhaps doubtful, assumption that progress had been made and further progress could be anticipated) rather than change provider, as it were, in midstream.

76. (I have referenced Mr Hollingworth's comment about his reasons for the advance payments as a matter of fairness to him., I have not taken this into account in relation to my findings about Mr Whale and Ms Cover, although the comment implicitly excludes the reasons given in the Brief for the prepayments. The comment is consistent with every statement made by Mr Hollingworth about the matter.)

77. At 2:53 pm on 28 March 2022, Mr Whale emailed Mr Hollingworth with the new schedule: $1,666,663 on commencement, 28 March 2022; $1,249,998 on 29 November 2022; $1,249,998 on 29 May 2023; $833,332 on 29 November 2023; and $20,833 on 29 May 2024 (a total of $4,999,990).

Procurement is completed

78. Also on 28 March 2022, Mr Whale sent Ms Cover the Brief updating her on the outcome of the contract negotiations and recommending consideration and endorsement of the agreement. In his evidence to the Commission, Mr Whale said that "the panel and to some extent Ms Cover had been discussing how we got to this point". He went on –

> … [s]he was aware that we'd started at 100[%] and we had been advising her on the progress on negotiations as they went without going into the full detail and this was seen as a document which has summed up where we were at to give her enough information to sign it off.

79. The text of the Brief was as follows –

Background

1. On 4 March 2022 you were provided with a report from the Evaluation Team (Attachment B) following assessment of proposals received in relation to the GS3003590- CIT Futures 2025 procurement process. The report recommended that the preferred Respondent for the required Services was Think Garden. As the Delegate in the process, you accepted the Evaluation Team's recommendation and requested contract negotiations commence with the preferred Respondent, with the outcome of negotiations to be reported back to you for approval.

2. The required Services are to be administered through a Service Agreement; the term of engagement is proposed to be two years commencing on 28 March 2022 and concluding on 28 March 2024.

Issues

3. To assist in considering the final recommendation of the Evaluation Team, a contract negotiation team was formed comprising Ms Cheryl Steff (A/g Executive Director, Corporate Services/ Chair, Evaluation Team), Mr Andrew Whale (Executive Director, Education and Training Services) and Mr Greg Tong (Chief Finance Officer). This team was engaged to provide input through the provision of guidance and/or advice in assisting the contract negotiation proceedings.

4. Endorsing the recommendation as to the preferred Respondent, commits CIT to expenditure approximating $5 million over two years from March 2022. The payment schedule is outlined in Schedule 1 of the Agreement (Attachment A).

5. Payments *are being made in advance, which for small to medium sized business is a consideration to enable them to make the necessary acquisitions, put required resourcing and materials in place, as is the case with this contract* (emphasis added). CIT is managing risk and value for money through monthly contract meetings focusing on work delivered over the previous month and work to be delivered in the following month. These meeting will focus on impact as well as the practical deliverables and the performance of the Service Provider. The indemnity and liability clauses in the attached Service Agreement provide further risk management capability to CIT and the Territory.

6. A percentage of 2.5% of the final payment is being held under the payment schedule till the completion of the contract to provide CIT capability to review and assess work completed prior to finalisation of the contract payments.

7. The Contract Negotiation team confirms that through the performance obligations articulated in the contract, best value for money to the Territory will be realized consistent with the assessment of the Evaluation Team (Attachment B). The contract provides for early termination by either party (where for example performance obligations have or are not being met).

8. *Throughout the contract negotiations CIT sought and received information, clarity and advice from the two officers of the ACT Government Solicitors office (GSO). The majority of this advice related to additional proposed wording drafted by the Service Provider in respect to liability and indemnity and also to the use of materials.* (Emphasis added.) All these matters were resolved in a way that effectively manages any risks for CIT and the Territory.

9. Additional advice was also sought and received by the ACT Insurance Agency (ACTIA) around indemnity.

10. Risks are being managed through the contract management components of the Agreement, the incorporation of advice from the GSO and ACTIA.

11. The value of the proposed engagement is indicative of the significance of the work for CIT, particularly at a time of major reform. As a complex adaptive system, CIT must become a system that learns to ensure adaptive capacity is built to enable the organisation to be situationally aware and respond appropriately to changing contexts. The service provided through this Agreement is innovative, contemporary and the full extent of the work may not be understood more broadly.

12. This connection between CIT's reform agenda under the Strategic Compass 2025 and this Agreement may lead to scrutiny or focus on the content of this Agreement by those internal and/or external to CIT who may be challenged by the different approaches and outcomes of the reform work. The Contract Negotiation team has ensured probity at all times emerging from the Procurement Process and relied heavily on advice from the GSO and ACTIA during negotiations to ensure decisions made to enable this Agreement are robust and provide value for money for the Territory.

13. Procurement ACT, the Government Procurement Board, the Senior Manager Procurement, Contracts and Records Management (CIT), the ACT GSO, ACTIA and members of the Evaluation Team and Contract Negotiation team have been consulted throughout the course of the procurement.

80. The Brief was an essential part of the procurement process, since it provided the administrative justification for execution of the agreement by Ms Cover as Delegate for the CIT. It was plainly also aimed at a wider audience. It was noted that the contract "may lead to scrutiny or focus … by those internal and/or external to CIT who may be challenged by the different approaches and outcomes of the reform work", hence the need to demonstrate probity (as explained in paragraphs 11 and 12), amongst others to the Board, the government and in the public square.

81. The Brief contains several misleading statements concerning the reasons for the advance payments and as to the extent of reliance on interactions with PACT and the GPB and the advice of the GSO. The obviously controversial aspects of the contract were the obscure character of the services to be provided, which was (for good reason) believed unlikely to be widely understood, and the advance payment schedule. The clear (and intentional) implication that GSO had been consulted, inter alia, about these critical elements of the contract was known by Mr Whale to be a fiction, as these issues had been, from the outset, expressly excluded from consideration. Furthermore, both PACT and the GPB only considered, as part of their process, a draft contract that did not provide for payments in advance and a Contract Management Plan prepared by the CIT which, in effect, contradicted such an arrangement. Both Mr Whale and Ms Cover knew, of course, both that the draft contract was significantly different to that considered at the outset by PACT and the GPB and that which went to market and that it had not been referred back to them in its ultimate form.

