ACT Ombudsman

Investigation into a procurement by the ACT Integrity Commission

Special Report of the Inspector of the ACT Integrity Commission

June 2025

Acknowledgement of Country

The Office of the ACT Ombudsman acknowledges the Traditional Custodians of the ACT and recognises any people or families with connection to the lands of the ACT and region. We respect Aboriginal and Torres Strait Islander people and their continuing culture and the contribution they make to the Canberra region and the life of this city and this region.

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Executive summary

The ACT Integrity Commission (the Commission) has a vital role to play in safeguarding the integrity of the governance of the Australian Capital Territory (ACT). Integrity within government is the bedrock upon which public trust is built. For these reasons, it is desirable the operations of the Commission itself are also seen to meet all applicable standards.

Government procurement is regulated by a legislative framework that governs and protects the expenditure of public money. Procurement decisions must be fair, impartial, ethical and value for money. Conflicts of interest must be identified, declared and appropriately managed so that decisions are not made, or seen to be made, to benefit others at the expense of the public good.

Management of conflicts of interest is an explicit requirement of the *Integrity Commission Act 2018* (ACT) (IC Act).[1] As Inspector of the Integrity Commission[2], I am expressly required to consider the Commission's management of conflicts of interest when assessing whether the Commission is complying with its legislation.[3] I am also required to consider the Commission's compliance with other laws, including the laws that govern the Commission's administration and procurement practices.[4]

Section 265 of the IC Act enables me to investigate the conduct of the Commission or Commission personnel in relation to the exercise of, or failure to exercise, a function[5] under the IC Act or another law in force in the Territory. This is my first investigation under section 265.

This investigation considered the Commissioner's and Commission staff's compliance with their legal obligations in several areas, including with laws that govern the

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[1] See sections 30-32 of the *Integrity Commission Act 2018* (ACT) (IC Act). Recent amendments to the IC Act require Commission staff to disclose conflicts of interest in writing, with disclosures recorded on a register that must be made available for inspection by the Inspector (section 50A of the IC Act)—this requirement was not in place at the time of the procurement that is the focus of this investigation.
[2] The role of the Inspector is currently performed by the ACT Ombudsman and by arrangement between the Commonwealth and ACT Governments, the role of ACT Ombudsman is performed by the Commonwealth Ombudsman.
[3] Section 280(2)(a) of the IC Act.
[4] The Inspector must consider whether the Commission has acted lawfully and in compliance with all relevant legislation (section 280(2)(b) of the IC Act).
[5] *Legislation Act 2001* (ACT), Dictionary Pt 1, defines 'function' as including authority, duty and power.

disclosure and management of conflicts of interest, procedural fairness in relation to apprehensions of bias in decision–making, and procurement practices.

I have exercised the power to prepare a special report on this investigation under section 275 of the IC Act. That provision permits me to prepare a report for the ACT Legislative Assembly at any time if I consider the matter needs to be brought to the attention of the ACT Legislative Assembly sooner than in my next annual operational review report. Given the annual operational review report for the 2024–25 financial year is not due until October 2025, considering the issues identified in this investigation are of public interest and relevant to all public sector entities and noting the Commission did not accept two of the three recommendations I have made, I consider it appropriate to prepare a special report on this issue.

An investigation by the Inspector under the IC Act is an administrative investigation. Although I am not bound by the rules of evidence, I am mindful of the serious consequences of adverse comments and the need for rigour in administrative decision–making. I have therefore decided to adopt, by analogy, the principles from judicial decision–making that a finding should not be made unless it is more probable than not, and that a more serious adverse finding may require stronger evidence.[6]

The investigation was prompted after my staff noticed the Tenders ACT[7] website referenced a contract valued at $150,000 awarded by the Commission to the then Chief Executive Officer (CEO) of the Commission while he was still CEO. There were no records in the Commission's conflicts of interest register of any declarations of conflicts of interest for this procurement. I wanted to know more about the Commission's processes for the procurement. The investigation focussed on documentation provided by the Commission, as well as considering the responses provided by individuals in the course of the procedural fairness process.

[6] See *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336.
[7] tenders.act.gov.au.

This investigation found concerns with the Commission's processes for this procurement. Notably:

- An email from the then CEO to the Commissioner recorded a proposal that he be given a contract to deliver services to the Commission and that this be exempted from any public competitive process to assess whether the proposal was value for money.[8]
- The then CEO did not declare a conflict of interest when preparing documents for the procurement, including a draft of the statement of requirements and a draft document to exempt the procurement of his services from a competitive tender process.
- There is no record of any steps being taken to manage the then CEO's clear conflict of interest in the process.
- The Commissioner has advised in his formal response to this investigation report that he had decided to procure the services of the then CEO prior to the procurement process commencing and that he instructed that the procurement documents should be prepared to give effect to that decision.[9]
- There is no record in the procurement documentation of any consideration of whether the Commission needed to externally procure those services or whether instead the services could have been undertaken by staff and by the incoming CEO.
- The Commission's procurement documents (including an exemption from competitive procurement requirements and the statement of requirements) were copied directly from the material provided by the then CEO with his procurement proposal – and were then used to assess that procurement proposal.

[8] There are conflicting recollections as to whether the original idea to contract the then CEO was the Commissioner's or the then CEO's. In my view it was not necessary for me to determine this issue because my concern was with how the procurement was conducted rather than with the initial idea.
[9] Attachment A, paragraph 34, 36 and 37.

- There was no record of any consideration or declaration of potential apprehensions of bias in the decision–making process, nor any measures taken to address or manage such concerns.
- There was no record of any independent advice being sought on the procurement.

These shortcomings occurred despite the Commission being on the record as stating that '[m]anaging conflicts of interest effectively and appropriately is an inherent part of working in the ACT public sector.'[10]

In this investigation, I focused only on the procurement process that was followed: there is no basis for me to reach conclusions or make findings that attribute any improper purpose to those involved, for example, and I have not done so.

I have not made a finding the Commissioner acted in breach of his statutory obligations. Rather, the central and repeated issue identified in the investigation is that there is insufficient documentation of the reasons for, and consideration of, the procurement decision. This issue was compounded by failures to properly consider, declare and manage conflicts of interest and potential apprehensions of bias. I consider there are gaps in the legislation and policies which contributed to that outcome but do not wholly excuse it.

Both the Commissioner and the then CEO, in response to the procedural fairness processes, provided extensive comments on the need for the procurement, the then CEO's suitability, and the application of the exemption. I maintain the view that these matters should have been clearly documented at the time of the procurement, not retrospectively addressed in response to my investigation.

In circumstances where there may be no clear requirement to declare a potential apprehended bias, in my view best governmental practice would see the Commission take a more systematic approach to the identification, documentation and management of circumstances that could give rise to questions of probity, including conflicts of interest and possible apprehensions of bias.

In my view, it would have been relatively simple for the Commission to have avoided any concerns – for example by seeking independent advice on, and ideally

[10] Integrity Commission Annual Report 2019-20, page 34.

independent involvement in, the procurement, and/or by having the incoming CEO as the decision–maker on the procurement. It would also have been possible to conduct a competitive procurement process. Had the independent advice been that a competitive procurement process was not required, there would then have been records of that advice and of the decision–making process involved.

I note my Office has previously made comments about the Commission's management of conflicts of interest and use of single select tender processes in a separate procurement matter.[11]

As a result of this investigation, I make 3 recommendations aimed at improving the Commission's procurement practices. The Commission accepted one recommendation and did not accept two of the recommendations.

In addition, this investigation identified what may be a gap in the legislation in relation to the requirement in section 31(2) of the IC Act for the Commissioner to report a conflict of interest to the Speaker of the ACT Legislative Assembly (the Speaker) and the Inspector. This requirement is limited to reporting conflicts of interest as defined by law and does not extend to apprehensions of bias or any other matter that may necessitate the Commissioner's recusal. Noting the ACT Government policy on conflicts of interest[12] discusses both conflicts of interest and bias, for the Inspector to provide effective oversight of the Commission there is a gap if the Inspector is not made aware of a matter that may necessitate the Commissioner's recusal and how the Commission is approaching potential issues of bias, in the same manner as the Inspector is kept informed of how the Commission is approaching potential conflicts of interest. I will be drawing this to the attention of the Government to consider as part of its review of the IC Act.

The Commissioner and current staff of the Commission are referred to in this report by their position. To avoid confusion, the former CEO, who held various roles at different times, is referred to as Mr A. While this report also makes reference to the current CEO of the Commission, I note for the sake of clarity the current CEO played no role in the

[11] Inspector of the ACT Integrity Commission Annual Report 2022-23, page 10.
[12] cmtedd.act.gov.au/__data/assets/pdf_file/0006/2329710/Conflict-of-Interest-Policy-2021-V2.pdf, issued June 2021.

procurement of Mr A's services and is not the subject of any adverse opinion or comment.

In accordance with procedural fairness requirements, including those set out in section 277 of the IC Act, a copy of the proposed report was provided to the individuals to which the report relates. All individuals were afforded the opportunity to provide any comments they considered relevant. After some amendments were made to the draft report, a second procedural fairness round was conducted to allow all individuals an opportunity to submit any final comments. I considered all the comments in preparing this report and amendments were made to the report. Where I have not amended the report to address particular comments, I advised the relevant individuals that those elements of the report have not been amended.

The Commission's final response to this report is attached in full[13] at **Attachment A**. Mr A's final response to this report is attached in full at **Attachment B**.

I thank the Commissioner, the current CEO and current and former Commission staff for their cooperation with this investigation.

Iain Anderson
Inspector of the ACT Integrity Commission

[13] Identifying names have been redacted or amended in line with naming conventions used in the Special Report. Information considered to be contrary to the public interest to disclose has also been redacted (pursuant to section 276 of the IC Act).

Recommendations

Recommendation 1

The ACT Integrity Commission engage independent procurement advice as an integral part of any proposed single select tender process.

ACT Integrity Commission response: Not accepted

Recommendation 2

The ACT Integrity Commission (the Commission) develop a procurement policy consistent with the requirements of the ACT Government procurement framework. The policy should require the Commission to document fully, for each procurement, the reasons for the procurement itself, the reasons for the method of procurement chosen and the reasons for the decision made upon the procurement.

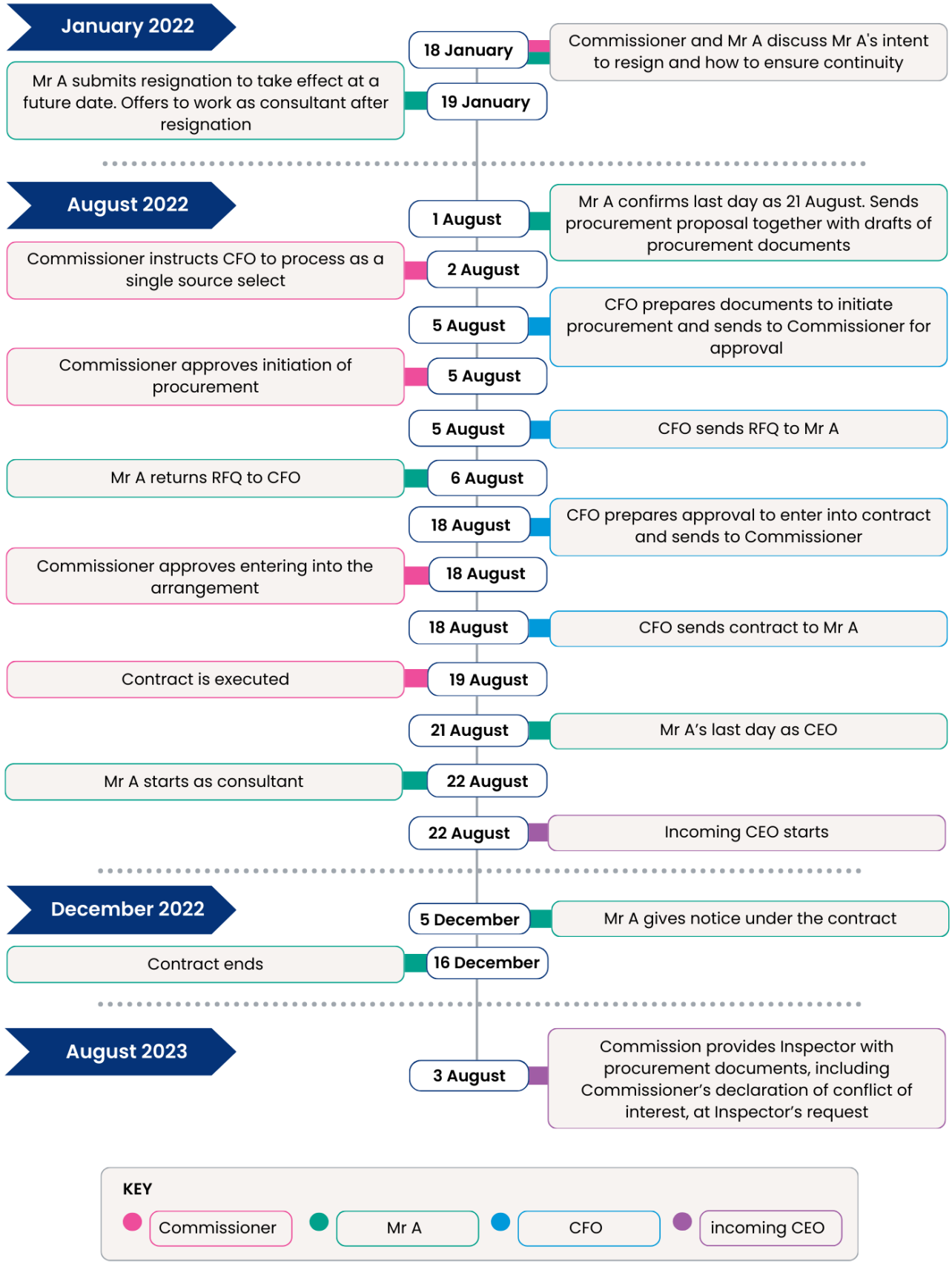
ACT Integrity Commission response: Not accepted

Recommendation 3

The ACT Integrity Commission develop and maintain a register of mandatory staff training, to include training on conflicts of interest and bias and procurement training.

ACT Integrity Commission response: Accepted

Procurement timeline



Part 1. The procurement

The contract

The contract[14] examined in this investigation was entered into by the ACT Integrity Commission (the Commission) with Mr A on 19 August 2022, while Mr A was Chief Executive Officer (CEO) of the Commission. The contract commenced on 22 August 2022, the same day the new CEO commenced and one day after Mr A's employment as CEO ended. The contract was valued at $150,000. The services to be provided were of the type that would ordinarily be performed by the CEO or staff of the Commission.

Mr A's resignation

Mr A was the CEO of the Commission from 28 October 2019 to 21 August 2022. He was responsible for the Commission's day–to–day operations and for advising the Commissioner about the Commission's operations and financial performance.[15]

In late 2021, Mr A discussed with the Commissioner that he was considering resigning. According to Mr A's legal representative, in January 2022 Mr A's intention to resign from the Commission was again discussed with the Commissioner. At this meeting, the Commissioner raised concerns about continuity for the work the CEO was undertaking.

Although Mr A did not cease to be employed by the Commission until 21 August 2022, his letter of resignation[16] was provided to the Commissioner on 19 January 2022.

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[14] Contract No. AC2222486, 'Establish independent ICT Environment, Telephone Interception Capability, Policies and Procedures to Support the Commission's Operational Requirements'. The contract was for a period of 6 months until 21 February 2023.

[15] The CEO's functions are set out in section 44(1) of the IC Act.

[16] Mr A's legal representative stated that it was a letter of resignation. In responding to the first draft of the proposed report, the Commissioner disputes that it was a letter of resignation, but instead a 'letter of intended resignation'. I do not believe the precise nature of the document is an issue I need to determine.

In his letter, Mr A advised:

> 'As discussed with you yesterday, I wish to tender my resignation as Chief Executive Officer of the Commission. Also as discussed, I am prepared to stay in the position until such time as a candidate is identified and found suitable for the role. I will continue to work in accordance with my position requirements until that time.
>
> Subsequent to that candidate being in my current role, I am prepared to work on a consultant/contractor basis for two days a week to ensure the telephone interception and shared services separation projects are complete or until such time you deem that my services are no longer required.'

Sometime at the end of July 2022, Mr A learned the Commissioner had selected a new CEO[17], who would commence in the role on Monday, 22 August 2022.

The proposal

On 1 August 2022, Mr A wrote to the Commissioner advising his last day of employment with the Commission would be Sunday, 21 August 2022. On the same day, using his Commission email, Mr A wrote to the Commissioner (copying in the Chief Financial Officer (CFO)), initiating a proposal[18] to work with the Commissioner and the new CEO as a consultant on a contractual basis after he ceased to be CEO. The covering email noted that:

> I have discussed this proposal with [the CFO] and, should you agree, he is happy to organise the processing of this service contract via procurement as a single select.

Mr A's email included a proposal document, a draft statement of requirements for the procurement, and an exemption for the Commissioner's consideration and signature. Although he was still the CEO, Mr A did not declare a conflict when he provided the draft exemption and statement of requirements to the Commissioner. In the proposal document, Mr A outlined the services he would provide to the

[17] The CEO is appointed by the Commissioner (section 41 of the IC Act).
[18] There are conflicting recollections as to whether the original idea to contract Mr A was the Commissioner's or Mr A's. In my view it was not necessary for me to determine this issue.

Commission, his fees and terms of engagement. The draft exemption was to exempt the Commission from the ACT Government's procurement requirements that would otherwise have required the Commission to open this procurement to competing bids from the market.

Commissioner approves the proposal

In responding to the second draft of the proposed report the Commissioner stated that all material decisions for the procurement were made prior to the procurement process commencing.[19] He also advised the proposal did no more than state requirements that had been determined by the Commissioner.[20] While verbal instructions may have been given, there is no accompanying contemporaneous documentation to this effect.

On 2 August 2022, the Commissioner forwarded Mr A's proposal email to the CFO and requested the CFO commence a single select process to procure Mr A's services. The Commissioner outlined the remuneration he had agreed with Mr A, which included a daily fee reduced from the one Mr A had proposed.[21]

On 5 August 2022, the CFO prepared the documents for the procurement.[22] The substantive content of these forms was copied directly from Mr A's proposal.

