ACT AUDITOR–GENERAL'S REPORT

SALE OF ACTTAB

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ACT Audit Office

AUDITOR-GENERAL AN OFFICER OF THE ACT LEGISLATIVE ASSEMBLY

PA 14/12

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

Dear Madam Speaker

I am pleased to forward to you a Performance Audit Report titled 'Sale of ACTTAB' for tabling in the Legislative Assembly pursuant to Subsection 17(5) of the *Auditor-General Act 1996*.

Yours sincerely

Dr Maxine Cooper
Auditor-General
26 June 2015

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SUMMARY

ACTTAB was an ACT Government betting agency that provided totalisator, betting and wagering services in the ACT. It had two voting shareholders, the Chief Minister and the Deputy Chief Minister, and an independent Board.

In October 2014 ACTTAB was sold to Tabcorp and continues to provide totalisator, betting and wagering services under these new arrangements.

On 17 June 2014, the Select Committee on Estimates 2014-15 made a recommendation in relation to the sale of ACTTAB:

> The Committee recommends that the Legislative Assembly refer the sale process of ACTTAB Ltd to the ACT Auditor-General to consider a review of the sale.

In September 2014 the Auditor-General decided to conduct a performance audit on the sale of ACTTAB.

Overall conclusion

The sale of ACTTAB successfully realised $105.5 million for the Territory. This far exceeded expectations. The sale was undertaken in a timely manner. Tabcorp was selected as the successful purchaser with the appropriate experience, capacity and integrity to operate a wagering business. In this regard the Bid stage (Stage 2 of the sale process), involving two potential purchasers, was effectively undertaken.

The local racing industry was not negatively affected by the sale and the welfare of ACTTAB employees was considered as part of the sale process.

Although a successful sale was achieved, the high standard of probity that would be expected for such a complex, large and high risk sale is not evident. There is a lack of transparency due to poor documentation. Some processes were inadequate, including there being no finalised risk plan and the one that was produced being developed too late to influence processes.

At the Expression of Interest stage (Stage 1 of the sale process), involving five interested parties, there were inadequacies due to the poor quality, and the inadequate assessment, of some evaluation criteria. Correcting these and the other inadequacies, although important in terms of probity, may not have changed the result. However, the inadequacies could have been relatively easily avoided.

Conclusions

PREPARING FOR THE SALE

The extensive governance arrangements in place and a number of subject matter experts involved are strengths of the sale process. However, there is a lack of documentation in relation to the conduct of the overall sale process, including a finalised risk management plan and an evaluation plan for the sale. These are significant inadequacies, for such a complex, large and high risk sale.

One person undertook the Probity Advisor role and also provided legal advice. This by its nature presents a risk, which given the characteristics of the sale, would have been prudent to avoid.

THE SALE PROCESS

The sale process was inadequate at the expression of interest stage due to the use of poorly constructed evaluation criteria and an inappropriate assessment of some evaluation criteria, including the use of information that was not submitted by potential purchasers in response to the criteria.

SALE RESULTS

The sale was successful as it met the five Sale Objectives set out in the November 2013 resolution of the ACT Legislative Assembly:

- achieve a fair and reasonable price;
- ensure local racing industry is not negatively affected;
- achieve a timely sale;
- ensure the successful party has appropriate experience, capacity and integrity to operate a wagering business; and
- ensure employee welfare is considered.

Key findings

PREPARING FOR THE SALE	Paragraph
PwC's *ACTTAB Future Options Feasibility Study* (July 2013) recommended the sale of 100 percent of ACTTAB shares through a trade sale (i.e. a business to business sale). The report identified an indicative value range for the sale of $35.6 million to $47.6 million.	2.2
The nature of the sale, i.e. what was being sold by the Territory, whether it was ACTTAB shares or its main undertakings, was at the discretion of the interested	2.4

parties themselves as this was deemed to be the best means of maximising the sale price.	
It would have been prudent to structure and manage the sale of ACTTAB with regard to the requirements of the *Government Procurement Act 2001* until it was clear that the Act did not apply (i.e. only assets were being sold and not shares). The Audit Office was advised by Chief Minister, Treasury and Economic Development Directorate that 'the sale was conducted on the basis of legal advice (albeit only verbal advice) received before the sale commenced indicating that the Procurement Act was not applicable regardless of whether it was a share sale or an asset sale.' The Sale Project Team relied on the legal advice that the sale was not subject to the *Government Procurement Act 2001*.	2.16
The sale of ACTTAB is considered to be a joint Territory and ACTTAB sale, which for all practical purposes means it would be appropriate to treat it as a 'Government sale'.	2.18
The approach adopted of an open competitive process, using expressions of interest from the broader community to shortlist and identifying interested parties' preference for an asset or a share sale for the sale was an acceptable process for implementing the Sale Objectives	2.25
The sale of ACTTAB is regarded as high risk, when compared against risk indicators identified in the Australian National Audit Office (ANAO) *Fairness and Transparency in Purchasing Decisions Better Practice Guide* (2007). This assessment was confirmed in interviews with Sale Project Team members.	2.29
The structure of the governance arrangements for the sale of ACTTAB, including the Steering Committee and Sale Project Team, were appropriate.	2.43
The draft procurement risk register (May 2014) developed for the sale of ACTTAB had very limited coverage of process risks. A more comprehensive risk assessment would have facilitated identification and treatment of a broader range of risks.	2.52
The sale of ACTTAB was a high risk procurement for which there was no finalised or approved procurement risk register. The draft procurement risk register that was prepared was inadequate and presented late in the process to the Sale Project Team. Accordingly, there was an absence of an adequate risk management framework.	2.54
Documentation of the processes used for the sale of ACTTAB was inadequate and did not meet accountability and transparency requirements for procurement commensurate with the size, complexity and risk of such a sale. Importantly, there was a lack of documented sign off or advice from the Probity Advisor following the completion of key stages of the sale process, including the finalisation of the sale.	2.84

THE SALE PROCESS

Paragraph

An open approach to the market was taken, whereby any interested party responding to the advertisement of the sale received a *Request for Expression of Interest*. The open approach to the market was initially flagged as being preferred by the Treasurer in the debate of the resolution for the sale of ACTTAB in the Legislative Assembly in November 2013. 3.10

A *Request for Expression of Interest* was sent out to interested parties that responded to the newspaper advertisements from 3 February 2014 onwards. Expressions of interest were required to be submitted by no later than 5:00 pm on 14 February 2014. 3.15

The *Request for Expression of Interest* sent to interested parties contained all relevant information requirements and was structured appropriately to allow for them to respond. 3.18

No evaluation plan(s) were prepared for the sale of ACTTAB. 3.28

The evaluation criteria in the *Request for Expression of Interest* did not align with the Sale Objectives, as identified in the ACT Legislative Assembly resolution in November 2013. It would have been straightforward to directly align the evaluation criteria in the *Request for Expression of Interest* with the Sale Objectives. This would have provided greater assurance that the Sale Objectives would have been appropriately considered in the evaluation process. Not aligning the criteria to the Sale Objectives presented a risk that important objectives of the sale were not given appropriate prominence in the selection process. 3.30

The criteria used for the evaluation of expressions of interest were poorly crafted as: 3.40

- one of the criteria was 'binary' and did not lend itself to being used to make a comparative evaluation between interested parties. Binary requirements are usually conditions for participation in a process rather than an evaluation criteria; and
- one of the Sale Objectives (timeliness) was aggregated with the financial capacity criterion and consequently could not be evaluated independently from financial considerations.

Five responses to the *Request for Expression of Interest* were received by the closing time of 5:00 pm on 14 February 2014, including responses from the two holders of totalisator pools in Australia. 3.45

The evaluation of the responses took place between 14 and 27 February 2014. The evaluation was initially conducted by the Sales Advisor (Deloitte) with an evaluation report (the first evaluation report) produced and sent to the Sale Project Team on 19 February 2014. The evaluation report recommended all five interest parties proceed to the next phase of the process. 3.48

In response to the first evaluation report from the Sales Advisor (Deloitte), on 20 February 2014 the Probity Advisor who also provided legal advice sent an email to members of the Sale Project Team. The email (which was subsequently retracted and updated) provided comments on each of the expressions of interest that were received, and ranked the expressions of interest 'in order of the quality of their responses'. 3.50

Following a meeting of the Sale Project Team on 20 February, the Sales Advisor (Deloitte) produced a second evaluation report on 21 February 2014. The evaluation report recommended all five potential interested parties proceed to the next phase of the process. 3.53

On 25 February 2014 the Probity Advisor who also provided legal advice sent an email to the Sale Project Team that retracted and updated the email previously sent on 20 February 2014. Similar to the first email, comments were provided on each of the expressions of interest that were received, and the expressions of interest were ranked 'in order of the quality of their responses'. The email provided an opinion that only two of the interested parties should proceed to the next phase. 3.55

On 25 February 2014, the Steering Committee considered the Sales Advisor's (Deloitte) second evaluation report and requested that the Sales Advisor (Deloitte) update the evaluation report and provide a ranking of the interested parties. 3.57

On 27 February 2014, the Sales Advisor (Deloitte) produced a third (and ultimately final) evaluation report that recommended *inter alia* that '[two of the interested parties] should progress to the next phase ...' 3.59

At its meeting on 28 February 2014, the Steering Committee considered: 3.63

- the third (and ultimately final) evaluation report from the Sales Advisor (Deloitte); and
- an agenda paper from the Sale Project Team, which the Sale Project Team advised was its evaluation report.

The third (and ultimately final) evaluation report from the Sales Advisor (Deloitte) stated '[two interested parties] should progress to the next phase of the process. The key risk which the shareholders should consider in determining whether to progress the remaining three bidders is their ability to execute a pooling agreement, for which no party has presented a clear alternative to [one of the interested parties], presenting a significant execution concern.' The agenda paper from the Sale Project Team stated '... there are only two suitable candidates who should be invited to participate in the indicative offer stage.' 3.64

There was no evidence of: 3.74

- documented and retained individual assessments of the submissions by members of the Sales Project Team;

- documentation showing a consolidated assessment of where the individual assessments of the submissions by members of the Sales Project Team were brought together; and
- a formal evaluation report with detail and judgements highlighted.

One of the key probity objectives set out in the Probity Plan was: *Establishing and maintaining a clear audit trail for accountability purposes*. The creation and maintenance of evaluation documentation is a key part of the accountability requirement. Documentation to support the evaluation of the expression of interest criteria was inadequate. 3.77

The Australian Government Solicitor and Mr Charles Scerri, QC concluded that it was more likely than not that the principles of the Hughes Case applied to the sale of ACTTAB. As a result, a 'process contract' existed in the sale of ACTTAB and there was, therefore, an obligation to conduct the sale in accordance with the defined procedures and the stated criteria that was in the *Request for Expression of Interest*. 3.81

The ACT Government Solicitor advised in responding to the proposed audit report that the principles of the Hughes Case did not apply. 3.82

While there is a difference of views, given the type of sale with its complexities and uncertainties, and given the consequences if the Hughes Case did apply, it would have been prudent for such an issue to have been explicitly considered in a risk analysis, in preparation for the sale. However, there is no evidence that this occurred. If it had occurred, any issues emerging could have been managed to reduce any associated risk. 3.83

The evaluation of the expression of interest criteria is considered to be inadequate regardless of whether (or not) the principles of the Hughes Case apply. If the Hughes Case does apply the issues have greater gravity because of: 3.84

- the use of different criteria to those in the *Request for Expression of Interest* document;
- the evaluation of binary criteria in a non binary way; and
- evaluation using material not provided by the applicant.

Neither the final evaluation report prepared by the Sales Advisor (Deloitte) or the agenda paper from the Sale Project Team to the Steering Committee precisely or rigorously applied the evaluation criteria set out in the *Request for Expression of Interest* document sent to interested parties. The incorrect application of evaluation criteria presents a risk to the probity of the sale process. If the Hughes Case is relevant to the sale of ACTTAB, this risk is exacerbated. Regardless, there is a high probability that interested parties would have had an expectation that they would be evaluated against the criteria in the *Request for Expression of Interest* document. This did not occur. 3.89

The incorrect application of the probity criterion, which was essentially a 'binary' 3.96

criterion that did not contemplate a subjective assessment, inappropriately excluded interested parties from further consideration. These interested parties may not have met the criterion had it been more aptly worded to allow for a subjective assessment.

The use of external material in evaluating submissions, including the work associated with evaluating interested parties' responses, should not have been used as the basis for the exclusion of interested parties from further consideration. This material could have been considered had the process been designed differently. 3.107

The operational capacity criterion required that interested parties demonstrate that they currently have the ability, or have a plan, to successfully operate a wagering business including a pari mutuel pooling arrangement. 3.108

Two interested parties operated large totalisator pools in Australia. The three other interested parties did not, and submitted their planned intentions in relation to establishing a pari mutuel pooling arrangement. The three other interested parties were primarily excluded from the process because they were assessed as not meeting the operational capacity requirement. 3.110

The evaluation of the operational capacity criterion inappropriately excluded interested parties from further consideration. These interested parties may not have met the intention of the criterion, if it had specified that they should have already been operating a totalisator pool. If the evaluation criteria had explicitly stated the need to already be operating a totalisator pool, then there would be no issue. 3.129

The 'reserved discretions' in the Request for Expressions of Interest were intended to allow for greater flexibility in the sale process. However, the Australian Government Solicitor and Mr Charles Scerri, QC advised that it is more likely than not that the Hughes Case principles applied and a 'process contract' was relevant to the sale of ACTTAB. Therefore, the 'reserved discretions' in the *Request for Expressions of Interest* document cannot be relied upon. It would have been prudent not to exercise the 'reserved discretions' as if they had priority over the *Request for Expressions of Interest* criteria. 3.143

Concerns regarding the incorrect use and application of expression of interest criteria are not issues of semantics as three of the five potential interested parties that provided expressions of interest were excluded from further consideration in the sale process. 3.144

Probity activities associated with managing confidentiality agreements, the approach to the market, probity planning, responding to interested parties' clarification requests and due diligence were performed satisfactorily. 3.147

There were some areas where not all probity requirements were met: 3.148

- formal sign-off on key 'approach to market' documents and evaluation

criteria;

- formal sign-off on evaluation processes and key 'milestones' and phases of the procurement process; and
- the management of a complaint.

The *Probity Plan* (December 2013) required the Probity Advisor to prepare a written report to the Steering Committee on the complaint referred for consideration. There was no evidence of this report and the Steering Committee minutes do not indicate whether any such report was presented to them. 3.157

SALE RESULTS

Paragraph

On 14 October 2014, the ACT Government accepted Tabcorp's final bid price of $105.5 million, subject to a number of terms and conditions. 4.2

The final bid price was more than that offered by the other potential purchaser. Given that the indicative Trade Sale Value of ACTTAB was estimated to be between $35.6 million and $47.6 million, as estimated by PwC in the *ACTTAB Future Options Feasibility Study* (July 2013), this represents a good financial result for the Territory. 4.4

The sale met all of the Sale Objectives, as set out in the resolution of the Legislative Assembly on 28 November 2013. 4.8

The indicative bids and final bids offered by the two potential purchasers offered various models and revenue streams. The evaluation of the financial value of the various bids was conducted by way of a discounted cash flow analysis, which allows for a comparison of revenue streams at current day values (Net Present Value). 4.12

The rate used for discounting future cash flows required a robust technical analysis to ensure appropriate treatment of cash flows. The Sale Project Team accepted the method for discounted cash flow analysis provided by PwC in the *ACTTAB Future Options Feasibility Study* (July 2013). This provided for the valuation of projected future cash flows in applicants' bids in terms of present day values. 4.14

There was appropriate consideration of the balance of risk and benefit in evaluating the net present value of upfront payments in potential purchasers' submissions. 4.23

One of the Sale Objectives was to ensure that the local racing industry was not negatively affected by the sale. 4.24

Before the ACT Government decided to pursue the sale of ACTTAB, representatives of the racing industry had proposed that the new owner should be required to fund the local racing industry on a similar basis as other TABs in the larger states. Representatives of the local racing industry indicated that their preferred funding model included a 40 year funding agreement with a fixed annual payment of $9.5 million indexed by CPI plus 6.3 per cent racing turnover generated by ACTTAB (in 4.28

excess of $152 million).

PwC and the Sales Advisor (Deloitte) cautioned that a funding agreement of the magnitude proposed by representatives of the ACT racing industry would strongly deter any potential purchasers. 4.29

The racing industry has not been negatively impacted by the sale of ACTTAB. 4.36

One of the Sale Objectives was to ensure that employee welfare was considered. Accordingly, the *Request for Indicative Offers*, provided to the potential purchasers in March 2014, sought an indication from the shortlisted potential purchasers of which employees would be offered positions with the successful purchaser in the event of the sale. 4.37

In the lead up to the ACT Government's decision to pursue the sale, the Community and Public Sector Union (union) put forward its preferences for proposed sale conditions including enhanced redundancies and a three year job guarantee. Neither of the union's proposals was made a condition of sale as both PwC and the Sales Advisor (Deloitte) cautioned that this would discourage buyers who would be unable to justify investing in a business with such limited cash flows (ACTTAB's profit for 2013-14 was only $750,000). 4.40

Potential purchasers were therefore informed of the preferences of the union and the racing industry and encouraged to submit alternative proposals with indicative pricing. However, no potential purchaser was prepared to fully adopt the preferences of the union or the racing industry. 4.41

Sufficient consideration was accorded to employee welfare during the sale process. 4.42

Recommendations

RECOMMENDATION 1 PROCUREMENT POLICIES, PROCEDURES AND PROCESSES

The Chief Minister, Treasury and Economic Development Directorate should examine, and if needed amend, its procurement policies, procedures and processes so they comprehensively cover:

Risk management:

1) all complex, high value or high risk procurements should be subject to a procurement risk assessment and be supported by an approved risk plan which is developed before procurement activity commences (this plan may subsequently be modified as needed); and
2) the risk assessment should guide mitigation measures and inform governance and administrative processes for the procurement;

Evaluation criteria:

3) evaluation criteria should be designed to match the way in which they will be evaluated; and
4) the assessment of evaluation criteria by an assessor and/or panel members should be precise, rigorous and documented;
5) Procurements that are not subject to the *ACT Government Procurement Act 2001*:
    i) need to have the policies, procedures and processes to be used defined and documented at the beginning of a procurement activity; and
    ii) need to be the subject of a risk assessment and have an approved risk plan;

Probity Plan and Probity Advisor role in complex, high value or high risk procurements:

6) a Probity Plan should include a requirement for the provision of written independent assurance at key stages of the procurement;
7) the Probity Advisor role as a principle should be independent of other roles in the procurement process. However, if this does not occur, the reasons for not so doing should be documented and a risk assessment undertaken to identify how any associated risks are to be managed;

Documentation and record-keeping requirements:

8) complex, high value or high risk procurements should be well documented; and
9) an audit should be undertaken immediately at the conclusion of the procurement to identify any gaps so that they can be corrected in a timely manner.

Auditees' responses

In accordance with section 18 of the *Auditor-General Act 1996* the Director-General of the Chief Minister, Treasury and Economic Development Directorate and the ACT Government Solicitor were provided with:

- a draft proposed report for comment. Comments received were considered and required changes were included in the final proposed report;
- a final proposed report for further comment. Comments received were considered and required changes were included in the revised final proposed report; and
- a revised final proposed report for further comment. Comments received were considered and required changes were included in the final report.

Sections of the draft and final proposed report were sent to other relevant entities as was considered appropriate.

Neither the Director-General of the Chief Minister, Treasury and Economic Development Directorate or the ACT Government Solicitor provided overall comments for inclusion in the Summary of this report.

1 INTRODUCTION

Background

1.1 ACTTAB was an ACT Government betting agency that provided totalisator, betting and wagering services in the ACT. It had two voting shareholders, the Chief Minister and the Deputy Chief Minister, and an independent Board.

1.2 ACTTAB operated from 52 physical locations in the ACT, which included three oncourse venues at Canberra Racecourse, Canberra Stadium and Manuka Oval; 37 sub-agencies located within clubs, hotels and Casino Canberra; and 15 branches. In addition to the physical locations, customers could also place bets online or via telephone.

1.3 ACTTAB employed approximately 68 full time staff at 30 June 2013.

ACTTAB Future Options Feasibility Study

1.4 In February 2013, the ACT Government engaged PricewaterhouseCoopers (PwC) to conduct a study on future options for ACTTAB.

1.5 In July 2013, PwC submitted a report on the outcomes of this work. The *ACTTAB Future Options Feasibility Study* report provided an analysis of the 'risks and opportunities' associated with the ACT Government's ownership of ACTTAB. The report provided an analysis of four options for the ACT Government:

- maintaining the status quo;
- forming a joint venture with a suitable private sector organisation;
- retaining government ownership and contracting out the management of ACTTAB; and
- a trade sale.

1.6 PwC recommended that the ACT Government should not retain ownership of ACTTAB and that the preferred method of sale should be via a trade sale (i.e. a business to business sale) of 100 percent of ACTTAB (shares).

1.7 PwC's rationale for recommending that ACTTAB be sold by way of a trade sale was that:

- the industry was rapidly changing and ACTTAB's relative market position was in decline;
- ACTTAB's commercial focus was constrained;
- ACTTAB's financial performance was in decline;
- the risk profile of the Territory's investment in ACTTAB was increasing;

- the potential funding gap was material; and
- ACTTAB's value was reducing.

1.8 PwC also assessed the indicative Trade Sale Value of ACTTAB (i.e. the money that might be expected to be achieved from a business to business sale) to fall within the range of $35.6 million to $47.6 million. Included in these valuations was the value potential buyers place on 'synergies', which was valued at $12.6 million. In simple terms, 'synergies' reflects the fact that combining two entities allows for cost savings and/or increased revenue.

Betting market and changes in recent times

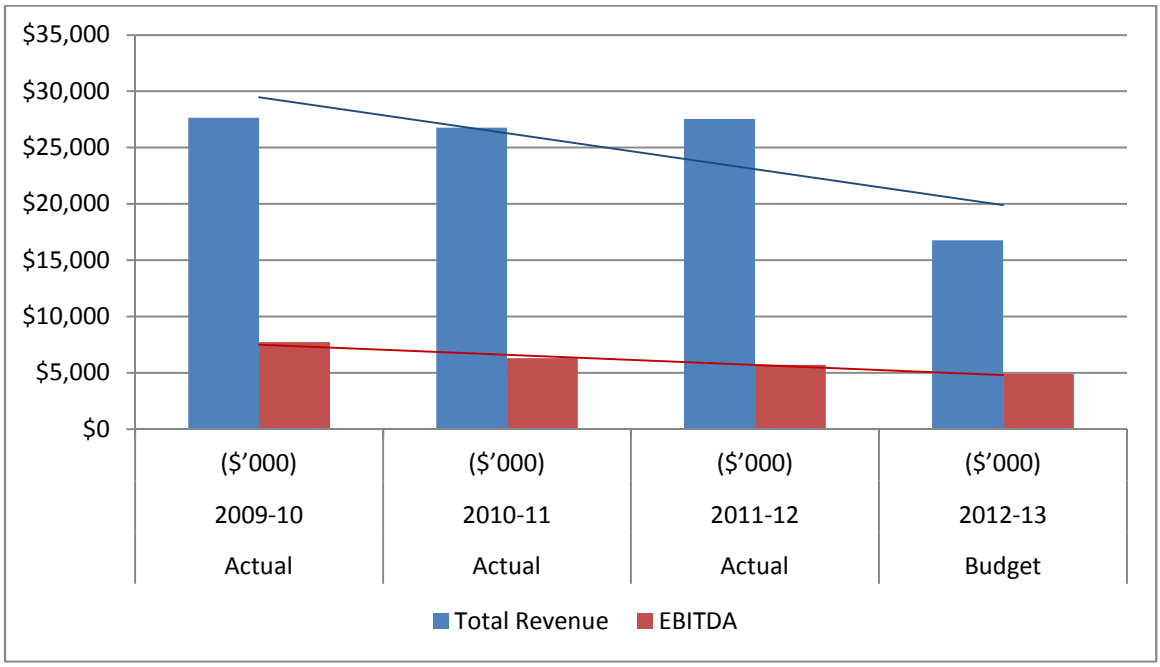
1.9 The ACT wagering market comprises three types of racing: thoroughbred, harness and greyhound.

1.10 PwC's *ACTTAB Future Options Feasibility Study* (July 2013) noted 'the industry is rapidly changing and ACTTAB's relative market position is in decline.' The report further noted:

> In the period FY03 to FY10 the ACT share of the national wagering market has decreased from 5.0% to 1.2%. During the same period the ACT share of the national gambling market decreased from 2.3% to 1.6%.
>
> In recent years numerous large international wagering operators have entered the Australian market driving innovation, an increased product offering, easier access to wagering and therefore creating a strong competitive landscape. There has been a leakage of ACT residents from ACTTAB to the online bookmakers.

1.11 Figure 1-1 presents the financial performance data for ACTTAB for the three years to 2011-12 and the budgeted performance for 2012-13, as identified in PwC's *ACTTAB Future Options Feasibility Study* (July 2013).