82. Clause 5 justified the payments in advance. Mr Whale's evidence about this was –

> *A.… So the up-front payment was part recognition of the work they needed to have in place prior to meeting with us literally a day or so after, after the contract was signed. So that, again not something that justified the 25% but that was the thinking and the discussions we were having and … my understanding was that he was meeting with his team and they were doing a lot of work in prep for this new contract so they could hit the ground running. Now, what that entailed I don't know.*
>
> *… [Also], when he, when he was talking about the larger amount he was also talking about reputational risk and whatever … but I don't think, I don't recall it being directly linked to the payments. … He was always concerned about [the prospect of premature cutting of the contract].*
>
> *COMMISSIONER: Q. Because he was aware that out there in the real world his theories may have been regarded derisively and would have a bad reputational effect on the CIT. He knew that that was the risk?---A. Yes, and he knew that if there was a change in the organisation's senior executive they may view the work differently.*

83. There was, however, no calculation as to the cost of the preparatory work. Mr Whale was taken to the language of paragraph 5 –

> *COUNSEL ASSISTING: Q. Okay. If I can take you to the section [in the Brief of 28 March 2022] on issues, Mr Whale?---A. Yep.*
>
> *Q. See that in that minute there you say, "Payments are being made in advance which for a small to medium sized business is a consideration to enable them to make the necessary acquisitions for required resourcing and materials in place as was the case with this contract." Do you see that?---A. Yep.*
>
> *Q. Mr Whale, I'd ask you to think very carefully before you answer this question. But that simply wasn't true, was it?---A. It went to the point I was raising earlier that our expectation is that they would be equipped and informed enough to hit the ground running within a day or two of the contract.*
>
> *Q. Yes?---A. And that they've done the preparation to do that.*
>
> *COMMISSIONER: Q. That couldn't possibly justify $1.7 million in advance, could it? -- A. No. And, as I said - - -*
>
> *Q. It therefore could not be true that $1.7 million in advance was attributed to the reasoning you expressed in that sentence?---A. I don't disagree.*
>
> *Q. Why would you put it in that term, why did you put it in that way?---A. It was trying to capture that up-front work that we were expecting to be done.*
>
> *Q. Mr Whale, you could have said there was up-front work that was necessary, and you could have said that was worth X or Y dollars. You were attempting to justify by this sentence $1.7 million in advance – I disregard all the other payments in advance that were necessarily involved in the way in which this contract was constructed – but this, I call it 1.7 – it's 1.66 whatever. You know what I'm talking about. So. to any objective reader of this this would have been directly misleading, wouldn't it? It would have given a totally false impression of why this money was paid?---A. I can see how you would reach that conclusion.*
>
> *Q. I suggest to you - well, this is an opportunity. Could it be read in any other way by an*

objective observer?---A. I think there would be difficulties with reading it any other way.

Q. Right. And was Ms Cover consulted on the language of this document?---A. Not to my recollection. She was provided with the final draft after the panel had read it.

…

Q. Well [the final upfront payment was] it was 33% in the result … but the point is that there was never any relationship between that amount and any amount of pre-work being done. That's correct, isn't it?---A. Correct.

Q. I'm not sure that you understand the significance of this, Mr Whale, and I feel bound to warn you of it. This document was an accounting document. It was a document that was required for the purposes of this contract and to justify both its execution and the payments in accordance with it. Do you understand that?---A. I do.

Q. It therefore had to be accurate. Do you understand that?---A. I do.

Q. This was not accurate. I think we've got there, have we not?---A. I think we agree, or I believe it failed to provide the amount of detail that should be provided.

Q. Well, why did you leave it out?---A. Um - - -

Q. If you're going to make this an honest and candid expression of the process to justify that payment and that initial sentence was designed to justify that payment why were you not candid about it? ---A. I think we had been discussing how we got to this point.

Q. Who is "we"?---The panel and to some extent Ms Cover, the delegate, because she was aware that we'd started at 100 and we had been advising her on the progress on negotiations as they went without going into the full detail and this was seen as a document which has summed up where we were at to give her enough information to sign it off.

Q. But it was misleading. It was positively misleading, Mr Whale, was it not?---A. I haven't argued with some of the issues that were raised around its clarity.

Q. I beg your pardon?---A. I haven't argued with some of the issues - - -

Q. No, I'm afraid I require a more direct answer than that?---A. It could have been more detailed, yes.

Q. No, not could have. This was not a - - -?---A. Yes, it should have been more detailed.

84. This was by no means, as Mr Whale well knew but did not wish to actually admit in terms, a mere matter of detail. The narrative of events, from the very outset when Mr Hollingworth submitted his tender to the finalisation of the contract terms, demonstrates with certainty that the explanation for the pricing schedule had nothing whatsoever to do with putting "the necessary acquisitions [or] required resourcing and materials in place". Accepting the possibility that Mr Hollingworth's team was in fact undertaking some preparatory work, he did not seek and, in fact, the payments in advance were not, made to defray this cost. Moreover, were this the fact, there is no good reason why it would not have been explicitly stated; accepting that preparatory work might be (obscurely) described as "resources"; even on Mr Whale's account, was

no proposal, let alone need, for “acquisitions” or “materials” to be put in place before the contract commenced or to enable Mr Hollingworth to be placed in a position to undertake the contract. The fact that at no time was there any mention of elements in any of the procurement or negotiating records is, in the circumstances, determinative, particularly where the extent of the instalments was actively controversial, Mr Hollingworth’s own reasons are explicit and also in the absence of any attempt to calculate the relevant costs. Mr Hollingworth’s actual (and expressed) reason for requiring the advance payments, else he would not enter into the agreement, was a vital matter for any Delegate to consider in making the decision whether or not to proceed with the contract. It was by no means a mere matter of detail. Furthermore, as pointed out above, the first instalment was not the only one that was wholly in advance of the provision of the services – each of the subsequent three instalments were also wholly in advance – and, by the time the second instalment was due, there could have been no further need to fund in advance additional acquisitions, or put resourcing and materials in place. I am satisfied to the requisite degree that neither Mr Whale nor Ms Cover thought that it might.

85. That Mr Whale significantly reworked Ms Steff’s draft of 16 March in respect of this issue demonstrates also that the fictional explanation was carefully elaborated and deliberately inserted to mislead. I am satisfied to the requisite standard that Mr Whale’s claim to the effect that this was merely a mistake rather than deliberate overgeneralisation and under detailed reference to the need to undertake preparatory work so the services could start without delay when the contract was executed is untrue.