The Commissioner signed these documents acknowledging his approval. This included the exemption, which allowed the Commission to seek a tender from only one provider (Mr A). Later that day, the CFO emailed Mr A's personal email address attaching a *Request for Quotation* (RFQ) and requested Mr A return it to the Commission.

On 6 August 2022, Mr A completed and returned the *Response to RFQ* to the CFO from his personal email address.

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[19] Attachment A, paragraph 34, 36 and 37.
[20] Attachment A, paragraph 56.
[21] The agreed hourly rate was $350.00 (plus GST) with a maximum daily rate of $2,000.00 (plus GST) for 6 or more hours, and a travel time rate of $250.00 (plus GST). Mr A had proposed the same hourly rate but a maximum daily rate of $2,500 (plus GST).
[22] The documents included a Procurement Plan Minute, Exemption from quotation and tender requirements statement, Buying Goods and Services Risk Questionnaire, and RFQ.

On 18 August 2022, the CFO presented the Commissioner with the procurement documentation for his endorsement. Relevantly, this included:

- the CFO's Conflict of Interest Disclosure noting there was an 'actual, potential, or perceived conflict of interest'
- a Conflict of Interest Disclosure Declaration for the Commissioner, pre–filled by the CFO, noting there was an 'actual, potential, or perceived conflict of interest'
- a Confidentiality Undertaking for the Commissioner, pre–filled by the CFO.[23]

The CFO's Conflict of Interest Disclosure and the pre–filled Conflict of Interest Disclosure for the Commissioner (which the Commissioner subsequently signed) both describe the conflict as:

> [Mr A] is the former [sic] Chief Executive Officer of the ACT Integrity Commission and is the only contractor being requested to provide a quotation for the required services. To address the probity concerns, [Mr A]'s RFQ response will be considered against the statement of requirements and consultancy fees will be assessed against the current remuneration tribunal determination for the CEO position, the NSW Government's capped daily rates for consultants, and other publicly available information to determine if the procurement provide [sic] value for money.

At the time these declarations were signed Mr A was still the CEO.

The Commissioner's declaration did not reference his professional relationship with Mr A nor his prior discussions with Mr A, including in January 2022, about engaging him for this work. There is no record of the Commissioner declaring or considering a potential apprehension of bias. I discuss this later in this report.

From the documentation provided by the Commission it appears the CFO was the only person evaluating the procurement, although the Commissioner's pre–filled confidentiality undertaking for the procurement stated the Commissioner was also a member of the evaluation team. The CFO recommended the Commissioner

[23] The other attached documents were: Mr A's response to the RFQ, evaluation report and assessment, and the CFO's Confidentiality Undertaking.

approve the Commission entering a contract with Mr A, which the Commissioner approved. The Commissioner and Mr A signed the contract, while Mr A was still the CEO of the Commission.[24]

The Commissioner has advised me of his view that 'by signing off on the procurement I indicated my own independent judgement of the issues involved in the procurement and would not have done so had that not been the case.' Further, the reference in the documentation to his role as chair of the evaluation panel was, '[he thought] merely reflecting [his] position as Commissioner'[25] and decision–maker.

While the documentation states the Commissioner was a member of the evaluation panel, I agree the role played by the Commissioner was as decision–maker, considering and accepting the recommendation of the CFO following the evaluation, rather than to have been part of an 'evaluation team' jointly with the CFO. Ultimately nothing of significance turns on this, other than that in my view it is one of a number of illustrations that the quality of the Commission's procurement documentation and processes can be improved.

Over the following 4 months, Mr A submitted invoices totalling $113,326.23, all of which were paid following approval by the Commissioner. On 5 December 2022, Mr A emailed the new CEO advising that for personal reasons he would be terminating his contract 2 months early on 16 December 2022. The work being undertaken by Mr A which was not complete was then progressed internally by Commission staff.

In comments provided by Mr A's legal representative, they advised he terminated his contract when he 'felt he had progressed matters to a logical point that someone else within the Commission was able to continue them….'.

On 3 August 2023, after my Office made some initial inquiries about the procurement, the current CEO provided my Office with documents relating to the procurement, including the Commissioner's declaration of a conflict of interest for the procurement. The conflicts of interest declaration had not previously been

[24] The Commissioner signed the procurement documents by DocuSign on 18 August 2022 and the approved contract was provided to Mr A the same day. On 19 August 2022, the Commissioner signed and executed the contract.
[25] Attachment A, paragraph 55.

provided to the Speaker of the ACT Legislative Assembly (the Speaker) nor to the Inspector.[26]

[26] The Commissioner is required to report a conflict of interest to the Speaker and the Inspector (section 31(2) of the IC Act).

Part 2. Conflicts of interest

Conflict of interest framework

Section 9 of the *Public Sector Management Act 1994* (ACT) (PSM Act) requires, among other things, public officials to take all reasonable steps to avoid a conflict of interest and declare or manage a conflict of interest that cannot reasonably be avoided. The Commissioner and the CEO are 'public sector members' to whom the obligations in section 9 of the PSM Act apply.[27]

Section 31 of the IC Act imposes an obligation on the Commissioner to avoid a conflict of interest and to disclose conflicts of interest to the Speaker and the Inspector.

The ACT Government's *Conflict of Interest Policy*[28] (ACT COI Policy) contains a set of whole–of–government instructions for ACT public officials issued by the Head of Service under section 17(2) of the PSM Act (which includes statutory office holders such as the Commissioner and the CEO). The policy defines a conflict of interest as including any personal interest that may influence or bias an official's judgment:

> …[a non–pecuniary interest includes…] any tendency towards favouring or prejudicing resulting from friendship, animosity or some other personal involvement of the employee that could bias their impartiality when taking actions or making decisions.[29]

Private or personal interests are essentially those interests that can bring benefits or disadvantages to a public official as an individual or to others whom they may wish to benefit or disadvantage.

The ACT COI Policy notes that conflicts of interest can be potential, perceived or actual, but that each needs to be appropriately handled. Appropriate management of conflicts of interest begins with sufficiently detailed and considered declarations

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[27] By virtue of section 150(1)(a)(i)-(ii) of the PSM Act which includes statutory officeholders and a person employed by a statutory officeholder as a public sector member under the PSM. Act.
[28] cmtedd.act.gov.au/__data/assets/pdf_file/0006/2329710/Conflict-of-Interest-Policy-2021-V2.pdf, issued June 2021.
[29] Ibid, paragraph 14.b.

of conflicts of interest. The declarations themselves are only the start of a process of identifying and implementing appropriate ways of managing the declared conflicts, such that there is no actual or perceived impairment of the integrity of the procurement process to which the conflicts relate.

The ACT Government *Conflict of Interest Policy Tool 1 – Examples and Definitions*[30] (ACT COI Policy Tool) contains a detailed discussion of close personal relationships:

> The impact of many relationships, linkages and associations can be subjective. Therefore, an employee's own judgement cannot be relied upon exclusively in determining a conflict of interest. What is important may not be what the employee thinks, but what a reasonable and independent observer would think or conclude knowing all the facts. This is why personal relationships must be declared. A close personal relationship is one in which there is a close connection between staff members or a staff member and client, and is not limited to where a pecuniary interest exists.

The NSW Independent Commission Against Corruption (ICAC) states in its guidance *Managing Conflicts of Interest in the NSW Public Sector*[31] that 'Any relationship with a person, who is more than an acquaintance, could amount to a personal interest.' Expanding on this, the Chief Commissioner of the NSW ICAC, the Hon Mr John Hatzistergos AM, has stated:

> ...what if the relationship is primarily professional and centres around professional activities that occur within a workplace...we need to consider how deep or intimate the relationship is. Certainly, socialising outside the work environment can indicate that a relationship has become personal, but socialising is not the only measure. For example, people who work closely together to achieve a professional outcome can develop a strong bond based on shared purpose, mutual trust and reliance. This can certainly

[30] cmtedd.act.gov.au/__data/assets/pdf_file/0006/1765446/Conflict-of-Interest-Policy-Tool-1-Examples-and-Definitions.pdf.
[31] icac.nsw.gov.au/prevention/corruption-prevention-publications/latest-corruption-prevention-publications/managing-conflicts-of-duties-in-the-nsw-public-sector-january-2024.

amount to a personal relationship that involves little or no socialising outside the work context.[32]

Examples of matters the ACT Government has identified in the ACT COI Policy Tool as being a conflict of interest include 'taking part in assessing a tender application where you have, or have had, a close personal relationship with a person, or organisation that has submitted a tender application'.[33]

Guidance on the management of conflicts of interest frequently incorporate concepts such as 'bias', 'dislike', or 'preference' for another person. This reflects the intention of these policies to capture the full spectrum of matters that may compromise or be perceived to compromise a person's ability to act impartially. However, in a strict legal sense these matters are better considered as 'apprehended bias' rather than conflicts of interest.

Administrative decisions, including those taken in procurement processes, must have regard to procedural fairness. Procedural fairness requires that the decision–maker is impartial and must act without bias or an appearance of bias (the 'bias rule'). To satisfy the bias rule, the decision–maker must be objectively seen as having an impartial and unbiased mind on the matter they are required to decide. An apprehension of bias arises when a fair–minded observer, appraised of the relevant facts, might reasonably apprehend a decision–maker was not impartial or had already reached a conclusion and predetermined a decision before properly considering the relevant material.

In the context of procurement decisions, an unsuccessful tenderer, or someone shut out from the usual tender process, is a person whose rights or interests may be adversely affected by a decision impugned by bias. Even in the absence of a challenge to a particular procurement decision, avoiding an apprehension of bias maintains the integrity of decision–making.

It may be reasonable, and good administrative practice, to expect individuals to consider both conflicts of interest and apprehension of bias when declaring a

[32] The Hon Mr John Hatzistergos AM, *When do relationships amount to a conflict of interest*, Australian Public Sector Anti-Corruption Conference 2024, Darwin, 31 July 2024.
[33] ACT COI Policy Tool (n30), page 4.

conflict of interest, as indicated by the ACT COI Policy[34]. However, from a legal perspective, conflicts of interest and apprehension of bias are separate legal doctrines. An apprehension of bias may not be a conflict of interest and a failure to declare and manage an apprehension of bias may not breach conflict of interest obligations.

Mr A: then CEO of the Commission

As the then CEO of the Commission, Mr A's functions included managing the day–to–day operations of the Commission and advising the Commissioner about the Commission's operations.[35] Mr A was in a position of authority in the Commission with a statutory obligation to take all reasonable steps to avoid a conflict of interest.[36] If a conflict could not be reasonably avoided, he was obliged to declare and manage the conflict.[37]

On the information before me, it appears that Mr A breached these obligations. He had a clear personal financial interest with respect to the proposal that he be engaged, which was considered by the Commission while he was still the CEO; he advised the Commissioner that the process should exempt the procurement of his services from a competitive process; he provided a draft of the statement of requirements (which he subsequently responded to as the sole tenderer), and he drafted the exemption of the procurement of his services from a competitive tender process. At no stage did he declare a conflict of interest or propose arrangements that could be considered to manage his conflict of interest.

Mr A's legal representative has suggested:

> [T]he requirement to identify a conflict of interest rests with the person whom is given the decision making responsibility [*their emphasis*] or the person taking the action that would be influenced… What is clear is that the conflict

[34] The ACT COI Policy includes 'any tendency towards favouring or prejudicing resulting from friendship, animosity or some other personal involvement of the employee that could *bias* their impartiality when taking actions or making decisions' as a non-pecuniary interest. (Emphasis added), paragraph 14.b.
[35] The CEO's functions are set out in section 44(1) of the IC Act.
[36] Section 9(1)(a) of the PSM Act.
[37] Section 9(1)(b) of the PSM Act.

> of interest arises where a "decision maker" could be affected by a decision he or she has a duty to make. It is the matters "outside of work" that would influence the judgment when taking actions or making decisions.

The Commissioner expressed similar views:

> It is necessary now to turn to the suggested conflict of interest of [Mr A]. There is no doubt, of course, that he had a pecuniary interest in the proposal to procure his services following his departure from the Commission. Such an interest is patent whenever an advantageous change is sought by any employee in their conditions of work. No declaration of a conflict of interest is necessary in this situation for two reasons: first, the personal interest is manifest from the request itself and, second, the employee is not the decision maker.

Respectfully, I do not agree.

While Mr A was not the decision–maker on his own engagement as a contractor, he did prepare draft documentation for his own procurement, using his official Commission email. His duties as CEO included to advise the Commission and he provided advice to the Commissioner about the process to be followed to procure his services.

While there is nothing unusual or improper about an official preparing documentation for review by a superior, the preparation of these documents and the giving of advice about the procurement involved a conflict between Mr A's personal financial interests and his functions as CEO. Mr A was obliged by virtue of section 9(1) of the PSM Act and the ACT COI Policy to declare and effectively manage the conflict of interest, which he failed to do.

I do not share the Commissioner's view that a self–evident conflict does not require appropriate disclosure or management. Further, I do not share the Commissioner's view that the conflict had been disclosed by virtue of the fact the conflict was obvious to the Commissioner.[38] There is a legislative requirement to declare and manage potential, perceived or actual conflicts of interest.[39]

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[38] Attachment A, paragraph 73.
[39] Section 9(1)(a) and (b) of the PSM Act.

The ACT COI Policy states:

> [An] employee may still be able to have a personal or financial interest in a matter that their directorate or agency is dealing with, so long as the interest is declared and effectively managed.
>
> In meeting this obligation, any employee with a perceived, potential or actual conflict of interest should firstly declare this to their supervisor/manager, followed by further discussions to agree on the appropriate management strategy to manage or avoid the conflict.[40]

The ACT COI Policy makes further provision for how conflicts should be declared and managed. Specifically with respect to procurement activities, the ACT COI Policy and related documents required Mr A to make a formal declaration:

> Employees involved in certain procurement activities must follow the requirements of the Probity in Procurement Guide.
>
> An ACT Procurement Conflict of Interest Disclosure form will need to be completed to confirm that the employee does not have a conflict of interest or that the conflict of interest is unlikely to arise during the course of their involvement in the procurement activity…[41]

Additionally, the *Probity in procurement guide* provides that '[p]robity must be observed at each stage of procurement' and that one of the 'probity principles' is the '[i]dentification and management of conflicts of interest'.[42] It further provides that:

> ACT Public Service (ACTPS) officers and employees have an obligation to act ethically and with integrity in accordance with the [PSM Act].

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[40] ACT COI Policy (n28), paragraph 46-47.

[41] Ibid paragraph 40-41.

[42] The ACT Government *Probity in procurement guide* has changed since the contract for Mr A's services was entered into, although not materially for the purpose of this report. At the time of the procurement, version 1.2 was in effect. The current published version is 4.0: procurement.act.gov.au/__data/assets/pdf_file/0007/2519413/Probity-in-procurement-guide-v4.0.pdf, see page 2 of version 4.0 and page 1 of version 1.2.

...

> To help ensure any potential, perceived or actual conflicts of interest are actively managed, all ACTPS officers and employees involved in a procurement must complete a conflict of interest disclosure (see **Appendix H**), including, where relevant, to affirm that they do not have a conflict of interest. The completed Disclosures must be maintained as a record with other documents relating to the procurement. Further guidance on managing conflicts of interest is available in the Conflict of Interest Policy.[43]

Mr A was involved in the procurement and he was required by the *Probity in procurement guide* to complete a conflict of interest disclosure, in writing, which he failed to do.

Mr A stood to gain financially through being awarded the contract, which provided him with a source of income after ceasing to be CEO. He had a conflict of interest and he should have declared the conflict prior to preparing documents for the procurement, including the exemption and statement of requirements. The Commissioner was aware of the conflict and, as the decision–maker, the Commissioner should have ensured Mr A declared the conflict and that measures were put in place to manage the conflict.

The Commissioner

While the Commissioner signed the Conflict of Interest Disclosure form prepared by the CFO, this disclosure was not included on the Commission's conflicts of interest register[44], nor provided to the Speaker, nor the Inspector.[45] It was not until 3 August 2023, nearly 12 months later, that my Office was provided with the disclosure, after my Office asked about the procurement.

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[43] Ibid, see page 11 of version 4.0 and page 7 of version 1.2.

[44] Section 32 of the IC Act requires the Commissioner to keep a conflicts of interest register that must contain (among other things) a copy of each disclosure made under section 31(2). The Commissioner must make this register available for inspection by the Inspector at any time (section 32(3) of the IC Act).

[45] Section 31(2) of the IC Act requires the Commissioner to report a conflict of interest to the Speaker and the Inspector.

The Commissioner's disclosure did not reference or address the Commissioner's professional relationship with Mr A, nor the earlier discussions he had with Mr A, including in January 2022, about engaging him.

In a letter dated 1 September 2023, the Commissioner informed me that he had signed the 'conflict of interest form simply as an administrative step', and that 'there was no actual or perceived conflict of interest in contemplation, but it was thought prudent to address the probity concern identified'. The Commissioner also emphasised that his relationship with the former CEO 'was entirely professional with no social component' and that 'there was nothing that might have suggested any personal interest [of the Commissioner].' The Commissioner maintained that, notwithstanding that he had completed a conflict of interest declaration, there was no duty under the IC Act[46] to declare a conflict.

I accept the Commissioner's advice the disclosure was made to address a matter of probity rather than to disclose a conflict of interest in the strict legal sense. I also accept the Commissioner did not have a personal interest in the procurement that required disclosure under the IC Act, and reporting to the Speaker and the Inspector. However, in situations where there is no explicit requirement to declare and manage issues that could raise probity concerns, in my view best governmental practice would see the Commission take a more systemic approach to identifying, documenting, and managing circumstances that could give rise to questions of probity in a procurement process. In my view, doing so aligns with the intentions of the ACT Government for Territory entities to maintain sound governance practices, with a focus on transparency and ethical engagement in procurement practices.[47]

I have also considered whether the Commissioner ought to have taken steps to manage an apprehension of bias, given the preference the Commissioner appeared to show to hiring Mr A as a consultant.

The Commissioner has stated in his formal response to the second draft of this report that all material decisions for the procurement were predetermined and

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[46] Ibid.

[47] See: *Probity in procurement guide*, (n42), see page 1 of versions 4.0 and 1.2.

made prior to the procurement process commencing, and prior to the evaluation panel being formed and formal decision–making occurring.[48]

A pre–existing stance on a matter could be seen as giving rise to an apprehension of bias.[49]

Working with a known individual may be convenient and minimise any disruption, but a preference to do so can result in unintentional bias that can undermine objectivity. When decisions are influenced, or perceived to be influenced, by personal preference they need to be handled cautiously. Managing apprehensions of bias, including those that may be unintentional, is part of ensuring objective and transparent decision–making.