Figure 1-1 Revenue and Earnings for ACTTAB 2009-10 to 2012-13



Source: *ACTTAB Future Operations Feasibility Study* (July 2013) (PwC)

Note 1: EBITDA is Earnings Before Interest, Taxation, Depreciation and Amortisation

1.12 PwC's ACTTAB Future Options Feasibility Study (July 2013) showed:

- ACTTAB's earnings before interest, taxation, depreciation and amortisation had fallen by 26.1 percent from 2009-10 to 2011-12; and
- ACTTAB's revenue had fallen by 5.0 percent from 2009-10 to 2011-12.

1.13 As the owner of the shares in ACTTAB the ACT Government was the recipient of licence fees and other returns from the corporation. Table 1-1 shows the total payments made by ACTTAB to the ACT Government for the period 2009-10 to 2011-12.

Table 1-1 Payments made by ACTTAB to the ACT Government between 2009-10 to 2011-12

	2009-10 ($'000)	2010-11 ($'000)	2011-12 ($'000)
ACT Government licence fees	4 071	4 249	3 990
less net GST paid to ATO	2 614	2 923	2 526
Net licence fee paid to ACT Government	1 457	1 326	1 464
Income tax paid to ACT Government	-	2 015	1 040
Net profit after tax paid to ACT Government	-	1 476	2 120
Special Dividend	-	-	3 000
Racing Development Fund payment	7 206	-	-
Total payments to ACT Government	8 663	4 817	7 624

Source: *ACTTAB Future Operations Feasibility Study* (July 2013) (PwC)

Sale of ACTTAB

1.14 On 22 November 2013, the ACT Government issued a media release which stated that it 'has determined to sell ACTTAB Corporation following careful consideration of the recommendations made in the *ACTTAB Future Options Feasibility Study'*.

1.15 On 28 November 2013, the Legislative Assembly passed a resolution that ACTTAB be sold, either through a sale of shares or a sale of ACTTAB's main undertakings.

1.16 The sale necessitated an amendment to the *Territory-owned Corporations Act 1990 (*ToC Act), which was achieved by the passing of the *Territory-owned Corporations Amendment Bill 2014*, which removed references from ACTTAB from the ToC Act. The Bill also provided for amendments to the *Taxation (Government Business Enterprises) Regulations 2003*, to ensure that ACTTAB would no longer be subject to this legislation as it ceased to be a government business enterprise.

Sale Objectives

1.17 The objectives for the sale of ACTTAB (the Sale Objectives), as provided for by the Legislative Assembly resolution, made on 28 November 2013, were to:

- achieve a fair and reasonable price;
- ensure local racing industry is not negatively affected;
- achieve a timely sale;
- ensure the successful party has appropriate experience, capacity and integrity to operate a wagering business; and
- ensure employee welfare is considered.

Sale process

1.18 The sale of ACTTAB was undertaken in two stages:

- Stage 1 – Expression of Interest (EOI); and
- Stage 2 – Bid.

1.19 Stage 1 of the sale process involved seeking expressions of interest from interest parties and was focused on short listing potential purchasers for progression to the next phase.

1.20 Stage 2 of the sale process involved the consideration and evaluation of bids from two potential purchasers. This stage involved the receipt and evaluation of indicative bids and final bids (the Bid phase), and was focused on the value of the deal that could be agreed.

Sale result

1.21 On 30 July 2014 the ACT Government announced that Tabcorp had been successful with its tender and had been selected as the purchaser. The sale amount was announced as $105.5 million, which included ACTTAB assets and associated issue of licences. The sale was completed in October 2014.

The Audit

Audit objective and scope

1.22 The objective of this audit was to provide an independent opinion to the Legislative Assembly on the probity of the sale of ACTTAB.

1.23 The audit included consideration of whether there was appropriate analysis of bids received from potential purchasers against legislative, policy and financial requirements and considerations.

1.24 The audit focused on the conduct of the sale including the planning, administration and communication processes associated with the sale. The audit also assessed if there was appropriate consideration of bids received.

1.25 The audit did not consider:

- the ACT Government's decision to sell ACTTAB's assets and liabilities;
- the ACT Government's policies and/or support with respect to the ongoing role of ACTTAB employees or the broader racing industry in the ACT; or
- the management and administration of ACTTAB, its activities or operations.

Audit criteria, approach and method

1.26 The audit object was addressed through examining the following audit criteria as based on better practice procurement guidance:

- Was the sale process conducted in compliance with ACT Government Legislation and policy associated with the sale of public assets?
- Was the sale process conducted using an appropriately competitive process?
- Was the sale process conducted fairly and impartially?
- Was the sale process conducted consistently and transparently?
- Was there appropriate financial consideration of bids/tenders received against ACT Government legislative policy requirements, including taxation and licensing considerations?

Legal considerations

1.27 The audit of the sale of ACTTAB raised four key legal questions:

- Was the sale of ACTTAB subject to the Government Procurement Act 2001?
- Was the sale of ACTTAB a 'Government sale'?
- Was the sale of ACTTAB subject to the Hughes Case (*Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151)?
- Do the 'reserved discretions', in the Request for Expressions of Interest, remove or reduce the application of the Hughes Case?

1.28 Discussion associated with these questions, including differing legal views, is presented in Appendix A.

1.29 The audit followed the ACT Audit Office's *Performance Audit Methods and Practices* and related policies, practice statements and guidance papers.

1.30 The approach and method consisted of:

- interviews and discussions with key Chief Minister, Treasury and Economic Development Directorate staff associated with the sale;
- interviews and discussions with other key participants in the sale and evaluation process (e.g. members of the Sale Project Team and Steering Committee, Sales Advisor (Deloitte), and Legal and Probity Advisor);
- review of key sale documents, including potential purchasers' submissions, evaluation documents and Cabinet documents;
- review of correspondence, including email communication, between key participants in the sale process for the relevant period of sale;

- sourcing legal advice from the Australian Government Solicitor (Chief Counsel Commercial; Deputy General Counsel Commercial); and Mr Charles Scerri, QC; and
- extensive consultation with auditees, and other entities involved in the sale process, on potential findings and conclusions in the draft proposed report, final proposed report and revised final proposed report.

2 PREPARING FOR THE SALE

2.1 This chapter examines activities associated with preparing for the sale of ACTTAB, including developing governance and administrative, risk management and probity arrangements for the sale process. It also considers documentation.

Summary

Conclusion

The extensive governance arrangements in place and a number of subject matter experts involved are strengths of the sale process. However, there is a lack of documentation in relation to the conduct of the overall sale process, including a finalised risk management plan and an evaluation plan for the sale. These are significant inadequacies, for such a complex, large and high risk sale.

One person undertook the Probity Advisor role and also provided legal advice. This by its nature presents a risk, which given the characteristics of the sale, would have been prudent to avoid.

Key findings

	Paragraph
PwC's *ACTTAB Future Options Feasibility Study* (July 2013) recommended the sale of 100 percent of ACTTAB shares through a trade sale (i.e. a business to business sale). The report identified an indicative value range for the sale of $35.6 million to $47.6 million.	2.2
The nature of the sale, i.e. what was being sold by the Territory, whether it was ACTTAB shares or its main undertakings, was at the discretion of the interested parties themselves as this was deemed to be the best means of maximising the sale price.	2.4
It would have been prudent to structure and manage the sale of ACTTAB with regard to the requirements of the *Government Procurement Act 2001* until it was clear that the Act did not apply (i.e. only assets were being sold and not shares). The Audit Office was advised by Chief Minister, Treasury and Economic Development Directorate that 'the sale was conducted on the basis of legal advice (albeit only verbal advice) received before the sale commenced indicating that the Procurement Act was not applicable regardless of whether it was a share sale or an asset sale.' The Sale Project Team relied on the legal advice that the sale was not subject to the *Government Procurement Act 2001*.	2.16

The sale of ACTTAB is considered to be a joint Territory and ACTTAB sale, which for all practical purposes means it would be appropriate to treat it as a 'Government sale'.	2.18
The approach adopted of an open competitive process, using expressions of interest from the broader community to shortlist and identifying interested parties' preference for an asset or a share sale for the sale was an acceptable process for implementing the Sale Objectives	2.25
The sale of ACTTAB is regarded as high risk, when compared against risk indicators identified in the Australian National Audit Office (ANAO) *Fairness and Transparency in Purchasing Decisions Better Practice Guide* (2007). This assessment was confirmed in interviews with Sale Project Team members.	2.29
The structure of the governance arrangements for the sale of ACTTAB, including the Steering Committee and Sale Project Team, were appropriate.	2.43
The draft procurement risk register (May 2014) developed for the sale of ACTTAB had very limited coverage of process risks. A more comprehensive risk assessment would have facilitated identification and treatment of a broader range of risks.	2.52
The sale of ACTTAB was a high risk procurement for which there was no finalised or approved procurement risk register. The draft procurement risk register that was prepared was inadequate and presented late in the process to the Sale Project Team. Accordingly, there was an absence of an adequate risk management framework.	2.54
Documentation of the processes used for the sale of ACTTAB was inadequate and did not meet accountability and transparency requirements for procurement commensurate with the size, complexity and risk of such a sale. Importantly, there was a lack of documented sign off or advice from the Probity Advisor following the completion of key stages of the sale process, including the finalisation of the sale.	2.84

Nature of the sale

2.2 PwC's *ACTTAB Future Options Feasibility Study* (July 2013) recommended the sale of 100 percent of ACTTAB shares through a trade sale (i.e. a business to business sale). The report identified an indicative value range for the sale of $35.6 million to $47.6 million.

2.3 A 28 November 2013 resolution by the ACT Legislative Assembly approved the disposal of the ACT's interest in ACTTAB limited:

…. by way of a sale of the ACTTAB Limited shares held by the Territory;

or

… by way of a sale of the main undertakings of ACTTAB Limited.

2.4 The nature of the sale, i.e. what was being sold by the Territory, whether it was ACTTAB shares or its main undertakings, was at the discretion of the interested parties themselves as this was deemed to be the best means of maximising the sale price.

2.5 PwC's *ACTTAB Future Options Feasibility Study* (July 2013) had presented forecasts of a long term decline in the value of ACTTAB:

> ACTTAB's financial performance is in a state of decline, with Management forecasting a 3.6% compound annual decrease in EBITDA (pre government fees) over the next four years.

2.6 A brief to the Chief Minister and Treasurer from the Chair of the Sale Project Team on 16 May 2014 stated:

> It appears inevitable that this industry will be very different in a relatively short timeframe, and no doubt by the end of ten years ... there is significant doubt over how long any value will remain in the main asset we are selling, which is the right to operate a pari-mutuel retail betting presence.
>
> There is a strong continuing trend away from totalisators to fixed-odds betting (both racing and sports betting) ... This shift away from the product we are selling - the tote fixed retail terminal presence - presents significant uncertainty for the long term viability and value of the totalisator licence.

2.7 In part the decline in value of ACTTAB may have been attributable to a lack of access to economies of scale that larger betting organisations have and, as a consequence, the 'synergies' that would enhance the value to a potential buyer. This was recognised by the ACT Racing Industry in a letter to the Deputy Chief Minister on 28 October 2013 which stated that:

> ... a sale is the best outcome because ACTTAB does not have the scale of operation to maintain and grow market share or to adapt to the rapidly changing digital wagering market which is supported by the PwC study.

2.8 PwC's *ACTTAB Future Options Feasibility Study* (July 2013) also identified that ACTTAB's ownership structure 'limits its ability to operate in a profit maximising manner' and that 'ACTTAB's market position constrains its ability to attract industry leading management resources'.

What was being sold

2.9 Notwithstanding that the precise nature of the sale was flexible, what was being sold was a complex asset. The key components being sold were:

- the physical tangible assets and liabilities of ACTTAB;
- the intangible assets such as brand and goodwill;

- an exclusive licence to operate a totalisator business in the ACT and a range of other wagering and betting licences; and
- the Government's commitment to certain regulatory settings with compensation provisions in the event that these settings change.

2.10 When considering the value of ACTTAB, it is important to understand that it is an asset within the context of a regulatory environment. Small changes to the ACT Government's regulation of the gaming industry could have a significant impact on the value of associated gaming licences. This relationship was commented on by the Australian Racing Board in a submission to the Productivity Commission's 2008 inquiry into Gambling:

> Gambling Markets are, and have always been, a creature of regulation. The current scale and nature of the Australian Thoroughbred Racing Industry is not accidental: it is the product of a set of regulatory arrangements that have existed for some 40 years. ... (T)he future regulatory framework for the wagering market must be such that enables not only the consumer benefits from competition between operators but also industry sustainability to be achieved.

2.11 A key component of the value of ACTTAB is the level of intervention and/or regulation by the ACT Government. For example, if the ACT Government were to limit or extend the regulation of wagering and totalisator operations, and/or the validity period for exclusive licences, it could have a significant impact on the value of the business.

Government sale

2.12 As mentioned in paragraph 2.3, the sale of ACTTAB could have resulted in either a:

- sale of the ACTTAB Limited shares held by the Territory, i.e. the ACT Government selling the Territory's shares; or
- sale of the main undertakings of ACTTAB Limited, i.e. the ACTTAB Board selling its business.

2.13 The sale process resulted in a sale of the main undertakings of ACTTAB. This was not determined until the bid stage.

2.14 As mentioned in paragraph 1.27 the sale of ACTTAB raised four key legal questions (refer to Appendix A). While all questions are relevant to the sale of ACTTAB, two are particularly pertinent to the nature of the sale. The two questions are:

- Was the sale of ACTTAB subject to the *Government Procurement Act 2001*?
- Was the sale of ACTTAB a 'Government sale'?

2.15 With respect to the application of the *Government Procurement Act 2001*, the Australian Government Solicitor advised that 'had the sale resulted in a sale of shares by the ACT Government, such a sale would then have been a "procurement" as defined in the [*Government Procurement Act 2001*]'.

2.16 It would have been prudent to structure and manage the sale of ACTTAB with regard to the requirements of the *Government Procurement Act 2001* until it was clear that the Act did not apply (i.e. only assets were being sold and not shares). The Audit Office was advised by Chief Minister, Treasury and Economic Development Directorate that 'the sale was conducted on the basis of legal advice (albeit only verbal advice) received before the sale commenced indicating that the Procurement Act was not applicable regardless of whether it was a share sale or an asset sale.' The Sale Project Team relied on the legal advice that the sale was not subject to the *Government Procurement Act 2001*.

2.17 With respect to whether it was a 'government sale', the Australian Government Solicitor advised that the sale could:

> ... be best described as being a joint Territory and ACTTAB sale. Whilst in practice only ACTTAB could sell its main undertaking and the Government could not do this itself other than via a sale of shares it is clear that in practice the Government exercised a significant degree of control over the sale of ACTTAB's business. ACTTAB did not of its own volition independently pursue and conclude the sale of its main undertaking.

2.18 The sale of ACTTAB is considered to be a joint Territory and ACTTAB sale, which for all practical purposes means it would be appropriate to treat it as a 'Government sale'.

Sale as a 'procurement'

2.19 In the following section of the report, and thereafter, references to the sale of ACTTAB frequently use the term 'procurement' or refer to 'procurement' processes. Procurement is defined in section 2A of the *Government Procurement Act 2001* as follows:

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

2.20 Accordingly, in this report, references to 'procurement' or 'procurement processes' are used for the sale process examined in this audit.

Approach to the sale

2.21 In a Legislative Assembly debate associated with the sale of ACTTAB on 28 November 2013, the Treasurer stated:

> … the sale will also be conducted through an open competitive process so as to maximise the number of bidders. This approach should ensure the best outcome for the Territory.

2.22 This approach was reinforced in a letter to the Chief Executive of the Canberra Racing Club (and others) on 13 December 2013 from the Deputy Chief Minister, which stated:

> The first stage will call for expressions of interest but will not be as prescriptive as a conventional sale as to the means of meeting the Government's objectives. As such it is intended to encourage prospective bidders to provide their best offering in meeting the Government's overall objectives including support for existing staff and the racing industry. During the second stage short listed bidders will have the opportunity to improve and firm up their offerings during an intensive period of clarification and parallel negotiations.

2.23 These statements indicate that the ACT Government's intention for the sale of ACTTAB were that the sale process:

- be run as an open competitive process;
- seek expressions of interest from the broader community in order to shortlist suitable potential purchasers; and
- identify applicants' preferences for the purchase of ACTTAB.

2.24 Such an approach is not unusual and may be adopted for two reasons:

- it facilitates consideration of a range of commercial approaches to meeting the Sale Objectives (refer to paragraph 1.17); and
- it allows for the effective short listing of potential purchasers.

2.25 The approach adopted of an open competitive process, using expressions of interest from the broader community to shortlist and identifying interested parties' preference for an asset or a share sale for the sale was an acceptable process for implementing the Sale Objectives

Scale, complexity and sensitivity

2.26 The greater the complexity, the larger the scale, and sometimes the greater the sensitivity of a procurement, the more likely it is that the level of inherent risk of the procurement is high. In these situations resources, team capabilities and processes need to be designed to reflect the level of risk that needs to be managed. One example of guidance on procurement risk is set out in the Australian National Audit Office (ANAO) *Fairness and Transparency in Purchasing Decisions Better Practice Guide* (2007). The ANAO better practice guide provides guidance on the types of factors to be considered to determine the level of risk associated with a procurement:

- The expected cost of the purchase is high, or relatively high compared with the purchases normally undertaken by the entity
- The entity has limited experience in either the nature of the purchase being undertaken or the market
- The project itself is inherently complex (technically, legally or financially)

- The project is potentially controversial or politically sensitive.

2.27 The ANAO guidance is only one of many better practice guides for procurement and is broadly representative of them.

2.28 Table 2-1 shows an assessment of the risk associated with the sale of ACTTAB, against the ANAO's indicators of risk. This report does not consider the sale process against any other Commonwealth or state better practice guidance, as it is considered that the ANAO guidance is broadly reflective of other better practice guidance. This material is used as general guidance rather than specific direction.

Table 2-1 Risk assessment associated with the sale of ACTTAB against better practice risk indicators

ANAO Indicator	Assessment of sale of ACTTAB	Rating
The expected value of the procurement is high.	Value at the commencement of the process was initially estimated by PwC at $36-$48 million.	High
There is limited experience in either the nature of the procurement or the market.	The sale of ACTTAB was a 'one-off' sale for the Territory.	High
The procurement process is inherently complex (technically, legally or financially).	The sale of ACTTAB involved a complex combination of: • sale of a Territory Owned Entity with an independent management structure and Board; • government policies on licensing, taxation, regulation, probity and legislation; • tangible and intangible assets; • business integration; • forecasting and modelling; and • complex commercial drivers.	High
The procurement is potentially controversial or politically sensitive.	The sale of ACTTAB was recognised as highly sensitive, due to: • political stakeholders and owners (as illustrated by the fact that the sale required a resolution by the Legislative Assembly); • community expectations (due to recognition of ACTTAB as a public asset); • industry expectations (due to the possible impact on the local racing industry); and • industrial matters (due to the impact on ACTTAB employees).	High

Source: ACT Audit Office analysis of Australian National Audit Office (ANAO) *Fairness and Transparency in Purchasing Decisions Better Practice Guide* (2007) guidance.

2.29 The sale of ACTTAB is regarded as high risk, when compared against risk indicators identified in the Australian National Audit Office (ANAO) *Fairness and Transparency in Purchasing Decisions Better Practice Guide* (2007). This assessment was confirmed in interviews with Sale Project Team members.

2.30 A high risk transaction, such as the sale of ACTTAB, requires greater levels of control than lower risk transactions. In particular, higher risk transactions may require:

- more detailed planning;
- access to specialist skills;
- access to good market knowledge; and
- comprehensive and explicit identification, documentation and management of risk.

2.31 In planning for a high risk sale, such as the sale of ACTTAB, it is essential that risks are identified as early as possible, and that they are documented and understood, so that management of the risks is integrated into governance and controls at the outset of the sale.

2.32 Key ways to manage a high risk sale, such as the sale of ACTTAB, (and its inherent risks) would include:

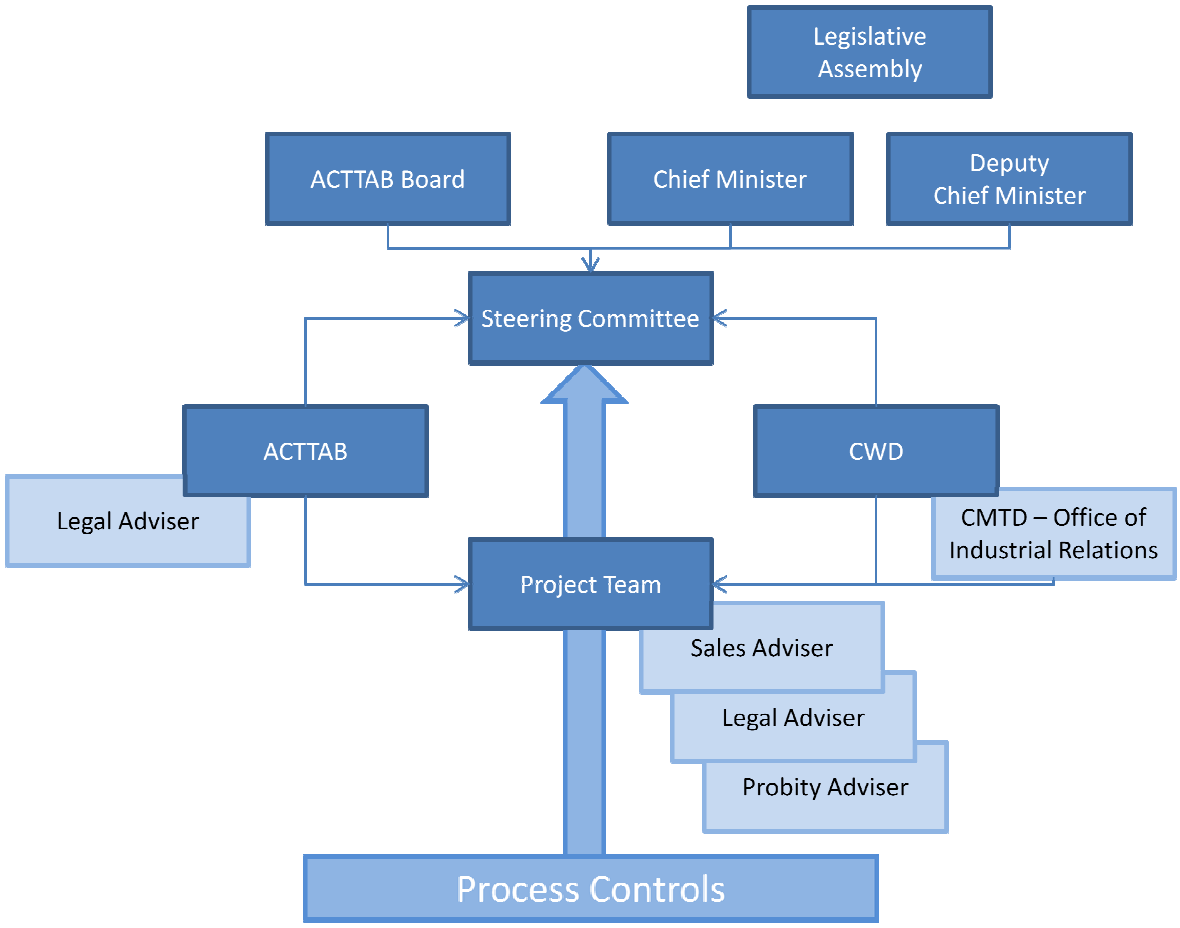
- appropriate governance arrangements, including well-defined roles and responsibilities;
- risk management, including the management of process risks and probity risks;
- use of specialist advisors;
- appropriate administrative policies, procedures and rules; and
- good documentation and record-keeping.

2.33 These are discussed in the following sections of the report.

Governance arrangements

2.34 The need for appropriate governance arrangements for the sale of ACTTAB was specifically identified in a documented *Probity Plan - Sale Process for the Territory's Interest in ACTTAB Ltd* (December 2013) and more generally in other documents associated with the sale process. The main governance elements associated with the sale process are illustrated in Figure 2-1.

Figure 2-1 Governance arrangements for the sale of ACTTAB



Source: ACT Audit Office

2.35 Key governance committees for the sale of ACTTAB were:

- the Steering Committee; and
- the Sale Project Team.

Steering Committee

2.36 The Steering Committee had two members; the Director-General of the Commerce and Works Directorate (Chair); and the Chair of the ACTTAB Board (Deputy Chair). Following the transfer of Commerce and Works Directorate functions in July 2014 the position of Steering Committee Chair transferred to the Director-General of the Territory and Municipal Services Directorate.

2.37 The Steering Committee had primary responsibility for:

- the oversight and direction of the Sale Project Team; and
- addressing and reporting to the Shareholders any regulatory and policy issues emerging from analysis of market responses and vendor due diligence.

2.38 Steering Committee meetings were required to be attended by ACTTAB's Managing Director and Executive Manager Finance and Business Services, the Sales Advisor (Deloitte), the Probity Advisor (ACT Government Solicitor) and the Chair of the Sale Project Team. Other officials and advisors attended relevant meetings as required.