86. The Brief justifying the contract was required to be accurate and truthful about the significant issues raised by the procurement, of which the advance payments was perhaps the most unusual. The reason for the advance payments was explicit and stated more than once, namely, to provide Mr Hollingworth with security against the seriously apprehended risk of early cancellation. If this were included in the Brief, the impropriety of such an arrangement would almost certainly have precluded either the making of the recommendation or Ms Cover’s approval of it. The commercial risk here was that, in the event of a breach of contract (i.e. a failure to provide the required services) that would otherwise have entitled the Territory to payment of damages, recovery of any amount – especially of money already paid in advance – may well have been rendered practically impossible or, at least doubtful and difficult, not least

because Mr Hollingworth was effectively a sole trader, albeit with a small number of employees or associates, whose financial position was unknown. No public official, acting with probity in the interests of the Territory, would enter into a contract that exposed the Territory to such a substantial risk on the basis that the contractor was concerned that the contract might be cancelled because it might attract controversy or be regarded as inappropriate by the Board, the government or a new agency executive. In other words, the contract could not, as a practical matter, have been approved on the basis of the true explanation for the advance payments. In addition to the false assurance in paragraph 5 that the payment schedule merely reflected conventional arrangements where a contractor needed make acquisitions and put required resourcing and materials in place to undertake the contract, was the misleading characterisation of the advice obtained from the GSO "throughout the contract negotiations" in paragraph 8 (also significantly varied from Ms Steff's initial draft by Mr Whale). It is asserted that the majority of the advice received "related to additional proposed wording drafted by the Service Provider in respect to liability and indemnity and also to the use of materials". The highly material fact was omitted that advice was only sought on specific matters and not on the most controversial issues in play, namely the pricing schedule and the description of services, which accordingly were most definitely not "resolved".

87. The same grossly misleading characterisation of utilising specialist independent advice is made in paragraph 12, which identifies the likelihood of outside scrutiny and controversy and gives the assurance that the "Contract Negotiation team has ensured probity at all times emerging from the Procurement Process and relied heavily on advice from the GSO and ACTIA during negotiations to ensure decisions made to enable this Agreement are robust and provide value for money for the Territory", with this in substance being repeated in paragraph 13.

88. The logic of events establishes that Ms Cover knew that paragraph 5 was a fabrication, and that paragraph 12 was seriously misleading, since there could be no reason for Mr Whale to have to invent a narrative to deceive Ms Cover.
Whether Ms Cover was aware of the limited extent of the legal advice that was sought from the GSO is less clear. However, there was no good reason why that advice should be so circumscribed and, given the importance, indeed, critical and controversial character of the issues of advance payment and specification of the services and the fact that these issues were specifically removed from the scope of

instructions – as distinct from being overlooked – it is overwhelmingly likely that she was aware of the course being taken and GSO advice on the payment schedule was not obtained (in her evidence she said she relied on Mr Whale and Mr Tong in respect of the appropriateness of the schedule – and did not suggest she relied on the advice of the GSO about it). I am satisfied to the requisite degree that Mr Whale drafted the Brief on the basis that Ms Cover was aware of and agreed to the fictional character of the narrative as to the reasons for the payment schedule and the extent of third party assistance.

89. It is clear from Ms Cover's knowledge of the Minister's letter of February 2021 calling into question the value for money of the Hollingworth contracts and her oversight of, involvement in and knowledge about the procurement, that she was well aware of the actual extent of PACT and GPB involvement, and the serious reputational risk of the contract arising from the cost and the obscurity of the services being contracted for and thus of the risk that the Board might not approve proceeding with the contract or might otherwise repudiate it. She was also aware of Mr Hollingworth's stipulation that the entire contract price was to be paid in advance, (itself likely to be extremely controversial) and had approved the first response, which was made to him at the very outset of negotiations, of four instalments in advance of 25% each. She knew also of Mr Hollingworth's concern about the risk of cancellation and its direct link to his insistence on the payment schedule. She was kept informed of the progress of the negotiations, which at no point adverted to or involved any need or request for preparatory or resourcing expenses. She was very well aware of the work to be done under the contract and that it involved no substantial acquisitions, resources or materials, as the procurement documents demonstrated and the contract itself made clear, still less that they needed to be made in advance of the services being provided or paid out of the contract price, as distinct from items payable as disbursements, which were not only having been provided for in the draft contract, referred to by Mr Hollingworth in his Response to the RFP, but discussed during the initial conversation with Mr Hollingworth – when he raised the problem whether they might be taken to increase the contract price to exceed the "limit" of $5m – at which she was present, and contained in the finalised terms of the contract.

90. In her comments on the Proposed Special Report, Ms Cover said –

> During [a] conversation [at a meeting with Mr Hollingworth and Mr Sloan on or near to 19 May 2021 at the CIT Reid campus], Mr Sloan and Mr Hollingworth spoke directly to each

other about the challenges of a small business or specifically Think Garden to scale their business to accommodate the needs of CIT. This included Mr Hollingworth commenting that Mr Sloan would acknowledge that you couldn't just hit the ground running or scale up a small business without considerable investment because these resources were not sitting within the organisation unused and you could just activate them, they would need to be procured and built … Mr Sloan proposed on the basis of the Cabinet direction, and the scope of the implementation of the Strategic Compass 2025, that perhaps a two year contract with a possible extension of one year could be appropriate. He also indicated that there may be a strong argument for a single select procurement to occur given the scarcity of the expertise in the market, the previous knowledge of Think Garden, and the increasing embedded application of the Evolving Together approach in the CIT decision making processes.

91. In her evidence to the Commission, 15 December 2022 (a time much closer to the events than the comments), Ms Cover said –

THE COMMISSIONER Can I ask you this. Did you take advice in relation to the amount of an up-front payment of that size?---A. Yes.

Q. Who did you take advice from?---A. From the, Andrew Whale, from, the lead of the Negotiation Team for the pricing.

Q. All right. Leading the Pricing Negotiation Team, Mr Whale. And what was your understanding for the justification for a $1.66 million up-front payment?---A. Predominantly around a small business needing to have access to funds at the initial stages of setting up this particular contract.

THE COMMISSIONER: Q. But it had been involved in not dissimilar work, in fact, very similar work, for over three years?---This work was quite different in terms of its scope and scale.

Q. Maybe, but it involved the same information, it involved the same timing, pretty well?---It didn't involve the same information or the similar, same process or so the - - -

92. It is difficult to align this evidence with the Procurement Approval that was part of the documents provided to the GPB for the sixth contract procurement process, indicated that, despite the earlier projects having "short-term impact … Evolving Together however continued, and with the acquisition of knowledge, visibility, exploration and scaffolding, the focus shifted … to the approach … [of] CIT strategic direction, Strategic Compass 2025 – CIT Futures (SC2025) … released in October 2021, and it is broadly a continuation of the strategic directions CIT embarked upon in 2016… [which] highlights the priorities for the next two years, with a focus on the physical, digital and social infrastructure of the organisation and reiterates the CIT Board's commitment to the Evolving Together approach. The Minute of 13 December 2021 proposing the Select Procurement Process, emphasized the "foundational organizational transformation and strategic guidance and mentoring services, particularly related to SC2020 and the Evolving Together Project" and noted that SC2025 was "broadly a continuation of the strategic directions CIT embarked upon in 2016", [highlighting] the priorities for the next two years, with a focus on the physical,

digital and social infrastructure of the organisation and reiterates the CIT Board's commitment to the Evolving Together approach". Similar points about continuity were made in the draft RFQ Objective.