I do not suggest the Commissioner was biased in his decision–making concerning the procurement of Mr A's services. I do not have evidence to warrant consideration of the motivation of anyone involved in these matters. The circumstances of the procurement do however raise a substantial concern about there being a reasonable apprehension of bias. This distinction is important, as the concern is not just about actual bias but also whether a fair–minded observer, appraised of the relevant facts, might reasonably apprehend the Commissioner, as the decision–maker for the procurement, was not impartial or had already reached a decision on the procurement before properly considering the procurement material.

The Commissioner had discussions with Mr A, including in January 2022, about engaging Mr A's services – well prior to the procurement process commencing. Payment negotiations occurred before the RFQ was sent to Mr A to formally submit his proposal. The Commissioner had a close professional working relationship with Mr A over the preceding 17 months, during which one of Mr A's functions was to be the key adviser to the Commissioner on the operations of the Commission. Given these factors, a reasonable and independent observer, appraised of all the facts may perceive or apprehend the Commissioner may not bring an open and

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[48] Attachment A, paragraph 34, 36 and 37.

[49] See: *Asset Energy Pty Ltd v Commonwealth Minister for Resources* [2023] FCA 86; 179 ALD 278 [30], Justice Jackson wrote 'Mr Morrison's public comments might lead a fair-minded observer to reasonably apprehend that when he did come to deliberate on the matter… his mind might have been closed to persuasion.'

impartial mind to the necessity of the procurement, the process for the procurement, and the decision itself on the procurement.

In my view, consideration should have been given as to how to appropriately manage an apprehension of bias, before any decisions were made about the procurement. For example, delegating[50] the procurement decision to the incoming CEO, and/or involving other people from outside the Commission in the procurement process, to ensure the process was visibly impartial and to ensure the independent consideration and preparation of the Commission's procurement documents.

The Commissioner has advised that in his view there would have been no utility in engaging an independent person in the procurement process as the Commissioner held all the requisite knowledge about the need for the procurement and Mr A's qualifications to carry out the work.

Respectfully, in my view this illustrates why a reasonable observer might reasonably conclude that when Commissioner came to consider the procurement material and formally decide matters, he may not have been open to persuasion. It is a fact that a large number of law enforcement and integrity agencies in Australia have been using telecommunications interception powers for years, for example, and a number of people therefore possess expertise in the use of these powers. It is unlikely that Mr A was the only person qualified to deliver the services that were procured, such that there was no merit in testing the market and value for money.

[50] Under the Government Procurement Regulation 2007 (ACT) (GP Regulation) the power to make the decision rests with the Commissioner, however, the Commissioner's functions can be delegated to staff of the Commission (section 53(1) of the IC Act).

The CFO

The Commissioner directly instructed the CFO to contract Mr A on a single select process. In an email dated 2 August 2022, the Commissioner wrote:

> Hi [CFO],
>
> Would you please process this as a single select procurement. We have agreed to $350 a day and $2000 per day (six hours or more).
>
> Thanks,
>
> Commissioner

Expectations for public sector conduct are set out in Division 2.1 of the PSM Act, which includes a requirement public officials carry out their duties with reasonable care and diligence, impartiality and honesty and not act in a way that undermines the integrity and reputation of the ACT public service. While the ACT Government has not developed specific guidance on the responsibilities of CFOs, the Department of Finance guidance[51] is relevant as it provides best practices and outlines a CFO's responsibilities. These include that CFOs are responsible for organisational financial planning, management, compliance, risk and advice.

The *Probity in procurement guide* provides guidance on the role of evaluation team members (including the chair). This includes being responsible for observing probity within the role allocated to them.

No evidence has been provided that demonstrates the CFO provided advice to the Commissioner about the procurement process, and information provided by the Commissioner indicates that he did not provide such advice. In his response to the first draft of the proposed report the Commissioner specifically stated:

> This assumes that the CFO had a duty to advise me about whether to proceed by way of a single select process. The Inspector cites no evidentiary basis for the existence of such a duty and I do not accept that he had such a duty. I did not consult him about whether there was a basis for such a process and I do not recall him proffering any advice on the subject.

[51] finance.gov.au.

I accept that the CFO did not have an express duty under the PSM Act to advise the Commissioner on the procurement. While on that basis I do not criticise the CFO, I think it would have been desirable, as a matter of due care and diligence and of risk management, for the CFO to have offered advice given the unusual manner in which this procurement had been developed.

In any event, given the way in which this procurement proceeded, I believe the Commission needs to seek external advice on every future single select procurement process it conducts.

Recommendation 1

The ACT Integrity Commission engage independent procurement advice as an integral part of any proposed single select tender process.

Part 3. Shortcomings in the procurement process

Procurement legal framework

The procurement process for an ACT Government Entity[52] must be conducted in compliance with relevant legislation, policies, and guidelines, including the *Government Procurement Act 2001* (ACT) (GP Act). The obligation to meet these requirements rests with the Commissioner as the 'responsible chief executive officer' under the GP Act. The Government Procurement Regulation 2007 (ACT)[53] (GP Regulation) provides detail on procurement requirements.

At the time of the procurement section 22A(3) of the GP Act required that in pursuing value for money, Territory entities must ***have regard to probity and ethical behaviour***. This provision has since been amended: it now requires Territory entities to ensure that procurement is undertaken with probity and stipulates that probity requires the Territory entity's behaviour is ***ethical and there is evidence of this behaviour*** *and the procurement is undertaken with integrity, uprightness and honesty* (section 7 of the GP Act).(Emphasis added).

Identification of needs

The intention of the procurement legislation is for an entity to first establish there are goods, services or works required and then to consider the appropriate process to procure those goods, services or works. In this case, however, it appears the Commissioner determined that Mr A's services were required and then set about engaging Mr A to supply those services.

[52] 'Territory entity' is defined by the GP Act. At the time of the procurement, it included at section 3(1)(iv) an Officer of the Assembly, which includes the Commission (this Act has since been amended and the current provision is at section 6(1)(c), the Commission remains a Territory entity).
[53] The GP Regulation has changed since the contract for Mr A's services was entered into, although not materially for the purpose of this report.

Following a discussion with the Commissioner, Mr A emailed the Commissioner with the proposal that Mr A provide the following services:

- establishing infrastructure to enable telephone interception capability
- facilitating the separation of the Commission's IT services from ACT Government Shared Services
- continue developing and reviewing operational policies and procedures, and
- providing handover information and guidance to the incoming CEO.

In responding to the first draft of the proposed report, Mr A's legal representative stated that '[t]he Commissioner indicated that he considered that the best way forward was for the CEO to continue working on the TIA [*Telecommunications (Interception and Access) Act 1979* (Cth)] Project and the Shared Services Project while reporting to the new CEO and requested that a proposal be provided to him in this regard.' Mr A's legal representative stated that '[i]t was not the CEO's proposal or something that he proffered or pursued'.

Mr A's description of these services was picked up verbatim[54] in all future procurement documentation (including the evaluation and the contract).

In response to my request for information at the commencement of my investigation, the Commission provided me with no evidence that anyone had turned their mind to whether the Commission had an actual need for the services that were being proposed. In responding to the second draft of the proposed report, the Commissioner stated that information about the need for the services was not requested by my Office.[55] I had however asked the Commission to provide all

[54] There was one small language modification between the 2 documents. Mr A's proposal suggested he would 'continue to develop and review operational policies…' The final contract stated he would 'develop and review operational policies…'.
[55] Attachment A, paragraph 29.

procurement records,[56] and I consider this encompasses any documents outlining the need for the services.

In exchanges with the CFO at the time, the Commissioner noted that 'all the tasks are CEO responsibility and we have just recruited a highly competent CEO.' No evidence was provided of any consultation with the incoming CEO on whether there was a need for the services before the contract was entered into. In this regard, I note the incoming CEO had worked at a senior level in a larger integrity agency with telephone interception powers and might therefore have been expected to have relevant experience in issues relating to telephone interception, for example.

There was also no evidence in the procurement documentation of the Commission having considered whether the tasks needed to be performed by someone of Mr A's seniority or whether there were other options that may have provided better value for money – for example, delegating the tasks to a staff member or by testing the market and undertaking a competitive tender process. There is also no evidence the Commissioner or the CFO actively engaged together as members of the evaluation panel. If this occurred, it is not reflected or evidenced in the procurement documentation.

In his response to the first draft of the proposed report, the Commissioner detailed reasons for the procurement and the exemption and stated his view that:

> [t]his was not a matter that I was required to place on record…it was self–evident, as was the commonsense response… This was also obvious as to require no more documentation than was produced in the management of the issues [being the procurement documentation].
>
> …
>
> The point as to record keeping of the course of negotiations [of Commission projects] is not entirely unreasonable but it is quite unreal in terms of utility. It would inform a succeeding negotiator but, depending on the matter in hand,

[56] The Commission was asked to provide 'all email correspondence and attachments, procurement documentation, file notes and evidence of meetings or other communications relating to the procurement activity that resulted in contract AC2222486.'

> would be no substitute for the continuation of the relationship that had developed [with Mr A and external parties] over the previous period.

I do not share the Commissioner's view the need for the procurement was so self–evident that it did not require documentation of any assessment or evaluation beyond what was drafted by Mr A. At the time of the procurement the GP Act required that in pursuing value for money, a Territory entity must have regard to probity and ethical behaviour, management of risk, open and effective competition and optimising whole of life costs.[57]

When the basis and rationale for a decision is not adequately documented, it becomes difficult to demonstrate that these requirements have been met. What was self–evident was the Commission had decided that it wished to continue Mr A's services, despite having replaced Mr A with a very well qualified CEO, and that having determined that it wished to do this it then proceeded to run a procurement process that would deliver this outcome.

I have noted above that a number of Australian agencies have considerable experience in the first proposed service, namely establishing infrastructure for telephone interception capability. Many agencies also have experience with moving from shared services arrangements to in–house, which is the second proposed service. The Commissioner has stated in his formal response to this report that, while other agencies may possess expertise in these areas, that is not relevant as he cannot procure services from those agencies.[58] This ignores the fact that many people have developed expertise from working in those other agencies and then resigned or retired, and the services of those people can be procured. Developing operational policies and procedures (the third proposed service) is a relatively common task. While Mr A was uniquely qualified to provide a handover to the incoming CEO (the fourth proposed service), in my experience a handover is generally seen to be a key requirement for an exiting staff member to prepare or arrange before separation and is not separately remunerated. Mr A also tendered his resignation in January 2022 and he had therefore already had 7 months within

[57] GP Act, Republication No 33, effective 6 April 2022—26 November 2023, section 22A(3).
[58] Attachment A, paragraph 22.

which to prepare appropriate handover documentation before the new CEO commenced in August 2022.

In response to my draft report, I have received comments that at the time of the procurement the Commission was experiencing staffing shortfalls, personnel issues and capability gaps, all of which I am willing to acknowledge. The procurement documentation did not however mention these issues or provide any explanation why it was necessary to procure these services externally or to procure them from a person of Mr A's seniority.

Mr A's legal representative provided extensive commentary to support Mr A's view that he was uniquely qualified to provide the services, that he considered the procurement of his services to be urgent and essential to the operation of the Commission, and that the rates he proposed were appropriate. These were considerations for the Commission itself to independently decide and document, not for the person offering their services.

In his comments to me, the Commissioner expressed similar views to Mr A about the urgent and essential nature of the procurement and Mr A's suitability to provide those services.

In his response to the first draft of the proposed report, the Commissioner also advised that:

> *Whilst I considered [Mr A's] view, I exercised an entirely independent judgment, based upon my active management of the Commission's business and my understanding of its needs, which the statement of requirements reflected. That they had been drafted by [Mr A] in the first place was merely a convenience and, as should have been obvious, cannot rationally lead to any inference that therefore I did not consider them for myself*.

I am not suggesting the Commissioner did not consider for himself the procurement proposal against the statement of requirements, putting to one side Mr A's role in drafting both documents. The documentary evidence of the procurement is however in my view another illustration that the way in which the Commission conducts single select procurement processes should be improved to better demonstrate and record compliance with ACT Government procurement requirements.

Exemption from open and effective competition

At the time of the procurement, for purchases estimated at $25,000 or more, and less than $200,000, section 6 of the GP Regulation required an ACT Government Entity to seek at least 3 written quotations from suppliers. At that time, section 10(1) allowed a 'responsible chief executive officer'[59] to, in writing, exempt the entity from the requirement to seek 3 quotations. However, they could only do so under section 10(2) **'if satisfied, on reasonable grounds, that the benefit of the exemption outweighs the benefit of compliance with the requirement'** (emphasis added). At that time, examples provided in the GP Regulation of where the benefit of the exemption may outweigh the benefit of compliance included where only one, or a limited number of suppliers can supply a particular service or where there are time pressures.[60]

Mr A was the first to suggest that an exemption from standard procurement process was required. In his email of 1 August 2022 to the Commissioner, he wrote:

> My engagement as a contractor **requires** [*my emphasis*] an exemption from the normal procurement process. Such an exemption is attached for your perusal / amendment. This needs to go to [the CFO] so he may proceed with the procurement.

Mr A prepared, and attached to his email, a draft exemption. The document drafted by Mr A, that would ultimately be signed by the Commissioner, read:

> [Mr A] has been instrumental in the ongoing development of operational policy and processes particular to the Commission (sic) effectiveness. His knowledge of the Commission's operating framework and technical requirements is unique in that he established the Commission's current operational methodology and designed, and project managed the current

[59] 'Responsible chief executive officer' is defined in the dictionary of the GP Act. For an Officer of the Assembly, the Officer, or in this case the Commissioner, is considered the 'responsible chief executive officer'.
[60] At the time of the procurement, exemption reasons were set out in section 10(2) of the GP Regulation and are currently set out in section 9.

> physical infrastructure. [Mr A] has resigned from the Integrity Commission effective Sunday 21 August 2022.
>
> I am further satisfied that under s22A of the Government Procurement Act 2001 the engagement of [Mr A] for an initial period of 6 months, to progress the IT projects identified above and continue to review and develop operational policy represents value for money in that his involvement reduces risk, he has appropriate security clearances, his knowledge of the Commission's operating environment and systems is unique. Further he has already commenced negotiations and procurement processes with providers and ACT and Commonwealth government and continuity in this process is considered essential.

Mr A's legal representative has stated that by providing the draft exemption:

> [Mr A] was simply alerting the Commissioner to the need for an exemption, if the Commissioner considered a single select process should follow, not attempting to conceal that a competitive process could also be followed.

I do not suggest that by providing the draft exemption that Mr A was trying to conceal the option of a competitive process. He did not, however, draw attention to the fact there was an alternative option to secure his services – and, as noted above, in providing advice about the procurement process and in drafting procurement documents, he also did not declare any conflict of interest.

Mr A's legal representative also stated that:

> [I]t is common practice within government organisations for staff to prepare drafts…for more senior staff or decision makers…
>
> It is good procurement practice to ensure consistency of the description of the services to be provided across the procurement documents and throughout the procurement process.

While it may be common practice for staff to prepare drafts for consideration by others, it is not common practice for the individual tendering for work to draft an exemption from a competitive tender process for their services or for their words to

be picked up verbatim[61] in procurement documentation (including the evaluation report, contract and exemption), as occurred. Mr A should also have filled out a Conflict of Interest Disclosure declaration[62] to accompany the material he prepared relating to the procurement of his services.

The commentary drafted by Mr A frames him as the only person capable of providing the services and omits information that might enliven the suitability of others to perform the services.

I have not been provided with any objective analysis of the market or other possible suppliers. As noted above, however, when Mr A ultimately terminated his contract 2 months early the Commission did find alternative ways to progress the work.

In response to my proposed report, the Commissioner stated:

> As it happened, I agreed with his [Mr A's] assessment both of the nature of the outstanding work and of his expertise in relation to it. There is no basis whatever for the Inspector to question my judgment about this.

I do not question whether the Commissioner agreed with Mr A's self–assessment of his capabilities, given he signed off on the verbatim reproduction of Mr A's words. The issue is the lack of any record of consideration of how the benefit of the exemption outweighed the benefit of compliance with the requirement to seek at least 3 written quotations from competing suppliers, as required by the GP Regulation. At the time of the procurement, section 10(4) of the GP Regulation required that the exemption must include the 'responsible chief executive officer's' (the Commissioner's) reasons for giving the exemption.

In responding to the second draft of this report, the Commissioner stated that:

> The Regulation does not require a "record of any consideration of how the benefit of the exemption outweighed the benefit of compliance with the requirement to seek …quotations". The language of the regulation is quite specific about this. What is required by Regulation 10(4)(b) is "the reasons for giving the exemption". In my view, it logically and obviously followed from the

[61] There was one minor language modification between the 2 documents (n54).
[62] By virtue of section 9(1) of the PSM Act and the ACT COI Policy and the *Probity in procurement guide*.

> explanation of [Mr A]'s unique experience and the nature of the tasks required that there were no or it was most unlikely that there could be any "competing suppliers". These needed to be competitive in respect of the key requirements of the position being procured. It was clear that, in my opinion, this was not reasonably available. These amounted to "reasonable grounds" for not seeking quotations.[63]

While the reasons given in the exemption document record the Commissioner's view that Mr A had unique knowledge of the Commission, and the Commissioner's response to the second draft of this report provides views on whether there were potential competing suppliers, there is no record in the procurement documentation of any consideration or exploration of whether there might be other potential suppliers—which is one of the examples in the GP Regulation of when the benefit of the exemption may outweigh the benefit of compliance.

At the time of the procurement, the GP Regulation provided that another possible reason for the use of single select procurement is when there are time pressures – however, the procurement documentation does not identify urgency of the procurement as a relevant factor.

Mr A had submitted his resignation in January and the Commission had had nearly 7 months to succession plan and put in place viable options and alternatives. While Mr A may have commenced relevant negotiations with other Government agencies in terms of the tasks covered by the procurement, a change of personnel is not unusual in government administration – which is one reason why there are record–keeping requirements on ACT public servants.