Sale Project Team

2.39 The Sale Project Team comprised the Senior Manager, Government Business Enterprises (Commerce and Works Directorate) (Chair), the ACTTAB Chief Executive (as Deputy Chair), Director of Corporate and Governance (Commerce and Works Directorate) and ACTTAB Executive Manager Finance and Business Services.

2.40 Advisors to the Sale Project Team included a Probity and Legal Advisor (ACT Government Solicitor), the Sales Advisor (Deloitte), Specialist Legal Advisor (Thompson Geer) and the Director, Office of Industrial Relations (from the then Chief Minister and Treasury Directorate). Minter Ellison also provided legal advice to ACTTAB and its Board.

2.41 The Sale Project Team had primary responsibility for managing the entire sale process including:

- day-to-day management of the sale process (including the development and implementation of an overall project plan for the sale, providing regular updates on key elements of the project and monitoring and resolving issues in accordance with the project plan); and
- management, arrangement and participation in all aspects of due diligence for the sale process. This included establishing protocols and appropriate verification and sign-off mechanisms; the organisation of, attendance at, and reporting on, potential buyer site visits; interviews and presentations to potential purchasers; conduct of due diligence and reporting with appropriate sign-off on key issues arising; establishing and maintaining data rooms including question and answer processes.

2.42 Both the Steering Committee and Sale Project Team were required to convene at regular intervals to receive progress reports, assign tasks and to resolve issues that may arise. The Steering Committee and the Sale Project Team met regularly and considered issues put before them.

2.43 The structure of the governance arrangements for the sale of ACTTAB, including the Steering Committee and Sale Project Team, were appropriate.

Managing procurement risk (including probity)

2.44 There are many publications that set out better practice guidance for managing procurement risk. The guidance provided is relatively consistent and for this report the Audit Office has relied on the Australian National Audit Office (ANAO) *Fairness and Transparency in Purchasing Decisions Better Practice Guide* (2007) which states that:

> Whether relatively straightforward or complex, the nature of procurement activity means that it generates a range of probity issues. With this in mind, the Better Practice Guide emphasises the important role of procedural integrity in managing procurement and probity risks.

Procurement risks

2.45 At the formative stages of procurement it is important to analyse and document procurement risks. This allows the whole procurement team to have a shared understanding of the risk and establish appropriate processes and measures to mitigate the risk so that there is assurance that the procurement does not present an unacceptable level of risk.

2.46 A key mechanism for managing procurement risk is to have a documented risk register.

2.47 The earliest evidence of a draft risk register for the sale of ACTTAB was in January 2014. It was, however, not provided to all Sale Project Team members until May 2014, which was three months after the release of the *Request for Expression of Interest* document. On 19 May 2014 an email was sent by the ACTTAB Sale Project Officer (an officer providing administrative support to the Sale Project Team and Steering Committee) requesting comments on a draft procurement risk register. On receipt of this email, a member of the Sale Project Team commented:

> Sorry, but a bit late and I would have thought a complete waste of time producing this document to us for the first time on 19 May 2014 (when the finishing line is in view), unless of course the primary purpose is to rewrite history and cover backsides, which I have no interest in doing. You will recall for instance that ACTTAB was of the view that there was a risk in going to the market in the manner which the Government has subsequently chosen to do (various options and uncertainty around licence terms and conditions) and there is no mention of this despite numerous conversations at Project and Steering Committee meetings. There was also the risk in wasting time in attempting to placate vested interest groups as well as an EOI process open to all and sundry who thought it might be nice to own a Tab. The document might serve some purpose within the Directorate but doesn't require our input at this late stage.

2.48 Later that day the same member of the Sale Project Team continued as follows.

> My response might have seemed a bit harsh ... however, I would have thought that if the project was going to have a risk assessment and register then that might have been discussed with the Project Committee members at inception and that we might have been invited to contribute before this. In racing parlance, the horse has bolted!

2.49 The draft procurement risk register (May 2014) included the risks shown in Table 2-2.

Table 2-2 Draft procurement risk register for the sale of ACTTAB May 2014

Risk Reference	Risk Description
1	Potential Failures to key sales objectives as stated below: - A fair and reasonable price is not achieved - The racing industry is negatively affected - Purchaser does not consider employee welfare - Purchaser does not have the appropriate experience, capacity or integrity to operate a wagering business - Failure to achieve a timely sale - Failure to sell ACTTAB
2	Adverse Publicity / Scrutiny
3	Racing industry and associated unions expectations do not align to Key Territory Sale objectives (see risk 1) for the sale, resulting in legislative and regulatory issues
4	ACTTAB and CWD do not co-operate effectively on the Sale
5	Loss of key personal / advisors to the process

Source: Sale of ACTTAB Risk Register v5 19 May 2014

2.50 The draft procurement risk register (May 2014) does not focus on specific risks. For example, *Adverse Publicity / Scrutiny* is a consequence rather than a risk in itself and *ACTTAB and CWD do not co-operate effectively on the Sale* is a cause and not a risk event. Poorly crafted risk registers can lead to necessary treatments being overlooked or inappropriate ones being developed.

2.51 The draft procurement risk register (May 2014) is also brief and identifies five risks that are primarily focused on outcome. In contrast, for example, the Tasmanian Government *Procurement Risk Checklist* identifies 46 procurement process risks in 10 categories as set out below:

- Identifying the need and planning the purchase;
- Developing the specification;
- Purchasing documentation;
- Inviting, clarifying and closing offers;
- Evaluating offers;
- Selecting the successful tenderer;
- Negotiations;
- Contract management;
- Evaluating the procurement process; and
- Disposals.

2.52 The draft procurement risk register (May 2014) developed for the sale of ACTTAB had very limited coverage of process risks. A more comprehensive risk assessment would have facilitated identification and treatment of a broader range of risks.

2.53 Compounding the problem of having an inadequate draft procurement risk register was the lateness of when it was developed and presented to the Sale Project Team. There is no evidence that the draft risk register guided the development of sale processes or that specific risk management actions were taken as a result of its guidance.

2.54 The sale of ACTTAB was a high risk procurement for which there was no finalised or approved procurement risk register. The draft procurement risk register that was prepared was inadequate and presented late in the process to the Sale Project Team. Accordingly, there was an absence of an adequate risk management framework.

2.55 With respect to the development of a risk register, the ACT Government Solicitor advised that:

> Key aspects of the proposed sale were unknown including:
>
> - whether prospective purchasers would wish to purchase the corporation's shares and/or assets and undertakings;
> - likely purchase price (notwithstanding the "PwC" indicative value range);
> - the key value points in the transaction;
> - the likely conditions of the sale; and
> - any undertakings a purchaser might ask of the Territory (if any) in relation to regulatory matters, and could only be the subject of speculation. This was borne out by the wide range in conformity, substance and quality of applications in response to the REOI.
>
> Accordingly, any attempt to prepare a detailed and meaningful risk assessment at any early stage of the process for the entire sale process was not feasible. The risks of the process to ACTTAB and/or to the Territory were instead identified at each key stage of the process, with relevant and appropriate mitigation measures considered. The engagement of an experienced team of government officers and private sector advisors working day to day on the sale was seen as a key factor in the success of this strategy.

2.56 The Chief Minister, Treasury and Economic Development Directorate similarly advised that:

> The Project Team considers it was well equipped to deal with particular risks, if and when they arose. Several members of the Project Team had been involved in previous privatisations overseas and in Australia, the Sales Advisor and the Legal Advisor are experienced in the sale of government and private businesses, and the specialist Legal Advisor has participated in the privatisation of all previous government owned TABs.
>
> The process adopted by the joint parties was that key risks were considered continuously at each meeting of the Project Team and Steering Committee.
>
> The success of the sale depended on a range of factors including the level of market interest, the relative strengths of the bidders, any timetable constraints, the structure

of the transaction (such as the term of the licence) and the state of the market. These factors can vary depending on the circumstances. The process adopted in each case will ultimately be a judgement call and so it was considered critical to have an experienced team with a demonstrated track record in achieving successful sale results.

2.57 While the advice of the ACT Government Solicitor and Chief Minister, Treasury and Economic Development Directorate is noted, given that 'key aspects of the proposed sale were unknown' suggests a greater need for documented risk identification and management at the earliest stages of the sale process, rather than a reason for not documenting risks early.

Use of specialist advisors

2.58 The following advisors were engaged to support the sale of ACTTAB:

- **Sales Advisor** – a professional services firm (Deloitte) was engaged to provide commercial and related advice on the sale and to manage all communication (including information provided through a data room) with interested parties as part of a due diligence process.
- **Human Resource Advisor –** a senior member of staff from the Human Resources function of the then Chief Minister and Treasury Directorate (CMTD) was available to assist the Sale Project Team to ensure that ACTTAB employee matters were considered.
- **Specialist Corporate Legal Advisor** – a subject matter expert in the racing and gaming sector was engaged on 27 February 2014 to provide a specialist corporate advisory function, with additional legal advice on transactions relating to the gaming and racing industry where necessary.
- **Probity Advisor** - the ACT Government Solicitor was engaged to advise the Steering Committee with respect to any probity issue notified by the Steering Committee, or the Sale Project Team arising in relation to the procurement process and thereby monitor compliance with the Probity Plan and the sale process. The Probity Advisor was also required to attend meetings of the Steering Committee and Sale Project Team in relation to the Project.
- **Legal Advisor -** the ACT Government Solicitor was engaged to provide advice in relation to the sale process. This included the preparation of sale instruments.

The role of the probity advisor

2.59 A representative of the ACT Government Solicitor was the identified Probity Advisor for the sale process. The Probity Plan (December 2013) provided:

> The Probity Adviser will:
>
> (a) advise the Steering Committee with respect to any probity issue notified by the Steering Committee or the Project Team arising in relation to the procurement process and thereby monitor compliance with the Probity Plan and the Sale Process; and
>
> (b) attend meetings of the Steering Committee and Project team in relation to the Project.

2.60 The Probity Advisor also provided legal advice in relation to the sale process. The Probity Plan (December 2013) allowed for this by stating:

> To the extent that the Probity Adviser will provide legal advice to the Steering Committee or the Project Team in relation to procedural aspects of the project, the Probity Adviser will have regard to this Probity Plan in the provision of their advice.

2.61 The Probity Advisor who was also providing legal advice was significantly involved in the entire sale process.

Guidance on the role of a probity advisor

2.62 The Australian Government Solicitor has published guidance in relation to managing probity and process issues in procurement; *Managing probity and process issues in procurement* (Commercial Note No.15, 14 March 2005). As part of this guidance, the Australian Government Solicitor has also provided guidance in relation to the role of a probity advisor. The guidance states:

> A probity adviser may be appointed under a probity plan to monitor and report on compliance with the plan. A probity adviser is usually an adviser who is external to and independent of the process, who will scrutinise (by way of observing and reviewing) the tender and evaluation process, provide advice on probity issues which may arise before and during the tender process, and advise whether the process is equitable and conducted with integrity.
>
> The role of the probity adviser is usually to monitor the tender, evaluation and selection processes in order to advise whether they are defensible and conducted in a fair and unbiased manner. The probity adviser does not undertake the evaluation and is not responsible for advising on the legal issues that arise from the conduct of the tender process. However, the probity adviser will provide advice on the conduct of the tender process (including the tender evaluation procedures), advise whether the tender rules and procedures are followed, and whether the tender process has been conducted fairly and the tenders received are assessed in accordance with the stated evaluation criteria.
>
> In the period following the release of the RFT, for example, the probity adviser can advise on issues such as bidder communications and bid receipt, including the treatment of late bids.

In respect of the evaluation phase, the probity adviser can advise on matters such as the establishment of an evaluation team, assessment of risk and score adjustment, and the assessment of value for money. The probity adviser can also conduct, or arrange for a third party to conduct, various types of probity and security investigations on a particular company and/or its directors and secretaries.

The probity adviser will normally advise and report to the project steering group, and may attend and monitor meetings of other tender committees. Often the probity adviser will also provide all tender evaluation team members with a probity briefing before the actual commencement of tender evaluation.

At the conclusion of the tender process, the probity adviser usually provides confirmation (or sign off) that the process has met all probity and process requirements. This would normally involve the provision of a sign off which confirms that the process followed applicable government policies and the agreed probity plan, and that the tender evaluation was conducted in accordance with the process as set out in the tender evaluation plan.

One person undertaking a Probity Advisor role and providing legal advice

2.63 The Australian Government Solicitor's published guidance on the role of a probity advisor (*Managing probity and process issues in procurement* (Commercial Note No.15, 14 March 2005)) states:

> A probity adviser works closely with the client from the beginning of the procurement process, providing advice on probity/process issues which may arise, and providing advice on strategies to overcome potential problems. The probity adviser is therefore expected to give advice which is proactive and strategic in nature. A probity adviser is closely involved in the procurement process, and so cannot be regarded as an 'independent' party. The probity adviser can also fulfil the role of legal adviser to the client.
>
> ...
>
> The extent of proactive involvement by a probity or legal process adviser varies from project to project and client to client. In some cases the client may only require the adviser to be involved at certain key stages of the tender process (for example, at tender opening and to review the tender evaluation process). In other projects, a client might see the adviser as being an integral member of the tender team and expect the adviser to play a proactive role throughout. In other words the role needs to be tailored to the client's own requirements and expectations.
>
> Some clients employ a legal process adviser without appointing a separate legal adviser for the project. In that case, they principally seek advice on process related issues with an expectation, however, that the process adviser would also comment on contractual issues where applicable (in many cases, the client will have used its in-house legal or contracting area to develop the contract in the first instance). Where this occurs the approach has been generally to have one or more team members examine the tender documentation (including the tender evaluation plan) from a probity or legal process perspective, and other team member(s) look at the proposed transaction documents (usually the contract) from a legal perspective.
>
> On occasions the same firm may be approached to formally act as both the legal adviser and the probity adviser for a particular project, with both roles being

specifically recognised in the terms of the engagement. In this situation, unless the client otherwise agrees to the roles effectively being combined, the approach has similarly been to have one team member focus on the probity/process issues and another team member focus on the legal issues. As there can be occasions where the dividing line between probity or process and legal issues is not altogether clear, it is important that these team members work closely together. However, the client needs to be aware that the probity adviser role cannot be totally independent.

2.64 The Audit Office sought advice from the Australian Government Solicitor with respect to a single person undertaking the role of Probity Advisor and providing legal advice. The Australian Government Solicitor advised that:

> The decision to appoint a probity advisor is typically based on a risk assessment of the procurement ... If one person is providing both legal and probity advice there is a greater risk that probity issues may not be identified or properly considered and accordingly the probity of the procurement may be compromised.

2.65 Consideration of the separation of probity advice and legal advice roles is consistent with other advice on high risk procurements of this type. For example, the NSW Independent Commission Against Corruption provides the following advice in relation to the independence of probity advice:

> A probity adviser should not be encumbered by any actual or perceived conflict of interest that could compromise his or her duty to give candid advice about the probity aspects of the project. The probity adviser or his or her organisation must not be providing another service relating to the project. A probity adviser cannot simultaneously serve in roles such as legal adviser, technical adviser or project manager and still maintain independence. The probity adviser's role in the project should be strictly confined to probity issues and not stray into other fields of advice, even if the adviser has expertise in these areas.

2.66 On this issue, the ACT Government Solicitor advised:

> In the circumstances of this particular process, having regard to the limited timeframes involved, embedding a probity adviser function into the process as part of the legal adviser role gives the key advantage that the probity adviser is highly conversant with all issues as part of the transaction in a timely manner. The probity adviser provided a great deal of timely and apposite advice throughout the process. This approach complemented the need for seamless and efficient advisory support functions.
>
> It is accepted that the circumstances of each *procurement process* should be analysed and the appropriateness of any combined legal adviser/probity adviser role carefully considered. The factual circumstances must however be considered *for any other processes,* including, as was the case with the role of ACTGS in this *sale process,* that the ACTGS lawyer who assumed the lead in the legal and probity roles, was supported by a team of lawyers including variously two to four lawyers from ACTGS, three to four lawyers from Thompson Geer and three to four lawyers from Minter Ellison who provided legal and in the case of ACTGS probity input on the sale process as required.

2.67 The ACT Government Solicitor further advised that there was other legal advice that was being provided throughout the process. In this respect the ACT Government Solicitor advised:

> Much of the key advice and guidance on the sale process from the Territory's perspective was provided by ... Partner of Thomson Geer who has significant prior experience in wagering and gambling sale transactions and by [a representative of] Deloitte who similarly has experience in significant wagering transactions.

2.68 Risk is increased by having a person undertake both a probity and legal advisory role; this is supported by much of the literature and better practice guidance available. Some of this material is referred to in this chapter. The Australian Government Solicitor advised:

> In our view, where a single person is providing both legal and probity advice in a procurement that person is not in a position to independently assess whether the probity of the procurement is being adequately addressed. If one person is providing both legal and probity advice there is a greater risk that probity issues may not be identified or properly considered and accordingly the probity of the procurement may be compromised.

2.69 Although the ACT Government Solicitor advised that there were lawyers in, and from outside, the ACT Government Solicitor's office who provided legal advice, having the Probity Advisor also providing legal advice is not better practice and increases risk. There is no evidence that there was a need for one person to undertake the Probity Advisor role and provide legal advice. Given the complexity and size of the sale of ACTTAB it would have been prudent to have the probity advisor role separate from other roles.

Documentation and record-keeping

2.70 It is standard practice in procurements to ensure that a comprehensive and complete record is retained for all decisions, processes and communication, to provide an evidence trail and facilitate accountability and transparency.

2.71 Section 6.2 of the *Probity Plan* (December 2013) states:

> Project Personnel who make a decision that may affect the conduct of the procurement process or any potential or actual Respondent must record in writing their decision, the advisers or other persons who were consulted before making the decision and the basis on which they made that decision.

2.72 *Section 7 Record Keeping and Process Control* of the *Probity Plan* (December 2013) provides directions to those involved in the sale of ACTTAB about documentation requirements. This section is primarily focused on the maintenance of a Communications Register, management of confidentiality, information security and conflicts of interest. The *Probity Plan* (December 2013) does not address day-to-day record keeping requirements of the Sale Project Team and Steering Committee members associated with managing and implementing the sale process.

2.73 Documentation was inadequate in relation to the sale process, for example:

- the Audit Office was advised that legal advice was provided that the *Government Procurement Act 2001* did not apply, but this was not documented. (Unsigned minutes from an (Interim) ACTTAB Sale Working Group meeting on 28 November 2013 nevertheless stated: 'Confirmed that the sales advisor procurement does not fall under the Procurement Act as if we proceed with a Sale of Assets, these are ACTTAB's assets and ACTTAB does not fall under the Procurement Act. If we proceed as a Sale of Shares, then this is a investment transactions (ie not sale of a good or service).' Notwithstanding the reference to the 'sales advisor procurement, which was underway at the time, this has been cited as support for consideration and endorsement that the *Government Procurement Act 2001* did not apply); and
- records provided to support the evaluation of the expressions of interest were reports by the external Sales Advisor (Deloitte), an agenda paper from the Sale Project Team to the Steering Committee summarising the evaluation of the expressions of interest and extracts from email correspondence. Members of the Sale Project Team confirmed during interviews that documentation of individual assessments of submissions had not been retained.

2.74 Transparency and accountability requires comprehensive and complete documentation to be retained to evidence transactions. Projects of this size, complexity and risk, typically have a high burden of documentation.

2.75 Table 2-3 shows instances where record keeping did not meet minimum requirements for accountability, transparency or risk management that the Audit Office had expected would be able to be provided.

Table 2-3 Documentation and record-keeping gaps

Documentation	Details	Comments
Project Plan	Required by Schedule3, Section 4 of the Probity Plan.	The Sales Advisor prepared and maintained a Gantt Chart but there was no other record.
Risk Management Plan (Risk Register)	Would be expected for a sale of the complexity and size of ACTTAB	A draft risk register was created but it was late and inadequate.
Evaluation Plan	Would be expected for a sale of the complexity and size of ACTTAB so that it was clear from the beginning what ultimately would be assessed	No record.
Probity reports on conduct of the sale process	Provided for by Section 10 of the Probity Plan.	A probity sign-off was provided at the Expressions of Interest stage but not on any other parts of the sale process.
Written reports to Steering Committee on complaints received	Provided for by Section 10 of the Probity Plan.	None recorded.

Source: ACT Audit Office

Probity sign-offs on sale process

2.76 Section 10.2 of the *Probity Plan* (December 2013) states:

> The Probity Advisor may:
>
> ...
>
> (d) report in writing to the Project Team on whether, in the Probity Adviser's opinion, the Project has been conducted fairly and in accordance with this Plan.

2.77 Such a role accords with Australian Government Solicitor better practice guidance, (*Managing probity and process issues in procurement* (Commercial Note No.15, 14 March 2005)) (refer to paragraph 2.62) specifically:

> At the conclusion of the tender process, the probity adviser usually provides confirmation (or sign off) that the process has met all probity and process requirements. This would normally involve the provision of a sign off which confirms that the process followed applicable government policies and the agreed probity plan, and that the tender evaluation was conducted in accordance with the process as set out in the tender evaluation plan.

2.78 Probity advice was provided on 4 March 2014 in relation to the Expression of Interest stage of the sale process. In a letter to the Chair of the Steering Committee, the Probity Advisor wrote:

> As the appointed probity adviser to the sale process, you have asked for my confirmation that I have no concerns in relation to the public Expression of Interest

> process recently completed. I note you have raised no specific issues or concerns in relation to the process.
>
> ...
>
> Based on the Deloitte evaluation report and the Project team recommendation to the Steering Committee, I have no reason to believe Deloitte or the Project Team has assessed the responses received otherwise than in accordance with the stated evaluation criteria.

2.79 No other advice was provided for any other stage of the sale process.

2.80 On 12 August 2014 the new Chair of the Steering Committee sent an email to the Chair of the Sale Project Team which stated:

> ... as part of the finalisation of the sale of ACTTAB we should complete a probity report. You may already have that in hand. Please discuss the process for this.

2.81 The Audit Office has been advised that a final 'wrap-up report' has not been produced but is contemplated for when ACTTAB is de-registered, which is expected to occur in July 2015. Such advice is considered to be too late in the process to identify any actions that need to be undertaken to manage any probity risks that are identified.

2.82 The ACT Government Solicitor has advised:

> The view of the ACTGS is that it is the role of a probity auditor to independently examine discrete parts and/or the whole of a process and deliver reports as to that process. As is set out in the approved Probity Plan, the role of the probity adviser is iterative: attending meetings, reviewing documents and issues and providing advice as and when necessary. Unless specifically requested to provide any report by the Steering Committee, or unless adverse issues had, in the opinion of the probity adviser arisen, there was no requirement for the probity adviser to provide reports and sign-off for the various stages of the process. This is confirmed in the approved Probity Plan.

2.83 The Audit Office notes the views of the ACT Government Solicitor, but notes that, with the exception of advice provided at the expression of interest stage, there was no formal, documented probity advice and no sign-off at key stages of the sale process. Such documentation and sign-off accords with Australian Government Solicitor better practice guidance for a probity adviser, which provides for probity advisor 'sign off which confirms that the process followed applicable government policies and the agreed probity plan, and that the tender evaluation was conducted in accordance with the process as set out in the tender evaluation plan.' Given the risks associated with the sale of ACTTAB, it would have been prudent to have more rigorous and documented probity advice and sign-off at key stages of the sale process.

2.84 Documentation of the processes used for the sale of ACTTAB was inadequate and did not meet accountability and transparency requirements for procurement commensurate with the size, complexity and risk of such a sale. Importantly, there was a lack of documented sign off or advice from the Probity Advisor following the completion of key stages of the sale process, including the finalisation of the sale.

2.85 As a result of the lack of documentation associated with the project, the Audit Office sought access to email records of key representatives of the Sale Project Team and Steering Committee in order to form a view of the processes associated with the sale.

3 THE SALE PROCESS

3.1 This chapter examines activities associated with the sale process, specifically the evaluation of expressions of interest and consideration of probity requirements.

Summary

Conclusions

The sale process was inadequate at the expression of interest stage due to the use of poorly constructed evaluation criteria and an inappropriate assessment of some evaluation criteria, including the use of information that was not submitted by potential purchasers in response to the criteria.

Key findings

	Paragraph
An open approach to the market was taken, whereby any interested party responding to the advertisement of the sale received a *Request for Expression of Interest*. The open approach to the market was initially flagged as being preferred by the Treasurer in the debate of the resolution for the sale of ACTTAB in the Legislative Assembly in November 2013.	3.10
A *Request for Expression of Interest* was sent out to interested parties that responded to the newspaper advertisements from 3 February 2014 onwards. Expressions of interest were required to be submitted by no later than 5:00 pm on 14 February 2014.	3.15
The *Request for Expression of Interest* sent to interested parties contained all relevant information requirements and was structured appropriately to allow for them to respond.	3.18
No evaluation plan(s) were prepared for the sale of ACTTAB.	3.28
The evaluation criteria in the *Request for Expression of Interest* did not align with the Sale Objectives, as identified in the ACT Legislative Assembly resolution in November 2013. It would have been straightforward to directly align the evaluation criteria in the *Request for Expression of Interest* with the Sale Objectives. This would have provided greater assurance that the Sale Objectives would have been appropriately considered in the evaluation process. Not aligning the criteria to the Sale Objectives presented a risk that important objectives of the sale were	3.30

not given appropriate prominence in the selection process.