Q. But what extra expenses would they have to undertake?---A. Well, my understanding is that additional staff had to be brought on for the scale of this contract and other expenses that a small business would, would need to prepare for.

Q. And these matters were referred to in the evaluation Report, were they?---A. I don't recall. [They were not.]

Q. Well, how were they passed on to you?---I do recall the conversation around this request but I don't recall exactly the content of the - - -

Q. And nothing in writing?---A. I'm not saying it wasn't in writing. I don't recall what was in the written brief.

COUNSEL ASSISTING: And that was, firstly, the written brief, was that separate to the evaluation Report?---A. I'm not, I'm not, I - - -

Q. You're not sure if this - - -?---A. No.

Q. - - - was referred to, I think. Is that what your evidence is?---A. Yeah. Yeah.

Q. Your evidence is, please correct me if I'm wrong, that there was a discussion, a verbal discussion, about it. Is that correct?---A. Correct.

Q. And you're not sure whether it was in writing, as well?---A. Correct

Q. Now, in terms of the verbal discussion, that was with Mr Whale. Is that correct?---A. Correct.

THE COMMISSIONER: Can I just ask this, then. He would have given you that information. He could only have got it from Mr Hollingworth unless he was making it up? He would have had to have got that information which you've spoken about, about the need to employ extra staff, from Mr Hollingworth?---A. Yes, during the negotiations. [It was not.]

Q. Have you ever seen a note to that effect?---A. I don't recall.

COUNSEL ASSISTING:Ms Cover, can I ask you this? In terms of what gave rise to that conversation, we'll come to the content in a moment, was that due to you raising a query about this amount?---A. I don't recall but I do recall the conversation about the rationale for why.

Q. All right. And just in terms of timing, we know when the contract is signed. Are you able to assist with timing in relation to its signature?---A. So can I just clarify, the timing of the conversation? (not transcribable)

Q. Timing of the conversation?---A. Yeah/

Q. I'm using the contract as a marker.---A. Thank you. Yeah. Yeah - - -

Q. And I'm suggesting you probably can't remember a precise date.---A. Prior, prior to the signing and I'm, I can't recall the exact time frame.

Q. Presumably, in terms of the pricing negotiation, in terms of the order of things, tender evaluation, award of tender, and then there's contract negotiation and there's pricing. Is that going on, contract and pricing going on parallel or similar timing?---A. Similar timing my understanding was in terms of discussions with the Government Solicitor's Office - - -

Q. Yes.--- - - - A. And the negotiations of pricing.

THE COMMISSIONER: How many additional staff were necessary in order to provide for this contract, did you understand?---A. At least, well, my comparison was to the amount of staff that were there in a previous contract. So my understanding is at least two.

THE COMMISSIONER: The $1.7 million advance payment?---A. Correct.

Q. You did not raise it with the board?---A. Correct.

Q. And therefore that must have been due - well, there are two possibilities. One, you decided not to or, two, it was an oversight. Those are the only two possibilities, are they not?---A. I don't recall. I don't recall considering not raising it. It perhaps was an oversight.

Q. All right. So what you're saying as you sit there as I understand it you know you did not raise it, correct? We reached that stage.---A. Correct.

Q. You don't know why you didn't raise it? Is that what you're saying?---A. Yes.

Q. It may have been because you made a decision not to do so or it may have been an oversight. Those are the two possibilities. Do you agree?---A. Yes. And I can't recall whether I did discuss the payment or not with Mr Sloan. But I don't think I did.

Q. Did you not interrogate that information?---A. I did ask about why we needed to do this. Yes.

Q. But did you get details, Ms Cover?---A. Yes

Q. You were after all - - -?---A. Yes.

- - - ultimately responsible - - -?---A. Yes.

- - - for ensuring these terms were appropriate.---A. Yes. I don't recall the details that I got.

THE COMMISSIONER: What did you do except for the conversation which said as I understand it two members of staff were necessary and some additional preparation for the additional work?---A. Things like purchase of software perhaps things like that.

Q. Perhaps. You don't remember now?---No.

COUNSEL ASSISTING: If I may, Commissioner, I suggest, Ms Cover, let's deal with this precisely. What is the extent of your recollection what you were told by Mr Whale as to the reason for this upfront payment?---A. That it was a strong negotiating point from the service provider in terms of their provisions for the negotiation.

Q. Yes.---A. That despite some conversation with Mr Whale that I would, I'd like to see, I'd like to see any reference, you know, reduced or minimised or not sort of around the upfront. Clearly the advice to me from Mr Whale was that clearly this was a negotiation point that was a sticking point for negotiations.

Q. Right. You've referred to a need for two additional members of staff. Is that something you were told by Mr Whale?---A. No, my recollection is I was answering the Commissioner's specific question about how many staff - - -

Q. Yes.--- - - - as I understand were needed.

Q. I think you've offered that. Where did your understanding of the need for more staff come from?---A. From reading the contract and seeing that there were additional staff.

Q. In the specified personnel section - - -?---A. Yes.

- - - is that what you're referring to?---A..Yes.

93. This evidence is inconsistent with learning of the need for additional resources from the conversation between Mr Sloan and Mr Hollingworth, which Ms Cover said in her comments occurred in May 2021. Moreover, Ms Cover's comments on the first proposed Special Report and the Amended first proposed Special Report did not refer to this conversation, although the justification for the advance payments was questioned in each and although she maintained generally that she discussed with

Mr Sloan the prospect of further contracts with Mr Hollingworth. The meeting was mentioned for the first time in her evidence of 8 April 2024 in answer to the proposed SR2. It was not consistent with Mr Sloan's evidence about what he knew of the proposed contract. As mentioned, the suggestion that any substantial procurement of human resources (the only requirement mentioned) would be necessary to undertake the proposed work is contrary to Mr Hollingworth's response to the RFP. Furthermore, it was not sought by him at the time of the contract negotiations, and I am satisfied to the requisite degree that Mr Whale did not tell Ms Cover that he had, there being no reason for inventing this account. Even if Mr Whale verbally conveyed the information to Ms Cover that advance payments would be needed "to pay for additional staff [believed by her to be only two] … [having] to be brought on for the scale of this contract and other expenses that a small business would, would need to prepare for", she could not have formed the opinion that these costs could possibly justify the amounts agreed in the payment schedule.