In his comments to me, the Commissioner provided further reasons for the exemption and his view the required skills and experience were not available in the market, and that uncertainties in timing and scope of the procurement made a competitive tender process impracticable.[64] However, the Commissioner's reasons should have been sufficiently documented at the time of the decision, rather than after the fact.

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[63] Attachment A, paragraph 43.
[64] Attachment A, paragraph 18.

Value for money

The ACT Auditor–General has observed that:

> … procurements using exemptions must demonstrate value for money. … a clear demonstration that value for money has been pursued is essential to public confidence in government procurement.[65]

The GP Act establishes the importance of achieving value for money in all procurement activities.[66] At the time of the procurement, section 22A provided that:

- A Territory entity must pursue value for money in undertaking any procurement activity.
- Value for money means the best available procurement outcome.
- In pursuing value for money, the entity must have regard to the following:

  (a) probity and ethical behaviour

  (b) management of risk

  (c) open and effective competition

  (d) optimising whole of life cost

  (e) anything else prescribed by regulation.

The Commission was required to turn its mind to these matters during the procurement process, and to manage or treat any associated risk.

(a) Probity and ethical behaviour

The *Probity in procurement guide* provides guidance for ACT Government entities on probity issues. The *Probity in procurement guide* highlights that 'concerns about

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[65] ACT Auditor–General's Report-*Procurement Exemptions and Value For Money*-Report No. 7 / 2021.
[66] The GP Act has changed since the contract for Mr A's services was entered into; however, Territory entities are still required to achieve value for money in their procurements and to manage risk (section 8).

probity in procurement undermine public trust and increase the risk of the ACT Government's exposure to reputational damage, including through legal challenge to procurement processes.' The *Probity in procurement guide* advises that ACT Government entities should complete a risk assessment during the planning of a procurement to inform appropriate risk treatments. Risks are to be 'assessed holistically in the context of the procurement'. It is recommended procurements assessed as medium (or high risk) have additional assurance measures to mitigate the increased level of risk, including a probity plan and a probity adviser.

In the *Procurement Plan Minute*, the CFO assessed the risk rating as 'low'. This was despite his own assessment there were probity concerns[67] and despite, in my view, 3 of the indicators in the *Probity in procurement guide* apparent to this procurement suggesting a 'medium' risk was more appropriate, namely:

- the estimated total cost of the procurement being high relative to the types of procurement normally undertaken by the Commission
- the requirements of the procurement being novel, and
- a potential for bias (eg because of an incumbent supplier).

In responding to the second draft of the proposed report, the Commissioner expressed similar views to the CFO that there was nothing inherently unique or unusual in the nature of the services being procured.[68]

At the time of the procurement, the Commission had awarded 11 contracts that were reported to tenders.act.gov.au. Of those contracts, only 3 were for consultancy–style services. The largest of those was the financial management services contract awarded to the CFO's own company for $115,500 (this contract provided for the CFO to undertake the CFO functions). The other 2 contracts were for less than $45,000. This indicates the estimated total cost ($150,000) of this procurement was high relative to other Commission procurements.

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[67] In the Risk Questionnaire attached to the Procurement Plan Minute, the CFO marked 'yes' to the question 'Are there any current probity concerns in relation to this purchase? Consider: is there a conflict of interest, bias or appearance of bias, fairness, impartiality or confidentiality concerns?'.
[68] Attachment A, paragraph 49.

When completing the *Buying Goods and Services Risk Questionnaire*, the CFO wrote that the purchase of services from Mr A was not unusual or unique, but in the next part of the form he states '**these projects are not normal or routine procurements for the Commission**.' (Emphasis added.)

Final risk indicators relevant to a rating of high/extreme risk were 'incumbent supplier with access to data or information not publicly available' and a 'high level of supplier engagement through the procurement process'.

Mr A was the CEO of the Commission. He had access to confidential information to which potential external competitors did not have access. He drafted procurement documents and provided advice on the procurement. These factors should have triggered reflection on the need for and benefit of higher probity requirements, as well as prompting consideration of whether there were conflicts of interest that should be declared and managed (as discussed above).

The Commissioner has advised me:

> However, since it was intended to proceed by way of a single select procurement, the risk derived from [Mr A's] access to information did not arise. Indeed, it was [Mr A's] familiarity with the Commission's needs that was a key factor in favour of such a procurement.

I do not share the Commissioner's view that Mr A's access to confidential information was not a risk. At the time the risk was required to be assessed, the procurement process was ongoing and the formal decision–making process in relation to the exemption was still to occur. Mr A used his knowledge to draft the procurement documents and exemption, which framed Mr A as the only person capable of providing the services.

Given his close professional working relationship with the Commissioner, the prior discussions the Commissioner had with Mr A, including in January 2022 about engaging him for this work, and the Commissioner's advice that all material decisions were made prior to the procurement process commencing, there was also a potential risk of apprehended bias. The *Probity in procurement guide* states that bias is an indicator that a procurement is medium risk.

The questionnaire recommends that, where there are potential concerns, the Entity seek advice from the ACT Procurement Helpdesk[69]. It also recommends, for medium risk procurements, that a probity advisor be used. In his response to the first draft report of this investigation the Commissioner advised that no independent advice was sought with respect to this procurement.

In my view, the probity risk of the procurement was inaccurately assessed as low.

(b) Management of risk

The CFO's proposed management of the identified – in his view, low–risk was as follows:

> To address the probity concerns, Mr A's RFQ response will be considered against the statement of requirements and consultancy fees will be assessed against the current remuneration tribunal determination for the CEO position, the NSW Government's capped daily rates for consultants, and other publicly available information to determine if the procurement provide (sic) value for money.

Simply reviewing Mr A's response against a statement of requirements that Mr A himself drafted would not render the procurement decision appropriate or sufficiently demonstrate the procurement was undertaken with probity. Similarly, assessing consultancy fees against a tribunal CEO remuneration determination does not address the probity concerns of using a sole select process, where the sole applicant is a current staff member, with what appeared to be a single person evaluation panel. Other shortcomings included a failure to declare or manage Mr A's conflict of interest, potential apprehensions of bias in the decision–making process, and no independent involvement or advice at any step of the process.

At a minimum, external advice from a probity adviser or from the ACT Procurement Helpdesk should have been sought. Had the independent advice been that a single select process was appropriate, there would then have been records of that advice and of the decision–making process involved.

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[69] The Procurement ACT Helpdesk provides procurement support for Territory entities.

The procurement lacked appropriate probity and risk mitigation measures to withstand public scrutiny and did not have appropriate risk treatments in place.

(c) Open and effective competition

By choosing to issue an exemption the Commissioner chose to rule out open competition. Even if it were thought that Mr A may be the only individual capable of providing the services, that could have readily been tested through an open procurement process in the 7 months between submitting his resignation and his actual departure, thereby avoiding the integrity issues manifest in the procurement as it occurred. Similarly, sufficiently detailing the reasons for the exemption at the time the decision was made would have assisted to address probity concerns and ensured the decision could withstand public scrutiny.

(d) Costs

The final consideration of value for money is an assessment of the whole of life costs of the contract[70]. In his proposal to the Commissioner of 1 August 2022, Mr A proposed his consultancy rates. On 2 August 2022, the Commissioner's email to the CFO confirmed that he had agreed a reduced rate. This email was sent (and therefore the negotiations had taken place) *before* the RFQ was sent to Mr A to formally submit his proposal. The final contract reflected these rates and allowed for travel expenses to be reimbursed.

The Commissioner wrote that Mr A's remuneration would be determined by assessing:

> [T]he current remuneration tribunal determination for the CEO position, the NSW Government's capped daily rates for consultants, and other publicly available information.

In his response to the first draft of my proposed report, the Commissioner advised the CFO performed the calculations about the real benefit of the Remuneration Tribunal's determinations of the remuneration of the CEO and Commissioner and

[70] At the time of the procurement, the GP Act expressly required Territory entities to have regard to optimising whole of life costs (section 22A(3)(d)).

obtained information in the public domain about consultation fees paid by the NSW Government. The Commissioner stated:

> There is no basis for any fair criticism of the approach taken to the fixing of [Mr A's] consultancy rate. It was transparent and self–evidently reasonable.

While Mr A was an experienced CEO, the relevant issue is the appropriate rate for the services that are being contracted and being delivered – not the rate that an individual who happens to be the CEO has proposed.[71] As noted above, the procurement documents did not detail any obvious need for the services to be procured from someone of CEO level or any analysis of the appropriate cost for the delivery of the services.

In his response to the first draft of my proposed report, the Commissioner advised that he considered the services were required to be delivered by an individual at the CEO level. He further advised that when Mr A terminated the contract, tasks were taken up by the current CEO or, to the extent that some were undertaken by staff, under the direct supervision of the CEO. While noting those comments, in my view the Commissioner's assessment should have been documented at the time of the procurement.

Conclusion

As an integrity agency, in my view it is desirable the Commission demonstrates integrity and probity in its procurement practices, otherwise it risks undermining public confidence in the broader systems it is meant to safeguard. Even the perception of bias, conflicts of interest or impropriety can erode public trust and impact the Commission's ability to perform its role effectively.

In my view, the procurement documentation does not adequately demonstrate compliance with the requirements in the GP Act and GP Regulation (as they were at that time). While I have been provided with a range of statements about the

[71] Comments provided by Mr A's legal representative included: 'The CEO had not previously undertaken work as a contractor … the CEO was very conscious of ensuring that he appropriately researched applicable hourly rates and daily rates to ensure his rates were appropriate for his skills and the projects that he was to undertake. This included researching rates for applicable services on NSW and Federal government websites.'

process in response to my draft report, these were not reflected in the Commission's documentation of the procurement.

At the time of the procurement, the Commission did not have a procurement policy. In my view, the Commission should have appropriate guidance in place for the procurement of goods and services. The Commission's procurement policy should reflect the requirements of the ACT Government's procurement framework and should clearly set out the requirement to fully record the reasoning process in each step of a procurement.

It is important that both initial and refresher training be provided to Commission staff on the ACT Government's requirements for managing conflicts of interest, managing apprehension of bias and for procurement. Participation in the training should be recorded in a register of mandatory staff training.

This investigation has identified a possible gap in the legislation in relation to the requirement in section 31(2) of the IC Act for the Commissioner to report a conflict of interest to the Speaker and the Inspector. This requirement is limited to reporting conflicts of interest in the strict legal sense and does not extend to apprehensions of bias which may require the Commissioner's recusal.

It may be appropriate for the Commissioner to disclose to the Speaker and the Inspector the management of apprehensions of bias in the same way the Commissioner discloses management of conflicts of interests. I will be recommending to the ACT Government that it consider this when considering the recent review of the IC Act.

I will also propose that the ACT Government consider updating the ACT Government's COI Policy to include the declaration and management of apprehensions of bias. Additionally, the ACT Government may wish to consider amending the disclosure requirements for procurement to include a requirement to disclose and manage circumstances that may give rise to an apprehension of bias.

Recommendation 2

The ACT Integrity Commission (the Commission) develop a procurement policy consistent with the requirements of the ACT Government procurement framework. The policy should require the Commission to document fully for each procurement, the reasons for the procurement itself, the reasons for the method of procurement chosen and the reasons for the decision made upon the procurement.

Recommendation 3

The ACT Integrity Commission develop and maintain a register of mandatory staff training, to include training on conflicts of interest and bias and procurement training.

Attachment A: ACT Integrity Commissioner's response

ACT INTEGRITY COMMISSION

Response to recommendations – Investigation into a procurement by the ACT Integrity Commission

The ACT Integrity Commission has, and always will, comply with all applicable legislated and mandated requirements. This includes the requirements set out in the *Government Procurement Act 2001*, *Government Procurement Regulation 2007* and Government Procurement Rules that guide the practical application of this legislation.

The Commission takes very seriously the notion of being an exemplar of all processes or actions by which other government officials are held to account. The Commission does not accept that any breach of the applicable procurement legislation or regulations occurred in relation to the procurement examined in this report.

The Commission also notes the considerable work done within the Commission on procurement. This includes:

- compulsory training for all staff involved in procurement activities.
- the inclusion in Commission Annual Reports of a table of contracts to provide full transparency – something which is in addition to disclosure requirements on the Contracts Register.
- the engagement of an independent probity adviser for major procurements undertaken by the Commission.
- the completion of a procurement 'maturity assessment' of its organisational capabilities relating to Procurement.
- formal decision making processes for all procurements.
- Engagement with ACT Procurement on novel or complex issues relating to Commission procurements
- the active management of all contracted suppliers, including assessment of performance against key performance measures

This information is contextual to explain the Commission's position on each of the recommendations contained within this report.

Recommendation 1

The ACT Integrity Commission engage independent procurement advice as an integral part of any proposed single select tender process.

ACT Integrity Commission response: Not accepted

This recommendation seeks to impose an additional and different requirement on the Commission that does not exist under the current ACT public sector procurement framework. In principle, the Commission does not accept that a different set of standards should be imposed on it that are not otherwise a part of the procurement framework for territory entities.

In accordance with current practices, where a procurement has been assessed as a medium or high risk using the procurement risk assessment tools provided by ACT Procurement, the Commission has proceeded to seek advice from a third-party probity adviser. That risk framework includes assessment of factors such as whether an incumbent provider exists and/or whether perceived or actual conflicts of interest exist. The Commission agrees that independent probity advice is an essential element to maintain probity of a procurement throughout its lifecycle. The Commission will continue with this approach, using either probity advisory services within Procurement ACT and/or third-party advisers.

Recommendation 2

The ACT Integrity Commission's (the Commission) develop a procurement policy consistent with the requirements of the ACT Government procurement framework. The policy should require the Commission to document fully, for each procurement, the reasons for the procurement itself, the reasons for the method of procurement chose and the reasons for the decision made upon the procurement.

ACT Integrity Commission response: Not accepted

In line with the principle (referred to in the response to recommendation 1 above) of not imposing additional standards on the Commission regarding procurement practices, the Commission does not agree that it needs to implement a procurement policy.

Developing an Integrity Commission specific procurement policy would imply the practices followed by the Commission are somehow different to the procurement practices expected to be followed by other territory entities. The Commission is committed to following and complying with procurement standards as set by Procurement ACT for all procurement activity and routinely follows this guidance now.

Commission staff are regularly reminded on the need to become familiar with and comply with all legislative requirements that relate to it. The Commission only develops internal policies that relate directly to the performance of its functions under the IC and PID Acts and/or where some adjustment is required to adapt 'whole of service' policies to the context of the Commission as an officer of the Legislative Assembly.

Recommendation 3

The ACT Integrity Commission develop and maintain a register of mandatory staff training, to include training on conflicts of interest and bias and procurement training.

ACT Integrity Commission response: Accepted

The Commission currently maintains a register of mandatory staff training and has continued to evolve this practice by expanding the mandatory training modules required of all staff, which include procurement training modules as provided by ACT Government.

The Commission will continue practices to ensure evidence of completion of ACT Government training modules on procurement are provided by new starters at the Commission, as well as ensure staff commencing a procurement activity complete procurement training prior to commencing the procurement activity. We will strengthen conflict of interest training by implementing a refresher session on the ACT Government Conflicts of Interest Policy and Tools and the ACT Integrity Commission Conflict of Interest Policy, including discussion on bias, as a part of the annual COI declaration process.

Links to the Conflict of Interest Policy and Tools on the ACTPS Employment Portal Policies and Guidance page, and the Commissions Conflict of Interest Policy, are also available on the Integrity Commission's intranet for quick reference.

Response of Commissioner to the Special Report of the Inspector

Introduction

1. As will be seen, although the relevant procedures required a number of steps, the issues in this matter were relatively simple. The inaugural CEO of the Commission, Mr A, had decided (for personal reasons not requiring comment) that he would resign before his contract was completed. He first informed me of this in late 2021, after having been in the position since October 2019. He had been largely responsible for the hands-on work of building the Commission from inception. This was a difficult and stressful task. The Commission was still far from mature with many structural issues, handled day-by-day with interim solutions and significantly under resourced, whilst it also was attempting to undertake operational work of assessing complaints and communicating with the ACT government environment. We discussed how his separation should be managed. He agreed to stay on until a replacement was recruited and, if significant structural work was still outstanding when they commenced, he would be prepared, on a part-time basis to continue the process until the CEO had settled into the Commission's situation wand was able to address them themselves. My view was that Mr A had performed his responsibilities with outstanding capacity and commitment, and I had the firm opinion that, if the structural work was still significantly outstanding (which was virtually certain), he was best placed to carry it on until the new CEO was in a position to assume complete control. There was no conceivable advantage in obtaining the services of an outsider and obvious disadvantages. The uncertainties of timing and recruitment and the then unpredictable state of the Commission's working environment did not permit any more definite arrangements.

2. The problem was in principle a practical one as was the practical solution.

3. The criticisms levelled by the Inspector about the manner in which the essentially simple management of Mr A departure proceeded represent the triumph of form over substance and a complete disregard for commonsense. Whilst not suggesting any actual failure of probity (as least on my part), the Inspector has concluded that some steps were not adequately recorded and that certain probity concerns were not adequately addressed. For the reasons – which, regrettably need to be somewhat lengthy – stated below these criticisms are completely unreasonable.

   The problem presented

4. The issues raised by the Inspector arise from the appointment of Mr A as a consultant to the Commission following his resignation, effective on 21 August 2022, from the position of CEO, to which he had been appointed from 28 October 2019 to 27 October 2026. (The new CEO was appointed on 22 August 2022.)

5. It is necessary to set out some relevant history, known to the Inspector, which provides relevant background to the situation in which the Commission found itself in January 2022. The inaugural Commissioner, the Hon Dennis Cowdroy AO QC was appointed in June 2019, and Mr A, who had been Acting Chief Executive Officer, and Executive Director of the Investigation Division, of the NSW ICAC, commenced as CEO in late October, with two investigators, a seconded intelligence analyst and several support staff appointed early March 2020. This, of course, was the very inception of the agency. It was necessary to find

and fit out premises, acquire equipment, make arrangements for the provision of the basic tools for starting work, from computers to data management and document control, set up cooperative arrangements with government (such as Shared Services) as well as continuing recruitment. Two additional investigators came on board by July, and a senior computer forensic specialist, intelligence analyst, and two more investigators being actively sought. Recruitment was significantly hampered by the statutory prohibition in employing persons who had worked for the ACT government in the previous five years. None of the new employees had actually worked in an investigative commission environment before. In the meantime, MOU's were being negotiated with various directorates and agencies, including the Office of the Public Sector Standards Commissioner and the then Inspector.

