



Ombudsman SA

Investigation into the
Growth Investigation Areas
Report procurement

Final Report

March 2013

Ombudsman SA

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OmbudsmanSA

The Honourable John Gazzola MLC
President
Legislative Council
Parliament House
Adelaide

Dear President

In accordance with the referral dated 30 May 2012, I provide you with my report pursuant to section 14(2) of the *Ombudsman Act 1972*.

Yours sincerely

Richard Bingham
SA OMBUDSMAN

March 2013

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EXECUTIVE SUMMARY

The legislated planning system in this state governs where and how the community lives. It can determine the quality of our physical, social, visual and economic environment, and impact on the wellbeing of our daily life. The community entrusts the government to develop and administer the state's planning system in the public interest.

Where the government chooses to engage consultants to assist in achieving its planning objectives, the community is entitled to expect that rigorous and accountable procurement processes will be followed - including ensuring consultant probity and identifying and dealing with conflicts of interest. Where government fails to do this, community confidence is lost. As the Crown Solicitor has commented:

In any Government procurement process the basic starting point should be that, unless there are compelling reasons to the contrary, a conflict of interest situation whether actual or perceived should not be permitted...

...

... in the context of Government procurement processes the generally accepted principal [sic] is that processes must be free, and be seen to be free, of conflict and bias in decision-making. This is essential for maintaining public confidence in the integrity of these processes. Public perception as to the operation of such processes is of the utmost importance.¹

In June 2008, following the State Planning and Development Review, the government announced a broad planning reform agenda.² This agenda included developing a 30 year plan to manage greater Adelaide's growth and development (the 30 Year Plan for Greater Adelaide); expanding Adelaide's urban growth boundary to increase land supply; and fast tracking rezoning. It was envisaged that this expansion would occur through investigating potential growth areas,³ and that the outcomes of the investigations would feed into the 30 Year Plan. There were seven other technical projects which also fed into the 30 Year Plan.

Planning SA (now the Department of Planning, Transport and Infrastructure) was responsible for developing the investigation project, and providing advice to the Minister (the Hon Paul Holloway MLC) on development capability of these areas. This 'major research and policy initiative',⁴ became known as the Growth Investigation Areas (**GIA**) project and was central to the 30 Year Plan.

The GIA project's time lines were critical; and Planning SA hoped that the project would be completed by December 2008, as the draft 30 Year Plan was to be ready for Cabinet consideration by July 2009. Planning SA considered it was short staffed and unable to deliver in the tight time frame, and decided to engage an outside consultant to run the project through a procurement process.

On 1 July 2008, just prior to beginning of the GIA project procurement, Planning SA changed from being a business unit within the Department of Primary Industries and Resources SA (**PIRSA**) to a public sector administrative unit in its own right. However, by virtue of a subsequent direction of the State Procurement Board, PIRSA assumed responsibility for Planning SA's procurement in the earlier stages of the GIA project procurement in August 2008.

In October 2008 at the conclusion of the procurement process, Connor Holmes Pty Ltd were awarded the consultancy to conduct the GIA project.

¹ Advice of the Crown Solicitor dated 29 September 2008.

² Government of South Australia, News Release, 'Action Now to Create Australia's Best Planning System', 10 June 2008.

³ Report to the Minister for Urban Development and Planning and Development Review Steering Committee for Consideration by Cabinet, 27 March 2008, recommendation 14.

⁴ Project Brief - 'Identifying and Prioritising Potential Long Term Growth Options for Greater Adelaide', September 2008, p4.

One of the 12 GIA areas identified by the government in the procurement documentation was Mount Barker. Chiefly through obtaining documents under the *Freedom of Information Act 1991*, the Hon Mark Parnell MLC and some in the Mount Barker community later raised concerns about conflict of interest, when it was learned that Connor Holmes were also representing land developers who were advocating expansion in the Mount Barker area.

Connor Holmes completed the GIA report in February 2009; and it was provided to the Minister in May 2009 and later considered by Cabinet.

At the end of May 2012, the Legislative Council referred to me for investigation the GIA project procurement process, as well as 'the probity investigation undertaken by the State Procurement Board' in relation to the decision to award the GIA project consultancy to Connor Holmes.