94. Moreover, if this conversation occurred and was an issue of genuine concern, since the proposal to the GPB was to seek approval for selecting Mr Hollingworth to perform the proposed contract, had it been the case that a substantial proportion of the contract price would need to be paid in advance – in amounts approaching the scale of the payments ultimately provided for – to enable Mr Hollingworth to put resources in place to perform the contract in a timely way, it should, and I am reasonably satisfied that it would, have been included in the initiating Minute of 13 December 2021 to approve the selection of Mr Hollingworth, and in the other procurement documentation, particularly because it would have been a known risk about due performance by him, with a proposal to avoid it. It was also inconsistent with the Contract Management Plan submitted to the GPB. That the need for prepayment for enabling Mr Hollingworth to procure the resources to undertake the contract in a timely way (or, perhaps, at all) was not a relevant consideration is reinforced by the fact that there was no attempt at any point to quantify its cost. Finally, the need for prepayment to resolve the problem said to have been raised by Mr Hollingworth with Mr Sloan in the conversation was at no point referred to by Mr Hollingworth in the course of his response to the RFP as justifying his stipulation of the advance payments as a condition of agreeing to the contract; indeed, as otherwise mentioned in the Report his explanation for the demand was altogether different. Lastly, even if the conversation had occurred, it was plainly overtaken by events, once procurement of the sixth contract was decided upon, as

evidenced by the documentation and the negotiations that establish that this issue of providing Mr Hollingworth, as a small business, with resourcing was never raised or suggested, let alone responded to by agreeing to the prepayments. Considering all the circumstances, I am satisfied to the requisite degree that Ms Cover did not actually believe that the payment schedule could be, let alone was, justified for the reasons she gave or as stated in the Brief.

95. In her evidence to the Commission, Ms Steff agreed that Mr Hollingworth never suggested that the amount paid in advance was necessary for him to employ staff and (as mentioned) that, from everything that she knew about the negotiations, there was no necessary acquisition, no required resourcing and no materials that needed to be put in place before the commencement of the contract. She was not aware that such a case had been made nor why the sentence about this was included in the Brief. She had not seen the Brief as drafted by Mr Whale and her approval of it had not been sought. She also agreed that Ms Cover, "was kept, with more or less frequency, informed of the process of the contract negotiation and the variations in the proposed payments in advance", including the changes in the instalments. Mr Whale gave evidence to the same effect as to keeping Ms Cover informed: Ms Cover did not direct the Contract Negotiation team to negotiate the contract and, when it had been finalised, bring it to her for signature; her approach was a cooperative, consultative one. Mr Whale gave evidence to the effect that, during the continuing negotiations about price, the payment schedule and liability, the team was giving Ms Cover "updates as we went".

96. In her comments, Ms Cover contended that the PSR2 overlooked "the work to be performed in the sixth contract in relation to the new information communication and technology (ICT) needs of students and CIT's business operations". She said –

> Cabinet had instructed CIT to review the CIT-ICT shared service arrangements so that CIT could extract itself from the inefficient and ineffective ACT ICT shared services model. The existing CIT-ICT shared service arrangements limited CIT's timely purchase, selection and user support for modern ICT teaching and learning tools and CIT's business operations. Given this gap and the immediate need to review all courses CIT lent heavily on Think Garden to scope, test and customise appropriate ICT tools in the Sixth Contract. It was essential these modern ICT tools were operational at the start of the Sixth Contract to ensure coordination and consistent processes were used to undertake the scale of the Strategic Compass 2025 requirements.
>
> The ICT tools encompassed a wide range of digital technologies used for communication, information and knowledge sharing and storage, project management, and data processing. These tools were embedded into the CIT-Think Garden work and used immediately upon commencement of Contract Six including in the Think Garden

presentation to the CIT Board.

97. The first and perhaps most obvious point to make is that, assuming that it was necessary to purchase ICT tools, this would necessarily have been done by CIT, either directly or indirectly under the disbursements clause, which dealt explicitly with the cost of digital tools and required payments in addition to the contract price. If they were in place when the contract commenced, they must already have been acquired by CIT. Ms Cover does not suggest any had actually been purchased by Mr Hollingworth on CIT's behalf. Had he made any such purchases, payment would certainly have been claimed under the disbursements clause – which, in its initial form proposed by him, added a "7.5% processing fee". In this respect, it is clear from Mr Hollingworth's Proposal that he anticipated some expenditure on digital assets, the cost of which would be defrayed by way of CIT payment under that clause. He clearly never expected that this would amount to any considerable sum, let alone that it would be paid out of the stipulated contract price, the "deconstruction" of which was completely absorbed by reference to the services of the stipulated individuals. Of course, were it necessary for sum approaching the scale of the installments to be expended on ICT, this would require compliance with the government procurement act and regulation (if $1 million or more, also the advice of the GPB), in a situation where the payments in advance had already been made or contractually agreed to be made. Such an arrangement would have been grossly improper, indeed, unlawful. I do not accept that this was contemplated as justification for the payment schedule. Nor was this item mentioned by Mr Hollingworth in any of the negotiations with Ms Steff or Mr Whale, which – had it been in fact a cost to him – would have been inevitable; he would scarcely have overlooked it as justifying (if nothing else) his insistence on the payment schedule as a condition of entry into the contract. Again, the lack of any attempt to quantify the sums involved in respect of any aspect of the suggested justification also convincingly supports the conclusion that it was never an element of the pricing or the payment schedule. The notion that acquisition of ICT tools, hardware and/or software, was to be defrayed by large sums needed to be paid in advance is contrary to the evidence of Ms Steff and, in substance, to that of Mr Whale – both of whom must have been made aware of this had it been the case.

98. Ms Cover's contention that the advance payments were, at least in part, attributable to the cost of ICT replacement is overwhelmingly contradicted by the effect of the documents cited in the PSR2, the documented course of negotiations and the

evidence of Ms Steff and Mr Whale which, congruent as it is with the objective circumstances and the logic of events, should be accepted as true and reliable. Taken as a whole, the evidence demonstrates to the requisite standard that Ms Cover was well aware of the falsity of the Brief and her agreement with the recommendations necessarily implied, despite this, that she agreed that the document accurately recorded the matters it stated, at least those of which she had personal knowledge.

99. What then, was the purpose of the false explanation? Ms Cover stated in her comment that she "did not regard the Brief as being aimed at a wider audience ... [but] as an orthodox communication to the CEO who was exercising a delegation under a procurement policy … [and] regarded it as being consistent with my understanding of the CIT procurement policies". She said that she was "surprised when this procurement attracted the media attention that it eventually did and deny that I had any anticipation at any time prior to signing the Brief that such an outcome was likely". These comments cannot be accepted. I am satisfied to the requisite standard that it they are not true. Since Ms Cover must have known that the contract would be registered on the Contracts Register, she knew it was certain to have become public. She was aware of media interest as well, of course, of the Minister's interest and his likely response yet another contract with Mr Hollingworth following on his queries of February 2021 and her conversation with his Chief of Staff in December of that year before her decision to proceed nevertheless. And, though it may be that the payment schedule might be redacted, it would necessarily be exposed on inquiry. Media interest was predicted as a risk in the Proposal documentation to the GPB, to which she was a party. The CIT procurement policies reflected the requirements of the Procurement and Procurement Regulation and the Brief was thus an essential step in the procurement process, forming part of the official record. There can be no doubt that "the Brief was aimed at a wider audience", and it explicitly said so in paragraphs 11 and 12. Ms Cover was well aware there was a serious reputational risk associated with the contract -- that it would not, as Dr Rayner had told her "pass the pub test". This would have been obvious by the mere exercise of common sense. There was, of course, the ABC's FOI; the risk was adverted to both in the documentation that went to the GPB and in the Brief itself; the Minute of 13 December 2021 from Ms Steff to Ms Cover concerning the desirability of the single select process para 30, under the heading "Media" states –

> There has been previous media attention about the organisational transformation being undertaken by CIT. It is likely that this may occur in the future.