6. The Commission formally commenced its operations on 1 December 2019 with the launch of its website and shortly after received its first corruption complaints, by June 2020 totalling 76 requiring assessment, with only two temporary seconded staff then available. During the reporting period 10 preliminary inquiries and two investigations had been commenced. The Solicitor was seconded from the ACT GSO (also with no investigative commission experience) with one additional employee whilst recruitment of a permanent Legal Director was undertaken. Commencing operations from a temporary office, it was not until August 2020 that the Commission moved into its permanent location. The first examinations occurred in December 2020. Corruption Prevention and Education greatly increased their engagement with ACT directorates and held the first Community of Practice meeting in September 2020 in the Commission's conference room. The Assembly advised of impending changes to the PID Act in late 2020. These changes, which came in effect in April 2021, placed the responsibility for the administration of the PID Act on the Commission, moving it away from the Public Sector Standards Commissioner and adding additional operational complexity to the task of assessing complaints.

7. From the outset, training was a major undertaking, since staff were drawn from a variety of sources, such as police, but not from investigative integrity agencies. Developing appropriate and practically effective schemes for managing the assessment, investigative and educational functions of the Commission's work, though in some respects generic, need to respond precisely to the particular requirements of the Integrity Commission Act and the legal structure it mandated, which controlled to a significant degree the required administrative and managerial processes, and imposed a legal framework which needed to be understood and applied. Other oversight agencies had generously made available their administrative and operational polices which provided useful guidance and suggestive procedures but, of necessity, they reflected very different legislative and, indeed, policy requirements, quite apart from having been created over time in their own variable governance environments and in response to their own developing situations. They provided practical assistance but needed continuous, necessarily ad hoc, adjustment on virtually a day-by-day basis as the work of the Commission was underway. Apart from their principal tasks, this was supervised by Mr A as CEO and the Commission's Solicitor (not appointed until late 2020), who had experience with the NSW ICAC. Staff were recruited and, of course, departed. They required close supportive management and training. It was necessary for me, as Commissioner (acting from January 2021), to supervise and finalise complaint assessments and other operational work as well – having been for three years, Chief Commissioner of the NSW Law Enforcement and Conduct Commission – in addition to my other responsibilities as Commissioner. The ethos of the agency was "all hands to the pumps".

8. As at 1 July 2021, the Commission still had only 8 staff (plus the Commissioner), nowhere near sufficient for it to operate adequately, let alone efficiently. Recruitment continued and, by year's end had increased to 18. However, this had still not nearly matched the pressure of work. One of the major continuing issues was the need to continually adjust operations to reflect the legislative requirements. Interim arrangements, ill-fitting to start with, became embedded with adjustments made in response to particular issues as they arose. The pressures of day-to-day business made it practically impossible, though increasingly essential, to create a set of fit-for-purpose operating procedures that clearly responded to both the legislative scheme and resource management of the Commission's business. The Commission was holding its own, and gradually building up its level of professionalism and expertise as staff experience grew, but at the cost of efficiency and significant stress. Corporate governance was ad hoc and required continual adjustment.

9. A distinct major problem that had been identified at the outset and put aside as other more urgent tasks were addressed, was the need for the Commission to ensure its independence from government communications and data control. This issue was connected with the need to have available as an essential investigative tool, powers under the *Telecommunications (Interception and Access) Act 1979*. The work associated with these tasks was difficult, not only in a technical sense, but because it raised issues of policy and budgeting, entailing extensive communications both with potential professional partners and ACT government. This issue became one of active concern after my appointment as Commissioner in early 2021 and was largely being managed by Mr A with my input from time to time. The issues were difficult, and progress was slow, though much assisted by his personal relations, developed over some years in part whilst he was with the NSW ICAC. I also reached out to my contacts in LECC for advice.

10. In summary, in cooperation with the Commissioner, the difficult, complex nuts and bolts day-to-day work – essentially building the agency from the ground up was the responsibility of Mr A. This involved the management and resolution of both operational and personal crises contributed to by the rudimentary and ill-fitted organisational processes that were in place and constantly requiring adjustment or interpretation, the difficult work being performed by relatively inexperienced staff handling it to the necessary standard and the deeply felt pressures to produce outcomes. Mr A performed these responsibilities with superb skill and patience.

11. In late 2021, Mr A (as mentioned) and I discussed the former's decision that he needed to consider resigning. Given his vitally important role, this prospect was a major blow. The size and stage of the Commission meant there was no redundancy. There was no one who could effectively take over his role or any significant part of it. His replacement would start "cold", with no institutional history and would need to take up the corporate and operational demands, still dynamic, on the run. Building the structural framework for the move to independent data and document management, improved data analysis, security requirements and organizational links enabling electronic interception and the urgently needed development of effective ground-roots-up operational guidelines for assessments and investigations would need to be paused until the new CEO had the day-to-day work firmly in hand. It was obvious that recruiting a replacement would be a difficult and likely lengthy process. Of course, Mr A and I discussed how that might be managed.

12. In January 2022, Mr A again spoke to me about his intention to resign. No specific resignation date was mentioned. He agreed that he would remain until the new CEO took up their duties and it was agreed that steps should be put in place as soon as practicable to commence this recruitment. It was not possible to predict with reasonable accuracy when this appointment would occur — nor even whether it would be successful – and, accordingly, what the actual situation at the Commission would be when a replacement arrived, in respect in particular of the separation from Shared Services and the interception arrangements, as to which Mr A had already commenced work and the operational procedures still to be out in place. How this outstanding but essential work might be managed without undue delay was of considerable concern to me and was also discussed. As agreed, on the following day, 22 January, Mr A wrote to me stating that he wished to tender his resignation as CEO. He confirmed that he was prepared to stay in the role until a suitable replacement was found. The letter also stated, in accordance with our discussion –

> "Subsequent to that candidate being in my current role, I am prepared to work on a consultant/contractor basis for two days a week to ensure the telephone interception and shared services separation projects are complete or until such time you deem that my services are no longer required."

13. Although this proposal did not refer to the other structural work that would likely be outstanding as at the date of his separation, necessarily uncertain at this point, the question remained a live one to be considered in due course when the position became clear, depending of course on Mr A own personal situation.

14. I had commenced as Acting Commissioner on 12 January 2021 and then as Commissioner on 6 May 2021. The Commission was at this time still maturing as an organization and at the same time attempting to carry out its operational functions. Almost immediately, I commenced working on two major investigations (operations Lyrebird and Raven), which placed additional burdens on the legal and investigations team. The Commission was far from in a settled state. Recruitment of staff – particularly operational staff – had been a lengthy and difficult process, inevitably involving compromises of experience gained in different contexts, and was still ongoing at the time of my appointment and when Mr A indicated his desire to resign.

15. Most staff had no actual experience of working in a similar agency and were therefore on steep learning curves requiring a great deal of support and assistance, including from me, the Solicitor and Mr A. The initial and inadequate staff setup proved somewhat unsatisfactory and required adjustment, which was not easy in the public service context. Senior operational staff were from policing, which though in some respects was an analogue, was in significant ways quite different. The need to undertake actual operations whilst at the same time training staff and developing operational systems stretched both my personal resources, those of Mr A as CEO and those of the staff. Mr A's senior roles at the NSW ICAC provided an invaluable and continuing resource, not replicated at any level in the Commission except my own experience as Chief Commissioner of the LECC. This meant, amongst other things, that it was necessary for me to assist with operational work as well performing my functions as Commissioner

16. All these issues were, for obvious reasons, greatly exacerbated by the pandemic, with Commission staff commencing to work from home in early March 2020 and complying with social distancing and isolation requirements and lockdown applying from mid 2021. This made mentoring and guidance, quite apart from building teams and supportive relationships, far more difficult.

17. The recruitment process for a replacement CEO was formally commenced in April 2022. It was not known when the process would be completed or, indeed, whether it would be successful: the particular skills were uncommon; the applicable experience highly variable; the willingness to move to the Territory problematic. And, as the legislation then stood, no-one who had been an ACT public official in the previous 5 years could be considered. The new CEO would be faced with the continuing issues to which I have already referred and would need time to familiarise themself with them, get to know the staff and start to develop their own management responses both to the longer-term issues and those presenting day-by-day, building on and almost certainly adjusting what had so far been achieved. At the same time, it was essential that the structural work be progressed. These tasks simply could not be managed at the same time.

18. Persons suitably qualified to replace Mr A – and prepared to come to the ACT – are few. I knew this, not only because of the difficulty that had been experienced in recruiting him in the first place, but similar problems I had experienced when Chief Commissioner of the LECC and my familiarity whilst in that position with the situations in the other investigative commissions in Australia. The skill set is highly specialised. The notion of the Inspector that the structural work was generic is, except at the most basic level, completely unrealistic, as is the speculative assumption that persons qualified – and willing to come to the ACT – to undertake it could be located with relative ease. The histories and environments of each integrity commission differ significantly, the manner in which they share digital and electronic communications with their governments varied in important respects both as to hardware and software, and the legislative schemes they operated also differed widely, with consequential significant variations at the operational level. These systemic problems coexisted with the practical difficulties of recruiting, for a period whose commencement and end points could not be accurately predicted, persons with the appropriate skill sets who would be available when needed and whose agencies (the resources of all being stretched to their limits) would be prepared to allow their secondment. Whilst police and members of other law enforcement agencies would have been familiar with electronic interception, this was but one problem, leaving setting up the operating systems, and applying the specialised mentoring and leadership skills responsive to the actual integrity assessment and investigation requirements of the Commission, which were dynamic. Experience in law enforcement was not a match by a substantial margin. Furthermore, identifying qualified individuals still left the substantial and almost insuperable obstacle of attracting them to work in the ACT for the Commission on a temporary basis for an unknown period. Bringing in someone from outside – even if a person with translatable experience could be found – was very much a second-level solution, if a practical solution at all, since they could not replicate at a useful level Mr A's experience with the Commission's situation and this was not a time or occasion for any significant adjustments to be made to accommodate the differences. For obvious reasons, the required skills and experience were not available by private commercial providers and the uncertainties in timing and scope made approaches completely impractical.

The proposed solution

19. The obvious solution was that, following Mr A's separation, when the new CEO commenced their contract, arrangements would be put in place enabling him to continue with the structural work until the CEO was in a position to take it over. Since it would take some months (at least) to recruit a replacement CEO – and more than one process might be needed – it was not possible to predict with reasonable accuracy when the new CEO would commence work and Mr A's term would cease or the actual extent of the carry-over work would be outstanding when the new CEO commenced. From commencement, the new CEO would need to adjust from their previous experience and commence to manage the day-to-day work of the Commission, understanding the procedures then used and making the inevitable, even if interim, changes necessary to ensure that operations continued as seamlessly as possible as well as familiarising themselves with and responding to the varying capacities of the staff. This "settling in" would, of course, be a progressive process with capacity to move to the structural challenges gradually increasing. My judgment, necessarily a guess – but one made with a good understanding of the scale of the issues needing to be dealt with – was that it would take some months. The proposed period of the consultancy was six months was an arbitrary outside limit; with Mr A's consultancy ceasing when the replacement CEO thought it was no longer useful.

The procurement requirements

20. Procurements in the Territory are governed by the *Government Procurement Act 2001* (Government Procurement Act) and the Government Procurement Regulation 2007 (the Regulation) and guided by the relevant policies and guidelines. In particular, s 22A of the Government Procurement Act required territory entities to "pursue value for money in undertaking and procurement activity" and defined value for money as "the best available procurement outcome". (I deal with this requirement at a later point in this response.) Section 6 of the Regulation requires 3 quotations from suppliers for contracts with a value of over $25,000 and under $200,000 and prima facie would apply to the proposal to contract the envisaged consultation services from Mr A. The immediately obvious difficulty with this requirement, that rendered it practically impossible, would have been to identify suppliers able to provide the envisaged services, certainly to the level of expertise and efficiency which was necessary and who would be able to quote meaningfully when their scope was so uncertain. At all events, other government agencies – particularly those outside the ACT – who might be able to assist by permitting staff secondments for limited periods were certainly not contemplated by this condition.

21. The inspector states –

> "It is a fact that a large number of law enforcement and integrity agencies in Australia have been using telecommunications interception powers for years, for example, and a number of people therefore possess expertise in the use of these powers. It is unlikely that Mr A was the only person qualified to deliver the services that were procured, such that there was no merit in testing the market and value for money."
>
> …
>
> "I have noted above that a number of Australian agencies have considerable experience in the first proposed service, namely establishing infrastructure for

telephone interception capability. Many agencies also have experience with moving from shared services arrangements to in-house, which is the second proposed service. Developing operational policies and procedures (the third proposed service) is a relatively common task. While Mr A was uniquely qualified to provide a handover to the incoming CEO (the fourth proposed service), in my experience a handover is generally seen to be a key requirement for an exiting staff member to prepare or arrange before separation and is not separately remunerated. Mr A also tendered his resignation in January 2022 and he had therefore already had 7 months within which to prepare appropriate handover documentation before the new CEO commenced in August 2022."

22. I have already pointed out why "testing the market" was not a realistic possibility. At all events, in no relevant (or, indeed, practical) sense are government agencies a "market" or "suppliers of services". Nor was the question so much whether other officials of Mr A's experience were working in law enforcement and integrity agencies or had experience in moving from shared data links and document keeping to independent systems. The question is whether it might be expected that they would be available or made available to work at the Commission. Only a short term contract of uncertain length and uncertain timing was in contemplation. Realistically, this help could be obtained only by secondment arrangements. The prospect of this arrangement being acceptable to any of the other agencies was fanciful. But interception functions are all context driven, so that any incomer would need – in order to be practically useful – to be acquainted with the Commission's situation, including the scope of its jurisdiction and investigative processes, which were generic only to a limited extent. Furthermore, complex discussions with government were ongoing about the policy itself. Introducing a stranger would not have been advantageous. Also, as I have already explained, interception and data control were far from the only outstanding structural issues requiring attention. The development of operating processes that responded to the Territory context, the Commission's dynamic and limited resource availability and its legislative mandate – all of which were intimately understood by Mr A – was also essential work to be undertaken. The notion that any seconded official could takeover with immediate effect is fanciful. I had already been involved (at LECC) with the development of operating processes. To be effective required considerable detailed understanding, not only of potential investigative resources, but the jurisdictional range of the conduct needing either to be assessed or investigated by officers whose experience had been gained in considerably different environments. The statement by the Inspector that "developing operational policies and procedures … is a relatively common task" certainly did not remotely answer what would have been sufficient for the Commission's purposes. As I have pointed out, the Commission utilised operating procedures from several other agencies. They had been developed over years and applied in very different environments. They required a great deal of adjustment and, even then, did not give the detailed guidance that in my view made them fit-for-purpose.

23. If by "testing the market and value for money", the Inspector means an open tendering process, this was not only not required but could not possibly have justified the expense and resource intensive process this must have entailed for a contract of the envisaged character. I assume that the absurdity of such a notion means that this was not the Inspector's actual suggested course of action.

24. Accordingly, there could be no reasonable prospect that other agencies, let alone integrity commissions, would be suppliers within the meaning of s 6 of the Regulation or not, even were they able to have provided some short term *ad hoc* assistance. As mentioned, there is no basis for supposing that private commercial suppliers would be likely to have available the necessary expertise relating to the exercise of interception powers, quite apart from experience in the integrity agency space to design operating processes responding to the Integrity Commission Act that would be fit for purpose in the actual environment of the Commission. These points were obvious from the very beginning of my consideration of how to deal with Mr A's proposed departure.

25. At all events, the test is not whether it would be possible to shoehorn an outsider into the Commission for the envisaged work but whether the exemption outweighed the (speculative) benefit of attempting to comply with the requirement. This issue is not addressed in any way by the Inspector. His criticism is that I did not expressly do so in writing. I maintain that it was adequately done by the explanation in the exemption certificate. His contrary view is untenable.

26. The first issue taken up by the Inspector concerns the need to consider whether the services were required and then to consider the appropriate process to procure them. The Inspector asserts that "the Commission was alerted to Mr A's interest in providing services to the Commission and it appears the Commission simply then set about engaging Mr A to supply those services". Nothing of the kind appears and the suggestion is without any basis at all. The inevitable need to arrange for a continuation of Mr A's work following his early departure was obvious from the outset. This would necessarily leave a substantial amount of essential structural work still outstanding which had to be addressed. Indeed, it is indicated from the very beginning in Mr A's letter of 19 January 2022 notifying me that he was proposing to resign before the expiration of his contract. It referred to our discussions about appropriate arrangements, including delaying departure until selection of a replacement and the possibility of continuing work thereafter as a consultant "to ensure the telephone interception and shared services separation projects are complete or until such time you deem that my services are no longer required". The extent of outstanding work that would still be needed when Mr A actually departed was not then known but that it would be substantial was inevitable (as, indeed, proved to be the case) and realised from the outset. It went without saying that, if there was no work outstanding that required Mr A's assistance, he would not be called on. The conclusion of the Inspector about this issue is, aside from being contrary to commonsense, wholly unjustified in light of the indisputable facts.

27. Furthermore, Mr A continued with his work at the Commission and the issues of management of the Commission's functions and the need for the structural work (which had commenced were part of everyday communications one way or another.

28. The Inspector states –

> "In response to my request for information, the Commission provided me with no evidence that anyone had turned their mind to whether the Commission had an actual need for the services that were being proposed."

29. This assertion is completely incorrect. The inspector never requested whether anyone had turned their mind to the Commission's need. The terms of the exchanges between Mr A and myself both at the time he first indicated his desire to resign early and, following the recruitment of the replacement CEO necessarily implied that the issue of what was to be done following his departure was not only discussed upon the necessary basis that the work needed to be undertaken. It should be noted at all events that it is not necessary, and the Procurement Act does not require work to be necessary as distinct from, say, useful or desirable. The exemption under s 10 of the Regulation (set out below) described the work that was required. It cannot rationally be suggested that the specification of the work in the exemption reasons was merely aspirational or hypothetical as distinct from being needed. Furthermore, the very nature of the work itself demonstrated the necessity of its being undertaken, nor does (or could) the Inspector suggest otherwise. No other conclusion is reasonably open but that the Commission had an actual need for the services. The Inspector's criticism is baseless, indeed captious.

