

MEDIA RELEASE**26 June 2015**

Sale of ACTTAB

The ACT Auditor-General, Dr Maxine Cooper, today presented the report on the **Sale of ACTTAB** to the Speaker for tabling in the ACT Legislative Assembly.

Dr Cooper says, '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.'

'Although a successful sale was achieved, the high standard of probity that would be expected for such a complex, large and high risk sale was not evident. There was 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', said Dr Cooper

The ACTTAB sale process involved two stages: Stage 1 – Expression of Interest, involving five interested parties; and Stage 2 - the Bid, involving two potential purchasers.

Dr Cooper says, 'There were inadequacies in the Expression of Interest stage due to the poor quality, and the inadequate assessment, of some evaluation criteria. However, the assessment of Bids was effectively undertaken.'

'Correcting the inadequacies, although important in terms of probity, may not have changed the result. However the inadequacies could have been relatively easily avoided', said Dr Cooper.

One recommendation was made to assist future sales and procurements. It focused on risk management, evaluation criteria, probity and the role of the probity advisor in complex, high value or high risk sales and procurements, and documentation and record keeping.

The audit conclusions, key findings and the recommendation in **Sale of ACTTAB: Report No. 7/2015** is attached to this media release.

Copies of **Sale of ACTTAB: Report No. 7/2015**, are available from the ACT Audit Office's website www.audit.act.gov.au . If you need assistance accessing the report please phone 6207 0833 or go to 11 Moore Street, Canberra City.

Extract of Summary:

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.

Chapter 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

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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.

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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.

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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*.

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The sale of ACTTAB is considered to be a joint Territory and ACTTAB sale, which for

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all practical purposes means it would be appropriate to treat it as a ‘Government sale’.

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

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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. 3.15

Expressions of interest were required to be submitted by no later than 5:00 pm on 14 February 2014.

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 3.50

received, and ranked the expressions of interest ‘in order of the quality of their responses’.

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 3.89

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.

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 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 3.143

Request for Expressions of Interest criteria.

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

<p>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 <i>ACTTAB Future Options Feasibility Study</i> (July 2013). This provided for the valuation of projected future cash flows in applicants' bids in terms of present day values.</p>	4.14
<p>There was appropriate consideration of the balance of risk and benefit in evaluating the net present value of upfront payments in potential purchasers' submissions.</p>	4.23
<p>One of the Sale Objectives was to ensure that the local racing industry was not negatively affected by the sale.</p>	4.24
<p>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).</p>	4.28
<p>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.</p>	4.29
<p>The racing industry has not been negatively impacted by the sale of ACTTAB.</p>	4.36
<p>One of the Sale Objectives was to ensure that employee welfare was considered. Accordingly, the <i>Request for Indicative Offers</i>, 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.</p>	4.37
<p>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).</p>	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

Recommendation

RECOMMENDATION

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.