The Risk Management Plan referred to "Reputational risk for CIT due to the select methodology [and the] services are not yet familiar", with the "Consequence" being "Public scrutiny of the contract and associated perceived value resulting in negative attention [and] a natural consequence of CIT using a complex, adaptive systems approach to reform increases ambiguity and discomfort". The "Risk controls" listed were: a select Brief has been drafted and will be approved by the Delegate prior to the RFQ documents being issued; previous phases of the transformation were effectively managed by CIT and completed by the Service Provider that will be engaged; the procurement methodology will be reviewed by the GPB prior to the RFQ documents being issued; the work is highly contextualised to CIT's transformation agenda to achieve the strategic compass; the CIT Board and the ACT government have endorsed SC2025 with a key commitment to CIT leading change through innovation. The CIT implementation plan articulates this methodology." (The SMPC, who was the procurement officer, told the Commission that Ms Cover had helped to write the statement of requirements and had seen all the – from the context, procurement – documentation. She said she thought she had drafted the risk management plan and sent to Ms Steff and Ms Cover for their input.)

100. When the contract became known to the media – which was virtually certain, one way or another – it would have instigated inquiry from the Board and the Minister and need to be justified, ultimately to government and independent officials. At all events, there is no reasonably open other explanation for the fabrication of the justification for the payments in advance – self-evidently an obvious point of controversy – than that it was aimed at those who did not know the actual reasons. Plainly enough, it was to persuade any reader that the contract had been negotiated with appropriate care and that the most contestable and controversial aspect, namely the schedule of advance payments, was justified in accordance with conventional practice. Once the contract was in the public domain, scrutiny, at least by the Board and the Minister would certainly have followed and the schedule brought to notice. I am satisfied to the requisite degree that it was the risk of controversy, possibly resulting in cancellation, to which the payments in advance were directed and why the Brief concealed the truth about the reason they had been stipulated and agreed to and sought to also provide comfort from purported reliance on third party specialist advice that was not actually sought and was not provided. Thus, the Brief was directed to deceive, if possible, any interrogator of the legitimacy of the transaction. Even if there had been no advertence

to the possibility of public scrutiny (which is not accepted), intentionally making a false statement in an official record of a procurement process must constitute serious wrongdoing. The Brief constituted the official record of the recommendation of the Contract Negotiation Team to the CEO for the purpose of exercising the delegation to execute the contract as the culmination of the procurement. For a public official to create or be a party to the creation of a fraudulent document of this kind plainly amounted to very serious wrongdoing indeed, whatever might be its technical legal characterisation.

Findings as to corrupt conduct

101. At the outset, it is important to note that both Ms Cover and Mr Whale (and Ms Steff, for that matter) are persons of good character. There is no evidence that either of them had any personal relationship with Mr Hollingworth, aside from that which occurred in the course of his performing the contracts, or that they have ever received or expected to receive any payments or benefits whatsoever from him. It is also accepted that both should be considered to be well-regarded public servants of many years' experience, with no disciplinary proceedings previously brought against Mr Whale and, in respect of Ms Cover (commenced as a result of the matters reported in SR1), not having been finalised (and, for present purposes, ignored). In assessing the evidence and the findings which it might justify, these facts have been given full weight in measuring and applying the appropriate standard of proof that gives appropriate significance to this important consideration. Both have categorically denied any wrongdoing or dishonesty. There is no evidence that explains why Ms Cover or Mr Whale would involve themselves in knowingly dishonest and or corrupt conduct and they categorically deny doing so. At the same time, whatever their motives may have been, the evidence establishes to the requisite standard that they each did in fact do so and that their denials are untrue.

102. It is important to appreciate the general need for candour in the performance of public duties. Sometimes the borderline between what is and is not strictly necessary to be disclosed is difficult to discern. Sometimes the omission of material facts or a calculated use of ambiguity might, in effect, amount to a positive misrepresentation. In such cases the most useful test of probity will often be whether the statement would

be regarded as honest by the standards of reasonable decent people. To overlook some matter because of ineptitude or carelessness (falling short of recklessness) would almost certainly not amount to corrupt conduct, nor would an accidental misunderstanding that, as it happened, gave rise to an actual misrepresentation. Nor, absent recklessness, would an honest misjudgment about relevance or materiality demonstrate a lack of integrity, however unfortunate it might turn out to be. It must be accepted that, as with all human endeavour, mistakes can occur and that requiring officials to conduct themselves defensively with an eye to avoiding all criticism or any risk of error would likely lead to the adoption of the lowest common denominator of possible outcomes, risk paralysing decision-making and impose unreasonable obstacles in the development and flexibility of public administration.

103. In the corruption space, it is essential to focus on substance rather than form and counsels of perfection will almost never be useful. Judgment calls must be made with a view to the needs for candour and accuracy, having regard to the purpose to which the communication is directed.

104. It is against that backdrop that the possible application of s 9(1)(a) of the IC Act falls to be considered. The section provides, as alternative bases for a finding of corrupt conduct (when associated with the conduct specified in s 9(1)(b)), findings that the impugned conduct *could* constitute a serious disciplinary offence (s 9(1)(a)(ii)) or reasonable grounds for dismissing or dispensing or otherwise terminating the services of a public official (s ((1)(a)(iii)) or a criminal offence (s 9(1)(a)(i)). There can be little doubt that being a party to creating a document containing a knowingly false account of relevant matters in connection with the exercise of an official function could constitute conduct within the first two mentioned subparagraphs. It is clear that the inclusion of a fabrication about key aspects of the procurement in the Brief, to which in one way or another Mr Whale and Ms Cover were intentional parties, could constitute a serious disciplinary offence or reasonable grounds for dismissal, dispensing or terminating their services.