Notwithstanding the fact that it is now some 4½ years since the GIA project procurement, my investigation raised issues that have continuing relevance to risk management and conflict of interest in state government procurement. In summary, my investigation found that:

- Despite the terms of the referral from the Legislative Council, the State Procurement Board was unaware of, and did not conduct any 'probity investigation' into the decision to award the GIA project consultancy to Connor Holmes.
- Political imperatives and the need for speedy completion of the GIA project; staffing and agency changes; and a failure to appreciate the significance of conflict of interest in procurement all contributed to compromising the integrity of the GIA project procurement process.
- The procurement's acquisition planning process was deficient, and contrary to the State Procurement Board's guidelines.
- Connor Holmes and the other potential consultants had identified during the procurement process that they had undertaken projects in identified GIA project areas; however, no concerns about possible conflict of interest were recorded by Planning SA in the procurement documentation.
- Furthermore, both before and during the procurement, as well as at the time of being awarded the consultancy, Connor Holmes were making concerted representations to the Minister on behalf of five developers, the Mount Barker Consortium, to expand and rezone Mount Barker. In my view, Connor Holmes were clearly conflicted between this role and their GIA consultancy role. Planning SA knew of these representations, but failed to identify Connor Holmes' conflict of interest during the procurement. This failure tainted the probity of the procurement process.
- In addition, despite their conflict of interest, Connor Holmes were subsequently requested to 'fast track' an analysis of Mount Barker as a growth investigation area by December 2008, so that a Ministerial Development Plan Amendment could be initiated prior to the end of 2008. It was not until after the commencement of this analysis, that it was formally recorded that Connor Holmes were conflicted. Further, this analysis was conducted and completed at the end of December 2008, under the auspice of the GIA project consultancy agreement.
- There was at the time, and there is still, inadequate attentiveness in the State Procurement Board's policies to the need for state government agencies to be alert to and ensure tight internal controls regarding supplier probity during procurement.

SUMMARY OF OPINIONS

OPINION

1

There were probity failures in the acquisition planning process of the GIA project procurement.

- Planning SA approached potential consultants and requested, received and shortlisted their 'capability statements' prior to the delegate giving formal approval for a selective tender process to occur. This was contrary to the State Procurement Board's Acquisition Planning Guideline.
- Shortlisted consultants were requested to submit a proposal for the GIA project consultancy, prior to the final Acquisition Plan being completed and signed off. This was contrary to the State Procurement Board's Acquisition Planning Guideline.
- Consultants who were asked to provide capability statements should have been informed of the basis on which their statements would be evaluated. This would have enabled the consultants to provide a more targeted response, and ensured transparency in the procurement process. I note that this was not a requirement under the Board's Acquisition Planning Guideline at the time; and the Board's recent guidelines have been amended to require the publishing of selection criteria during procurement.
- Despite the failings above, there is no evidence to suggest any substantive unfairness to any of the potential consultants in the GIA project procurement process, or that Planning SA officers did not act in good faith.
- To further transparency and accountability in government procurement and in developing its policies and guidelines, the Board should consider requiring release of weightings to potential suppliers.

OPINION

2

PIRSA failed to report its non-compliance in the GIA project procurement process with the State Procurement Board's Acquisition Planning Guideline, in its 2008-2009 Annual Procurement Compliance Report to the Board. This was contrary to the State Procurement Board's Reporting Policy.

OPINION

3

- Government agencies must be vigilant about the probity of potential consultants during their procurement processes, in particular in relation to conflict of interest.
- The State Procurement Board's policies and guidelines should provide more detailed guidance to assist to address this issue,
- I commend the New South Wales ICAC publication 'Developing a Statement of Business Ethics' as a guide.

OPINION

4

The GIA project procurement documentation shows that no consideration was given to potential consultants' conflict of interest, contrary to the State Procurement Board's Acquisition Planning Guideline. This failure compromised the integrity of the procurement process.

- Potential consultants were not asked to address conflict of interest in their capability statements.
- Seven out of eight consultants disclosed in their capability statements past or current project work in one or more of the proposed 12 GIA project areas, but no consideration was given to these consultants' potential conflict of interest when their capability statements were shortlisted.
- No consideration was given to conflict of interest when the final three consultants' proposals were evaluated. This was despite the fact all three had disclosed that they had worked in at least half of the 12 identified GIA project areas. This was also despite the fact that one consultant had specifically drawn attention to one project where they may have been conflicted.