30. The need for and the character of the services is clearly set out in the exemption decision (made on 5 August 2022) forming part of the procurement documentation, as well as the hand-over document prepared by Mr A (in consultation with me) shortly before his separation –

Exemption from quotation and tender requirements Government Procurement Regulation 2007, Regulation 10

I Michael Adams, Commissioner of the ACT Integrity Commission, hereby exempt the Commission from undertaking the normal quotation and tender requirements as identified under section 6 of the (ACT) Government Procurement Regulation 2007. Section 6 requires 3 quotations from suppliers for contracts with a value of over $25,000 and under $200,000. The Commission requires ongoing assistance in the separation of the IT services from the ACT Government shared services network. This separation is required for the ongoing confidentiality of all Commission information and eventually, the necessity to ensure appropriate control can be maintained over any information obtained under the provisions of the *Telecommunications (Interception and Access) Act 1979*. The Commission also requires ongoing review and development of operational policy and processes. These processes have been commenced by the CEO Mr A, during the 2021 and 2022 financial years with appropriate funding being provided by ACT government to facilitate these technical projects. Mr A has been instrumental in the ongoing development of operational policy and processes particular to the Commission effectiveness. His knowledge of the Commission's operating framework and technical requirements is unique in that he established the Commission's current operational methodology and designed and project managed the current physical infrastructure. Mr A has resigned from the Integrity Commission effective Sunday 21 August 2022. I am further satisfied that under s22A of the Government Procurement Act 2001 the engagement of Mr A for an initial period ending on 30 June 2022 (ten months – [this was a typographical error]), to progress the IT projects identified above and continue to review and develop operational policy represents value for money in that his involvement reduces risk, he has appropriate security clearances, his knowledge of the Commission's operating

environment and systems is unique. Further he has already commenced negotiations and procurement processes with providers and ACT and Commonwealth government and continuity in this process is considered essential.

31. The hand-over document stated –

To be drafted:

Investigation reports and briefs for examinations/prosecution
Witnesses

Interviews/ statements
engaging expert witnesses
protection/injunctions

Use of Investigation powers

Requesting information from the Head of Service
Examinations notices (preliminary and compulsory)
Powers on entry without warrant (general powers)
Powers of seizure
Search warrants
Electronic evidence
Surveillance devices
Physical surveillance
Telecommunications interception and Access
Disseminations and request for information

MOU's
Public Sector Standards Commissioner
Inspector of the ACTIC (currently being reviewed by Ombo staff)

Projects

The Commissioner has requested I stay on in a part time contract basis to further in particular two projects and to promulgate additional operational policies (identified above) to assist the Commission. Both processed have been commenced and are detailed below:

Shared Services separation
The Commission has commenced a process to have its own IT network separate from the current shared services environment. This is ·necessary for telephone interception capacity (once granted) and also to ensure the security of the Commission's information. [redacted]

A submission was made to Treasury to fund the separation and funds have been committed to this process. Initial consultations have been undertaken with IT providers, which is ongoing. There will be another meeting between the CFO, [redacted] an IT provider and a Cisco systems specialist on Thursday at 11.00am.

Funding for this process was rolled over from last financial year due to the economic slow down and ability for suppliers to provide technical infrastructure. This process also allowed for the employment of the Commission's own IT specialist for help desk
and infrastructure management. Thus far, after two recruitment rounds no individual has been identified as suitable.

The Head of Procurement ACT, [redacted] has been advised of the intention to approach market shortly. There is a requirement for ICT procurement to be involved because it is likely the cost of the system over two three year period will be in excess of $1m.

Telephone interception
Ongoing negotiation and meetings have occurred between the Commissioner and members of the Chief Ministers directorate (CMTEDD) to further the legal process required for the nomination of the Commission under the provisions of the TIA Act.
This will likely take some time given some obstacles within CMTEDD. There is still the necessity to press ahead and ensure that when the designation is provided by the Commonwealth Attorney General the Commission is in a position to leverage the use of that technology as it may apply to the investigative methodologies at that time.

This project is also based on the first project of separation from shared services.

A business case was provided to Treasury and funding was supplied to facilitate the process. [redacted]

This will necessitate the Commission' comms room being graded to level three security certification - a process which is underway.

[redacted]

These requirements would have been self-evident to anyone who gave the work of the Commission a moment's consideration. Additional requirements, as explained, were detailed operational procedures for assessments and investigations.

The Inspector comments that –

> "In response to my draft report, I have received comments that at the time of the contract the Commission was experiencing staffing shortfalls, personnel issues and capability gaps, all of which I am willing to acknowledge. The procurement documentation did not however mention these issues or provide any explanation why it was necessary to procure these services externally or to procure them from a person of Mr A's seniority."

32. The explanation for the exemption required by Regulation 10 that justified exemption from other procurement processes was adequately explained in the exemption. It would have, of course, been possible for it to be more discursive – that is invariably true of every document. An explanation was required; it needed to demonstrate probity. The explanation was given and demonstrated a decision that satisfied the Regulation, in particular compliance with example 1 in the Regulation. The explanation explained, albeit briefly, why Mr A's experience was unique. Those reasons necessary explained why it was not practical, let alone useful, to procure the specified services from an outsider. It was also not necessary to explain additionally why they needed to be performed by someone of Mr A's seniority. He was the CEO. It was self-evident why the work was required. It was being or was to be performed by him (had he stayed) and the very nature of the work demonstrated to any reasonable mind why someone of his seniority was required. It was not necessary to explain the entire picture, only to state those matters that sufficiently satisfied the requirement. I do not accept that it was a failure in probity to provide more details than those provided and which adequately justified the procurement. Given the explanation as to Mr A's actual unique experience, it followed that an outsider would not have qualified. This did not need to be spelled out.

33. The Inspector also states –

> "In his response to the first draft of the proposed report, the Commissioner also advised that:
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> > Whilst I considered [Mr A's] view [about why he was uniquely qualified], I exercised an entirely independent judgment, based upon my active management of the Commission's business and my understanding of its needs, which the statement of requirements reflected. That they had been drafted by Mr A in the first place was merely a convenience and, as should have been obvious, cannot rationally lead to any inference that therefore I did not consider them for myself.
>
> I am not suggesting the Commissioner did not consider for himself the procurement proposal against the statement of requirements, putting to one side Mr A's role in drafting both documents. The documentary evidence of the procurement is however in my view another illustration that the way in which the Commission conducts single select procurement processes should be improved to better demonstrate and record compliance with ACT Government procurement requirements."

For the reasons already explained, I do not agree with the Inspector's criticism. The documentary evidence adequately exposed the process of procurement and compliance with the regulatory requirements and demonstrated its complete probity.

34. The Inspector makes a great deal of the fact that the documents were drafted by Mr A (and by the CFO). Who drafted the documents is, in fact, entirely inconsequential: the sole question is whether they are correct. As it happened, of course as Commissioner, I did not draft the documents. When the time came from them to be drafted, the decisions to which they related had been made – by me as the relevant, indeed, the only decision-maker – and I directed that the necessary documents were created. Indeed, Mr A's original proposal was sent to me following my suggestion that he should put the sense of the issues in writing to move the matter along. None of this matters in the slightest. The fact is that it was essential that Mr A tell me of his plans and perfectly reasonable that he should make a suggestion as to what could or should be done about it, even if we had not already discussed the matter.

35. Thus, the Inspector states –

> "Mr A was the first to suggest that an exemption from standard procurement process was required. In his email of 1 August 2022 to the Commissioner, he wrote:
>
> > My engagement as a contractor *requires* [my emphasis] an exemption from the normal procurement process. Such an exemption is attached for your perusal / amendment. This needs to go to [the CFO] so he may proceed with the procurement.
>
> Mr A prepared, and attached to his email, a draft exemption. The document drafted by Mr A, that would ultimately be signed by the Commissioner, read:
> [set out above].

36. It is incorrect to state that that "Mr A was the first to suggest that an exemption from standard procurement process was required …" This may be the first document that refers to the exemption. Documents do not appear out of a vacuum. It was part of a suite of documents that were required by the Regulation as to which all material decisions had already been made by me. The emphasised word "requires") correctly stated the legal position that he could not be appointed as envisaged, indeed, already agreed, without the exemption. It implies nothing else. The date alone demonstrates this point. It is obvious that this was not the first occasion upon which the procurement requirements were mentioned, let alone considered. This document came into being because it was necessary to formalise the process in light of Mr A's resignation. When the question of employing Mr A as a consultant first arose (and I do not now recall when it did, but it was very early in the piece) of course it was understood that the procurement requirements needed to be complied with. I was well aware of the Regulation and the requirements for making a single select procurement. Had I not already satisfied myself that the Regulation permitted me to make the appointment as the responsible official, and that proceeding in any other way was impractical and doomed to fail (as explained earlier in this response) the matter would never have advanced to this stage. The notion that it was only because Mr A

brought it to my attention is absurd and certainly cannot be inferred from the email of 1 August 2022.

37. The Inspector did not suggest that by providing the draft exemption that Mr A "was trying to conceal the option of a competitive process" but criticising him for not "draw[ing] attention to the fact there was an alternative option to secure his services". I will deal below with the suggestion that Mr A had a conflict of interest. For now, it is enough to state that the alternative modes of appointing a replacement CEO were well discussed and understood. After all, the Commission had already initiated the process of seeking by open competition to appoint a new CEO. It's unreasonable to suggest that Mr A had a duty at this point – all relevant decisions having been made – to raise the possibility of an approach to market. I agree that the requirement of regulation 6 as to seeking three quotes from suppliers was not specifically mentioned and was not part of the CEO replacement recruitment but it could scarcely be overlooked when Regulation 10 itself specifically refers to the requirement in regulation 6 and the need to explain why the single selection is beneficial. The implication that Mr A needed to bring the Regulation to my attention or that I had overlooked it when it is expressly stated in the first sentence of the exemption explanation – forwarded by him with his email and signed by me is self-evidently completely unsustainable.

38. The Inspector goes on to say (in respect of the fact that I signed Mr A's draft without change) –

"Mr A's legal representative also stated that:

> [I]t is common practice within government organisations for staff to prepare drafts…for more senior staff or decision makers…
>
> It is good procurement practice to ensure consistency of the description of the services to be provided across the procurement documents and throughout the procurement process.

While it may be common practice for staff to prepare drafts for consideration by others, it is not common practice for the individual tendering for work to draft an exemption from a competitive tender process for their services or for their words to be picked up verbatim in procurement documentation (including the evaluation report, contract and exemption), as occurred. Mr A should also have filled out a Conflict of Interest Disclosure declaration to accompany the material he prepared relating to the procurement of his services."

39. The comment by the Inspector is no more than a guess and is plainly no more than his idiosyncratic personal opinion. Nor does it matter. As it happened, the substance of the document was already directed by me and, as I recall it, I asked him to put the documentation together. Of course I read it before signing it as adequately setting out the material facts and satisfying the procurement requirements. The fact that the procurement was of his services is inconsequential. Whether this is a common practice or not does not matter. It was not improper in the slightest. As it happened, it was a convenient way of completing the formal requirements. I understand that procedures are important but some sense of proportion must be present: the only important question is whether the document told the truth and whether it correctly stated my views as decision-maker. All else is merely immaterial form.

40. The Inspector added –

> "The commentary drafted by Mr A frames him as the only person capable of providing the services and omits information that might enliven the suitability of others to perform the services."

41. That is because it was my judgment that this was the case and the document was drafted in accordance with my instructions. The information stated in the exemption demonstrated why the "framing" was appropriate indeed, inevitable. I have already explained at length why this was so. I had already decided that Example 1 of Regulation 10 applied. It could only apply in the specified circumstances which I had decided were present and thus there was no room for the alternative counterfactual proposed by the Inspector. This criticism is completely unjustified.

42. The Inspector did not question whether I in fact agreed with "Mr A's self-assessment of his capabilities" but stated that –

> "… The issue is the lack of any record of consideration of how the benefit of the exemption outweighed the benefit of compliance with the requirement to seek at least 3 written quotations from competing suppliers, as required by the GP Regulation. At the time of the procurement, section 10(4) of the GP Regulation required that the exemption must include the 'responsible chief executive officer's' (the Commissioner's) reasons for giving the exemption."

43. The Regulation does not require a "record of any consideration of how the benefit of the exemption outweighed the benefit of compliance with the requirement to seek …quotations". The language of the regulation is quite specific about this. What is required by Regulation 10(4)(b) is "the reasons for giving the exemption". In my view, it logically and obviously followed from the explanation of Mr A's unique experience and the nature of the tasks required that there were no or it was most unlikely that there could be any "competing suppliers". These needed to be competitive in respect of the key requirements of the position being procured. It was clear that, in my opinion, this was not reasonably available. These amounted to "reasonable grounds" for not seeking quotations. I note that the Inspector has proposed other possible consultants but, as explained, these speculations are wholly unrealistic. On any fair reading of the exemption, the reasonable grounds for not seeking quotations and the reasons for giving the exemption appear clearly enough.

44. The Inspector points out that Mr A had submitted his resignation in January 2022 "and the Commission had had nearly 7 months to succession plan and put in place viable options and alternatives". This is simply illogical. Seven months notice is true only in hindsight. The uncertainties were of the time it would take to recruit a replacement CEO - and it could not be by any means predicted with certainly that only one round would be sufficient nor, assuming a selection were made, when the appointment would be taken up - whilst, in the meantime, the work was moving forward and what would still need to be done not able to be predicted with accuracy. The succession plan would necessarily be provisional. It had been agreed that Mr A would stay on until a replacement had been found and that he would agree to part-time work as a consultant for outstanding structural work until the CEO had established adequate management and control of the day-to-day work. There was no

agreement to this course except as an available one to be decided on when timings were more predictable. Even if it were practicable to go to market, this could not have happened then because of the uncertainties. The Inspector's comment also implies that there were in fact "viable options and alternatives". I do not understand what these might have been, in light of the situation with which the Commission was faced. He does not elaborate. I have already dismissed the viability of his other suggestions as to outside assistance. This point is simply untenable. In respect of the continuing negotiations about shared services and interception powers, as I have already made clear, this was but one aspect of the structural work that needed to be carried forward.

45. Whilst, as the Inspector acknowledged that I gave in my response to the Inspector's first draft further reasons for the exemption, he asserts that these should have been "sufficiently documented at the time of the decision, rather than after the fact". Whether this is the case or not, the fact is that sufficient reasons for making the procurement of Mr A were adequately documented for the purposes of the Procurement Act and Regulations. That is all that was necessary.

46. The Inspector's report turns next to the issue of value for money. There is no doubt that this is an overriding consideration. Section 22A of the procurement Act provides that "Value for money "means the best available procurement outcome" and requires regard to be had to "probity and ethical behaviour", "management of risk", "open and effective competition" and "optimising whole of life cost".

47. In respect of the first element, the *Probity in procurement guide* advises completion of a risk assessment during the planning of a procurement, which should be "assessed holistically in the context of the procurement". For obvious reasons, as risk increases, assurance measures to mitigate risk should respond and, if considered to be medium or high risk need a probity plan and a probity adviser. As noted by the Inspector, in the Procurement Plan Minute, the CFO assessed the risk rating as 'low'. The Inspector thought there were indicators suggesting the risk should be medium because "the estimated total cost of the procurement being high relative to the types of procurement normally undertaken by the Commission", "the requirements of the procurement being novel", and "a potential for bias (eg because of an incumbent supplier)". It is a matter of judgment whether these "indicators" where definitive in the particular circumstances. Merely because the Inspector measured their affects differently does not mean that the approach actually adopted was mistaken.

48. As to the first of these considerations, the Inspector noted that, at the time, the Commission had awarded 11 contracts, of which three were for consultancy-style services and the largest of which was the financial management services contract awarded to the CFO's company for$115,500, the other 2 were for values less than $45,000. Accordingly, the estimated total cost ($150,000) of the instant contract was high relative to other Commission procurements.

49. The Inspector also noted that, when completing the Buying Goods and Services Risk Questionnaire, the CFO wrote that the purchase of services from Mr A was not unusual or unique – but in the next part of the form he states "these projects are not normal or routine procurements for the Commission." Of course, the questions must be understood in context. There was nothing in principle different about obtaining the services being procured; in the ordinary course, they would simply have been performed pursuant to the

exercise of his statutory responsibility for the day-to-day management of the Commission's business. That they were not normal or unique *procurements* was merely an accident of history: they fell well within the business of the Commission, as it was then necessary, to be provided by its conventional resources. The services were at the higher end of the CEO's responsibilities and not the business as usual aspect of his functions but that did not take them outside the expected range of work the CEO was expected – and qualified to undertake. Indeed, it was always expected, until he resigned early, that he would in due course undertake them to the appropriate standard. There was thus nothing in the nature of the services that was inherently unique or unusual that created medium, let alone, high risk, provided that they were performed by a person who was qualified to undertake them. If delay had not been a problem, the new CEO would in due course have taken them up and undoubtedly performed them to the high level that her work has exhibited since her arrival at the Commission. Thus, the risk under this heading was not at all because it was especially difficult or inherently unique, as such, for the CEO, whose experience and expertise made him particularly qualified to undertake the work, though along a developing path.

50. The Inspector refers to the "final risk indicator relevant to a rating of high/extreme risk was "incumbent Supplier with access to data or information not publicly available" and pointed out that Mr A was the CEO of the Commission with access to confidential information to which external applicants would not have had access, concluding that "this on its own should have triggered reflection on the need for and benefit of higher probity requirements, as well as prompting consideration of whether there were personal interests or conflicts of interest that should be declared and managed (as discussed above)". This was of course relevant if the appropriate procurement method was open market competition or even under regulation 6 the obtaining of quotations from suppliers. Since it was intended to proceed by way of a single select procurement, the risk to a competitive process derived from access to information did not arise. Indeed, it was Mr A's unique familiarity with the Commission's needs and the expertise that he had demonstrated during his work as CEO that was a key factor in favour of such a procurement and militated decisively against a competitive process. This is not the occasion for a discussion of this general subject but the point should be made that it makes no sense for a procuring agency to disregard the record of an incumbent tenderer in considering their suitability as against other candidates in a competitive process. Ignoring highly relevant information is irrational and the utility of the competitive process as a mode of selecting the best provider is not logically – or realistically – compromised by taking all relevant information into account. Indeed, where an incumbent has performed a contract with complete competence and has acquired confidential information that cannot or ought not be disclosed to potential competitors, this may well justify not conducting an open market competitive process at all. The more complex the procurement need and the more adept and skilled and successfully it has been navigated by an incumbent necessarily significantly informs the question of the extent to which they provide value for money. To ignore valuable information of this kind must be at the cost –potentially the substantial cost – of the Territory. Of course, if an incumbent has only just satisfied requirements by good fortune or muddling through, that would rightly – indeed, it must be inevitably – go into the scales against their being recontracted. The reasoning in either event must be adequately exposed but it cannot be unfair, let alone lacking in probity in any way, to make judgments of competence on the basis of what has actually been demonstrated. The matters to which regard is to be had are not ordered in any way that

prioritises one over the other or suggests that any one is decisive. The overriding consideration is "the best available procurement outcome".