105. As the three elements in s 9(1)(a) are expressed as alternatives, having concluded that conduct satisfies one or two of the elements already, it is not strictly necessary to consider the extent to which the third might also be satisfied. However, it is a serious issue that public servants and officials should be aware of that certain misconduct could constitute a criminal offence. In what follows, I emphasise there is no finding that

the conduct identified here would or did constitute one or more the specified offences, only that it *could or might do* so, were the elements of the offences to be proved beyond reasonable doubt, which as explained above, is a more rigorous test than that which is applied to my findings of corrupt conduct. (Furthermore, the evidence given by Ms Cover and Mr Whale to the Commission cannot be used against them in any criminal proceedings, by virtue of s 176 of the IC Act.)

106. The Criminal Code 2002 (ACT) (the **Code**) prescribes the following apparently relevant offences –

333 General dishonesty

(1) A person commits an offence if—
- (a) the person does something with the intention of dishonestly obtaining a gain from someone else; and
- (b) the other person is the Territory.

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

(2) Absolute liability applies to subsection (1)(b).

(3) A person commits an offence if—
- (a) the person does something with the intention of dishonestly causing a loss to someone else; and
- (b) the other person is the Territory.

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

(4) Absolute liability applies to subsection (3)(b).

(5) A person commits an offence if—
- (a) the person—
  - (i) dishonestly causes a loss, or a risk of loss, to someone else; and
  - (ii) knows or believes that the loss will happen or that there is a substantial risk of the loss happening; and
- (b) the other person is the Territory.

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

(6) Absolute liability applies to subsection (5)(b).

(7) A person commits an offence if—
- (a) the person does something with the intention of dishonestly influencing a public official in the exercise of the official's duty as a public official; and
- (b) the public official is a territory public official; and
- (c) the duty is a duty as a territory public official.

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

(8) Absolute liability applies to subsection (7)(b) and (c).

(9) In this section:

Territory—see section 319.

334 Conspiracy to defraud

(1) …

(2) …

(3) …

(4) A person commits an offence if the person conspires with someone else with the intention of dishonestly influencing a public official in the exercise of the official's duty as a public official.

Maximum penalty: 1 000 penalty units, imprisonment for 10 years or both.

(5) A person commits an offence against this section (conspiracy to defraud) only if—
- (a) the person enters into an agreement with at least 1 other person; and
- (b) the person and at least 1 other party to the agreement intend to do the thing under the agreement; and
- (c) the person or at least 1 other party to the agreement commits an overt act under the agreement.

338 Giving false or misleading information

(1) A person commits an offence if—
- (a) the person gives information to someone else; and
- (b) the information is false or misleading; and
- (c) the person knows that the information—
  - (i) is false or misleading; or
  - (ii) omits anything without which the information is false or misleading; and
- (d) any of the following applies:
  - (i) the person to whom the information is given is the Territory;
  - (ii) the person to whom the information is given is a person who is exercising a function under a territory law;
  - (iii) the information is given in compliance or purported compliance with a territory law.

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

(2) Absolute liability applies to subsection (1)(d)(i), (ii) and (iii).

(3) Subsection (1)(b) and (c)(i) does not apply if the information is not false or misleading in a material particular.

(4) Subsection (1)(b) and (c)(ii) does not apply if the omission does not make the information false or misleading in a material particular.

(5) Subsection (1)(d)(i) does not apply if, before the information was given by the person to the Territory, the Territory did not take reasonable steps to tell the person about the existence of the offence against subsection (1).

(6) Subsection (1)(d)(ii) does not apply if, before the information was given by a person (A) to the person mentioned in that subparagraph (B), B did not take reasonable steps to tell A about the existence of the offence against subsection (1).

(7) For subsections (5) and (6), it is sufficient if the following form of words is used:

'Giving false or misleading information is a serious offence'.

(8) In this section:

Territory—see section 319.

339 Producing false or misleading documents

(1) A person commits an offence if—
- (a) the person produces a document to someone else; and
- (b) the document is false or misleading; and
- (c) the person knows that the document is false or misleading; and
- (d) the document is produced in compliance or purported compliance with a territory law.

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

(2) Subsection (1)(b) and (c) does not apply if the document is not false or misleading in a material particular.

(3) Subsection (1) does not apply to a person who produces a document if the document is accompanied by a signed statement—
- (a) stating that the document is, to the signing person's knowledge, false or misleading in a material particular; and
- (b) setting out, or referring to, the material particular in which the document is, to the signing person's knowledge, false or misleading.

(4) The statement under subsection (3) must be signed by—
- (a) the person; or
- (b) if the person who produces the document is a corporation—a competent officer of the corporation.

359 Abuse of public office

(1) A public official commits an offence if—
- (a) the official—
  - (i) exercises any function or influence that the official has as a public official; or
  - (ii) fails to exercise any function the official has as a public official; or
  - (iii) engages in any conduct in the exercise of the official's duties as a public official; or
  - (iv) uses any information that the official has gained as a public official; and
- (b) the official does so with the intention of—
  - (i) dishonestly obtaining a benefit for the official or someone else; or
  - (ii) dishonestly causing a detriment to someone else.

Maximum penalty: 500 penalty units, imprisonment for 5 years or both.

(2)…

107. For present purposes, a conviction under s 333(1) would require proof beyond reasonable doubt that the relevant public official acted with an intention that had two elements: the first that it was intended to obtain a gain at the cost of the Territory; and second, that this was to involve dishonest means. On the assumption that, as found above, the recommendation in the Brief would not have been made or would not have been accepted (and the contract therefore not entered into), had the true explanation

not been concealed and, instead, disclosed in the Brief, a properly instructed jury could conclude that the false entry was a dishonest element of a scheme, to which the defendant public official was a party, for the Territory to enter into a contract that obliged the Territory to pay Mr Hollingworth for services that had not been delivered and, thus provide him with a gain to which he would otherwise not have been entitled, in short an exceptionally commercially advantageous contract. The subsection does not specify that the intended recipient of gain must be the erstwhile defendant, nor that the intended recipient has acted dishonestly; all that is necessary is that the intended gain, whomever is the intended beneficiary, be obtained from the Territory as the result of the dishonest conduct of the defendant.

108. In some ways s 333(3) is the obverse of s 333(1). For the purposes of this provision, the focus is on whether the conduct involves the dishonest intention to cause a loss to the Territory as distinct from a gain to another. The above analysis of the conduct identifies the prejudice or injury to the Territory's commercial interests and contractual rights caused by the payment schedule. "Loss" should be understood in its ordinary English sense (and not, for example, as an accounting term) and, accordingly, a properly instructed jury could conclude that the prejudice or injury to the Territory amounted to a relevant loss on the basis that the false entry was a dishonest element of a scheme, to which the defendant public official was a party, to procure the Territory to enter into an improvident contract at unusually advantageous commercial terms to Mr Hollingworth and this would amount to a loss which would not arise had the contract been honestly transacted.