The criteria used for the evaluation of expressions of interest were poorly crafted as: 3.40

- one of the criteria was 'binary' and did not lend itself to being used to make a comparative evaluation between interested parties. Binary requirements are usually conditions for participation in a process rather than an evaluation criteria; and
- one of the Sale Objectives (timeliness) was aggregated with the financial capacity criterion and consequently could not be evaluated independently from financial considerations.

Five responses to the *Request for Expression of Interest* were received by the closing time of 5:00 pm on 14 February 2014, including responses from the two holders of totalisator pools in Australia. 3.45

The evaluation of the responses took place between 14 and 27 February 2014. The evaluation was initially conducted by the Sales Advisor (Deloitte) with an evaluation report (the first evaluation report) produced and sent to the Sale Project Team on 19 February 2014. The evaluation report recommended all five interest parties proceed to the next phase of the process. 3.48

In response to the first evaluation report from the Sales Advisor (Deloitte), on 20 February 2014 the Probity Advisor who also provided legal advice sent an email to members of the Sale Project Team. The email (which was subsequently retracted and updated) provided comments on each of the expressions of interest that were received, and ranked the expressions of interest 'in order of the quality of their responses'. 3.50

Following a meeting of the Sale Project Team on 20 February, the Sales Advisor (Deloitte) produced a second evaluation report on 21 February 2014. The evaluation report recommended all five potential interested parties proceed to the next phase of the process. 3.53

On 25 February 2014 the Probity Advisor who also provided legal advice sent an email to the Sale Project Team that retracted and updated the email previously sent on 20 February 2014. Similar to the first email, comments were provided on each of the expressions of interest that were received, and the expressions of interest were ranked 'in order of the quality of their responses'. The email provided an opinion that only two of the interested parties should proceed to the next phase. 3.55

On 25 February 2014, the Steering Committee considered the Sales Advisor's 3.57

(Deloitte) second evaluation report and requested that the Sales Advisor (Deloitte) update the evaluation report and provide a ranking of the interested parties.

On 27 February 2014, the Sales Advisor (Deloitte) produced a third (and ultimately final) evaluation report that recommended *inter alia* that '[two of the interested parties] should progress to the next phase ...' 3.59

At its meeting on 28 February 2014, the Steering Committee considered: 3.63

- the third (and ultimately final) evaluation report from the Sales Advisor (Deloitte); and
- an agenda paper from the Sale Project Team, which the Sale Project Team advised was its evaluation report.

The third (and ultimately final) evaluation report from the Sales Advisor (Deloitte) stated '[two interested parties] should progress to the next phase of the process. The key risk which the shareholders should consider in determining whether to progress the remaining three bidders is their ability to execute a pooling agreement, for which no party has presented a clear alternative to [one of the interested parties], presenting a significant execution concern.' The agenda paper from the Sale Project Team stated '... there are only two suitable candidates who should be invited to participate in the indicative offer stage.' 3.64

There was no evidence of: 3.74

- documented and retained individual assessments of the submissions by members of the Sales Project Team;
- documentation showing a consolidated assessment of where the individual assessments of the submissions by members of the Sales Project Team were brought together; and
- a formal evaluation report with detail and judgements highlighted.

One of the key probity objectives set out in the Probity Plan was: *Establishing and maintaining a clear audit trail for accountability purposes*. The creation and maintenance of evaluation documentation is a key part of the accountability requirement. Documentation to support the evaluation of the expression of interest criteria was inadequate. 3.77

The Australian Government Solicitor and Mr Charles Scerri, QC concluded that it was more likely than not that the principles of the Hughes Case applied to the sale of ACTTAB. As a result, a 'process contract' existed in the sale of ACTTAB and there was, therefore, an obligation to conduct the sale in accordance with the defined procedures and the stated criteria that was in the *Request for Expression of Interest*. 3.81

The ACT Government Solicitor advised in responding to the proposed audit report that the principles of the Hughes Case did not apply. 3.82

While there is a difference of views, given the type of sale with its complexities and uncertainties, and given the consequences if the Hughes Case did apply, it would have been prudent for such an issue to have been explicitly considered in a risk analysis, in preparation for the sale. However, there is no evidence that this occurred. If it had occurred, any issues emerging could have been managed to reduce any associated risk. 3.83

The evaluation of the expression of interest criteria is considered to be inadequate regardless of whether (or not) the principles of the Hughes Case apply. If the Hughes Case does apply the issues have greater gravity because of: 3.84

- the use of different criteria to those in the *Request for Expression of Interest* document;
- the evaluation of binary criteria in a non binary way; and
- evaluation using material not provided by the applicant.

Neither the final evaluation report prepared by the Sales Advisor (Deloitte) or the agenda paper from the Sale Project Team to the Steering Committee precisely or rigorously applied the evaluation criteria set out in the *Request for Expression of Interest* document sent to interested parties. The incorrect application of evaluation criteria presents a risk to the probity of the sale process. If the Hughes Case is relevant to the sale of ACTTAB, this risk is exacerbated. Regardless, there is a high probability that interested parties would have had an expectation that they would be evaluated against the criteria in the *Request for Expression of Interest* document. This did not occur. 3.89

The incorrect application of the probity criterion, which was essentially a 'binary' criterion that did not contemplate a subjective assessment, inappropriately excluded interested parties from further consideration. These interested parties may not have met the criterion had it been more aptly worded to allow for a subjective assessment. 3.96

The use of external material in evaluating submissions, including the work associated with evaluating interested parties' responses, should not have been used as the basis for the exclusion of interested parties from further consideration. This material could have been considered had the process been designed differently. 3.107

The operational capacity criterion required that interested parties demonstrate that they currently have the ability, or have a plan, to successfully operate a 3.108

wagering business including a pari mutuel pooling arrangement.

Two interested parties operated large totalisator pools in Australia. The three other interested parties did not, and submitted their planned intentions in relation to establishing a pari mutuel pooling arrangement. The three other interested parties were primarily excluded from the process because they were assessed as not meeting the operational capacity requirement. 3.110

The evaluation of the operational capacity criterion inappropriately excluded interested parties from further consideration. These interested parties may not have met the intention of the criterion, if it had specified that they should have already been operating a totalisator pool. If the evaluation criteria had explicitly stated the need to already be operating a totalisator pool, then there would be no issue. 3.129

The 'reserved discretions' in the Request for Expressions of Interest were intended to allow for greater flexibility in the sale process. However, the Australian Government Solicitor and Mr Charles Scerri, QC advised that it is more likely than not that the Hughes Case principles applied and a 'process contract' was relevant to the sale of ACTTAB. Therefore, the 'reserved discretions' in the *Request for Expressions of Interest* document cannot be relied upon. It would have been prudent not to exercise the 'reserved discretions' as if they had priority over the *Request for Expressions of Interest* criteria. 3.143

Concerns regarding the incorrect use and application of expression of interest criteria are not issues of semantics as three of the five potential interested parties that provided expressions of interest were excluded from further consideration in the sale process. 3.144

Probity activities associated with managing confidentiality agreements, the approach to the market, probity planning, responding to interested parties' clarification requests and due diligence were performed satisfactorily. 3.147

There were some areas where not all probity requirements were met: 3.148

- formal sign-off on key 'approach to market' documents and evaluation criteria;
- formal sign-off on evaluation processes and key 'milestones' and phases of the procurement process; and
- the management of a complaint.

The *Probity Plan* (December 2013) required the Probity Advisor to prepare a written report to the Steering Committee on the complaint referred for consideration. There was no evidence of this report and the Steering Committee minutes do not indicate whether any such report was presented to them. 3.157

Context for the sale process

3.2 The ACT Legislative Assembly passed a resolution in support of the sale of ACTTAB on 28 November 2013. The Sale Objectives set out in the resolution were:

- achieve a fair and reasonable price;
- ensure local racing industry is not negatively affected;
- achieve a timely sale;
- ensure the successful party has appropriate experience, capacity and integrity to operate a wagering business; and
- ensure employee welfare is considered.

3.3 Chapter 4 considers performance against these Sale Objectives.

Probity Plan (December 2013)

3.4 On 10 December 2013 the ACT Government approved a *Probity Plan* for the sale process. The *Probity Plan* (December 2013) set out 'the framework that will govern procedural aspects of the sale preparation and implementation phases in a manner which reflects a high degree of probity in achieving a value for money outcome.'

3.5 The *Probity Plan* (December 2013) required that the process be conducted consistently with the Sale Objectives (as established by the resolution of the Legislative Assembly in November 2013). The *Probity Plan* (December 2013) also required that the Sale Project Team ensure that the sale process be conducted with a high standard of probity and integrity.

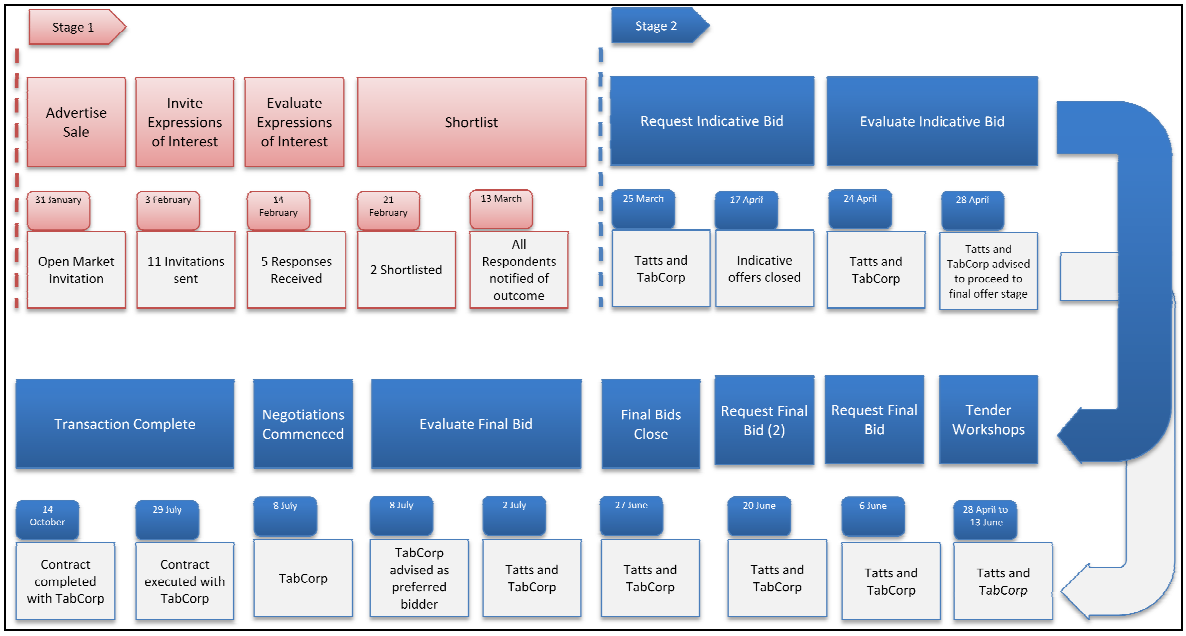
Sale process

3.6 The sale of ACTTAB was undertaken in two stages:

- Stage 1 - Expression of Interest (EOI)
  - advertisement and contact with parties who had previously shown int*erest*
  - invitation to express interest
  - evaluation of EOI (and Evaluation Report)
  - short list
- Stage 2 - Bid
  - indicative bid
  - indicative bid valuation
  - final bid
  - final bid evaluation
  - negotiation
  - contractual agreement.

3.7 The process for the sale of ACTTAB is illustrated in Figure 3-1. Also shown in this figure is the progression, or not, of interested parties.

Figure 3-1 Process for the sale of ACTTAB



Source: ACT Audit Office

3.8 Stage 1 of the sale process involved seeking expressions of interest from interest parties and was focused on short listing interested parties. The expression of interest stage was a critical stage as it was at this stage that interested parties were excluded from further participation in the process.

3.9 Stage 2 of the sale process, which involved the receipt and evaluation of indicative bids and final bids (the Bid stage), was focused on the value of the deal that could be agreed.

Request for expressions of interest

3.10 An open approach to the market was taken, whereby any interested party responding to the advertisement of the sale received a *Request for Expression of Interest*. The open approach to the market was initially flagged as being preferred by the Treasurer in the debate of the resolution for the sale of ACTTAB in the Legislative Assembly in November 2013.

3.11 As part of the debate of the resolution for the sale of ACTTAB in the Legislative Assembly the Treasurer stated:

> The sale will also be conducted through an open competitive process so as to maximise the number of bidders. This approach should ensure the best outcome for the Territory.

3.12 Members of the Sale Project Team also advised that, following the release of the PwC *ACTTAB Future Options Feasibility Study* (July 2013), the market had shown some interest in the future sale. Accordingly, a number of interested parties that had submitted unsolicited expressions of interest subsequent to the release of the PwC report in July 2013 were also sent a *Request for Expression of Interest* in February 2014.

3.13 On 24 January 2014 a briefing was provided to the Chief Minister and Treasurer identifying that the strategy for the sale process would include seeking expressions of interest in order to short-list potential purchasers. The briefing advised:

> The sale strategy will use the Expression of Interest process to short list suitable parties to proceed to the Initial Offer Stage subject to signing a confidentiality agreement and accepting the bidding rules in order to be given access to confidential information to conduct due diligence. Short listing during this initial phase will be based on financial and operational capability to run Totalisator operations.

3.14 The Sales Advisor (Deloitte), on behalf of the ACT Government, Commerce and Works Directorate and ACTTAB, advertised in the press (*Australian Financial Review* and *Weekend Australian*) on 31 January 2014 and on 1 and 2 February 2014 respectively, that:

> … it was seeking parties with a serious interest in acquiring ACTTAB. Parties responding would receive an invitation to lodge an Expression of Interest (Invitation).

3.15 A *Request for Expression of Interest* was sent out to interested parties that responded to the newspaper advertisements from 3 February 2014 onwards. Expressions of interest were required to be submitted by no later than 5:00 pm on 14 February 2014.

3.16 Eleven organisations were invited to lodge an expression of interest and five submissions were made by the due date and time.

Request for Expression of Interest document

3.17 A *Request for Expression of Interest* is expected to include sufficient information for interested parties to respond. Typically a minimum would be:

- a description of the subject of the expression of interest;
- a formal call for expressions of interest;
- a description of the process;
- contact person;
- indicative timetable;
- evaluation criteria;
- documents to be submitted;
- lodgement requirements;
- evaluation of applications; and
- outcome of the process.

3.18 The *Request for Expression of Interest* sent to interested parties contained all relevant information requirements and was structured appropriately to allow for them to respond.

3.19 The time for the sale was short, and this was appropriately reflected in sale process documents and consequently in the times available for interested parties to respond to the *Request for Expression of Interest*, i.e. eleven days. At least one interested party requested an extension to the time, but this was not provided.

3.20 While a short response time is not necessarily a concern, it is important that information that is sought reflects the time available to the interested parties. The Sale Project Team, in evaluating the expressions of interest that were received, should have recognised the restricted time available to interested parties. This issue is addressed when considering the evaluation of the submissions in paragraph 3.125.

The *Request Expression of Interest* evaluation criteria

3.21 The *Request for Expression of Interest* set out the Sale Objectives as well as the evaluation criteria. In relation to the evaluation criteria, the *Request for Expression of Interest* stated:

> An Applicant's [expression of interest] should contain sufficient information to demonstrate, to the satisfaction of the Vendors ...

3.22 The evaluation criteria are shown in Table 3-1.

Table 3-1 Request for Expression of Interest evaluation criteria

EOI Criterion	
Financial capacity	Applicants must demonstrate the financial capacity to execute a contract sale and purchase for this transaction by no later than 30 June 2014 which must not be subject to the Applicant having to obtain necessary finance. As a guide Applicants should be able to demonstrate, either a net tangible asset position which is currently at least A$100m, a year net profit after tax of at least A$10m or if listed on a recognised stock exchange, a current market capitalisation of at least A$100m;
Operational capacity	Applicants must demonstrate that they currently have the ability or have a plan to successfully operate a wagering business including the pari-mutuel pooling arrangements, since existing pooling arrangements may or may not continue post the Sale Process;
Future intentions	Applicants should provide indicative guidance in relation to their future intentions for ACTTAB post the Sale Process; and
Probity requirements	Applicants must provide a statement that they see no reasons why they, and their associates, would not be considered to be suitable to hold, or to be an associate of the holder, of a totalisator licence in the ACT.

Source: *Request for Expression of Interest* 3 February 2014

3.23 The importance of evaluating expressions of interest against published evaluation criteria is an important principle of probity in procurement. The ACT Government Procurement Policy Circular *PC21: Probity and Ethical Behaviour* states:

> The importance of probity has been reinforced by the Federal Court, which has handed down decisions that highlight the need for government agencies to deal fairly with prospective tenderers, adhere to proper procedures, and to conduct tender evaluations in accordance with the evaluation criteria as outlined in the request for offer documents.[1]

3.24 Similarly, the Australian Government Solicitor has also published guidance in relation to managing probity and process issues in procurement; *Managing probity and process issues in procurement* (Commercial Note No.15, 14 March 2005). The guidance states, in relation to a duty to act fairly:

> ... One aspect of this duty involves the requirement to evaluate bids according to the priorities and methodology specific in the RFT. In this context it is now common practice for government agencies to prepare and obtain internal sign off on a formal evaluation plan before bids are opened. Properly drafted and implemented evaluation plans enable agencies to demonstrate that they have objectively evaluated bids in accordance with the RFT and without conscious or subconscious bias towards an initially preferred bidder.

[1] ACT Government Procurement Policy Circular *PC21: Probity and Ethical Behaviour*, page 4. The circular provides a reference to court decisions in support of these principles, including 'Hughes Aircraft Systems International v Air Services Australia and J.S. McMillan Pty Limited, Pirie Printers Holdings Pty Limited and Imsep Pty Limited v Commonwealth of Australia.'

3.25 The Australian Government Solicitor's guidance further states:

> ... in practice there is often a lack of consistency between evaluation plans and the requirements specific in the applicable RFTs. To avoid this problem, the RFT and the evaluation plan should be drafted together to enable 'side by side' review to ensure that the evaluation methodology proposed in the plan is consistent with the draft RFT.

3.26 It is better practice that the basis of evaluation is also 'fixed' at the same time as the evaluation criteria. This is frequently achieved through determining the basis for the evaluation (i.e. developing an evaluation plan) and preparing the evaluation criteria at the same time and having them approved by the Probity Advisor and the ultimate delegate for the transaction. An arrangement such as this would have served to provide a check that the stipulated criteria would be likely to achieve the desired outcome of the sale.

3.27 While the development of an evaluation plan at the right time would not necessarily have affected the result of the sale, it would have been a strong control over process risk for such a complex and large sale.

3.28 No evaluation plan(s) were prepared for the sale of ACTTAB.

Quality of the Evaluation Criteria

3.29 The evaluation criteria used in the *Request for Expression of Interest* was analysed. Table 3-2 presents an analysis of the alignment of the expression of interest criteria with the Sale Objectives.

Table 3-2 Alignment of Sale Objectives with evaluation criteria

Sale Objectives	EOI Criterion (refer to Table 3-1)	Comment
Achieve a fair and reasonable price.	None	While no price/value criterion existed, pricing was considered in the indicative Offer and Final bid stages. This is consistent with usual practice.
Achieve a timely sale. Ensure the successful purchaser has the appropriate experience, integrity and capacity to operate a wagering business.	Financial Capacity Operational Capacity Probity Requirements	The timeliness of the sale is only referred to in the body of the financial criterion; this restricts the basis for evaluation.
Ensure the local racing industry is not negatively affected. Ensure employee welfare is considered.	Future Intentions	The criterion was supported by some explanatory text about employees and assets, but did not include the racing industry.

Source: ACT Audit Office

3.30 The evaluation criteria in the *Request for Expression of Interest* did not align with the Sale Objectives, as identified in the ACT Legislative Assembly resolution in November 2013. It would have been straightforward to directly align the evaluation criteria in the *Request for Expression of Interest* with the Sale Objectives. This would have provided greater

assurance that the Sale Objectives would have been appropriately considered in the evaluation process. Not aligning the criteria to the Sale Objectives presented a risk that important objectives of the sale were not given appropriate prominence in the selection process.

3.31 On this issue, however, the ACT Government Solicitor advises that:

> The purpose of the REOI was clearly stated to be for ACTTAB and the Territory to determine those applicants that should progress into the "...competitive, staged [sale] process...". On that basis, there is not suggestion or requirement that the evaluation criteria strictly align with the stated sale objectives. The evaluation criteria could be whatever ACTTAB and the Territory considered properly identified the parties who should proceed into the asset sale process. The criteria effectively fulfilled that purpose as well as aligning in material respects with the stated sale objectives: for example, the first and third objectives were reflected in criterion 2, and the fourth and fifth objectives were reflected in criteria 3 and 4, respectively.

3.32 Two other features of the evaluation criteria are:

- the binary nature of one of the criteria; and
- aggregation of unrelated requirements in another criteria.

Binary criteria

3.33 The probity criterion simply required that the interested party 'provide a statement':

> Applicants must provide a statement that they see no reason why they, and their associates, would not be considered to be suitable to hold, or to be an associate of the holder, of a totalisator licence in ACT.

3.34 This has two important weaknesses:

- the requirement is binary, in that the interested party either complies (by making the required statement), or does not; it does not request detailed information to allow for either a measured and/or comparative evaluation of the probity of the interested parties; and
- the criterion is only indirectly targeted at probity. The criterion is constructed in a way that the measureable element is the ability of an interested party to provide a particular statement.

3.35 The probity criterion should have been worded to facilitate a measured and comparative assessment of interested parties, or the provision of the material requested should have been made a condition for participation.

Aggregation of unrelated requirements

3.36 The financial capacity criterion stated:

> Applicants must demonstrate the financial capacity to execute a contract for sale and purchase for this transaction by no later than 30 June 2014 which must not be subject

to the Applicant having to obtain necessary finance. As a guide Applicants should be able to demonstrate, either a net tangible asset position which is currently at least $100m, a prior year net profit after tax of at least A$10m or if listed on a recognised stock exchange, a current capitalisation of at least A$100m.

3.37 A problem with this criterion is that it has defined timeliness in terms of financial capacity when there are other factors that could impact on timeliness, e.g. the time required for applicants to gain regulatory approval.

3.38 This criterion should have been disaggregated into two criteria as follows:

- financial capacity; and
- ability to meet timeline for the transaction.

3.39 This disaggregation would have been appropriate given that the requirement to achieve a timely sale was a specific Sale Objective.

3.40 The criteria used for the evaluation of expressions of interest were poorly crafted as:

- one of the criteria was 'binary' and did not lend itself to being used to make a comparative evaluation between interested parties. Binary requirements are usually conditions for participation in a process rather than an evaluation criteria; and
- one of the Sale Objectives (timeliness) was aggregated with the financial capacity criterion and consequently could not be evaluated independently from financial considerations.

3.41 The ACT Government Solicitor advised that:

> The purpose of the REOI was clearly stated to be for ACTTAB and the Territory to determine those applicants that should progress into the " ... competitive, staged, [sale] process ... ". On that basis, there is no suggestion or requirement that the evaluation criteria strictly align with the stated sale objectives. The evaluation criteria could be whatever ACTTAB and the Territory considered properly identified the parties who should proceed into the asset sale process. The criteria effectively fulfilled that purpose as well as aligning in material respects with the stated asset sale objectives: for example, the first and third objectives were reflected in criterion 2, and the fourth and fifth objectives were reflected in criteria 3 and 4, respectively.

3.42 The Chief Minister, Treasury and Economic Development Directorate advised that:

> ... the evaluation criteria were prepared in collaboration with the Project Team, the Steering Committee, the Sales Advisor and the Legal/Probity Advisor who have a collective wealth of knowledge and experience in this regard.
>
> The sale objectives were identified in the first paragraph of the Request for Expression of Interest document to serve as a guide to applicants.
>
> It was not considered necessary at such an early stage to expect candidates to thoroughly address each objective before they had been given the opportunity to conduct due diligence. ACTTAB was not prepared to allow applicants to conduct due

diligence unless they were considered likely to be able to ultimately enter into a sale contract.

It is my understanding the eligibility criteria were prepared with two key risks in mind, namely execution and timetable risks.

3.43 While it is not necessary for the criteria to align with the Sale Objectives, as stated in paragraph 3.30, not aligning the criteria to the Sale Objectives increased the risk that important objectives of the sale were not given appropriate prominence in the selection process. This is what appears to have happened in relation to the 'achieve a timely sale' Sale Objective (refer to paragraphs 3.97 to 3.107).

3.44 The result of the sale process could have been achieved with less risk if the evaluation criteria had been more focused on the key factors mentioned; execution and timetable.

Market response

3.45 Five responses to the *Request for Expression of Interest* were received by the closing time of 5:00 pm on 14 February 2014, including responses from the two holders of totalisator pools in Australia.

Evaluation of expressions of interest

The evaluation chronology and short listing

3.46 The evaluation of expressions of interest was initially undertaken by the Sales Advisor (Deloitte), with input from members of the Sale Project Team and Steering Committee.