51. The Inspector concluded that, in his view, the probity risk of the procurement was inaccurately assessed as low. I do not agree. The matters on which the Inspector relies were: the estimated total cost of the procurement being high relative to the types of procurement normally undertaken by the Commission; the requirements of the procurement being novel; and a potential for bias, which he explained arose "because of an incumbent supplier". The cost of the procurement did not in fact give rise to any discernible risk, since it was calculated pro rata by reference to discernible and available data. The requirements of the procurement were not novel in any relevant sense, since they were already the subject of Mr A's work as CEO – though not falling into the category of day-to-day management
– and were well within the experience and competence of the incoming CEO who was managing the work. They were novel in the sense only that they had not been the subject of a consultancy. The only identifiable "bias" arose from my knowledge about the experience and competence of Mr A. This is not a bias that is material to probity, as I have endeavoured to explain. The Inspector's view about this is not only unreasonable, it is contrary to what the requirements of probity – in the sense of protecting the interests of the Territory – require. It was not only possible but essential to take into account whether Mr A could do the job and, in that respect, how he had been doing it so far was probably the most significant factor in deciding how to manage his departure. Indeed, this is demonstrated by example 1 in Regulation 10, which necessarily references knowledge of a supplier's expertise. To suggest that means actual knowledge of the expertise is to be ignored is absurd. As I have already demonstrated, there was no potential for bias.

52. The inspector disagreed with my view that Mr A's access to confidential information was not a risk, stating "Mr A used his knowledge to draft the procurement documents and exemption, which framed Mr A as the only person capable of providing the services". Firstly, Mr A was applying for work as a consultant to perform certain work. How could he do so unless he knew what that work was and what was required to do so? On the Inspector's view, where an employee seeking a position within his or her place of employment where they were aware of the job and its requirements because they worked there, that created a probity risk. Of course they would use that knowledge to explain why they were suitable for the job. This would not only be normal, it would be essential. The Inspector's point makes no sense at all. As for the framing of his unique aptness for the position, this was also entirely reasonable and assessed in light of my own detailed knowledge of both the requirements and Mr A's suitability, in accordance with my responsibility as Commissioner. The access to confidential information was, in the circumstances, no kind of probity risk at all but an inherent and necessary part of the process.

53. The Inspector also stated –

> "Given his close professional working relationship with the Commissioner, and the prior discussion the Commissioner had with Mr A in January 2022 about engaging him for this work, there was also a potential risk of apprehended bias. The Probity in procurement guide states that bias is an indicator that a procurement is medium risk..)"

54. (For the reasons I explain below, there was here no potential risk or apprehended bias. I note, for the present, that the Inspector does not state the character of the bias or how it might be apprehended. I have already dealt with one possible meaning of "bias" in the risk guidelines.)

55. The Inspector described the CFO's proposed management of the risk –

> To address the probity concerns, Mr A's RFQ response will be considered against the statement of requirements and consultancy fees will be assessed against the current remuneration tribunal determination for the CEO position, the NSW Government's capped daily rates for consultants, and other publicly available information to determine if the procurement provides value for money.

The Inspector's opinion about this was –

> Simply reviewing Mr A's response against a statement of requirements that Mr A himself had provided the draft of would not render the procurement decision appropriate. Similarly, assessing consultancy fees against a tribunal CEO remuneration determination does not in fact address the probity concerns of using a sole select process, where the sole applicant is a current staff member, with a single person evaluation panel, failures to declare or manage personal interests or conflicts of interest and no independent involvement or advice at any step of the process.

Each of these criticisms is baseless. The first point is that the statement of requirements were those which I had determined to be appropriate and which no other person was as fit to determine, a matter that is evident from the exemption and the contract itself. Secondly, since the work to be done was necessary to be done by someone at least with the qualifications of CEO, it was obvious that the objective assessment made by the ACT Remuneration Tribunal of the remuneration to be paid to the CEO was relevant though the work did not involve the other responsibilities of the position (accounted for as a factor of time). The reference to the Remuneration Tribunal had nothing to do with the choice of procurement method: it was concerned with assessing value for money. Thirdly, as to the "probity concerns" identified by the Inspector, it is patently wrong to state that the evaluation panel comprised one person – the documentation makes it clear I was Chair of the panel (I think, merely reflecting my position as Commissioner) – and there is no doubt that I was solely responsible for making the decision. The facts, which were personally known to me, were as had been stated in the exemption form. I deal below with the suggested conflicts and merely state at this point that there were no material conflicts of interest or perceived conflicts of interest and no call for any "independent involvement" at all, since I was acting as Commissioner exercising my wholly independent judgment on the relevant issues. Moreover, far from the single select process of itself being a concern, it was manifestly the appropriate process to adopt, for the reasons already explained and with which the Inspector has declined to grapple with in any substantive way.

56. It follows that there was no call to obtain "external advice from a probity adviser or from the ACT Procurement helpdesk". Nor do I agree that the advice, had it been sought, would have been that the exemption was inappropriate. The view of the Inspector was predicated on the error that Mr A was responsible for the statement of requirements. As was

abundantly clear, he actually did no more than state the requirements: I determined what they should be and the fact that I adopted the language of his draft is immaterial.

57. The Inspector states –

> "While Mr A was an experienced CEO, the relevant issue is the appropriate rate for the services that are being contracted and being delivered—not the rate that an individual who happens to be the CEO has proposed… As noted above, the procurement documents did not detail any obvious need for the services to be procured from someone of CEO level or any analysis of the appropriate cost for the delivery of the services.
>
> In his response to the first draft of my proposed report, the Commissioner advised that he considered the services were required to be delivered by an individual at the CEO level. He further advised that when Mr A terminated the contract, tasks were taken up by the current CEO or, to the extent that some were undertaken by staff, under the direct supervision of the CEO. While noting those comments, in my view the Commissioner's assessment should have been documented at the time of the procurement."

The fact that the services described in the exemption needed to be performed by a person at CEO level, as was progressively the case and anticipated to continue, was so indisputable as not to need any further clarification. No official in my position would have suggested otherwise. Had that not been my view, I would scarcely have approved the exemption in the terms it expressed. What more could sensibly have been added? A statement to the effect, "In my judgment a person at CEO level should undertake these tasks because of their importance and difficulty" was necessarily implied on any fair reading of the exemption. My assessment was in fact noted at the time of the procurement and obviously so.

58. The Inspector states –

> "There was also no evidence in the procurement documentation of the Commission having considered whether the tasks needed to be performed by someone of Mr A's seniority or whether there were other options that may have provided better value for money—for example, delegating the tasks to a staff member or by testing the market and undertaking a competitive tender process."

Since I described the reasons in the exemption for procuring the services of Mr A, this necessarily implied that I had decided I did not have other staff members available for this work. Any reasonable person looking at the description of the work not only in the exemption but in the handover document would readily understand that these raised major policy issues patently necessary to be dealt with at CEO level. At all events, as I have already made clear, the need for Mr A's services was because there was no one within the Commission available to undertake the additional work, as they were fully taken up with the day-to-day operations. I have already explained why the proposal of "testing the market" was not practicable. I note that the Inspector does not make any practical suggestion how this might be done. Taking up the repeated theme of the Inspector about a market or

competitive approach, it is also relevant to note the *Approach to Market and Request Types (Procurement Factsheet) PLN-02)* –

> Request for Quotation (RFQ) RFQs are used in limited market approaches to the market for low risk, low value procurements of readily available goods or services. They are most appropriate for procurements from a limited or specialist market where you know precisely what you need, and you just need suppliers to indicate their capacity, capability and price for that specific good or service.

The Inspector's suggestions about the market do not reflect the well known reality of how limited it actually is and the practical problems of attempting to negotiate arrangements in the uncertain circumstances of timing and scope. The failure to deal with these issues whilst steadfastly maintaining an unrealistic proposal is problematic, indeed, characterises the significant limitations of this report.

As to the assessment of cost, that was dealt with in another document, discussed below.

59. I now come to the suggestions of the Inspector about apprehended bias. I should mention, at the outset (as disclosed to the Inspector and, as I understand it, accepted) I had no social relationship with Mr A of any kind: our interactions occurred exclusively in the working environment. The Inspector states –

> "Given his close professional working relationship with the Commissioner, and the prior discussion the Commissioner had with Mr A in January 2022 about engaging him for this work, there was also a potential risk of apprehended bias. The Probity in procurement guide states that bias is an indicator that a procurement is medium risk."

The working relationship commenced in January 2021, the intimation of proposed resignation about 12 months later and ultimate separation 7 months later, in August 2022, during much of which Covid restrictions limited personal contact. At no point does the Inspector explain the test he applied to conclude there was a risk of apprehended bias from the matters he mentioned: that we worked together – as statutory office-holders under the Integrity Commission Act – and the prior discussion in January 2022 about engagement. As mentioned above the "discussion" referred to in the above passage, adverted to in an email from Mr A of 22 January 2022, did not suggest bias of any kind. I have already outlined above what concerned. I assume that the Inspector is not suggesting that any probity concerns could possibly have arisen from Mr A's informing me of his intention to end his contract prematurely. Nor could it be suggested that any such concerns arose because there was a discussion about what might be the consequences for the needs of the Commission and how they might be addressed of which, of course, Mr A and I were all too well aware. Of course, one of the necessary considerations was the need to undertake recruitment of a replacement. To discuss further how to deal with the work that would be outstanding at the time of replacement was also merely commonsense and, had this not been done, would have strongly suggested gross incompetence. Again, this could not possibly have raised an issue of probity except in the sense that the arrangements that might in due course be put in place needed to be undertaken with propriety. There was not any suggestion of any agreement as to the possibility of a consultancy except that it might be a useful and appropriate response to the situation at the time. This was, for the reasons

explained, largely unknown except in the sense that something would need to be done to address it seemed inevitable. The matter was left as a mere possibility and certainly did not amount to any commitment of any kind by either Mr A or myself.

60. Problems about bias in decision making, both judicial and administrative, have, of course, been around for a long time. Not surprisingly, consideration of how to identify and manage the problem have been the subject of development by the courts and administrators. The first issue is to identify the problem: it concerns the need to ensure that decisions are not affected or influenced by factors that are not properly part of the relevant consideration. It is, of course, not concerned with mere mistakes but with the lack of probity or propriety. It is theoretically possible, of course, that every decision might be improperly affected by ulterior matters; it is also often difficult to tell whether outside influences have actually been brought to bear.

61. Since mere possibilities are logically available in virtually every case, it has been found necessary to impose a rational limit on the extent of the inquiry. The rule that is applied across the whole of government administration in Australia – and is applicable here – is to consider the apprehension of the fair-minded observer, neither complacent nor unduly sensitive or suspicious, who would give the matter careful thought rather than make a snap judgment and having reasonable knowledge of the salient facts. The need to apply a rational standard to the assessment of whether bias might be apprehended arises from two important considerations. The first is that an unlimited inquiry would create arbitrary and capricious results, depending on the idiosyncratic opinion in each case of the person assessing the issue, with arbitrary, chaotic and capricious results. The second major problem is that it would strongly encourage officials, in order to avoid attacks on their probity, to adopt an excessively defensive approach to their decisions, and undertake unnecessary, inefficient and potentially costly management to avoid criticism. This would also encourage adopting the lowest common denominator of available decisions. Sound public administration continuously demands assessment of a range of approaches of varying degrees of efficacy, almost all of which will be attended with some risk of a less than optimal outcome; creating an environment in which serious consideration needs to be given to avoiding even unreasonable criticisms that attacking their probity places an entirely inappropriate burden on the decisionmaker, encourages mediocre decision-making and undermines the respect appropriately accorded to responsible accountability, which is even more important where the decisions are not easy to make. The public service (in its widest sense) desperately needs officials who have, in plain terms, the courage of their convictions. Encouraging management approaches restricting the ability of officials to make decisions according to their best judgment because of fear of criticism is classically and rightly ridiculed as “red-tape”. Accordingly, the necessity that only bias that is apprehended by a reasonable person who knows the salient facts needs be managed is no mere lawyer’s quibble but is essential to effective governance. It is not only justified but required by policy considerations of considerable importance. The need to protect the probity of governance and maintain public confidence in its integrity is also adequately answered by the reasonable apprehension test.

62. A useful statement of the appropriate rule is in *The Australian Public Service Values and Code of Conduct*, which "requires employees to take reasonable steps to avoid any conflict of interest, real or apparent, in connection with their employment", pointing out –

5.1.3 A real conflict of interest occurs where there is a conflict between the public duty and personal interests of an employee that improperly influences the employee in the performance of his or her duties.
5.1.4 An apparent conflict of interest occurs where it appears that an employee's personal interests could improperly influence the performance of his or her duties but this is not in fact the case.
…
5.1.6 Conflicts of interest, real or apparent, cannot always be avoided. Where this is the case, the Code requires employees to disclose details of any material personal interest of the employee in connection with their employment.
…
5.2.2 To be 'material' a personal interest needs to be of a type that can give rise to a real or apparent conflict of interest. Personal interests do not give rise to a conflict of interest unless there is a real or sensible possibility of conflict and not simply a remote or theoretical possibility of conflict. If no reasonable person could draw a connection between the employee's personal interest and their duties, then the personal interest is not 'material'.

63. These considerations are also taken up in the Territory, for example in the *ACT Government Conflict of Interest Policy Tool*, which contains a detailed discussion of close personal relationships -

Close Personal Relationships
The impact of many relationships, linkages and associations can be subjective. Therefore, an employee's own judgement cannot be relied upon exclusively in determining a conflict of interest. What is important may not be what the employee thinks, but what a reasonable and independent observer would think or conclude knowing all the facts. This is why personal relationships must be declared. A close personal relationship is one in which there is a close connection between staff members or a staff member and client, and is not limited to where a pecuniary interest exists.

Close personal relationships may include, but are not limited to:

- relationships with family members, including wife, husband, former wife or husband, intimate partner/s, former intimate partner/s, parent, step-parent, foster parents, foster children, foster siblings, sibling-by-birth, step-sibling, daughter, step-daughter, son, stepson, grandparent, stepgrandparent, aunt-by-birth, uncle-by-birth and cousin-by-birth;
- relationships between a family member and a client;
- personal links between a friend and a client;
- friendships with personal links outside of the workplace (may include social connections with clubs, religious groups, sporting teams);
- relationships where one person is financially linked with or dependent on the other, relationships with a history of conflict between parties; and
- incidental contacts with a client such as at a social function.

…

- personal relationship with a reporting staff member, peer, supervisor or higher authority in the operational chain of command (e.g. becoming responsible for supervision of family members, working in the same business unit/section);
- any decision-making process (e.g. exercising a delegation) where a personal relationship with affected parties (including their referee or business employer) exist; you (or a relative, or a close associate) hold shares or have a position in a company bidding for government work; and
- you use government property or equipment, information, your position or government affiliation to pursue personal interests or the interests of another organisation.

Not a conflict of interest

Where an employee develops a positive working relationship with a colleague that becomes a friendship, it is not a conflict of interest. However, if the relationship is such that it would place either of these individuals in a position that may compromise, or appear to compromise the proper discharge of their official duties, then the conflict must be notified and managed appropriately in accordance with the ACT Public Service Conflict of Interest Policy.

Conflict of Interest Scenarios

Examples of some conflicts of interest are outlined below:

- A Project Manager undertaking a new major project is allocated additional funding to allow for the recruitment of an administration officer on a six-month contract. The manager is an active member of a sporting club committee and is aware that one of the committee member's is experiencing financial difficulties and is in search of work. After a committee meeting, the manager suggests to the woman that a position is soon to be advertised in her team and recommends applying. The manager declares a conflict of interest and does not participate in the interview process however she informally recommends the woman to her staff member who will be sitting on the interview panel.
- A cultural festival spanning two months has been arranged to showcase Canberra locally, nationally and internationally as a thriving and innovative arts centre. The creative director of the festival has been contracted for his local ties and international acclaim. In effort to attract broad interest, involvement has been sought from varying art disciplines and in some instances, this includes requests for national and international artists. One of the international artists approached is a close friend of the creative director.
- The stepbrother of a policy officer is looking to purchase land under a Government joint venture. The policy officer works in an area unrelated to land purchase but has acquaintances that do and requests that priority is given for the release of a particular block of land.
- An ICT specialist has recently started a personal business. Over the course of her 15 year career with the ACT Government, she has developed close

working relationships and networks with colleagues and clients. When mentioning her new endeavours, a colleague expressed interest in the services and suggested putting notices up on the staff bulletin board and the portal.

- A taskforce team was formed immediately following intensive flooding to the region. The lead of the taskforce had significant experience with national and international emergency relief work and recovery in short turn around. One of the major local construction businesses was contracted by the Taskforce. This business was headed by the lead of the taskforce's brother-in-law but due to the limited local competition for a local business able to meet the needs of the emergency, this relationship was overlooked and not declared.
- A local rugby team was applying for a grant to travel to Scotland to attend a specialised training camp. The president of the club that sponsors the team was also a director in the ACT Government. His position as president was widely known throughout the community.
- A staff member tasked with issuing parking infringement notices, has come across her partner's vehicle parked without a parking ticket displayed. She and her partner are experiencing financial difficulties and, as their morning was very hectic, she was aware that he was running late for work and highly stressed. She does not impose any charges.

64. Since, as all the descriptions of conflict of interest as a source of bias make clear, its significance lies in the capacity that such a conflict has for distorting the proper exercise of official functions or undermining the confidence that can be placed in their due exercise; in short the focus is on the result or apprehended result. The relationship of the parties may be so close and personal or the person interested in the outcome (here, Mr A) so dominant or influential that a fair-minded person might not make the decision impartially. Here the only possible influence was my judgment as to how well he performed his official functions and, hence, what could be the utility of employing him as a consultant for the interim period following the takeover by the new CEO. Knowledge of Mr A's capacity for the possible additional work is by no means any form of relevant bias: it is information that is very relevant in deciding whether a consultation arrangement could be appropriate. But that is not and could not be an inappropriate consideration that introduces an ulterior purpose into the situation.