OPINION

5

- Before and during the GIA project procurement process, Connor Holmes were making concerted representations to the Minister about expanding and developing Mount Barker, on behalf of five developers, the Mount Barker Consortium. Further, Connor Holmes had identified in the procurement process that they had involvement in the Mount Barker area. In my view, Connor Holmes were therefore conflicted in relation to the proposed GIA project work concerning Mount Barker.
- This conflict of interest was not identified by Planning SA in any of the procurement documentation, including the Acquisition Plan and Risk Management Plan.
- This failure tainted the procurement process and became the subject of debate in the Legislative Council and the media; and it left some in the Mount Barker community feeling understandably suspicious of the process.

OPINION

6

Planning SA should have alerted the Crown Solicitor and sought advice about the probity implications of Connor Holmes' conflict of interest in relation to Mount Barker, at the same time as it requested and received advice about conflict of interest involving a Connor Holmes' representative in respect of the 30 Year Plan procurement.

This may have mitigated any risk that the appointment of Connor Holmes as the GIA project consultants presented, in relation to the Mount Barker aspect of the project.

OPINION**7**

It was only after the conclusion of the GIA project procurement process and the engagement of Connor Holmes as the consultant to conduct the project (on 14 October 2008), that it was formally acknowledged that Connor Holmes had a conflict of interest in relation to the GIA study area of Mount Barker.

Before this acknowledgement and Connor Holmes' subsequent undertaking not to make representations on behalf of their clients in relation to Development Plan Amendments, Connor Holmes were requested to 'fast track' an analysis of Mount Barker as a growth investigation area by December 2008, so that a Ministerial Development Plan Amendment could be initiated prior to the end of 2008

Furthermore, this analysis was conducted and concluded by 23 December 2008, under the auspice of the GIA project consultancy agreement.

OPINION**8**

The State Procurement Board did not conduct a 'probity investigation' of the GIA project procurement process (and nor was it required to), as described in paragraph I (b) of the referral for investigation by the Legislative Council under section 14(1) of the Ombudsman Act.

OPINION**9**

In view of the government's reliance on consultants in the planning sector and the smaller size of the sector in the state, the agency responsible for planning must ensure that internal controls are in place and rigorously applied in order to identify and manage consultants' conflicts of interest prior to embarking on a procurement process.

OPINION**10**

It would be in the public interest for the government to revisit its views, and consider releasing the GIA project report, in recognition of:

- the probity failures in the acquisition planning process of the GIA project procurement
- the failure to identify and address Connor Holmes' conflict of interest in relation to Mount Barker during the procurement process
- transparency and accountability concerns expressed at the time by the president of the SA Division of the Planning Institute of Australia on behalf of the membership.

INTRODUCTION

JURISDICTION

1. The *Ombudsman Act 1972* (SA) empowers me to investigate ‘administrative acts’ of an ‘agency’, as defined in section 3(1).
2. An ‘agency’ is defined to include state government departments, local government councils and certain statutory authorities. The Department of Planning, Transport and Infrastructure, the Department of Primary Industries and Resources (SA) and the State Procurement Board fall within the definition of ‘agency’. Ministers of the Crown and Members of Parliament do not fall within the definition.
3. The Ombudsman Act defines the word ‘act’ in section 3(1) to include:
 - (a) an omission;
 - (b) a decision, proposal or recommendation (including a recommendation made to a Minister of the Crown), and the circumstances surrounding an act;
4. The term ‘administrative act’ in section 3(1) is defined to mean:
 - (a) an act relating to a matter of administration on the part of an agency to which this Act applies or a person engaged in the work of such an agency; or
 - (b) an act done in the performance of functions conferred under a contract for services with the Crown or an agency to which this Act applies,
 but does not include—
 - (c) an act done in the discharge of a judicial authority; or
 - (d) an act done by a person in the capacity of legal adviser to the Crown; or
 - (e) an act of a class declared by the regulations not to be an administrative act for the purposes of this definition;
5. The term ‘matter of administration’ is not defined in the Ombudsman Act. However, it is accepted that the term does not include acts of a judicial or legislative nature. Matters which are purely policy are also beyond jurisdiction.⁵

Power to investigate

6. Under the Ombudsman Act, I may conduct an investigation of an administrative act on receipt of a complaint from a member of the public; on my own initiative;⁶ or such as in this instance, on receipt of a referral from a House or Committee of the Parliament (section 14(1)).

Referral for an investigation from a House or Committee of the Parliament

7. Section 14(1) of the Ombudsman Act relevantly provides:

... either House of Parliament ... may refer to the Ombudsman, for investigation and report, any matter that is within the jurisdiction of the Ombudsman and which that House ... considers should be investigated by the Ombudsman.
8. Matters that are referred to me by a House of the Parliament must be within my jurisdiction; and it is mandatory for me to investigate and to report to the referring house’s representative in response to such referral (section 14(2)).