3.47 On 19 February 2014 the Chair of the Sale Project Team sought legal advice noting that 'as some respondents have proposed they would offer TOTE odds if they are unable to access a betting pool it may be worthwhile considering if they would be eligible for an exclusive licence under such an arrangement.' The Audit Office was advised by the Chief Minister, Treasury and Economic Development Directorate that legal advice was provided in emails from the ACT Government Solicitor on 20 February, 25 February 2014 and 2 March 2014. This advice is discussed in paragraphs 3.50 to 3.56 and 3.120 to 3.122. The Audit Office was further advised that 'it was the content of the legal advice received that convinced the Project Team and Deloitte to exclude three of the respondents at the Expression of Interest stage.'

3.48 The evaluation of the responses took place between 14 and 27 February 2014. The evaluation was initially conducted by the Sales Advisor (Deloitte) with an evaluation report (the first evaluation report) produced and sent to the Sale Project Team on 19 February 2014. The evaluation report recommended all five interest parties proceed to the next phase of the process.

3.49 The first evaluation report from the Sales Advisor (Deloitte) (19 February 2014) recommended:

> ... all five parties proceed to the next phase of the process since there appear to be no compelling reasons to exclude any party based on the evaluation criteria.

3.50 In response to the first evaluation report from the Sales Advisor (Deloitte), on 20 February 2014 the Probity Advisor who also provided legal advice sent an email to members of the Sale Project Team. The email (which was subsequently retracted and updated) provided comments on each of the expressions of interest that were received, and ranked the expressions of interest 'in order of the quality of their responses'.

3.51 The Probity Advisor who also provided legal advice concluded:

> We have a stated deadline of 30 June to get this matter complete. ... (T)aking through marginal and most likely unsatisfactory bidders to the IM process to my mind unnecessarily adds time, work and cost to the process ... To my mind there are only two (perhaps marginally three) out of this process.

3.52 The Probity Advisor who also provided legal advice provided an evaluation that was subjective and did not consider the expressions of interest against the published evaluation criteria. It concluded that certain interested parties should be excluded based on the following reasoning:

> We all knew the key distinguishing question in the EOI was how bidders would address the tote pooling issues and the responses have confirmed what we already (thought) we knew.
>
> ... none of these parties (the three bidders being excluded) would be entitled to hold a tote licence ...

3.53 Following a meeting of the Sale Project Team on 20 February, the Sales Advisor (Deloitte) produced a second evaluation report on 21 February 2014. The evaluation report recommended all five potential interested parties proceed to the next phase of the process.

3.54 The second evaluation report (21 February 2014) recommended:

> Considering progressing all five parties to the next phase since there appear to be no compelling reasons to exclude any party based on the evaluation criteria provided to applicants.

3.55 On 25 February 2014 the Probity Advisor who also provided legal advice sent an email to the Sale Project Team that retracted and updated the email previously sent on 20 February 2014. Similar to the first email, comments were provided on each of the expressions of interest that were received, and the expressions of interest were ranked 'in order of the quality of their responses'. The email provided an opinion that only two of the interested parties should proceed to the next phase.

3.56 The email from the Probity Advisor who also provided legal advice stated:

> In my view the Territory can only move into the IM phase with bidders who have satisfied the EOI criteria satisfactorily and whose bids are likely to result in the Territory meeting the sale objectives. In my view only Tabcorp and [another interested party] can be considered to satisfy these requirements.

3.57 On 25 February 2014, the Steering Committee considered the Sales Advisor's (Deloitte) second evaluation report and requested that the Sales Advisor (Deloitte) update the evaluation report and provide a ranking of the interested parties.

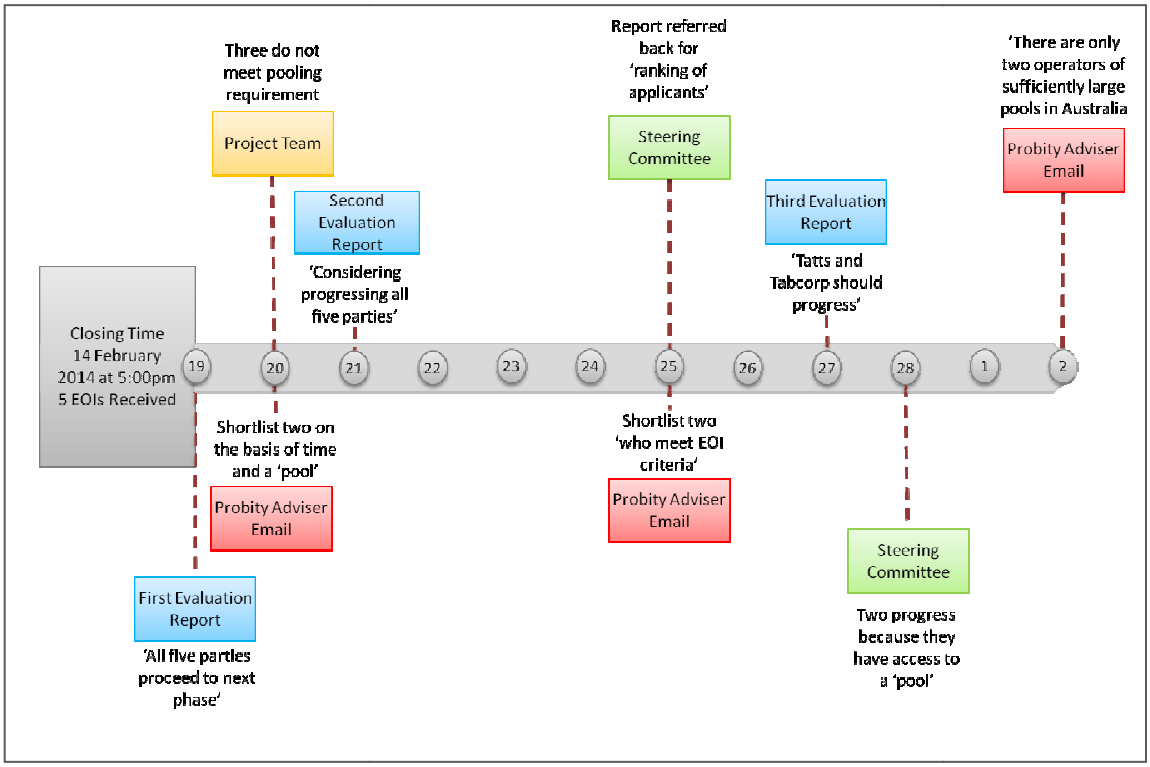
3.58 Minutes of the meeting of the Steering Committee on 25 February 2014 stated:

> ACTION: Deloitte and Project Team update the evaluation report with more discussion including a ranking of the applicants.

3.59 On 27 February 2014, the Sales Advisor (Deloitte) produced a third (and ultimately final) evaluation report that recommended *inter alia* that '[two of the interested parties] should progress to the next phase ...'

3.60 The chronology of the evaluation of expressions of interest is illustrated in Figure 3-2.

Figure 3-2 Expressions of interest evaluation chronology



Source: ACT Audit Office

Legal/Probity Adviser role in evaluation

3.61 The Legal/Probity Adviser sent two emails to the Sale Project Team, which provided advice and guidance in relation to the evaluation of the expressions of interest that were

received. The Probity Advisor who also provided legal advice provided an opinion in relation to which of the interested parties should progress to the next phase of the sale process.

3.62 The Probity Advisor who also provided legal advice should not conduct evaluations in procurements as this impairs the conduct of the probity role. The conduct of the probity role was articulated in the *Probity Plan* (December 2013) where the role was described as being one of responding to requests for probity advice.

Documentation of evaluation

3.63 At its meeting on 28 February 2014, the Steering Committee considered:

- the third (and ultimately final) evaluation report from the Sales Advisor (Deloitte); and
- an agenda paper from the Sale Project Team, which the Sale Project Team advised was its evaluation report.

3.64 The third (and ultimately final) evaluation report from the Sales Advisor (Deloitte) stated '[two interested parties] should progress to the next phase of the process. The key risk which the shareholders should consider in determining whether to progress the remaining three bidders is their ability to execute a pooling agreement, for which no party has presented a clear alternative to [one of the interested parties], presenting a significant execution concern.' The agenda paper from the Sale Project Team stated '... there are only two suitable candidates who should be invited to participate in the indicative offer stage.'

3.65 The agenda paper of the Sale Project Team stated:

> Attached for the consideration of the Steering Committee is the ACTTAB EOI Evaluation report submitted by Deloitte.
>
> The Project Team has reviewed the report and each of the five submissions received in response to the request for EOI's that was advertised in the Financial Review on 31 January 2014 and the Weekend Australian on 1 February 2014 and submit their recommendation:
>
> ...
>
> The Project Team has assessed each proposal against the criteria listed above and considers there are only two suitable candidates who should be invited to participate in the indicative offer stage. The two firms selected are ...
>
> The Project Team found the remaining three applicants had other process risks including passing probity and/or did not provide adequate responses concerning prospective pooling arrangements. The ability to hold a licence under the proposed Totalisator Act is fundamental to the viability of the sale.

3.66 The minutes of the Steering Committee meeting of 28 February 2014 record that the short listing of interested parties was discussed and that:

> The report of the Project Team was considered and it was decided applicants had received adequate notice of the need to address the pooling requirement in order to be eligible to apply for a totalisator licence.

3.67 This issue of adequate notice is considered in paragraph 3.127.

3.68 The minutes of the 28 February Meeting of the Steering Committee also state the following action to be taken as a result of the meeting:

> Shareholders to be informed on the EOI outcome subject to confirmation of ACTTAB Board position and resolution of Steering Committee.

3.69 This information was conveyed to the ACTTAB Board and on 3 March 2014 the Chief Executive Officer of ACTTAB advised the Chair of the Steering Committee that 'The Chairman has requested that I inform you that the ACTTAB Board has today unanimously endorsed the proposed recommendation of the Steering Committee to be put to the Shareholders, that only ... be progressed to the next stage of the sales process.'

3.70 On 6 March 2014, in relation to the resolution identified in the 28 February 2014 agenda paper of the Sale Project Team, the Chair of the Steering Committee advised the Chair of the Sale Project Team 'I can confirm that I support this.' On 6 March 2014 the Deputy Chair of the Steering Committee similarly advised 'I too support the recommendation that was presented to the Steering Committee.'

3.71 The three reports of the Sales Advisor (Deloitte) provided a documented assessment of each of the five expressions of interest received against selection criteria. (There are, however, issues associated with the application of the selection criteria, which are discussed in paragraphs 3.86 to 3.133).

3.72 The agenda paper of the Sale Project Team did not provide a detailed assessment of the selection criteria for each of the expressions of interest. The agenda paper of the Sale Project Team did, however, provide an overall summary of information received.

3.73 The evaluation process brought out differences in the conclusions drawn about the interested parties' submissions, specifically the discussions that focused on the short listing with respect to whether all five or only two interested parties should progress. However, the only documentation of the reasons for the evaluation was in:

- the evaluation reports prepared by the Sales Advisor (Deloitte);
- the Sale Project Team agenda paper to the Steering Committee meeting held on 28 February 2014; and
- emails sent by the Probity Advisor who also provided legal advice.

3.74 There was no evidence of:

- documented and retained individual assessments of the submissions by members of the Sales Project Team;
- documentation showing a consolidated assessment of where the individual assessments of the submissions by members of the Sales Project Team were brought together; and
- a formal evaluation report with detail and judgements highlighted.

3.75 Documentation of decision making is important to demonstrate the integrity of an evaluation process. For example, the *Commonwealth Procurement Rules 2014* state:

> In conducting procurements, officials are expected to appropriately manage risk. This requires considering the approach to procurement, evaluating available courses of action and recording and documenting relevant decisions ...

3.76 The Chief Minister, Treasury and Economic Development Directorate stated:

> The auditors were interested to see the working papers of members of the Project Team in relation the evaluation of the expressions of interest. These working papers do not exist as it was usual practice to circulate draft papers out of session to allow members to prepare for each meeting. Project Team members were not asked to table their working papers.

3.77 One of the key probity objectives set out in the Probity Plan was: *Establishing and maintaining a clear audit trail for accountability purposes*. The creation and maintenance of evaluation documentation is a key part of the accountability requirement. Documentation to support the evaluation of the expression of interest criteria was inadequate.

3.78 In relation to the evaluation process, the Chief Minister, Treasury and Economic Development Directorate advised that:

> The Project Team has advised it did not place unquestioning reliance on the advice of the Sales Advisor.
>
> The Project Team undertook to ensure that the advice was reliable and appropriately addressed all considerations on which a recommendation to the ACTTAB Board and the Voting Shareholders should be based.
>
> Throughout the sale process the Project Team considered the basis upon which the various experts formed their view on particular issues before taking a final position.
>
> On occasion the Project Team asked the Sale Advisor to undertake additional work, or sought further advice from other experts including the Legal/Probity Advisors.
>
> If the Project Team considered any advice may be incomplete or unreliable, I believe the Project Team had an implied duty to make further inquiries to maintain the integrity of the process and to minimise any associated risk.
>
> In this regard, after attaining satisfaction as to whether the information was reliable and competent, I expect the Project Team needed to ensure the Steering Committee, ACTTAB Board and Voting Shareholders were adequately briefed to be able to make an informed decision at each stage.

> I understand the Project Team did not accept on face value the initial draft report prepared by the Sale Advisor that recommended all five applicants proceed to the next stage.
>
> ...
>
> In order to reduce the risk of the Board not agreeing to the terms of the sale, the Project Team and the Steering Committee ensured that the Board was briefed and given the opportunity to respond before key decisions were made. The following email extracts were in keeping with this protocol.
>
> The minutes of 28 February 2014 indicate the ACTTAB Chairman would undertake to confirm the position of the Board about the proposed short listing of the Expressions of Interest.
>
> In an email dated 3 March 2014, ACTTAB's CEO advised the Chair of the Steering Committee that the "ACTTAB Board has today unanimously endorsed the proposed recommendation of the Steering Committee to be put to the Shareholders, that only Tabcorp and [another interested party] be progressed to the next stage of the sales process".
>
> The support of the Chair of the Steering Committee was confirmed in an email dated 4 March 2014.
>
> The support of the Deputy Chair of the Steering Committee was confirmed in an email dated 6 March 2014.
>
> The Voting Shareholders were advised in a brief prepared by the Chair of the Project Team on 5 March 2014 regarding the outcome of the call for expressions of interest. The brief outlined the five responses that were received and the assessment of each. The brief indicated only Tabcorp and [another interested party] would be invited to progress through to the indicative offer stage, and provided the Voting Shareholders the opportunity to comment or disagree with that course of action.

Hughes Case

3.79 As mentioned in paragraph 1.27 the sale of ACTTAB raised four key legal questions (refer to Appendix A). While all questions are relevant to the sale of ACTTAB, two are particularly pertinent to how the evaluation criteria were assessed. The two questions are:

- Was the sale of ACTTAB subject to the Hughes Case?
- Do the 'reserved discretions', in the *Request for Expression of Interest*, remove or reduce the application of the Hughes Case?

3.80 The Australian Government Solicitor and Mr Charles Scerri QC provided advice regarding the above questions (refer to Appendix A).

3.81 The Australian Government Solicitor and Mr Charles Scerri, QC concluded that it was more likely than not that the principles of the Hughes Case applied to the sale of ACTTAB. As a result, a 'process contract' existed in the sale of ACTTAB and there was, therefore, an obligation to conduct the sale in accordance with the defined procedures and the stated criteria that was in the *Request for Expression of Interest*.

3.82 The ACT Government Solicitor advised in responding to the proposed audit report that the principles of the Hughes Case did not apply.

3.83 While there is a difference of views, given the type of sale with its complexities and uncertainties, and given the consequences if the Hughes Case did apply, it would have been prudent for such an issue to have been explicitly considered in a risk analysis, in preparation for the sale. However, there is no evidence that this occurred. If it had occurred, any issues emerging could have been managed to reduce any associated risk.

3.84 The evaluation of the expression of interest criteria is considered to be inadequate regardless of whether (or not) the principles of the Hughes Case apply. If the Hughes Case does apply the issues have greater gravity because of:

- the use of different criteria to those in the *Request for Expression of Interest* document;
- the evaluation of binary criteria in a non binary way; and
- evaluation using material not provided by the applicant.

3.85 These are discussed in the following section of the report.

Inadequacies in what was evaluated

3.86 The assessment of the evaluation process undertaken as part of this performance audit is based on the information contained in the third and final evaluation report prepared by the Sales Advisor (Deloitte) on 27 February 2014 and presented to the Steering Committee on 28 February 2014 and the agenda paper from the Sale Project Team.

Use of different criteria to those in the *Request for Expression of Interest*

3.87 The criteria from the *Request for Expression of Interest* have been compared to the criteria actually used in evaluating the expressions of interest in the third (and final) evaluation report from the Sales Advisor (Deloitte). Differences in the criteria are shown in Table 3-3.

Table 3-3 Comparison of *Request for Expression of Interest* criteria and actual evaluation criteria use in assessing bids (Deloitte Sales Advisor report)

EOI criterion (Full details in Table 3-1)	Evaluation report criterion used for ranking	Comment
Financial capacity	Financial strength	Strong alignment
Operational capacity	Pooling solution	Did not consider broader matters associated with operational capacity and focused explicitly on the pooling solution
Future intentions		Not considered in evaluation for ranking
Probity requirements	Likelihood of passing probity	Took into account a broad range of factors not identified in the EOI criterion (see 3.97)
	Ability to meet transaction timeframes	Evaluated separately for ranking but was not identified as a separate criterion in the EOI

Source: ACT Audit Office

3.88 The agenda paper from the Sale Project Team, provided to the Steering Committee on 28 February 2014, did not provide an explicit assessment of the five responses that were received against the selection criteria. Nevertheless, the agenda paper from the Sale Project Team advised the Steering Committee that:

> The request for EOI's indicated that proposals would be assessed against the following criteria:
>
> - Demonstrated financial capacity to complete the transaction by 30 June 2014.
> - Demonstrated operational capacity to successfully operate a wagering business. This included a mandatory requirement to demonstrate they currently have the ability or have a plan to successfully operate a wagering business including pari-mutuel arrangements.
> - Indicative guidance in relation to the applicant's future intentions for the business.
> - Providing a statement that the applicant or their associates can see no reason why they would be considered unsuitable to hold a totalisator licence in the ACT.

3.89 Neither the final evaluation report prepared by the Sales Advisor (Deloitte) or the agenda paper from the Sale Project Team to the Steering Committee precisely or rigorously applied the evaluation criteria set out in the *Request for Expression of Interest* document sent to interested parties. The incorrect application of evaluation criteria presents a risk to the probity of the sale process. If the Hughes Case is relevant to the sale of ACTTAB, this risk is exacerbated. Regardless, there is a high probability that interested parties would have had an expectation that they would be evaluated against the criteria in the *Request for Expression of Interest* document. This did not occur.

Evaluation of binary and non binary criteria

3.90 In paragraph 3.33 the issue of 'binary' criteria was discussed. It was evident that interested parties responded to the evaluation in line with the stated requirements. For example, the probity criterion required applicants to:

> ... provide a statement that they see no reason why they, and their associates, would not be considered to be suitable ...

3.91 All applicants provided a statement to the effect required by the criterion.

3.92 However, ultimately, in the Sales Advisor (Deloitte) third and final evaluation report applicants were ranked based on a subjective evaluation of the quality of their response to this binary criterion. The impact of this is described below.

What was asked for:

> Applicants must provide a statement that they see no reason why they, and their associates, would not be considered to be suitable to hold, or to be an associate of the holder, of a totalisator licence in ACT.

An interested party's response:

> The consortium including it's members, subsequent shareholders, directors and key staff acknowledge that in order to submit their bid they must successfully undertake probity. The consortium members and their associates acknowledge the importance and value of the probity process and see no reason why it, or its associates would not be considered suitable by the ACT Gambling and Racing Commission. Many consortium members and/or associates have undertaken probity in a variety in a number of jurisdictions.

The evaluation:

3.93 The third and final evaluation report (27 February 2014) ranked this interested party as equal fourth on this criterion. The correct application of this criterion cannot be a 'ranking'. It is, of its nature, 'met' or 'not met'. The interested party 'met' the criterion through the provision of the required statement and this ranking should not have influenced a decision to exclude certain interested parties.

3.94 The agenda paper from the Sale Project Team to the Steering Committee (28 February 2014) stated:

> The Project Team is concerned that the consortium may not pass the probity requirement.

3.95 There were no other statements, reasoning or arguments or documentation in support of the Sale Project Team's view, as articulated in its agenda paper (28 February 2014).

3.96 The incorrect application of the probity criterion, which was essentially a 'binary' criterion that did not contemplate a subjective assessment, inappropriately excluded interested

parties from further consideration. These interested parties may not have met the criterion had it been more aptly worded to allow for a subjective assessment.

Using material not provided by the applicant (ability to complete a timely sale)

3.97 The requirement for a timely completion of the transaction was aggregated with financial capacity considerations, as discussed in paragraph 3.36. An example is set out below.

What was asked for:

> Applicants must demonstrate the financial capacity to execute a contract for sale and purchase for this transaction by no later than 30 June 2014 which must not be subject to the Applicant having to obtain necessary finance. As a guide Applicants should be able to demonstrate, either a net tangible asset position which is currently at least $100m, a prior year net profit after tax of at least A$10m or if listed on a recognised stock exchange, a current capitalisation of at least A$100m.

3.98 The information requirements for this criterion stated:

> This information may include, but is not limited to, the following: Most recent annual report, most recent annual company return provided to the Australian Securities and Investments Commission (or such equivalent regulatory body), statement of market capital, tax return or bank statement.

Interested parties' responses:

3.99 All interested parties' responses to the financial capacity requirement were focused explicitly on their financial status. None provided a broader response to the timeliness requirement.

3.100 For example, an interested party responded:

> [the interested party] is a 100% fully owned subsidiary of [the interested party's parent company], a [country] based company which is listed on the [city] Stock Exchange. ... This shows that as of today the company has a market capitalisation of [currency] 1.3b.

3.101 The interested party also included in its expression of interest a range of supporting financial material.

The evaluation:

3.102 The ranking of expressions of interest by the Sales Advisor (Deloitte) included a criterion *Ability to meet transaction timeframes*, which was assessed based on information that was not provided by applicants.

3.103 In relation to one of the expressions of interest that was received, the agenda paper from the Sale Project Team to the Steering Committee (28 February 2014) stated:

> It is noted that Deloitte has previously indicated that if the process involved overseas purchasers a more comprehensive due diligence process may be required. The

> required probity checks by the regulator are also expected to extend for several months which would put the expected completion within the stated timetable at risk.

3.104 The Probity Advisor who also provided legal advice emailed advice and analysis regarding the evaluation of the expression of interest to the Sale Project Team on 20 February 2014 in which it was stated:

> We have a stated deadline of 30 June to get this matter complete. ... (T)aking through marginal and most likely unsatisfactory bidders to the IM process to my mind unnecessarily adds time, work and cost to the process ... To my mind there are only two (perhaps marginally three) out of this process.

3.105 This statement extends the assessment of timeliness to include consideration of additional work, cost and the likely success of an interested party. This is outside the framing of the criterion which makes a singular link to financial capacity.

3.106 The timeliness of the transaction was one of the Sale Objectives and was of considerable importance. However, this requirement was aggregated with other considerations in another criterion and should only have been evaluated in that context. The matter of timeliness (except to the extent it was linked to financial viability) should not have been considered in the evaluation of interested parties' expressions of interest.

3.107 The use of external material in evaluating submissions, including the work associated with evaluating interested parties' responses, should not have been used as the basis for the exclusion of interested parties from further consideration. This material could have been considered had the process been designed differently.

Evaluation of the ability to operate a wagering business, including a pari mutuel pooling arrangement

3.108 The operational capacity criterion required that interested parties demonstrate that they currently have the ability, or have a plan, to successfully operate a wagering business including a pari mutuel pooling arrangement.

3.109 The operational capacity criterion stated:

> Applicants must demonstrate that they currently have the ability or have a plan to successfully operate a wagering business including the pari mutuel pooling arrangements, since existing pooling arrangements may or may not continue post the Sale Process.

3.110 Two interested parties operated large totalisator pools in Australia. The three other interested parties did not, and submitted their planned intentions in relation to establishing a pari mutuel pooling arrangement. The three other interested parties were primarily excluded from the process because they were assessed as not meeting the operational capacity requirement.

Submissions from interest parties

3.111 Two of the interested parties identified that they were currently operating totalisator pools in Australia and that they had the necessary capacity and experience to run a pari mutuel pooling arrangement in the ACT.

3.112 One of the interested parties advised of their planned intentions as follows:

- continue the existing arrangement with one of the operators of a totalisator pool in Australia;
- if agreement was not reached, seek a pooling arrangement with the other operator of a totalisator pool in Australia;
- operate its own pool; or
- 'offer the same product ... via tote odds betting.'