65. No conclusion of apprehended bias affecting probity can be drawn without examining the nature of the association, the frequency of the contact and the nature of the interest of the associated person. Merely that there is such an interest does not mean that it is reasonable to apprehend that the decisionmaker may be affected by bias. This is why it is essential to identify the nature of the personal interest of the decisionmaker said to give rise to the bias that has or might reasonably be perceived to inappropriately affect the due exercise of their duty. It is the identification of the personal stake in the outcome that makes it possible to assess whether it has the impugned tendency. This is not merely some formal requirement but expresses the very essence of the issue. Unless the personal stake is identified, it is impossible to rationally assess whether there is a real or sensible possibility of bias and not simply a remote or theoretical possibility. This must be the result of explicit reasoning and not a mere assertion of personal opinion.

66. Accordingly, the mere fact of a personal relationship with a person who is or might be affected by the exercise of the relevant function is the commencement of the process and can never be sufficient of its own. The question which must then be considered is whether it actually gives rise to a personal interest that involves or might reasonably be apprehended to entail the real or sensible possibility that the exercise of the function will be improperly affected. The bare assertion that a decision maker has a relationship that might give rise to the bias is never sufficient. The nature of the interest, and its connection with the possibility of departure from impartial decision making, must be considered and articulated.

67. Here, the only relationship to which the Inspector adverts is the professional relationship created by the fact that each of myself and Mr A were statutory officeholders with responsibilities within the ACT Integrity Commission and worked together. That could not possibly have given rise to a "material interest" (to adopt the useful language in the *Australian Public Service Values and Code of Conduct*). He regarded the question whether there was an apprehension of bias as settled by the mere fact that, as Commissioner, I worked with Mr A as CEO. (His reference to the conversation between me and the CEO as recorded in the latter's letter indicating his intention to resign early takes the matter no further.) This provides no basis for a conclusion that there was any apprehended bias involved in the decision ultimately made to enter into the contract for consultancy with Mr A. The mere assertion that I might not have brought an open and unbiased mind to whether the procurement was necessary, as to the process, or the decision to enter into the contract, derived essentially from the fact that Mr A had been the Commission's CEO is completely inadequate as a basis for any conclusion nor did the circumstances suggest that it was either necessary or desirable to consult some independent person (who, at all events, could gather the relevant information from me). The mere description of the necessary tasks demonstrated that they were essential to the operations of the Commission, I have already explained why regulation 10 applied. These were issues not susceptible to practical debate.

68. The Inspector moved from his bare assertion that there was a potential risk of apprehended bias to citing *The Probity in procurement guide* statement that "bias is an indicator that a procurement is medium risk". (I pass over the point that apprehended and actual bias are altogether different notions.) and then to the recommendation that "for medium risk procurements, that a probity advisor be used", pointing out that he considered that the probity risk of the procurement was inaccurately assessed as low" and, hence a probity adviser be appointed. I accept that the Inspector disagrees with my assessment of the risk. I have explained why this is based on error which does not deal with the factors that need to be taken into account. I maintain my view as correct and consider that the Inspector's view is not reasonably available. I would point out, in addition, that there is not the slightest suggestion that, in respect of any decision – in particular the principal decision to enter into the contract with Mr A – there was actually a failure of probity or a decision affected by inappropriate considerations of any kind.

69. I now come to the question of cost. The Inspector commenced by noting that, in his proposal to the Commissioner of 1 August 2022, Mr A proposed his consultancy rates and that, on 2 August 2022, the Commissioner's email to the CFO that he had agreed a slightly reduced rate. The rate proposed by Mr A was $350 per hour and $2500 per day (in excess of six hours). Following discussion, the proposed daily rate was reduced to $2000.

(I do not agree that the reduction of $500 per day could fairly be described as "slight".) These discussions took place in the space of a few days and, plainly enough, before the Request for Quotation was sent. But this is inconsequential. It is true that I did not record the reason for deciding that Mr A's daily rate should aligned with the remuneration of the CEO's position or with NSW Treasury's capped daily rates framework but there was no need to do so. The utility of this information was plain on its face. The Inspector's opinion was that "there was no obvious need for the services to be procured from someone of CEO level - to be procured externally" and said that, as evidence of this, when Mr A chose to terminate the contract, the tasks were then progressed by staff of the Commission". As I have already stated, and is at all events evident, the work being done was performed by Mr A as part of his function as CEO and obviously got no simpler because of his departure. I did not have to justify why he was doing this work before his resignation, and it is irrational to suggest that it was necessary to assess whether the same work should continue to be done by him or someone of his capacity after his departure. The tasks as described in the RFQ self evidently required someone of Mr A's standing to undertake. Reference to the extract from the Handover is more than sufficient, at all events, to demonstrate the reasonableness of this assessment. Furthermore, it is simply untrue that the work was progressed by staff of the Commission on his departure. It is true that some work was undertaken but this was at the direction of the CEO, whose input was essential and under my personal supervision.

70. The Evaluation stated -

> Mr A's proposal is considered to provide very good value for money. Mr A's proposal has been evaluated against publicly available information regarding the NSW Government's maximum daily rates for consultants that were reported in the AFR on 3 September 2019. Based on this information and Mr A's experience and qualification it would be reasonable to assume his fees would be at the Director/Partner level, with daily rates for the required services of $3,410.00 - $3,960.00. The proposed hourly rate of $350.00 (plus GST) with a maximum daily rate of $2,000.00 (plus GST) and the reduced travel time rate of $250.00 (plus GST) are well below the reported NSW Government's maximum daily rates.
>
> The amount of $150,000.00 (inc GST) represents the maximum amount the Commission would pay for the services. However, it is expected the actual cost may be closer to $115,000.00 (inc GST). [This expectation proved correct.]

71. As mentioned, I also took into account the ACT Remuneration Tribunal's determinations of the remuneration payable to the ACTIC CEO (and the Commissioner, to provide an indication of an upper limit). There is no basis for any fair criticism of the approach taken to the fixing of Mr A's consultancy rate. It was transparent and self-evidently reasonable.

72. I now deal with the Inspector's view that Mr A had a conflict of interest that was not appropriately managed. There is no doubt, of course, that Mr A had a pecuniary interest in the proposal to procure his services following his departure from the Commission. Such an interest is patent whenever an advantageous change is sought by any employee in their conditions of work. No declaration of a conflict of interest is necessary in this situation for two reasons: first, the personal interest is manifest from the request itself and, second,

the employee is not the decision maker. In Mr A's case, to the extent that he expressed the opinion that his proposal was a good idea, this was in the circumstances, no more than a submission that might be made by anyone in his position and no decision-maker would consider it otherwise. There could be little doubt that, although Mr A's representations in this regard were sincere and he may genuinely have considered what he proposed was in the interest of the Commission, he would have understood – as was the fact – that I would independently make up my own mind about the matter. However, this is not to say that it would have been appropriate to disregard what Mr A put forward in support of his proposal. What an applicant says in support of their position is always considered on the clearly understood basis that this consideration would be independent and objective.

73. In my view, Mr A was entitled to put forward any legitimate argument that supported his proposed procurement and was not obliged to propose those that did not. From our discussions, he was perfectly well aware that I understood the procurement requirements and would make my own independent judgment as to the appropriate steps to take. What, at all events, was the management proposed by the Inspector? The first was that he should have declared his relationship with me. This was already evident from his January letter, from the exemption and from the subsequent declaration of interest; that I was Commissioner and he was CEO was declared on the Commission's website. The other element was that he had an interest in the decision. This was also evident, as I have already explained. That the contract could only be entered into by complying with the Government procurement Act and the Regulation was also a given and made explicit. There was no need for Mr A to remind me of the requirements, as they were strictly followed on my instructions as the occasion for the contract arose. The Inspector is quite correct in his observation that "there is a legislative requirement to declare and manage potential, perceived or actual conflicts of interest". He added "Mr A was involved in the procurement and he was required by the Probity in procurement guide to complete a conflict of interest disclosure, in writing, which he failed to do". However, this was actually done and the assertion that that it was not done despite the information actually having been in writing as distinct from the form is merely captious. The supposition – without analysis – that this was a situation to which the conflicts of interest policy was directed is at all events untenable. The Inspector's opinion that Mr A "fundamentally breached" the obligations arising from the asserted conflict of interest is completely unjustified.

74. The Inspector also raises an issue about apprehended bias in my decision to proceed by way of exemption pursuant to Regulation 10. He bases this on my knowledge of the work necessary to be performed and the approach to additional assistance to move what I have called the structural work forward whilst the new CEO placed her own stamp on the Commission and had capacity to move beyond the day-to-day problems that needed to be addressed in connection with my knowledge of Mr A's capacities that gave me confidence that he would be able to provide the necessary assistance when the new CEO arrived and he had separated. This is said by the Inspector to have given rise to apprehended bias by way of prejudgment as to what needed to be done. This is simply illogical. It was a judgment certainly, but it was a judgment that it was necessary for me to make as Commissioner in dealing with my responsibilities for the Commission. There is no basis whatever for any suggestion that I did not consider other possibilities. And it is, at all events, not true. Nor is there any basis whatever for suggesting that my judgment of nature of the work and Mr A's ability to perform it was in any sense less than objective. This is

a purely speculative suggestion (which, aside from anything else, ignored the fact that I had a direct interest in ensuring that he could do the job, considering what the consequences might be were it performed inadequately or incompetently) whether Mr A was uniquely qualified, as I judged. The conclusion at which I arrived was in the circumstances, as I have already extensively explained, and is adequately set out in the exemption, was the only practically available one in the circumstances. I was not acting as a judge deciding between litigants but as an administrator dealing with a problem of managing a problem.

Summary conclusion

Contrary to the Inspector's repeated statements this was an unusual procurement. In fact it was simple and straightforward, the sort of problem faced frequently when senior officers in the throes of important continuing work of considerable significance to a government agency leave before their work is completed and arrangements must be made to fill the gap. Here, there is an experienced CEO coming into the Commission but whose previous experience with ACLEI was in a very different jurisdiction, both legally and administratively. She was, of course, an excellent candidate and there was no doubt that her experience and knowledge were translatable into the situation with which she would be faced. But I judged (and I was the only one in a position to do this objectively) that she needed time to settle and, in the meantime I was anxious that the important structural work should continue. The availability of Mr A to do this until the new CEO took it over herself was an obvious solution. Indeed, to use the vernacular, it was a "no-brainer". No outsider could be immediately effective, and it would mean that I – with more than enough work on my desk – would need to take time to assist. In short, if obtaining Mr A's services parttime whilst they were needed could be done in compliance with the procurement requirements, that would obviously provide the "best procurement outcome for the territory", in other words, the best value for money. That was my judgment at the time. And so it proved. I would make exactly the same judgment again, although in order to avoid the need for this excessive use of my very limited time resources at a time of considerable stress, I would see to it that forms were filled in in a way likely to satisfy the Inspector.

75. The Conclusion of the Inspector that "The procurement lacked appropriate probity and risk mitigation measures to withstand public scrutiny and did not have appropriate risk treatments in place." I have no doubt that any reasonable public scrutiny would regard my appointment of Mr A as a consultant to the Commission in the circumstances as not only entirely proper but a sensible response to the problem which the Commission then faced.

Attachment B: Mr A's response

2 May 2025

Inspector of the ACT Integrity Commission

Comments on revised Special Report
Pursuant to sections 277 and 277A(1)(b) of the *Integrity Commission Act 2018* (ACT)

1. On 27 June 2024, Mr A was provided with a copy of a proposed Special Report prepared by the Inspector of the ACT Integrity Commission (**First Proposed Report**).

2. On 9 August 2024, Mr A made extensive comments in response to the First Proposed Report (**Mr A's First Submission**).

3. On 4 March 2025, Mr A was provided with a revised proposed Special Report prepared by the Inspector of the ACT Integrity Commission (**revised Special Report**).

4. The revised Special Report:

   (a) removed many matters in their entirety following receipt of Mr A's First Submission (and the submissions of others, including the Commissioner);

   (b) deleted an entire section, previously titled "*Part 4. Additional matters*";

   (c) made two new recommendations, deleting two of the three recommendations contained in the First Proposed Report;

   (d) notwithstanding the deletion of large parts of the First Proposed Report, the revised Special Report increased in length significantly, from 29 pages to 43 pages, adding an additional 14 pages;

   (e) made new findings, reached different conclusions, and indicated the Inspector relied on new material that differed to the First Proposed Report.

5. On 16 April 2025, Mr A made further extensive comments on the revised Special Report (**Mr A's Second Submission**).

6. In Mr A's Second Submission, it was submitted that given the detailed submissions made, proper procedural fairness would dictate that the Inspector must issue a further amended Special Report and provide Mr A with an opportunity to comment on the further revised version pursuant to section 277 of the *Integrity Commission Act 2018* (ACT) (**the IC Act**).

7. On 17 April 2025, the Inspector wrote to Mr A and noted:

   > *As outlined in my letter, any comments or submissions from your client in response to my proposed special report were to be provided by 16 April 2025. While I acknowledge your suggestion that there may be a further opportunity to comment, it is not currently envisaged that additional procedural fairness rounds will occur.*
   >
   > *To ensure your client has a final opportunity to provide any comments they wish to have attached to the final report, | am offering your client a short extension. Please provide any comments your client wishes to be included as an attachment to the final report to actinspector@ombudsman.gov.au on or before COB Friday 25 April 2025.*

8. On 17 April 2025, Mr A responded to the Inspector's letter of even date and noted:

   > *4. The revised Special Report is so altered it is, for all intents and purposes, a new report.*

5. [Mr A] delivered substantive submissions in response to the revised Special Report only yesterday.

6. In all the circumstances, we trust that the Inspector has not prejudged the issue of whether a further opportunity to comment will be provided, and will properly consider both [Mr A's] substantive submissions dated 16 April 2025 and how procedural fairness is best addressed in this matter.

9. Mr A's letter dated 17 April 2025, also requested until 2 May 2025 to provide any comments that Mr A wished be attached the any Final Report (**Publishable Comments**).

10. On 17 April 2025, the Office of the Inspector of the ACT Integrity Commission confirmed Mr A could submit any Publishable Comments by 2 May 2025.

11. The comments provided herein are based on the draft revised Special Report received on 4 March 2025. Although they are proposed to be attached to a Final Report, they are provided without having seen the Final Report, or knowing what difference, if any, there will be between the revised Special Report and the Final Report once issued.

Mr A

12. Mr A is the former Chief Executive Officer (**CEO**) of the ACT Integrity Commission (the **Commission**).

13. It is accepted that Mr A was required, by section 9(1)(a) and (b) of the *Public Sector Management Act 1994* (ACT) (**PSM Act**) to take all reasonable steps to avoid a conflict of interest and declare or manage a conflict of interest that cannot reasonably be avoided.

14. However, at the relevant time the subject of the Special Report, there was no conflict of interest that Mr A was reasonably required to avoid, nor was there any conflict of interest Mr A was required to declare or manage.

15. The Inspector has provided no evidence or basis to find otherwise.

16. The Inspector has referred to much guidance on what constitutes a conflict of interest in the ACT. None of that guidance material relates to the relevant circumstances the subject of this Special Report and much of it post-dated the relevant time and therefore cannot be relied upon to found any criticism of or make any adverse finding about Mr A.

17. In the event the Inspector considers that new guidance material should be developed to cover the precise circumstances the subject of the Special Report, then it is open to the Inspector to make such a recommendation. But what is not open to the Inspector is to positively find that Mr A ought to have declared a conflict of interest in the circumstances.

18. The situation Mr A found himself in was analogous to a public servant applying for a promotion/ new contract or some advantageous career progression. Of course, that person stands to gain a financial benefit, that is so obvious it goes without saying, however those circumstances do not warrant the declaration of a conflict of interest.

19. If there was any conflict to be declared, which is not accepted in the precise circumstances here, it rests with the Decision Maker. However, it is noted that the revised Special Report has removed any suggestion that the Decision Maker (the Commissioner) was required to declare any conflict of interest in the precise circumstances the subject of the Special Report.

20. It is noted there are occasions where public sector recruitment involves the drafting of material or business cases to support promotions or career progression. In those circumstances, a more senior person then decides (i.e. the Decision Maker) whether that progression will occur. In that situation, no conflict of interest is declared by the person who first applied for, sought, or drafted material related to their career progression or new contract position or promotion.

21. Based on the Inspector's revised Special Report it appears that the Inspector is seeking to impose such an obligation. That is, the Inspector is seeking to overlay an unestablished category of conflict to this procurement process where no such obligation exists.

22. It would seem that if there is any criticism that can be made in the circumstances contemplated above, it is only against the Decision Maker who having received draft material either:

    (a) does not change it; or

    (b) does not keep a record that the material was drafted by someone other than the Decision Maker themselves, but it was nonetheless considered independently by the Decision Maker and was accepted unchanged.

23. It is clear that ultimately what is done by the Decision Maker is out of the control of the person who prepared the material. As such, there can be no adverse findings made about the person preparing that material, which here was Mr A.

24. To do so would be baseless and would be seeking to extend the operation of any obligation that was on Mr A at the relevant time without the proper evidence to support such an extension.

25. The Special Report has, from its first iterations been heavily criticised by the people the subject of it. Against that backdrop, the draft findings which appeared in the revised Special Report (which may or may not appear in the final Special Report), were framed as being unequivocal, even being described as "clear".

26. It is difficult to see how a finding could be made, let alone be described as "clear", in circumstances where the findings were contested by both Mr A and the Commissioner.

27. Previous iterations of the Special Report contained adverse findings which have been watered down and/or removed. To the extent any adverse finding is made against Mr A, given there is no basis to make such findings, it would appear that the findings are made in an attempt to justify the investigation the subject of this Special Report.

28. To publish a Final Report which makes an adverse finding against Mr A would be to do so without any basis and without regard to the very serious consequences for an individual's professional reputation.

29. Additionally this nearly year long process has caused significant distress to Mr A and it seems to go against the public interest to expend resources in pursuit of findings which are not properly supported on the evidence.

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