⁵ *City of Salisbury v Biganovsky* 54 SASR 117.

⁶ *Ombudsman Act 1972*, section 13(2).

9. The Ombudsman Act provides that I must not investigate an administrative act where the person affected by an administrative act has a right of appeal or review to another body; the person had a remedy by way of legal proceedings; or 12 months have elapsed since the person had notice of the administrative act.⁷ In the event of a section 14(1) referral, however, the referring house is able to resolve that:

...in all the circumstances of the case, the administrative act warrants investigation by the Ombudsman despite the availability of that appeal, reference, review or remedy or the passage of time since the person affected had notice of the administrative act.⁸

10. The remedial recommendatory provisions of section 25 of the Ombudsman Act subsequent to an investigation on complaint or on my own initiative, do not apply to an investigation conducted in response to a parliamentary referral under section 14.⁹
11. If I consider it to be in the public interest or in the interests of an agency, I may have a report on an investigation published in such a manner as I think fit (section 26).

REFERRAL FROM THE LEGISLATIVE COUNCIL - 30 MAY 2012

12. On 30 May 2012, the Legislative Council resolved to refer to me a matter for my investigation and report (**the referral**) as follows:

That the Legislative Council, pursuant to section 14 of the Ombudsman Act 1972 -

- I. Refers to the Ombudsman, for investigation and report, compliance of the following processes in relation to administrative acts, relevant laws and policies -
 - (a) the tender process for the preparation of the Growth Investigation Areas Report
 - (b) the probity investigation undertaken by the State Procurement Board in relation to the decision awarding a contract to Connor Holmes for the preparation of the Growth Investigation Areas Report, including the findings and advice arising from that probity investigation.
- II. Resolves that the administrative acts warrant investigation by the Ombudsman, despite any availability of a right of appeal, reference, review or remedy, or the passage of time referred to under section 14(3) of the Ombudsman Act.

INVESTIGATION

Investigation of which agencies?

13. To consider paragraph I (a) of the referral and the procurement process for the preparation of the Growth Investigation Areas (**GIA**) report, my investigation considered the administrative actions of the state government agencies responsible for planning and planning procurement at the relevant time.
14. Prior to 1 July 2008, the responsible planning agency was Planning SA, which was then a business unit within the administrative unit of the Department of Primary Industries and Resources SA (**PIRSA**). PIRSA became the Department of Primary Industries and Regions SA by proclamation dated 21 October 2011.¹⁰ In my report, I refer to both as 'PIRSA'.

⁷ *Ombudsman Act 1972*, sections 13(3), 16.

⁸ *Ombudsman Act, 1972* section 14(3).

⁹ *Ombudsman Act 1972*, section 25(1a).

¹⁰ *Public Sector (Administrative Units) Proclamation 2011*, Government Gazette, 21 October 2011, p4307.

15. On 1 July 2008, just before the commencement of the GIA report procurement process, Planning SA became an administrative unit in its own right within the public service; and employees from PIRSA were transferred to Planning SA.¹¹
16. Just after the GIA report procurement process on 16 October 2008, Planning SA changed to become the Department of Planning and Local Government (DPLG).¹²
17. Three years later on 21 October 2011, the planning division of DPLG became a part of the new and current Department of Planning, Transport and Infrastructure (DPTI).
18. In my report, I have endeavoured to name the particular administrative unit responsible for planning or planning procurement at the relevant time (whether it be PIRSA, Planning SA, DPLG or DPTI).
19. To consider paragraph I (b) of the referral, my investigation made enquiries with the State Procurement Board (**the Board**).
20. My investigation considered only the administrative actions of the planning and procurement agencies above in the GIA project procurement process; and not the actions of Connor Holmes Pty Ltd (**Connor Holmes**).¹³