3.113 Another interested party advised of its planned intentions as follows:

- continue the existing arrangement with one of the operators of a totalisator pool in Australia;
- if agreement was not reached, seek a pooling arrangement with another pari mutuel operator; or
- (noting that one of its subsidiaries was currently operating a pari mutuel arrangement in Europe) seek to either licence its software or alternatively build the necessary software through its technical team in Australia.

3.114 Another interested party identified that 'pari-mutuel betting is not presently offered on any of our sites but partners have experience of running pari-mutuel and this can easily be added to the product portfolio.'

Evaluation results

3.115 The third and final evaluation report from the Sales Advisor (Deloitte) provided an evaluation and ranking of the bidders, as shown in Table 3-4.

Table 3-4 Evaluation of 'Pooling' criteria for interested parties

Interested Party	Evaluation
(names removed for confidentiality reasons)	
	
	
	
	

Source: Information from the Deloitte Evaluation Report (27 February 2014)

Key: High/Strong -  Low/Weak - 

3.116 The agenda paper from the Sale Project Team to the Steering Committee (28 February 2014) stated:

> The Project Team found that the three remaining applicants had other process risks including passing probity and/or did not provide adequate responses concerning prospective pooling arrangements. The ability to hold a licence under the proposed Totalisator Act is fundamental to the viability of the sale.

3.117 In relation to the expression of interest response identified above (refer to paragraph 3.112) the agenda paper from the Sale Project Team to the Steering Committee (28 February 2014) stated:

> Nor has [the interested party] provided adequate information to satisfy the pooling requirements in order to be eligible for the pari-mutuel licence offered as a key part of the proposed sale.

3.118 In relation to the expression of interest response identified above (refer to paragraph 3.113) the agenda paper from the Sale Project Team to the Steering Committee (28 February 2014) stated:

> The Project Team is concerned that unless [the interested party] can secure a pooling arrangement with [one of the operators of totalisator pools in Australia] they would rely on synthetic pooling or offering fixed odds. This presents a key risk as to whether they would be eligible to hold the pari-mutuel licence which comprises a key part of the proposed sale.
>
> ...
>
> The Project Team does not consider [the interested party] has adequately addressed the pari-mutuel pooling criteria ...

3.119 In relation to the expression of interest response identified above (refer to paragraph 3.114) the agenda paper from the Sale Project Team to the Steering Committee (28 February 2014) stated:

> ... the response does not adequately address the pooling requirement.

Evaluation process

3.120 In relation to the evaluation of the expressions of interest that were received, the Chief Minister, Treasury and Economic Development Directorate advised:

> ... the turning point came when the Chair of the Project Team sought legal advice as to whether 'tote odds betting' or 'synthetic pooling' would satisfy the requirements to obtain a totalisator licence. When the legal advice was received indicating that tote odds betting or synthetic pooling did not satisfy the requirements for pari-mutuel betting, the Project Team considered it was inevitable that only [the two operators of totalisator pools in Australia] could proceed to the next stage. In other words, no pari-mutuel pool meant not totalisator licence which in turn meant no totalisator business. The Project Team's recommendation to the Steering Committee indicated this was the primary reason for excluding three of the expressions of interest.

3.121 The Audit Office sought clarification on the legal advice that was provided. The Audit Office was referred to two emails from the Probity Advisor who also provided legal advice (20 February 2014 and 25 February 2014). These emails, as discussed previously in paragraphs 3.47 to 3.56, provided a summary of comments on the expressions of interest that were received. The emailed advice from 25 February 2014 stated:

> I have three further general comments:
>
> - what is being sold (apart from the assets of ACTTAB) is a license to operate a pari mutuel/totalisator wagering system. This is clearly set out in the new Totalisator legislation. ... all indicate they will offer fixed odds/best tote odds if they cannot do a deal with [one of the two operators of totalisator pools in Australia] to access their pools. Fixed odds offerings are not pari mutuel betting systems and accordingly, none of these parties would seem to be entitled to hold the tote licence unless they actually operate a totalisator. This would seem to defeat the purpose of the sale.
> - The Treasurer made a press release in November 2013 regarding the government's intention to sell ACTTAB and to complete the process by 30 June 2014. Those parties sufficiently interested in the sale ought to have been well aware of this and I think could have commenced getting their bid structures together from that time, including addressing the issue of pari mutuel pooling.
> - ...

3.122 The Audit Office was also referred to an email from the Probity Advisor who also provided legal advice on Sunday 2 March 2014 to the members of the Steering Committee. The email stated:

> Further to the Steering Committee meeting on Friday 28 Feb 2014 I note you have asked for my advice in relation to the reasoning for requiring the buyer of ACTTAB to

have the ability to operate a pari mutuel totalisator and hold a licence in terms of the proposed Totalisator Act, as part of the EOI process.

I understand the pari mutuel totalisator operations of ACTTAB form a substantial part of its business undertaking and it was always in the contemplation of the Territory and ACTTAB that the business would be sold as a going concern in conjunction with an exclusive licence to operate a totalisator in the Territory. Further, it was expected that a significant part of the sale proceeds would result from the offering of the exclusive totalisator licence and it was also considered likely the licence would provide the Territory with an opportunity for ongoing value through licence fees and/or other valuable licence conditions.

It should be noted that in order to operate an effective pari mutuel totalisator pool, the operator must have access to a sufficiently large pool of bets on Australian races in order to ensure attractive returns to punters. There are only two operators of sufficiently large totalisator pools in Australia: ... ACTTAB currently contracts with ... to access its totalisator pool, but it is not clear that ... would agree to novate that agreement to a buyer and this was made clear in the EOI materials.

In light of the above, all respondents to the EOI were asked to indicate that they either already operate a pari mutuel totalisator with access to a pool, or have a plan to access such a pool. It was a matter for respondents to make necessary enquiries and arrangements to satisfy this requirement - either through perhaps an arrangement with [one of the two operators of totalisator pools in Australia] or some other pooling arrangement. Given the sale has been public since November 2013, it is difficult to accept that potential bidders have not had sufficient time to make appropriate enquiries and arrangements to address the pooling requirement.

As I understand the responses to the EOI, other than for ..., no respondent indicated they had an existing pool or had any reasonable plan to operate a pool - including none indicating they had made any contact with ... to discuss access to their pools. Those parties instead indicated they would simply offer fixed odds (or some permutation of fixed odds) if they weren't able to negotiate a novation of the [existing] agreement. An offering of fixed odds is quite distinct from odds offered via a pari mutuel totalisator, does not require a totalisator licence and a sale to such a bidder would result in a very different sale outcome than that currently envisaged.

Issues with the evaluation of this criterion

3.123 There are three issues arising from the evaluation of the operational capacity criterion:

- the criterion states that interested parties must demonstrate that they have the ability, or have a plan, to successfully operate a wagering business, including pari mutuel arrangements. The criterion is silent on the extent, or other expectations, of any 'plan';
- there was arguably insufficient time available to interested parties for them to develop a detailed or comprehensive 'plan'; and
- there was an expectation on the part of the Sale Project Team that interested parties would have approached one of the two operators of totalisator pools in Australia and come to an arrangement with them for the purpose of the expression of interest stage.

3.124 In relation to the first issue, the operational capacity criterion states that interested parties must demonstrate that they have the ability, or have a plan, to successfully operate a wagering business, including pari mutuel arrangements. The criterion is silent on the extent, or other expectations, of the plan. The three interested parties who were excluded from the process beyond the expression of interest stage all advised of their planned intentions, but this was considered inadequate.

3.125 In relation to the second issue and the limited time available, the applicants had eleven calendar days to prepare their expressions of interest (3 February 2014 to 14 February 2014). However, the Probity Advisor who also provided legal advice stated that:

> The Treasurer made a press release in November 2013 regarding the Government's intention to sell ACTTAB and to complete the process by 30 June 2014. Those parties sufficiently interested in the sale ought to have been well aware of this and I think should have commenced getting their bid structures together from that time.

3.126 The appropriate mechanism to notify the market of an intended procurement process and to allow prospective applicants to make preparation for an upcoming procurement is through a pre-tender (or pre-sale) notification. This did not occur.

3.127 In relation to the third issue, during interviews Sale Project Team members stated that it was expected that, as part of the 'plan' required by the criterion, interested parties would have reached an agreement with one of the two totalisator pool licence holders. This was also noted by the Probity Advisor in advice to the Steering Committee on 2 March 2014.

3.128 For this expectation of the Sale Project Team to be met, the two operators of totalisator pools would need to agree (in principle) to a competitor accessing its totalisator pool to enable that competitor to compete with them. There was no evidence of analysis to support this expectation.

3.129 The evaluation of the operational capacity criterion inappropriately excluded interested parties from further consideration. These interested parties may not have met the intention of the criterion, if it had specified that they should have already been operating a totalisator pool. If the evaluation criteria had explicitly stated the need to already be operating a totalisator pool, then there would be no issue.

3.130 The ACT Government Solicitor advised that:

> It was apparently plain to the decision makers (which accorded with the advice from the Project Team) that the responses to the operational capacity criteria by each of (three unsuccessful applicants) had failed to satisfy the criteria:
>
> - (One) expressed merely that they had some experience offering pari-mutuel wagering;
> - (Another) expressed that they would endeavour to reach an agreement with [one of the operators of a totalisator pool in Australia], or if not, with [the other operator of the a totalisator pool in Australia]; and

- (The last) indicated they would hope to contract with a parimutuel operator or build their own system

None of the (three unsuccessful) applicants demonstrated in their response that they operated, had access to or could likely obtain access to a totalisator system and a sufficient pari-mutuel pool in Australia - as would be required to continue to hold the exclusive totalisator licence on offer as part of the sale and operate the ACTTAB pari-mutuel wagering business.

3.131 The Chief Minister, Treasury and Economic Development Directorate advised that:

> Four of the five applicants had previously submitted unsolicited expressions of interest before the decision to pursue a sale was announced.
>
> There was significant media coverage at the time the decision was first announced and it was expected any serious bidders would have started to do their 'homework' in relation to any acquisition of the ACTTAB business and its exclusive totalisator licence.
>
> While it was expected that as part of the 'plan' applicants would have at least approached [one of the two operators of totalisator pools in Australia] about possible pooling arrangements, the Project Team recognised that it was unlikely they would have been accepted. This was because they had both submitted an expression of interest and were unlikely to respond favourably to any such requests from rival bidders. [One operator] does not allow co-mingling in any case, and [one operator] has previously only pooled with government owned TABs.
>
> While there was an expectation that participants in developing their 'plan' may approach [one of the two operators of totalisator pools in Australia], the Project Team recognised that there may be other potential pooling arrangements that the Project Team was not aware of and that may have been appropriate to be able to operate a totalisator. No such alternatives were forth coming.
>
> ...
>
> I consider it would have been irresponsible and unfair to other respondents not to exclude any respondents if it was inconceivable, based on the terms of their proposal, that they would be able to be issued the exclusive totalisator licence and successfully operate the ACTTAB totalisator wagering business.
>
> Each expression of interest was carefully evaluated in terms of their relative strengths and weaknesses. The process included an assessment of their business strategies and financial status. This required sound judgement and it was important to be able to call on the knowledge of relevant experts.
>
> The Project Team considered it would be inappropriate to accept any respondent who stood little or no chance in acquiring the totalisator licence and successfully operating the ACTTAB totalisator wagering business. This would have made a farce of the selection process, and would have been unfair to those applicants, who would have been required to spend unnecessary time, effort and money, in participating further in the sale process.

3.132 This audit report acknowledges that the responses by the three excluded interested parties were not as comprehensive as the responses from the two operators of totalisator pools in Australia. However, the criterion required only 'a plan' without specifying the inclusions in that plan. It is also noted that only 11 calendar days were allowed for a

response and it would be incorrect to assume that interested parties were put on notice by previous announcements.

3.133 The findings presented in this audit are not that the outcome would have been served by allowing more applicants to progress further in the sale process; the findings are focused on the poorly crafted criteria and the poor evaluation of the criteria.

Reserved discretions

3.134 A review of the *Request for Expression of Interest* document, the expressions of interest received and the evaluation of the expressions of interest for the sale of ACTTAB demonstrates that the responses were not evaluated in accordance with the evaluation criteria included in the *Request for Expression of Interest*. This has introduced risks to the integrity of the sale.

3.135 The Chair of the Sale Project Team advised the Audit Office that the responses to the expression of interest had been evaluated against 'additional criteria' and that this was in line with the *Request for Expression of Interest* which stated that the submissions 'could be assessed against other criteria'.

3.136 The Chair of the Sale Project Team and the Probity Advisor who also provided legal advice similarly advised the Audit Office that they could use 'any other information' to make an assessment of the potential buyers.

3.137 The *Request for Expression of Interest* document also had 'reserved discretions'. Paragraph 6 stated:

> EOIs [Expression of Interests] will be assessed by the Vendors in their absolute discretion based on the above criteria, and any other criteria determined relevant by the Vendors, to determine the Applicant's suitability to progress past the EOI stage.

3.138 Paragraph 8 stated:

> The Vendors are under no obligation to respond to any EOI [Expression of Interest], The Vendors also reserve the right, at any time, and in their absolute discretion, to:
>
> Accept or reject without providing reasons any EOI, offer or bid in connection with the sale of ACTTAB submitted by any applicant at any time;
>
> Request from any or all Applicants any further information they may require;
>
> Vary, cease or suspend the Sale Process or any part of it;
>
> Invite further parties to participate in the Sale Process, at any time; and
>
> Take into account any additional information obtained by the vendors during the sale process.

3.139 The Australian Government Solicitor advised that:

> In our view none of these reserved rights operate in such a way as to expressly disclaim the REOI [Request for Expression of Interest] from being interpreted to be a "process contract" within the meaning of Hughes. In addition, the discretions do not

seek to exclude the Hughes implied obligation to act fairly in terms of the way in which the reserved rights may be exercised and the sale process conducted.

3.140 The ACT Government Solicitor in responding to the draft proposed report stated:

> The Report does not appear to acknowledge the expressly reserved discretions stated in the conditions of the REOI, including paragraphs 6 and 8. 3. Reference is made in the Report to advice being obtained from the Australian Government Solicitor. As we have not been privy to the instructions provided nor the advice given, we cannot specifically address that advice

3.141 The Australian Government Solicitor after considering the response of the ACT Government Solicitor advised that:

> There are expressly reserved discretions stated in the conditions of the REOI, in particular-paragraphs 6 and 8.
>
> Paragraph 6 refers to the evaluation criteria and states that the '*EOIs will be assessed by the Vendors in their absolute discretion based on the above criteria, and any other criteria determined relevant by the Vendors, to determine the Applicant's suitability to progress past the EOI stage'*.
>
> Paragraph 8 sets out the Vendors reserved rights in the conduct of the EOI process. There rights include a right to accept or reject without providing reasons, a right to vary, cease or suspend the Sale process, a right to request further information, take into account additional information or request further information.
>
> In our view none of these reserved rights operate in such a way as to expressly disclaim the REOI from being interpreted to be a "process contract" within the meaning of Hughes. In addition, the discretions do not seek to exclude the Hughes implied obligation to act fairly in terms of the way in which the reserved rights may be exercised and the sale process conducted.
>
> For completeness we do note that Paragraph 9 of the REOI deals with responsibility for costs and states that the Vendors are not liable to reimburse or compensate any Applicant for any fees, costs or expenses incurred in connection with activities relating the sale of ACTTAB and/or the sale process. There is nothing in this provision which negates the potential for the REOI to be interpreted to be a process contract or which involves an express contracting out from the implied obligation to act fairly.

3.142 Mr Charles Scerri, QC advised that:

> A subsidiary question upon which AGS advised was whether certain provisions in the REOI excluded the application of *Hughes*. In particular these were provisions which referred to the vendors' right to act in their absolute discretion in assessing each expression of interest 'based on the [stated] criteria and any other criteria determined relevant by the Vendors'. There was also the reservation of an express 'right to vary, cease or suspend the sale process' and a provision limiting liability for bidders' costs in the sale process. See para. 12 above.
>
> Although these provisions are relevant, I agree with AGS that they are not explicit and direct enough to exclude any obligation that the ACT Government would have otherwise to act fairly and in accordance with the stated procedures.

3.143 The 'reserved discretions' in the Request for Expressions of Interest were intended to allow for greater flexibility in the sale process. However, the Australian Government Solicitor and Mr Charles Scerri, QC advised that it is more likely than not that the Hughes Case principles applied and a 'process contract' was relevant to the sale of ACTTAB. Therefore, the 'reserved discretions' in the *Request for Expressions of Interest* document cannot be relied upon. It would have been prudent not to exercise the 'reserved discretions' as if they had priority over the *Request for Expressions of Interest* criteria.

3.144 Concerns regarding the incorrect use and application of expression of interest criteria are not issues of semantics as three of the five potential interested parties that provided expressions of interest were excluded from further consideration in the sale process.

Probity role and advice

3.145 Probity advice is important for managing risks relating to the integrity of the ACTTAB sale process, including risks in evaluation against published criteria.

3.146 Table 3-5 provides an assessment of probity activities associated with the sale of ACTTAB. These expected activities are drawn from the *Probity Plan* (December 2013) for the sale of ACTTAB and guidance on better practice has been taken from the *Ethics, Probity and Accountability in Procurement* document issued by the Queensland Government and Australian Government Solicitor guidance in relation to managing probity and process issues in procurement; *Managing probity and process issues in procurement* (Commercial Note No.15, 14 March 2005).

Table 3-5 Probity activities

Specific probity activities	Analysis rating	Assessment of actions in the ACTTAB sale process
Management of conflicts of interest*	Satisfactory	A Register was maintained.
Confidentiality Agreements	Satisfactory	Agreements were obtained.
Approach to market	Satisfactory	No evidence of formal probity advice. However, this may not be needed as the approach to market was largely determined by the ACT Government.
Probity Plan	Satisfactory	The *Probity Plan* was developed and endorsed by ACT Government.
Responding to requests for clarification from interested parties	Satisfactory	Administered and controlled by the Sales Advisor (Deloitte).
Formal sign off on approach to market documents	Unsatisfactory	No evidence of formal sign off.
Formal sign off on evaluation criteria to be used	Unsatisfactory	No evidence of formal sign off.

Specific probity activities	Analysis rating	Assessment of actions in the ACTTAB sale process
Formal sign off on evaluation of bids	Unsatisfactory	No formal sign off. It is clear that the Probity Advisor was part of the evaluation and could not provide independent sign off.
Formal sign off on 'milestones' of procurement process	Unsatisfactory	Probity advice provided confirming 'no concerns in relation to the public Expressions of Interest process recently completed.' No other sign-offs for any other parts of the process, including: • planning • indicative offer • final bid • final final bid • overall process sign off (pre-commitment)
Referral point for complaints, consideration and formal resolution *	Unsatisfactory	For one complaint there was no evidence of a formal process or resolution.
Arrangements for and the conduct of tender due diligence, including the development and execution of 'data room protocols and all other necessary framework documents to support the data room process'*	Satisfactory	The due diligence was organised and executed by the Sales Advisor (Deloitte).
Specific requirements of the *Probity Plan* are marked *		

Source: ACT Audit Office analysis based on *Probity Plan* (December 2013) for the sale of ACTTAB and the *Ethics, Probity and Accountability in Procurement* document issued by the Queensland Government, 2006.

3.147 Probity activities associated with managing confidentiality agreements, the approach to the market, probity planning, responding to interested parties' clarification requests and due diligence were performed satisfactorily.

3.148 There were some areas where not all probity requirements were met:

- formal sign-off on key 'approach to market' documents and evaluation criteria;
- formal sign-off on evaluation processes and key 'milestones' and phases of the procurement process; and
- the management of a complaint.

3.149 The ACT Government Solicitor advised that:

> While the Report sought to highlight apparent shortcomings in the probity function performed during the asset sale process based almost exclusively on erroneous conclusions in relation to the REOI process, the text of the Report suggests that the relevant context appears not to have been considered. In the role of probity advisor,

the relevant officer provided numerous and regular advices on a significant number of probity matters throughout the asset sale process including but not limited to:

- advising the Director-General and Minister's office on appropriate responses to media enquiries;
- advising the Director-General and Minister's office on appropriate responses to approaches by the ACTT AB employees union and the Canberra Racing Club;
- advising key personnel in relation to management of potential personal conflicts of interest;
- clearing all documents and correspondence issued to potential and actual applicants;
- negotiating and clearing the verification process conducted as part of finalising the due diligence materials and information memorandum;
- clearing all individual processes adopted as part of the overall sale process including bidder interactive meetings and negotiations (this included ensuring no breach of bidder IP occurred);
- preparation and clearing of all due diligence processes and the electronic data room access;
- ensuring the mis-disclosure of certain due diligence material was promptly corrected;
- ensuring the sale advisor kept proper records of all correspondence and conversations with applicants and provided that to the government sale team;
- ensuring the sale advisor provide an assessment to the Territory of any issues they discovered pertaining to their due diligence review of ACTTAB;
- clearing of all employee communications issued to ACTTAB staff as part of the process; and
- clearing all communications processes and media and stock exchange releases.

The fact that performing the dual role allowed the probity advisor to remain in close contact with all key issues and matters on a day to day basis put the probity advisor in a very good position to identify and deal with matters of probity as and when they arose. As was the case in the selection of matters outlined above.

...

... the senior lawyer appointed to the role of probity advisor in providing both probity and legal advice was supported by a team of lawyers from ACTGS. In addition, a significant amount of legal advice and input was provided by senior lawyers from Thomson Geer and to a relevant extent Minter Ellison acting for ACTTAB. For the Report to suggest ... that one person provided the legal and probity advice on this transaction is erroneous.

The Report appears to confuse the role of a probity advisor with that of a probity auditor. It is incorrect to assert that review and sign off of each key stage of the process is a requirement of a probity advisor. While a probity advisor may provide a summary report at various stages, if requested, as was done by the probity advisor in this case as part of the REOI process, the provision of detailed probity reviews and reports is the accepted role of a probity auditor.

3.150 The findings of the report are based on the fact that a single person undertook legal and probity advisory roles and that these roles are not necessarily compatible. In this regard the Australian Government Solicitor advised:

> ... we do not recommend that a single person provide both legal advice and probity advice in a major procurement such as an asset sale process. If a single legal practice is providing legal advice and probity advice, various measures can be adopted such as the use of separate advisors or separate teams within the legal practice to provide the legal advice and the probity advice and the development of a comprehensive probity framework or plan for that asset sale process.

3.151 The findings about the functions that the Probity Advisor performed were based on the documentation provided, the Probity Plan requirements and better practice. The report does not contend that the Probity Advisor did not perform any activities; it contends that evidence of some activities expected of a Probity Advisor was not available. The findings about the probity advisor role are drawn from better practice guidance for that role.

Response to a complaint and comment about the process

3.152 The requirements for dealing with complaints were set out in the *Probity Plan* (December 2013) as follows:

> 10.3 All written complaints from potential Respondents received by the Territory that relate to the Project must be referred in a timely way to the Probity Advisor for consideration and, if the Probity Advisor considers it appropriate, investigation.
>
> 10.4 The Probity Advisor must prepare a written report to the Steering Committee on each complaint referred to him/her for consideration.

3.153 One obvious complaint was received during the sale process from an interested party. Additionally, during the bid stage, one of the potential purchasers expressed a view that the process had changed from what had been previously discussed with the Sale Project Team. This could be interpreted as a complaint.

Complaint in relation to the expression of interest

3.154 A complaint was received by email by the Sales Advisor (Deloitte) (who at that time was managing all communication with interested parties) from an interested party in relation to the expression of interest stage. The complaint was received on 18 March 2014 and set out a number of issues relating to the conduct of the expression of interest process as follows:

> I sought an extension of time which you advised that we should submit within the timeframe and that if additional information was required, you would contact us ... you specifically acknowledged this when you acknowledged receipt ... to suggest that we did not satisfactorily address the criteria in these circumstances (and without seeking further information) is a significant breach of the promise you made us.

3.155 On 18 March 2014 the Sales Advisor (Deloitte) sent the email to the Chair of the Sale Project Team and the Probity Advisor for advice on how to respond. The Probity Adviser forwarded the email to the Chair of the Steering Committee shortly after.

3.156 In response to a follow-up request from the Sales Advisor (Deloitte) on 21 March 2014, the Probity Advisor advised the Sales Advisor (Deloitte) to provide a brief response to the effect that:

> ... the Vendors did not require any further information from this bidder in order to form the view they should not proceed to the next states of the sale process ... we would be happy to provide a debriefing once the sale process has reached a conclusion.

3.157 The *Probity Plan* (December 2013) required the Probity Advisor to prepare a written report to the Steering Committee on the complaint referred for consideration. There was no evidence of this report and the Steering Committee minutes do not indicate whether any such report was presented to them.

Comment in relation to the bid stage

3.158 During the bid stage one of the potential purchasers communicated via email:

> We note that the process has changed from what we discussed at our meeting on Friday 13th of June in Canberra. In particular we note that the final process letter requires bidders to submit a final bid price based on the terms of the Final Bid Documents – it does not seem to accommodate what was discussed at our last meeting when we discussed allowing mark-ups to non-identified areas for the purpose of the base bid ... We also note that the process we understood to apply to the Final Bid now relates to the Alternate offer – again we believe this will limit materially the value that could well have been ascribed through an Alternate bid process whereby bidders could amend all clauses noting the risk was on them for the changes.