109. The offence prescribed by s 333(5) requires proof of a loss or risk of a loss to the Territory dishonestly caused by the defendant who knows or believes that the loss will occur or there is a substantial risk that it will occur. I have already explained how the loss (or substantial risk of loss) might be regarded as having been part of the scheme to enter into a contract with Mr Hollingworth providing for most of the contract price to be paid in advance of the services being delivered. The prejudice to the Territory is a loss incurred as at the date of the contract but this offence could be committed if there were a substantial risk that the services might not be provided or adequately provided in breach of the contract and the Territory then attempt to recover the amount paid in advance. A jury might conclude that there was a substantial (in the sense of not being trivial or inconsequential) risk that Mr Hollingworth might not be able to provide the contracted services fully or at all since doing so was predominantly his personal

responsibility and there must inevitably be a risk that he could be absent for any reason (whether, for example, due to serious accident or illness or otherwise) over the term of the contract.

110. It is not an express element of the offence under s 333(7) that the public official must be deceived. If a properly instructed jury were to be persuaded beyond reasonable doubt that, as found above, Mr Whale and Ms Cover were acting together in making the false statement in the Brief, Mr Whale's submission of the Brief by way (on this hypothesis) of encouraging or abetting Ms Cover's adoption and use of the false explanation to enable the recommendation to enter into the contract to be accepted, could be regarded as "dishonestly influencing" Ms Cover in the exercise of her duty. On the other hand, if it were proved to the necessary standard that the false statement in the Brief was intended by Mr Whale and/or Ms Cover to mislead any public official whose duty required the document to be considered (for example, when assessing the propriety of the procurement or the effect of the contract), this also could constitute this offence, since it is not essential that the defendant have in mind any particular public official or the performance of any particular official duty.

111. The offence under s 334(4) is a statutory recasting of the offence known to the common law as a conspiracy to defraud. Whilst, in most cases, a conspiracy to defraud arises when two or more persons agree to use dishonest means with the intention of obtaining, making use of or prejudicing another person's economic right or interest or inducing another person to act or refrain from acting to his or her economic detriment, it may also arise where they agree to use dishonest means to induce a third person to act or refrain from acting in contravention of the third person's public duty. Here, the Brief contains false and dishonest statements, known to both Mr Whale and Ms Cover, as to the reasons justifying the payment schedule and entry into the contract – the former encapsulated in paragraph 5 and the latter in paragraph 13. It could be concluded that the purpose of these falsehoods (either individually or taken together) was to justify entry into the contract with Mr Hollingworth and to deceive any person who had the public duty of auditing the process or considering whether the probity requirements of government were followed, and accordingly to place in the official record a false explanation of how the contract came to be agreed. Since the essence of the crime is the agreement, the fact that the particular use that might be made of the false statements was unknown, except that it was directed to an official, is immaterial. It is also open to conclude, as mentioned in the above discussion that the payments

schedule operated to the economic disadvantage of the Territory and that this was known since, if the true reason were acknowledged, the contract would not have been entered into as the Territory would never have accepted the risks thus created, and Ms Cover would not have signed the contract. The requisite overt acts under s 334(5)(c) is the production of the Brief by Mr Whale and its signature as approved by Ms Cover.

112. The relevant elements of the offence under s 338 are the giving of knowingly false or misleading information in compliance or purported compliance with a Territory law (either the *Procurement Act and Regulation* and/or s 9 of the *Public Sector Management Act 1994*). Here, the false statement was that in paragraph five as to the reasons for the advance payments, the document was provided, either directly or indirectly by Ms Cover for action to Ms Steff and Mr Tong. Mr Whale could have committed this offence by providing the document to Ms Cover or as an accessory.

113. Section 339 creates an offence in relation to producing false or misleading documents. It arises when a person produces a knowingly false or misleading documents to another and the document is produced in purported compliance with a Territory law. Here, the false document was the Brief, which was provided by Mr Whale to Ms Cover and by Ms Cover, directly or indirectly to Ms Steff and Mr Tong for action, each in purported compliance with the procurement regime prescribed by Territory law.

114. For the purposes of s 359, the elements specified in sub paras (1)(a)(i) and (iii) could be satisfied in respect of both Mr Whale and Ms Cover in that each was exercising a function as a public official in relation to the procurement of the sixth contract and the creation of the Brief for the purpose of exercising the delegation was conduct as a public official. That function and conduct could each be found to have been exercised dishonestly either for the benefit of Mr Hollingworth or the detriment of the Territory or both.

115. The common law offence of wilful misconduct in public office is also available. This is committed by a public official who, in the course of or connected to his or her public office, wilfully misconducts themselves, by act or omission without reasonable excuse or justification, and where such misconduct is serious and merits criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the

departure from those objects.

116. It should be noted that the conduct of each of Mr Whale and Ms Cover, comprising, as it did, a purported exercise of power or authority by them as public officers otherwise than in an honest attempt to perform the functions of their office to the cost of the Territory may well constitute the tort of misfeasance in public office, for which they may be personally liable to be sued for damages.

117. Whether in the context of a possible crime or possible disciplinary action, there is no doubt that the conduct described would also be conduct that "constitutes the exercise of the public official's functions in a way that is not honest" within s 9(1)(b)(i) or constitutes "a breach of public trust" within s 9(1)(b)(ii)(A). The conduct of both Mr Whale and Ms Cover therefore satisfies the definition of corrupt conduct for the purposes of the IC Act.

118. The question arises whether their corrupt conduct is serious corrupt conduct in that it "is likely to threaten public confidence in the integrity of government or public administration" for the purposes of s 10 of the IC Act. The significance of the Brief as part of the process by which Ms Cover exercised her delegation as CEO of the CIT to approve its entry into the sixth contract with Mr Hollingworth has already been explained. The integrity of public procurements is a matter of serious public concern and the intentional falsification of a crucial document concerning a critical aspect of a proposed contract would itself be likely to threaten public confidence in the probity of the relevant process, but even more so when it was done in an attempt to mislead any likely interrogation of its propriety and permit inclusion of contractual terms that were grossly improper. This was not a case where relevant information was omitted from or false information inserted in a document merely to cover up some unfortunate mistake (which, however, might in any event amount to serious corrupt conduct – though, perhaps to a lesser degree). Here, a fictional narrative was placed in a crucial authorisation with the intentional effect of enabling a multimillion-dollar procurement to be contracted in a form which gave substantial commercial and financial gain to the contractor at the cost of the Territory and deflecting or misleading scrutiny or inquiry. The conduct seriously undermined the probity of the procurement process, enabled a substantively unjustified contract and, additionally, was directed to obstruct or hinder administrative and government oversight. It would inevitably threaten public confidence in the integrity of government or public administration. Accordingly, the conduct of both

Mr Whale and Ms Cover amounted to serious corrupt conduct as defined in s 10 of the IC Act.

The Hon Michael Adams KC,
Commissioner

25 July 2025