Investigation process

21. My investigation principally involved:
 - research, including *Hansard*, case law and the media
 - considering in particular, the following legislation:
 - *State Procurement Act 2004* (SA) and related policies and guidelines
 - *Development Act 1993* (SA)
 - issuing a summons for production of documents to the Chair of the Board and the Chief Executive of DPTI under the Ombudsman Act and the *Royal Commissions Act 1917* (SA), and considering these documents
 - requesting a copy of the GIA report from the Minister for Planning
 - notifying the Chair of the Board, the Chief Executive of DPTI and the Chief Executive of PIRSA of my full investigation (section 18(1a) Ombudsman Act)
 - considering reports from the Chief Executive and Deputy Chief Executive, Planning Division, DPTI, and the Chair of the Board
 - receiving and considering documents from the District Council of Mount Barker and the Hon Mark Parnell MLC
 - receiving and considering submissions from Mr Brian Calvert, Mount Barker Coalition for Sustainable Communities
 - meeting with and receiving submissions from:
 - the Mayor and Chief Executive Officer of the District Council of Mount Barker
 - the Hon Mark Parnell MLC and his adviser, Mr Craig Wilkins
 - the president of the Planning Institute of Australia, SA Division at the time of the GIA report procurement (2008)
 - the executive of the Mount Barker and District Residents' Association Inc
 - Mr Sam Minervini, Director Procurement Policy and Governance, Department of Treasury and Finance and Ms Isabel Tsakiri, Manager Policy and Governance, Government, Accounting, Reporting and Procurement, Department of Treasury and Finance

¹¹ *Public Sector Management (Planning SA) Proclamation 2008*, Government Gazette, 26 June 2008, p2614.

¹² *Public Sector Management (Department of Planning and Local Government) Proclamation 2008*, Government Gazette 16 October 2008, p4835. On 30 October 2008, the *Public Sector Management (Department of Planning and Local Government - Transfer of Employees) Proclamation 2008* proclaimed that effective from 3 November 2008, the Office for State and Local Government Relations, Office for Southern Suburbs and Office for the Northern Suburbs would transfer to the Department of Planning and Local Government.

¹³ In September 2012, Connor Holmes merged with Fyfe Pty Ltd.

- Mr Andrew McKeegan, Director, Planning Reform and Governance, DPTI and Mr Greg Slattery, Principal Planner, Planning Division, DPTI
- Mr Mark O'Shea, Manager, Procurement and Security, PIRSA
- inviting the Hon David Ridgway MLC and the Member for Kavel, Mr Mark Goldsworthy MP to provide submissions to my office
- providing a copy of my interim 'provisional report' in early November 2012 in full or in part to affected parties, for their comment
- considering parties' responses to my provisional report; communicating further with the Board; and preparing my (final) report.

Previous external reviews under the *Freedom of Information Act 1991 (FOI Act)*

22. During the latter part of 2009 and during 2010 in my capacity as an external review authority under the FOI Act, I conducted four reviews of determinations by DPLG to refuse access to documents. The documents under review related to issues which are the subject of the referral and now, my investigation and report.¹⁴ It is important to note that my deliberations in these reviews focussed on the applicability of exemption clauses to these documents under the FOI Act, and not on the merit or otherwise of the administrative actions of the state's planning or procurement agencies during the GIA project procurement process.
23. For the purposes of my investigation in response to the referral, it was appropriate to seek these documents under summons from DPTI.

Release of my provisional report

24. Section 18(4) of the Ombudsman Act provides that before I make a report affecting an agency, I must allow the principal officer of the agency 'a reasonable opportunity to comment on the subject matter of the report'.
25. I provided a copy of my provisional report to DPTI, PIRSA, the Board, Connor Holmes and other affected parties in early November 2012.
26. The evidence on which my provisional report was primarily based was the documentation provided to my investigation by DPTI, PIRSA and the Board. I prepared my provisional report to allow the parties to consider my tentative views based on this documentation, and to decide whether they wished to controvert or add to my views by providing additional documentation or to make oral submissions by way of evidence before I concluded my investigation.

Comment on the responses to my provisional report

27. I have addressed in my report, what I consider to be some of the parties' more salient submissions in response to my provisional report. In some instances, I have simply modified my views; and in other instances, I have outlined and addressed the parties' arguments in response.
28. In accordance with my obligations in section 22 of the Ombudsman Act, I have treated the parties' submissions as confidential, except to the extent that it has been necessary to disclose them for the purposes of my investigation and my report.
29. In general, DPTI did not accept my opinions in my provisional report. It suggested that I had misrepresented or misunderstood the nature and purpose of the GIA study; and

¹⁴ DPLG reference: PLAN F2009/000974, PLAN F2009/000975, PLAN F2009/001273, PLAN F2009/001013; Ombudsman reference: 2010/00093, 2010/00095, 2010/00091, 2010/00097. My determinations are on the Ombudsman SA website <http://www.ombudsman.sa.gov.au/freedom-of-information/foi-determinations>.