3.159 This communication was in relation to the final bid process letter issued on 20 June 2014. The potential purchaser communicated that the process ' ... has changed from what was discussed in our meeting on Friday 13th June in Canberra'. The communication was referred to the Probity Advisor who provided advice to the Sales Advisor (Deloitte) on the same day who in turn provided a response to the potential purchaser. This communication could have been interpreted as a complaint, which needed to be dealt with through the manner set out in the *Probity Plan* (December 2013) which required direct intervention of the Probity Advisor and a report to the Steering Committee.

3.160 The ACT Government Solicitor advised:

> The suggestion that the comments from [the potential purchaser] in the final stages of the process were a complaint is incorrect. This correspondence amounted to no more than a clarification and/or process query. No complaints were received at any time to the knowledge of the probity advisor from [the potential purchaser]. The other complaint referred to from [the interested party] may not have resulted in a

written report to the Steering Committee, however both members of the Committee were made well aware of the issue and the proposed response.

3.161 As evident from paragraph 3.158 one of the potential purchasers raised concerns about the conduct of the process. It would have been prudent to treat this in a more formal way.

4 SALE RESULTS

4.1 This chapter analyses the sale with respect to the Sale Objectives, as established by the November 2013 resolution of the ACT Legislative Assembly.

Summary

Conclusion

The sale was successful as it met the five Sale Objectives set out in the November 2013 resolution of the ACT Legislative Assembly:

- achieve a fair and reasonable price;
- ensure local racing industry is not negatively affected;
- achieve a timely sale;
- ensure the successful party has appropriate experience, capacity and integrity to operate a wagering business; and
- ensure employee welfare is considered.

Key findings

	Paragraph
On 14 October 2014, the ACT Government accepted Tabcorp's final bid price of $105.5 million, subject to a number of terms and conditions.	4.2
The final bid price was more than that offered by the other potential purchaser. Given that the indicative Trade Sale Value of ACTTAB was estimated to be between $35.6 million and $47.6 million, as estimated by PwC in the *ACTTAB Future Options Feasibility Study* (July 2013), this represents a good financial result for the Territory.	4.4
The sale met all of the Sale Objectives, as set out in the resolution of the Legislative Assembly on 28 November 2013.	4.8
The indicative bids and final bids offered by the two potential purchasers offered various models and revenue streams. The evaluation of the financial value of the various bids was conducted by way of a discounted cash flow analysis, which allows for a comparison of revenue streams at current day values (Net Present Value).	4.12
The rate used for discounting future cash flows required a robust technical analysis to ensure appropriate treatment of cash flows. The Sale Project Team accepted the	4.14

method for discounted cash flow analysis provided by PwC in the *ACTTAB Future Options Feasibility Study* (July 2013). This provided for the valuation of projected future cash flows in applicants' bids in terms of present day values.

There was appropriate consideration of the balance of risk and benefit in evaluating the net present value of upfront payments in potential purchasers' submissions. 4.23

One of the Sale Objectives was to ensure that the local racing industry was not negatively affected by the sale. 4.24

Before the ACT Government decided to pursue the sale of ACTTAB, representatives of the racing industry had proposed that the new owner should be required to fund the local racing industry on a similar basis as other TABs in the larger states. Representatives of the local racing industry indicated that their preferred funding model included a 40 year funding agreement with a fixed annual payment of $9.5 million indexed by CPI plus 6.3 per cent racing turnover generated by ACTTAB (in excess of $152 million). 4.28

PwC and the Sales Advisor (Deloitte) cautioned that a funding agreement of the magnitude proposed by representatives of the ACT racing industry would strongly deter any potential purchasers. 4.29

The racing industry has not been negatively impacted by the sale of ACTTAB. 4.36

One of the Sale Objectives was to ensure that employee welfare was considered. Accordingly, the *Request for Indicative Offers*, provided to the potential purchasers in March 2014, sought an indication from the shortlisted potential purchasers of which employees would be offered positions with the successful purchaser in the event of the sale. 4.37

In the lead up to the ACT Government's decision to pursue the sale, the Community and Public Sector Union (union) put forward its preferences for proposed sale conditions including enhanced redundancies and a three year job guarantee. Neither of the union's proposals was made a condition of sale as both PwC and the Sales Advisor (Deloitte) cautioned that this would discourage buyers who would be unable to justify investing in a business with such limited cash flows (ACTTAB's profit for 2013-14 was only $750,000). 4.40

Potential purchasers were therefore informed of the preferences of the union and the racing industry and encouraged to submit alternative proposals with indicative pricing. However, no potential purchaser was prepared to fully adopt the preferences of the union or the racing industry. 4.41

Sufficient consideration was accorded to employee welfare during the sale process. 4.42

Final result

4.2 On 14 October 2014, the ACT Government accepted Tabcorp's final bid price of $105.5 million, subject to a number of terms and conditions.

4.3 A summary of the deal is provided in Table 4-1.

Table 4-1 Final sale price and conditions

Tabcorp	ACT Government commitments
Final bid price of $105.5 million. Annual fee of $1 million for the sole totalisator licence (for the term of the sale). Tabcorp to provide for at least ten years, annual payments (indexed by CPI) of $300,000 to the racing industry for sponsorships and hospitality, and $400,000 per annum to community organisations. Tabcorp will also contribute $50,000 per annum (indexed by CPI) to problem gambling over the 50 year licence period. Spend at least $2 million to improve retail outlets over the next three years and to maintain a substantial retail presence in the territory for at least 10 years. Tabcorp committed to offer employment to staff on existing terms and conditions for at least 3 months (this included some other undertakings to facilitate employment of staff across Tabcorp operations).	ACT Government to issue a sole Totalisator licence for 50 years with an annual licence fee of $1million indexed by CPI. ACT Government to issue a Sports Bookmaking Licence (by the Gambling and Racing Commission) for the maximum period of 15 years including retail venue exclusivity and subject to existing tax arrangements. Compensation is payable by the ACT Government if this licence is not re-issued for a second 15 year period. The Gambling and Racing Commission to issue Keno and Trackside approvals with existing tax arrangements. ACT Government to provide prescribed amounts of compensation in certain circumstances including removal of any licences, allowing competitors to enter the market, or due to a change to, or a new, fee or tax. These arrangements expire variously between 11 and 25 years from the date of completion.

Source: ACT Audit Office analysis

4.4 The final bid price was more than that offered by the other potential purchaser. Given that the indicative Trade Sale Value of ACTTAB was estimated to be between $35.6 million and $47.6 million, as estimated by PwC in the *ACTTAB Future Options Feasibility Study* (July 2013), this represents a good financial result for the Territory.

Sale result

4.5 Several Sale Project Team members interviewed as part of the audit indicated that the final price paid for ACTTAB significantly exceeded their expectations. Sale Project Team members also noted that the final price was also far in excess (more than double) of the likely value range identified in the PwC report.

4.6 The Deputy Chair of the Steering Committee was the only person interviewed who indicated that the final sale price was 'about right'. He explained this in terms of the value of ACTTAB's cash flow in the hands of an established and efficient betting business.

4.7 The Deputy Chair also considered that if he could have sold the business by engaging directly, in a fully commercial manner, with the two operators of pari mutuel pools in Australia, the ACT Government could have got 'a bit more' for the business (e.g. potentially around $15 million more).

Alignment to Sale Objectives

4.8 The sale met all of the Sale Objectives, as set out in the resolution of the Legislative Assembly on 28 November 2013.

4.9 Table 4-2 provides a summary of achievements against the Sale Objectives.

Table 4-2 Achievement of Sale Objectives

Sale Objective	Sale Outcome	Comment
Achieve a fair and reasonable price	Achieved	Price was above that indicated by the Price Waterhouse Coopers (PwC) *ACTTAB Future Options Feasibility Study.*
Ensure local racing industry is not negatively affected	Achieved	Ongoing funding to the local industry through the budget process has not been negatively affected by sale.
Achieve a timely sale	Achieved	Government announced its intention to sell in November 2013, a preferred purchaser was announced in July 2014 and the sale was completed in October 2014.
Ensure the successful party has appropriate experience, capacity and integrity to operate a wagering business	Achieved	The preferred purchaser operates a large wagering business in Australia.
Ensure employee welfare is considered	Achieved	Employee welfare was considered at relevant stages of the Sale Process. An officer from Chief Minister and Treasury Directorate was available to the Sale Project Team to ensure that these interests received appropriate consideration.

Source: ACT Audit Office analysis

4.10 A number of issues were raised in the Legislative Assembly and the media following the ACT Government's announcement that Tabcorp's bid had been accepted. Three issues received considerable attention:

- the assessment of upfront payments versus future revenue (including taxation and licence fees);

- impact of the sale on the local racing industry; and
- consideration of employee welfare.

Upfront payments versus future revenue

4.11 The shortlisted potential purchasers provided bids that included a mix of upfront and ongoing financial benefits. The process for the assessment of these bids followed the staged approach as follows (refer to paragraph 3.6):

- indicative bid
- indicative bid valuation
- final bid
- final bid evaluation
- negotiation
- contractual agreement.

4.12 The indicative bids and final bids offered by the two potential purchasers offered various models and revenue streams. The evaluation of the financial value of the various bids was conducted by way of a discounted cash flow analysis, which allows for a comparison of revenue streams at current day values (Net Present Value).

4.13 That is, the future value of money provided for by the different bid, e.g. ten or 20 years into the future, was valued at current day values through discounted cash flow analysis, for the purpose of appropriately comparing the different bids.

4.14 The rate used for discounting future cash flows required a robust technical analysis to ensure appropriate treatment of cash flows. The Sale Project Team accepted the method for discounted cash flow analysis provided by PwC in the *ACTTAB Future Options Feasibility Study* (July 2013). This provided for the valuation of projected future cash flows in applicants' bids in terms of present day values.

4.15 The approach to discounted cash flow evaluation was applied equitably to both bids.

Final Bid process

4.16 The Audit Office examined the bid process, including the offers that were made by the two potential purchasers. In summary:

- in the final bid process both Tabcorp and the other potential purchaser were provided with an option to submit alternative bids subject to a number of conditions;
- Tabcorp's Alternative Bid conformed to the required conditions, but a substantial part of its value was associated with adjustments to timeframes, warranties and compensation that posed an additional level of risk to the Territory that was not acceptable to the Steering Committee;

- the other potential purchaser's Alternative Bid was substantially higher than its Final Bid, but it introduced a new proposal that was not previously identified in the non-binding offers. The other potential purchaser also sought to amend items within various agreements which were considered to be non-negotiable. The other potential purchaser's Alternative Bid was found to be non-conforming and was not evaluated as part of the final evaluation process.

4.17 At the conclusion of the process Tabcorp's Final Offer, with an additional component included in its Alternative Bid, was accepted.

Rationale for upfront payments

4.18 By virtue of the discounted cash flow analysis conducted by the Sales Advisor (Deloitte) on behalf of the Sale Project Team, as provided for by PwC in the *ACTTAB Future Options Feasibility Study* (July 2013), there was a greater emphasis placed on monies received up-front, as compared to future cash flows, from potential purchasers.

4.19 In its analysis of industry funding scenarios as part of the *ACTTAB Future Options Feasibility Study* (July 2013) PwC advised:

> Following privatisation of other state owned TABs, the relevant state based racing industries have been funded through a combination of direct payments from the TAB operator, product feed from corporate bookmakers and direct Government funding. ... The analysis suggests that unlike other states that have privatised TABs, the ACT Government's obligations to fund the industry far exceed the value of the business, therefore the ACT government will be unable to transfer all of its obligations to fund the racing industry to a new operator. Having, said that, there is merit in charging the new operator an annual licence fee as it will provide the ACT government with an ongoing revenue source, and may create additional value through the tax deductibility of the licence fee by the operator. It will be important to ensure that the total licence fee imposed does not prevent ACTTAB from being presented as an attractive investment opportunity with sufficient profit and cash generation justifying a buyers interest in acquiring the business.

4.20 The basis for preferring upfront payments to future cash flows was the subject of advice from the Sales Advisor (Deloitte) and considered and accepted by the ACT Government in May 2014:

> As part of the evaluation of indicative offers, Deloitte has advised that given the significant risks associated with the wagering industry the Government's preferred position should be to take all proceeds upfront rather than adopt the ongoing industry funding model.

4.21 Eligibility for Commonwealth Asset Recycling compensation also favoured upfront payment:

> ... should the proceeds from the ACTTAB sale be deemed eligible for the Commonwealth's proposed compensation of 15% of the proceeds, there is added incentive to maximise the up front payment.

4.22 The Commonwealth's Asset Recycling Initiative is designed to help unlock funding for new public infrastructure projects through reinvestment of the sale proceeds from existing government-owned assets. Under this programme the Commonwealth will provide states and territories with incentive payments of 15 per cent of the sale price of privatised assets. The programme was planned to commence in mid-2014 and close in mid-2019.

4.23 There was appropriate consideration of the balance of risk and benefit in evaluating the net present value of upfront payments in potential purchasers' submissions.

Affect on the local racing industry

4.24 One of the Sale Objectives was to ensure that the local racing industry was not negatively affected by the sale.

4.25 The racing industry had been funded by ACTTAB at a rate of 4.5 per cent of total racing turnover up to 2010. Since then the racing industry has received direct funding from the ACT Government. The change to direct funding had been driven by the racing industry's concerns that ACTTAB's financial capacity to fund the industry was declining.

4.26 In a Memorandum of Understanding (MOU) signed in December 2013, the ACT Government agreed to continue funding the ACT racing industry in 2013-14 by an amount of $7.827 million to be indexed each following year until the end of 2016-17. This level of funding exceeds ACTTAB's annual turnover that is attributed to local races, which was about $4.7 million in 2013-14.

4.27 In 2011 the Independent Competition and Regulatory Commission found that the economic contribution of the racing industry to the ACT ranged between $4.9 million and $8.6 million and that this did not justify continuing a high level of budget funding support.

4.28 Before the ACT Government decided to pursue the sale of ACTTAB, representatives of the racing industry had proposed that the new owner should be required to fund the local racing industry on a similar basis as other TABs in the larger states. Representatives of the local racing industry indicated that their preferred funding model included a 40 year funding agreement with a fixed annual payment of $9.5 million indexed by CPI plus 6.3 per cent racing turnover generated by ACTTAB (in excess of $152 million).

4.29 PwC and the Sales Advisor (Deloitte) cautioned that a funding agreement of the magnitude proposed by representatives of the ACT racing industry would strongly deter any potential purchasers.

4.30 In New South Wales, Queensland and Victoria, the local racing industry receives the majority of their funding under commercial agreements with their respective TABs. The revenue generated from wagering on local races in these jurisdictions is a major profit driver for the TAB in each of those states (in the order of 50 percent or more).

4.31 This is not the case in the ACT, Tasmania and the Northern Territory, where local racing industries are dependent on budget funding. This is due to the smaller scale of operations in these jurisdictions.

4.32 Tasmania has a 20 year funding agreement (currently being reviewed) and the Northern Territory has a five year funding agreement that is also being reviewed. Although budget funding in each case is more than the ACT, there are more racing clubs to support (16 in Tasmania and seven in the Northern Territory - when compared with three in the ACT). The funding position for the three jurisdictions in 2013-14 is summarised in Table 4-3 below.

Table 4-3 Summary of funding provided to the racing industry in ACT, Tasmania and the Northern Territory in 2013-14

Financial Year	ACT	Tasmania	Northern Territory
2013-14	$7.8 m (for 3 clubs)	$22.3 m (for 16 clubs)	$14.7 m (for 7 clubs)

Source: ACT Audit Office analysis

4.33 Tabcorp has committed to provide (for at least ten years) annual payments of $300,000 (indexed by CPI) to the racing industry for sponsorships and hospitality and $400,000 per annum to community organisations. Tabcorp will also contribute $50,000 per annum (indexed by CPI) to problem gambling over the 50 year licence period.

4.34 The 2013 Memorandum of Understanding remains in effect and is not impacted by the sale of ACTTAB.

4.35 The ACT Government agreed to fund the ACT racing industry in 2013-14 by an amount of $7.827 million to be indexed each following year until the end of 2016-17. The local racing industry received $7.5 million in 2012-13.

4.36 The racing industry has not been negatively impacted by the sale of ACTTAB.

Consideration of employee welfare

4.37 One of the Sale Objectives was to ensure that employee welfare was considered. Accordingly, the *Request for Indicative Offers*, provided to the potential purchasers in March 2014, sought an indication from the shortlisted potential purchasers of which employees would be offered positions with the successful purchaser in the event of the sale.

4.38 Tabcorp's response demonstrated that it had considered this issue in some depth, including recognition of the importance of local employment opportunities within a small jurisdiction such as the ACT.

4.39 This resulted in a commitment from Tabcorp to the following.

- offer all staff, excluding the Board, CEO and CEO's Personal Assistant, employment in a form that recognises continuous service and on terms which are substantially similar and no less favourable than employees' current ACTTAB terms;
- ensure no redundancies, for staff offered employment, for a period of at least three months following the date of completion of the sale (and in some cases 12 months following the date of completion of the sale);
- investigate alternative roles in other parts of the Tabcorp group for any ACTTAB staff affected by redundancy (there were approximately 60 open roles for recruitment within Tabcorp at the time);
- pay all redundancy costs (in the event where no alternative roles could be identified) in accordance with the *ACTTAB Enterprise Agreement 2011-2014*. Tabcorp would also provide career transition services and outplacement services to assist affected employees locate roles outside of Tabcorp; and
- maintain staff salaries at current levels from the date of completion of the sale and to meet with all staff to discuss their future and keep formal lines of communication open during the transition period.

4.40 In the lead up to the ACT Government's decision to pursue the sale, the Community and Public Sector Union (union) put forward its preferences for proposed sale conditions including enhanced redundancies and a three year job guarantee. Neither of the union's proposals was made a condition of sale as both PwC and the Sales Advisor (Deloitte) cautioned that this would discourage buyers who would be unable to justify investing in a business with such limited cash flows (ACTTAB's profit for 2013-14 was only $750,000).

4.41 Potential purchasers were therefore informed of the preferences of the union and the racing industry and encouraged to submit alternative proposals with indicative pricing. However, no potential purchaser was prepared to fully adopt the preferences of the union or the racing industry.

4.42 Sufficient consideration was accorded to employee welfare during the sale process.

RECOMMENDATION 1 PROCUREMENT POLICIES, PROCEDURES AND PROCESSES

The Chief Minister, Treasury and Economic Development Directorate should examine, and if needed amend, its procurement policies, procedures and processes so they comprehensively cover:

Risk management:

1) all complex, high value or high risk procurements should be subject to a procurement risk assessment and be supported by an approved risk plan which is developed before procurement activity commences (this plan may subsequently be modified as needed); and
2) the risk assessment should guide mitigation measures and inform governance and administrative processes for the procurement;

Evaluation criteria:

3) evaluation criteria should be designed to match the way in which they will be evaluated; and
4) the assessment of evaluation criteria by an assessor and/or panel members should be precise, rigorous and documented;
5) Procurements that are not subject to the *ACT Government Procurement Act 2001*:
    i) need to have the policies, procedures and processes to be used defined and documented at the beginning of a procurement activity; and
    ii) need to be the subject of a risk assessment and have an approved risk plan;

Probity Plan and Probity Advisor role in complex, high value or high risk procurements:

6) a Probity Plan should include a requirement for the provision of written independent assurance at key stages of the procurement;
7) the Probity Advisor role as a principle should be independent of other roles in the procurement process. However, if this does not occur, the reasons for not so doing should be documented and a risk assessment undertaken to identify how any associated risks are to be managed;

Documentation and record-keeping requirements:

8) complex, high value or high risk procurements should be well documented; and
9) an audit should be undertaken immediately at the conclusion of the procurement to identify any gaps so that they can be corrected in a timely manner.

APPENDIX A: LEGAL CONSIDERATIONS

A.1 The audit of the sale of ACTTAB raised four key legal questions:

- Was the sale of ACTTAB subject to the *Government Procurement Act 2001*?
- Was the sale of ACTTAB a 'Government sale'?
- Was the sale of ACTTAB subject to the Hughes Case (Hughes Aircraft Systems International v Airservices Australia (1997) 76 FCR 151)?
- Do the 'reserved discretions', in the Request for Expression of Interest, remove or reduce the application of the Hughes Case?

A.2 Advice from the Australian Government Solicitor and Mr Charles Scerri, QC was sought to assist in answering these questions. Where relevant, advice from the ACT Government Solicitor is also recognised.

Government Procurement Act 2001

A.3 The draft proposed audit report, which was provided to the auditees and other entities involved in the sale process, for consideration and comment, identified that the *Government Procurement Act 2001* did not apply to the sale of ACTTAB because the sale involved the sale of assets by ACTTAB, which was not covered by the Act.

A.4 In its response to the draft proposed report, the ACT Government Solicitor advised that it was incorrect to categorise the sale of ACTTAB as a procurement process. The ACT Government Solicitor also advised that 'a key concern for ACTGS is that the Report is nonetheless premised on the presumption that in the Territory, the proposed sale of what was initially proposed to be the shares and/or assets and undertakings of a Territory-owned corporation under the Corporations Act, was required to be governed by procurement principles and processes generally applicable in government tendering or purchasing of goods, services or works.' The ACT Government Solicitor advised that the draft proposed report:

> ... erroneously characterises the process as a tender or purchase process, referring for example to: "submission of tenders", "tender documentation", "tendering equity" and best practice guide for "Purchasing Decisions" by the Commonwealth's ANAO; "process contract" in the way that term applies by virtue of case law to actual government tendering, purchasing and procurement processes; the requirements of the ACT Procurement Act and the various policies, processes and plans that underpin it, should have been applied to the ACTTAB asset sale process.
>
> There is no purpose or utility in attempting to ascribe, as the Report does, procurement processes to an asset sale process that did not take that form and irrespective of whether or not the sale proceeded as a sale of assets and undertaking by ACTTAB or a sale of the shares of ACTTAB and by the Territory.

ACT Government Solicitor advice

A.5 The ACT Government Solicitor also advised that the *Government Procurement Act 2001* did not at any stage apply to the sale of ACTTAB, because:

- the sale of the business of ACTTAB Ltd by ACTTAB Ltd was not subject to the *Government Procurement Act 2001*, because ACTTAB, as a Territory-owned corporation, was specifically excluded from the operation of the act by virtue of subsection 3(2), which provides a definition of a Territory entity; and
- the sale of the shares of ACTTAB Ltd do not come within the scope of the *Government Procurement Act 2001*, as it does not meet the definition of procurement, provided for in section 2A of the *Government Procurement Act 2001*.

A.6 Procurement is defined in section 2A of the *Government Procurement Act 2001* as follows:

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

A.7 The ACT Government Solicitor further advised:

> No direction was issued to ACTTAB Limited by the voting shareholders pursuant to s 17 of the Territory-owned Corporations Act as to the process to be followed. It follows that ACTTAB could not be obliged to apply the Government Procurement Act.

A.8 In support of this view, the ACT Government Solicitor advised:

> The ACTTAB asset sale process, as was made clear in all public documents, was at least initially a joint sale process conducted by ACTTAB and the Territory. ACTTAB was at the relevant time a public company limited by shares and independent of the Territory. As the sale could ultimately proceed as either a sale of the assets and undertaking of ACTTAB by ACTTAB or a sale of the shares of ACTTAB by the Territory, this was the only appropriate approach to take from the outset. When it became clear, well into the indicative bid stage of the process, that the sale would proceed as a sale of assets and undertaking by ACTTAB, the Territory then in effect took on more of a supporting and facilitative role in ensuring a successful sale by ACTTAB in a form that the shareholders would approve in accordance with the TOC Act.
>
> There was no sale legislation passed by the Legislative Assembly, as it was considered unnecessary and no direction was issued by the Territory (via the Voting Shareholders) to ACTTAB in terms of s17 of the Territory-owned Corporations Act 1990 (TOC Act).
>
> Accordingly, at no time did the Territory have control over the asset sale process and at no time could the Territory have imposed a government procurement process, including any of the various plans and policies inherent in a government procurement process, upon ACTTAB.

A.9 The ACT Government Solicitor further advised:

> It is asserted that the process should have been conducted in accordance with the Government Procurement Act in the event the Territory decided to proceed with a sale of shares. Although the view of the ACTGS is that shares of a Territory-owned Corporation are not within the scope of a procurement as that term is defined in the Government Procurement Act 2001, that is not determinative of any relevant issue as to any process that ACTTAB Ltd was obliged or might choose to follow. At no point did the Territory determine to offer the shares of ACTTAB Ltd for sale. What was

> offered for sale (refer the first sentence of the REOI document) was the business undertaking of ACTTAB Ltd and ... the sale ultimately proceeded on that basis, via a business sale agreement entered into between ACTTAB Ltd and the purchaser.

November 2013 (Interim) ACTTAB Sale Working Group minutes

A.10 On 28 November 2013 a meeting of the (Interim) ACTTAB Sale Working Group was held. The meeting was attended by the then Director-General of the Commerce and Works Directorate, two representatives of the Commerce and Works Directorate, one representative of the Chief Minister and Treasury Directorate and two representatives of the ACT Government Solicitor. Unsigned minutes of that meeting were provided to the Audit Office. Under the 'Request for Expression of Interest and Information Memorandum' issue/topic it was reported:

> Confirmed that the sales advisor procurement does not fall under the Procurement Act as if we proceed with a Sale of Assets, these are ACTTAB's assets and ACTTAB does not fall under the Procurement Act. If we proceed as a Sale of Shares, then this is a investment transactions (ie not sale of a good or service).

A.11 While there appeared to be an incorrect reference to the procurement process that was then underway for the Sales Advisor in the minutes, the minutes identify two reasons as to why the *Government Procurement Act 2001* would not apply to the sale process.

A.12 No written legal advice was provided in relation to the application of the *Government Procurement Act 2001* at that time.

Australian Government Solicitor advice

A.13 With respect to the application of the *Government Procurement Act 2001*, the Australian Government Solicitor advised that 'had the sale resulted in a sale of shares by the ACT Government, such a sale would then have been a "procurement" as defined in the [Government Procurement Act 2001]'. The Australian Government Solicitor further advised:

> At least at the REOI [Request for Expression of Interest] stage the sale could have involved either a sale of shares by the ACT Government or the sale of ACTTAB's main undertaking. Because a sale by the ACT Government of its shares in ACTTAB was a possibility it would in our view have been prudent, at least at that stage of the sale process, to treat the process as potentially involving a procurement under the GP Act.

A.14 In relation to the question of whether the sale of shares would be covered by the *Government Procurement Act 2001*, the Australian Government Solicitor advised:

> The sale of those shares would have been a disposal of property and therefore within the definition of 'procurement' in s 2A of the GP Act. We cannot see any basis for saying that the GP Act would not apply because the sale of shares would be regarded as an 'investment transaction.'

A.15 Mr Charles Scerri, QC also advised in relation to the application of the *Government Procurement Act 2001* that:

> ... It seems clear (as AGS advised) that if the sale had proceeded as a sale of shares, the sale would have been a 'procurement' within the meaning of this Act [*Government Procurement Act 2001*]. This is because s.2A of that Act defines 'procurement' to include disposing of property. However, also as advised by AGS,

since the shares were held in the names of the Chief Minister and Deputy Chief Minister it is not entirely clear that a sale of shares would have been procurement by a "Territory entity" as defined in the Government Procurement Act.

The AGS characterised the sale process as a 'joint sale' by ACTTAB and the Government, and advised that it would be prudent to treat the sale process as potentially involving a 'procurement' under the Government Procurement Act at least until it was determined that it would be an asset sale.

... I consider that advice to be clearly correct. Until a sale of assets was determined upon, it was possible that there would be a sale of shares, i.e. a 'procurement' by a 'Territory entity'. It would not have been prudent to structure and manage the sale process without regard to the requirements of the Government Procurement Act until it was clear the Act did not apply.

A.16 It would have been prudent to structure and manage the sale of ACTTAB with regard to the requirements of the Government *Procurement Act 2001* until it was clear that the Act did not apply (i.e. only assets were being sold and not shares).

A 'Government sale'

A.17 Advice was sought from the Australian Government Solicitor with respect to whether the sale of ACTTAB was a 'Government sale'. The Australian Government Solicitor advised that the sale could:

> ... be best described as being a joint Territory and ACTTAB sale. Whilst in practice only ACTTAB could sell its main undertaking and the Government could not do this itself other than via a sale of shares it is clear that in practice the Government exercised a significant degree of control over the sale of ACTTAB's business. ACTTAB did not of its own volition independently pursue and conclude the sale of its main undertaking. Our reasons for reaching this conclusion are as follows:
>
> - the sale required specific approval by ACTTAB's shareholders - ACTTAB was a territory corporation. It was governed by the provisions of the *Territory-owned Corporations Act 1990*. Pursuant to s16(1)(a) ACTTAB required the prior written consent of its shareholders to dispose of its main undertaking i.e. it could not act or conclude a sale independently. The 2014 ACTTAB Sale Timeline document also clearly shows that the ACTTAB Board required the approval of the Voting Shareholders to approve the sale to the identified preferred purchaser;
> - s 22(4)(a) of the *Territory-owned Corporations Act 1990* also provides that a territory-owned corporation must not dispose of any of its main undertaking unless the ACT Legislative Assembly approved the disposal-it is understood that consistent with this requirement the ACT Legislative Assembly passed a resolution approving a sale of shares or sale of assets;
> - the REOI refers to the ACT Government and the Board of ACTTAB as jointly being the Vendors and carries the logos of both the ACT Government (Commerce and Works Directorate) as well as ACTTAB. The Request for Binding Offers is similarly expressed. Respondents to the REOI and Request for Binding Offers would in our view have reasonably concluded that the ACT Government was, at a minimum, jointly conducting the sale process with the Board of ACTTAB;
> - the Probity Plan prepared by the ACT Government Solicitor for the ACT Commerce & Works Directorate was expressed to be for the "*Sale Process for the*

Territory's interest in ACTTAB Ltd" and clearly applied to both Territory personnel as well as to ACTTAB personnel;

- in the Request for Final Binding Offers, the description of the Sale Process Overview specifically refers to "*the licence terms that will be offered by the ACT Government as part of the sale"*.
- the Business Sale Agreement between ACTTAB (described as the Vendor), the ACT, and the Purchaser included a number of conditions precedent to Completion-see Clause 3.1 and Schedule 8. The approval of the Minister to the transfer of the Totalisator Gaming Licence to the Purchaser, the issue of a Sports Book making licence to the Purchaser, and the approval of the Purchaser conducting lottery products known as Keno and Trackside were all expressed to be conditions precedent to Completion. A failure to satisfy any of these conditions precedent provided the Purchaser with an automatic right to terminate the Business Sale Agreement (see Clause 3.2 of the Business Sale Agreement). It seems clear that the sale of the assets of ACTTAB without the corresponding Government and Gaming Commission approvals for the transfer/granting of the required licences would not have been achievable-the sale of ACTTAB's assets and the transfer/approval of the required totalisator and gaming licences were interdependent. These licences were not assets of ACTTAB which ACTTAB could itself offer to sell to a successful purchaser;
- pursuant to Clause 6.3(e) of the Business Sale Agreement, the Purchaser at Completion was required to *"do or execute all other acts and documents that this agreement requires the Purchaser to do or execute at Completion".* One of the documents requiring execution by the Purchaser at Completion was the Industry and Community Support Deed between the Territory, the Purchaser and the Purchaser's Guarantor (see the definition of this Agreement in Clause 1.1 of the Business Sale Agreement). Under Clause 6.5 of the Business Sale Agreement a failure by the Purchaser to execute the Industry and Community Support Deed entitled the ACTTAB not to proceed with the sale-it is clear that the Business Sale Agreement and the Industry Community and Support Deed were interdependent and it is not unreasonable to assume that ACTTAB's shareholders would probably have refused approval for the sale to proceed unless the purchaser had executed the Community and Support Deed;
- the Steering Committee which was responsible for making a recommendation on a preferred purchaser had joint ACTTAB and Territory representation thru the Chair of ACTTAB and the Director-General of the Commerce and Works Directorate;
- the Project Team supporting the Steering Committee also had joint Territory and ACTTAB representation;
- the non-binding MOU between the Territory and ACTTAB details the cooperation arrangements between the Territory and ACTTAB in relation to the sale of ACTTAB- Clause 3 identifies "*Sale Decisions"* which, in the event of a sale of the assets and undertaking of ACTTAB, were identified to be key matters that are expected to be referred to the ACTTAB Board for decision. These "*Sale Decisions"* included decisions on the bidders to be shortlisted following completion of the initial expression of interest process and a decision on the preferred bidder as a result of the lodgement of final offers by shortlisted bidders. Taken on its own this clause in the MOU would support an argument that the sale process was

controlled by the Board of ACTTAB. In our view however this clause cannot be looked at in isolation. Indeed Clause 7.2 of the MOU states that *"responsibility for making any required key decisions as part of the Sale process will rest with the Territory through the Chief Minister and Treasurer as shareholders of ACTTAB and where appropriate, the Board of ACTTAB".* Clause 6.3 of the MOU includes a provision for the Territory to reimburse sale costs to ACTTAB in the event that *"the Territory determines to cease the Sale process"*. Recital A of the MOU refers to the resolution of the Legislative Assembly on 28 November 2013 to approve "*the disposal of the Territory's interest in ACTTAB";*

- the Territory indemnified the ACTTAB Board in relation to any Claim arising out of or in connection with, or resulting from any act, omission or conduct of the Director in the capacity of an officer of ACTTAB or in connection with the affairs of ACTTAB which was incurred in relation to the Sale or Sale process. Sale is defined in the Deed of Indemnity to include the sale by ACTTAB of all or any of its main undertakings and assets. As long as the ACTTAB Directors did not act dishonestly, fraudulently, maliciously, in bad faith or criminally or otherwise obtain any personal gain or engage in conduct constituting Gross negligence, the Territory indemnified them for their acts, omissions and conduct in relation to the Sale. If the Territory was not itself involved in and had no control whatsoever over the sale process it is difficult to understand why such an indemnity would have been granted (or indeed needed);
- sale legislation was necessary to facilitate the sale-see the *Territory-Owned Corporations Amendment Act 2014* which effected the removal from the Act of references to ACTTAB;

A.18 The sale of ACTTAB is considered to be a joint Territory and ACTTAB sale, which for all practical purposes means it would be appropriate to treat it as a 'Government sale'.

Hughes Case

A.19 The draft proposed audit report, which was provided to the auditees and other entities involved in the sale process, for consideration and comment, identified that it was likely that the principles of the Hughes Case applied to the sale of ACTTAB and that the concept of a 'process contract' was likely to exist.

A.20 The ACT Government Solicitor, in responding to the draft proposed audit report in relation to the application of the Hughes Case, stated:

> The Report makes numerous references to *Hughes Aircraft Systems International Inc v Airservices Australia* (1997) 76 FCR 151 (Hughes), seeking to apply the judgment to the sale of a government corporation's assets. While the decision of a single judge of the Federal Court of Australia in Hughes has provided some guidance in relation to the conduct of government procurements, the facts of the case are very specific and in the absence of any clarity by an appeal court or the High Court, it is unclear the extent to which the finding of a process contract would apply beyond government tendering processes. It is the view of ACTGS that the case does not extend to the proposed sale of the shares and/or assets and undertakings of a corporation but is confined to government tendering and purchasing processes.
>
> ... the Hughes case has no bearing on the conduct of the sale process, other than a likely obligation on the Territory (but not ACTTAB) to conduct itself fairly and in good faith as part of the process. The findings of the Report in relation to the conduct of

the sale process do not identify by reference to the evaluation of EOIs against the published criteria, in what way the sale was not conducted fairly and with probity.

A.21 The Australian Government Solicitor after considering the response of the ACT Government Solicitor advised that:

> We would agree that if the Government had no involvement in the sale process it would be difficult to argue that the principles in the Hughes case would apply to a sale process conducted solely by ACTTAB. This is not however what happened.
>
> ... the sale process can in our view best be described as a joint sale by the Territory and the Board of ACTTAB. It is clear to us that the Territory was intimately involved in all stages of the sale process. It is also clear that it was represented to respondents to the REOI and to the Request for Binding Offers that the sale process was a joint ACTTAB /Territory sale process.
>
> The approach to the market to sell ACTTAB was effectively a two stage tender process consisting of the REOI and the Request for Final Binding Offers. Respondents to the REOI were shortlisted to participate in the Request for Binding Offers based on the assessment of their REOI responses. In our view the REOI and Request for Final Binding Offers should not be seen to be two completely separate and distinct processes. They are inextricably linked. Two stage or even three stage tender processes involving a REOI, followed by a Request for Tender or Request for Proposals sometimes then also followed by a further Request for Revised Offers or even a Request for a Best and Final Offer are in our experience, common Government tendering arrangements.
>
> The ACT Solicitor General has argued that a disposal process cannot be equated with a tender process. In our view, the characterisation of the process as a tender process or as a disposal process is not a relevant consideration with respect to whether or not public law requirements associated with the application of administrative law principles apply.
>
> ...
>
> The sale to the preferred purchaser required the approval of ACTTAB's Voting shareholders, the Chief Minister and Treasurer (acting on behalf of the Territory). Accordingly, the sale decision involved the exercise of the Government's executive power. Indeed the sale could not even commence/be conducted without the prior approval of the ACT Legislative Assembly. In addition ... for so long as the option of a sale of shares remained a possibility, the prudent approach in our view would have been to adopt a process which was governed by the requirements of the GP Act.
>
> Against this background of Territory involvement in the conduct of the sale process, it would in our view have been reasonable for the Applicants in the sale process to have had a legitimate expectation that the process would be conducted in accordance with the rules of natural justice or procedural fairness. A legitimate expectation has been recognised by the courts for some time as an interest that is protected by procedural fairness. In the case *Attorney-General of Hong Kong v Ng Yuen-Shiu* (1983) All ER at 350 Lord Fraser explained legitimate expectations as justifiably arising on the footing that;
>
> *"When a public authority has promised to follow a certain procedure, it is in the interests of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with statutory duty".*

In the case of *Kioa v West* (1985) 159 CLR 550) Brennan J as he then was observed as follows:

"There are interests beyond legal rights that the legislature is presumed to intend to protect by the principle of natural justice. It is hardly to be thought that a modern legislature when it creates regimes for the regulation of social interest-licensing and permit systems, means of securing opportunities for acquiring legal rights, schemes for the provision of privileges and benefits at the discretion of Ministers and or public officials-intends that the interests of individuals which do not amount to legal rights but which are affected by the myriad and complex powers conferred on the bureaucracy should be accorded less protection that legal rights. The protected interests which do not amount to legal rights are nowadays frequently described as "legitimate expectations".

In the same case, Mason J (as he then was) said as follows:

"The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness in the making of administrative decisions which affect rights, interests and legitimate expectations……"

As we have previously advised the potential for legal challenge for a breach of an implied condition to act fairly was addressed in the Hughes case which established for the first time in Australia authority for the existence of a 'process contract", that is, a contract between the entity conducting the tender process and each tenderer to govern the conduct of that tender process, and that a breach of that process contract can involve damage to the tenderer for which the latter may seek remedy. It was held in the Hughes case that the terms of the process contract were a combination of the express terms contained in the conditions of tender and two implied terms, one of which was stated to be implied as a matter of law to the effect that the government entity would exhibit fair dealing in the performance of the process contract.

...

As we have previously advised we are of the view that there would be a considerable risk that a Court would find the terms of the REOI and Request for Binding Final offers, taken together, constituted a process contract to which the Territory was a party. In reaching this conclusion we have relied on the fact that it was the Territory Government that decided to pursue a sale of its interest in ACTTAB. The sale only proceeded on the basis of an express approval of the ACT legislative Assembly. The sale was conducted jointly by the Board of ACTTAB and the ACT Community and Works Directorate and finally, the sale to the identified preferred purchaser required the approval of ACTTAB's voting shareholders, the Chief Minister and the Treasurer.

Accordingly we remain of the view that there is considerable risk that a Court would find that a process contract did exist and that the implied obligation to exhibit fair dealing (as determined by the Hughes case –and a number of following cases) applied.

A.22 Mr Charles Scerri, QC advised that he supported the Australian Government Solicitor's view, and stated that:

I agree with that advice, and I consider that the finding that a process contract existed is more likely than not.

It is necessary to describe briefly the sale process that was undertaken.

The first step was the issue of the REOI. That provided that the sale would proceed *either* as a sale of shares in ACTTAB *or* as a sale by ACTTAB of its assets and undertaking. The 'Vendors' were defined as the ACT Government and the board of ACTTAB.

The REOI described the sale as a 'competitive sale process'. The REOI said that the exclusive licence currently held by ACTTAB would be offered to the successful purchaser on terms to be negotiated as part of the sale process. The final licence terms would not be determined by the relevant Minister 'until completion of the sale agreement with the successful purchaser.' Paragraph 3 of the REOI said that the sale would be subject to the new legislative provisions proposed by the *Totalisator Bill* 2013 and would only proceed where it was deemed to be in the best interests of the Vendors.

The REOI contained very detailed provisions as to the information that was required to be submitted in support of an expression of interest. The evaluation criteria were set out in detail. In particular, information was required in relation to the identity of any applicant and its advisors, the applicant's financial capacity, the applicant's operational capacity and the applicant's future intentions.

Applicants were requested to provide an outline of whether they had a preference to acquire the shares of ACTTAB or specified assets.

Clause 8 of the REOI dealt with 'Vendors Rights'. These included an 'absolute discretion' to accept or reject any expression of interest, offer or bid. Clause 9 provided that the vendors would not be liable to reimburse or compensate any applicant for any fees costs or expenses incurred in connection with any activities relating to the sale or the sale process.

The RFBO referred to 'licence terms that will be offered by the ACT Government as part of the sale'. The RFBO contained detailed provisions in relation to the sale process including how data would be made available and how the Q&A process was to be managed.

Other important features of the sale process include the following:

a) By reason of s.16(1)(a) of the *Territory-Owned Corporations Act 1990*, ACTTAB was prohibited from selling its main undertaking without the consent of the Voting Shareholders (i.e. the Territory Government).

b) The sale process was the subject of a Memorandum of Understanding between the ACTTAB and the Territory (**MOU**). That noted that the Legislative Assembly of the Territory had passed a resolution approving 'the disposal of the Territory's interest in ACTTAB by either a sale of the shares of ACTTAB or a sale by ACTTAB of its main undertaking'. (This resolution was necessary under s.16(4)(a) of the *Territory-Owned Corporations Act 1990.)* The Schedule to the MOU set out 'Sale Decisions' that were said to be 'the key matters that are expected to be referred to the Board of ACTTAB for decision'. Paragraph B of the Schedule said 'For the avoidance of doubt, if the Sale does not proceed as a sale of the assets and undertaking of ACTTAB, there are no Sale Decisions'.

c) The sale process required the involvement of the Territory, even where it took the form of an asset sale. In particular, the sale was conditional upon the transfer or issue to the purchaser of ACTTAB's Totalisator Gaming Licence and certain other licences. The transfer of the Totalisator Gaming Licence required the approval of

the Minister, it was necessary for the Gaming Commission to issue a Sports Bookmaking licence, and it was necessary for the Gaming Commission to give approval to the purchaser to conduct certain lottery products: see Schedule 8 to the Sale Agreement.

In Hughes, it was held that a tender process for the acquisition of services by the Civil Aviation Authority was subject to a 'tender process contract' to the effect that the tender process would be conducted fairly by the Authority and in accordance with the defined procedures and criteria that had been stipulated by the Authority.

In my opinion, a Court is likely to reach the same conclusion in this case. That is, the nature of the sale process, and the involvement of the ACT Government in that process, gave rise to a process contract under which the ACT Government was obliged to conduct the sale fairly and in accordance with the defined procedures and criteria that it had stated would apply to the sale process.

The involvement of the Government did vary once it was agreed with the purchaser that the transaction would take the form of an asset sale, rather than a sale of shares. This is reflected in the REOI and in the MOU (see above). But the Government remained critically involved in relation to the transfer and issue of the relevant licences and approvals (see above).

I have been briefed with an opinion of the Solicitor-General of the Territory dated 10 April 2015 in which he expresses the view that *Hughes* 'does not extend to the proposed sale of the shares and/or assets of [ACTTAB] but is confined to government tendering and purchasing processes'. I respectfully disagree.

The general proposition is that where a government has stated that it will follow a particular procedure in relation to dealing with third parties, the government is under an obligation to act fairly and in accordance with the stated procedure. See, for example, *Kioa* v *West* (1985) CLR 550. This principle is not limited to purchasing tenders but is a general principle of modern administrative law. In the tendering context, the principle is given effect to by the imposition of a process contract.

A.23 Legal advice provided for the audit by the Australian Government Solicitor and Mr Charles Scerri, QC concluded that it was more likely than not that the principles of the Hughes Case applied to the sale of ACTTAB. As a result, a 'process contract' existed in the sale of ACTTAB and there was, therefore, an obligation to conduct the sale in accordance with the defined procedures and the stated criteria that was in the *Request for Expression of Interest*.

A.24 The ACT Government Solicitor advised in responding to the proposed audit report that the principles of the Hughes Case did not apply.

A.25 While there is a difference of views, given the type of sale with its complexities and uncertainties, and given the consequences if the Hughes Case did apply, it would have been prudent for such an issue to have been explicitly considered in a risk analysis, in preparations for the sale. However, there is no evidence that this occurred. If it had occurred, any issues emerging due to differing views could have been managed to reduce any associated risk

'Reserved discretions'

A.26 For a procurement where a 'process contract' exists, there is less flexibility in the process, compared with one where such a concept does not apply. If a 'process contract' exists

then even having 'reserved discretions', which are designed to give a vendor flexibility, may not be relied upon.

A.27 In responding to the draft proposed report, the ACT Government Solicitor stated 'the Report does not appear to acknowledge the expressly reserved discretions stated in the conditions of the REOI, including paragraphs 6 and 8'.

A.28 The *Request for Expressions of Interest* document had 'reserved discretions' identified as follows:

Paragraph 6 stated:

> EOIs [Expression of Interests] will be assessed by the Vendors in their absolute discretion based on the above criteria, and any other criteria determined relevant by the Vendors, to determine the Applicant's suitability to progress past the EOI stage.

Paragraph 8 stated:

> The Vendors are under no obligation to respond to any EOI [Expression of Interest]. The Vendors also reserve the right, at any time, and in their absolute discretion, to:
>
> - Accept or reject without providing reasons any EOI, offer or bid in connection with the sale of ACTTAB submitted by any applicant at any time;
> - Request from any or all Applicants any further information they may require;
> - Vary, cease or suspend the Sale Process or any part of it;
> - Invite further parties to participate in the Sale Process, at any time; and
> - Take into account any additional information obtained by the vendors during the sale process.

A.29 The Australian Government Solicitor advised that:

> In our view none of these reserved rights operate in such a way as to expressly disclaim the REOI [Request for Expression of Interest] from being interpreted to be a "process contract" within the meaning of Hughes. In addition, the discretions do not seek to exclude the Hughes implied obligation to act fairly in terms of the way in which the reserved rights may be exercised and the sale process conducted.

A.30 The Australian Government Solicitor further advised that:

> There are expressly reserved discretions stated in the conditions of the REOI, in particular-paragraphs 6 and 8.
>
> Paragraph 6 refers to the evaluation criteria and states that the '*EOIs will be assessed by the Vendors in their absolute discretion based on the above criteria, and any other criteria determined relevant by the Vendors, to determine the Applicant's suitability to progress past the EOI stage'*.
>
> Paragraph 8 sets out the Vendors reserved rights in the conduct of the EOI process. Their rights include a right to accept or reject without providing reasons, a right to vary, cease or suspend the Sale process, a right to request further information, take into account additional information or request further information.
>
> In our view none of these reserved rights operate in such a way as to expressly disclaim the REOI from being interpreted to be a "process contract" within the meaning of Hughes. In addition, the discretions do not seek to exclude the Hughes

> implied obligation to act fairly in terms of the way in which the reserved rights may be exercised and the sale process conducted.
>
> For completeness we do note that Paragraph 9 of the REOI deals with responsibility for costs and states that the Vendors are not liable to reimburse or compensate any Applicant for any fees, costs or expenses incurred in connection with activities relating the sale of ACTTAB and/or the sale process. There is nothing in this provision which negates the potential for the REOI to be interpreted to be a process contract or which involves an express contracting out from the implied obligation to act fairly.

A.31 Mr Charles Scerri, QC advised that:

> A subsidiary question upon which AGS advised was whether certain provisions in the REOI excluded the application of *Hughes*. In particular these were provisions which referred to the vendors' right to act in their absolute discretion in assessing each expression of interest 'based on the [stated] criteria and any other criteria determined relevant by the Vendors'. There was also the reservation of an express 'right to vary, cease or suspend the sale process' and a provision limiting liability for bidders' costs in the sale process.
>
> Although these provisions are relevant, I agree with AGS that they are not explicit and direct enough to exclude any obligation that the ACT Government would have otherwise to act fairly and in accordance with the stated procedures.

A.32 The 'reserved discretions' in the Request for Expressions of Interest were intended to allow for greater flexibility in the sale process. However, as it is more likely than not that the Hughes Case principles applied and a 'process contract' was relevant to the sale of ACTTAB the 'reserved discretions' in the *Request for Expressions of Interest* document cannot be relied upon. It therefore would have been prudent not to exercise the 'reserved discretions' as if these had priority over the *Request for Expressions of Interest* document and its criteria.

Summary

A.33 The Australian Government Solicitor advised that:

> In summary ... the sale process can be categorised as a joint Territory and ACTTAB sale involving a staged tender process comprising a REOI [Request for Expression of Interest] and as Request for Final Binding Offers. Having regard to the Territory's decision-making and approval responsibilities with respect to the sale process there is ... a considerable risk that a Court would find that a process contract existed and that in so far as the exercise of the Territory's rights and decision-making on the sale process is concerned, there was an implied obligation to accord Applicants [bidders] "procedural fairness", i.e. act fairly.

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