that as a consequence, my proposed findings overstated the risks associated with the GIA project planning and procurement process.¹⁵ The Chief Executive submitted that 'it was critical to understand that the GIA study was one of a number of technical analytical documents commissioned to inform the development of the 30-Year Plan for Greater Adelaide'. These included:

- Activity Centres Review - Essential Economics, August 2008
- Water Security, Urban Development and Population Growth paper - Tonkin Consulting, September 2008
- Transit Corridors Study - Parsons Brinckerhoff, October 2008
- Metropolitan Adelaide Residential Development Criteria Study, Ruan Consulting, August 2008
- Sustainability Modelling Framework - Kinesis, August 2008
- Housing Affordability paper - SGS Economic and Planning, September 2008
- Greater Metropolitan Adelaide Economy and Employment paper - SGS Economics and Planning, August 2008.

30. The Chief Executive advised that subsequent to the development of these documents, the GIA project and the 30 Year Plan were commissioned as parallel consultancy procurements. Both projects were run concurrently; and both procurements were finalised at the same time.
31. The Chief Executive advised that my provisional report did not 'recognise or give credit to the integrated governance arrangements' which were established to manage all work and inputs associated with the development of the 30 Year Plan, including the GIA study. These arrangements were a 'robust way of managing issues such as conflict of interest'.¹⁶
32. I acknowledge the Chief Executive's submissions. However, no evidence was provided to my investigation to show how these 'governance arrangements' dealt with conflict of interest during the procurement process for the GIA report.
33. I was not persuaded to change the thrust of my provisional opinions. In my view, DPTI's response minimised the significance of Connor Holmes' potential conflict of interest in relation to the nominated GIA study area of Mount Barker during the procurement process.
34. I provide more detailed comment about DPTI's response in the body of my report.
35. Former Planning SA officers who provided responses to my provisional report commented that they were hampered in responding because of the passage of time; or that they no longer worked for Planning SA; or they did not have access to documentation. I appreciate this difficulty; and I have taken this into account in my report.
36. These officers were also concerned to comment that they had limited tenure in Planning SA during the GIA report procurement and contract process; and that there were political and senior management pressures to fast track the process; as well as a high turnover of staff at the time.¹⁷ They submitted that they were ultimately responsible to the Acting Chief Executive of Planning SA during their tenure, and were acting under direction. On the basis of the evidence presented to my investigation, I accept this to be the case; and that responsibility for the conduct of the procurement process necessarily lay with the heads of Planning SA and PIRSA at the time.

¹⁵ Letter from the Chief Executive, DPTI to Ombudsman dated 11 December 2012, p3.

¹⁶ Letter from the Chief Executive, DPTI to Ombudsman dated 11 December 2012, pp4-5.

¹⁷ The former Director, Planning Strategy was contracted between December 2007 and 8 August 2008 (leaving early September 2008); and this officer's replacement, the Director, Strategy and Sustainability commenced in the role from late August and left in January 2009 (resigning in December 2008).

37. In response to my provisional report, PIRSA considered my first three opinions were relevant to its remit as the authority responsible for Planning SA's actions relating to the GIA report procurement. PIRSA did not object to these opinions; but considered that DPTI and the Board were 'better placed' to respond to my remaining opinions.
38. The Board agreed with my provisional opinion that the Board was not apparently aware of the GIA report procurement, and that it did not conduct a 'probity investigation' into the procurement process. The Board confirmed that PIRSA had the authority to manage and approve the procurement; and that under the Board's policy framework, PIRSA was not required to present the procurement's acquisition plan to the Board for approval.
39. The Board also noted my opinion regarding the need for the Board to provide more detailed guidance for government agencies on supplier probity; and advised that it will consider my recommendation to consider the NSW Independent Commission Against Corruption's (ICAC) publication 'Developing a Statement of Business Ethics' when reviewing its policies.

PUBLICATION OF MY REPORT

40. I am obliged to provide a copy of my report to the Legislative Council (section 14(2) Ombudsman Act).
41. However, I consider there is a public interest in the public release of my report under section 26 of the Ombudsman Act. My reasons are:
 - the issue of Connor Holmes' conflict of interest in relation to Mount Barker was raised on several occasions in the SA Parliament, especially in the Legislative Council and in the media from 2009
 - the lessons learned from my investigation may benefit other government agencies and serve to remind them of their need to ensure the probity of potential consultants or suppliers before the commencement of a procurement process, and to identify and manage supplier conflict of interest.

STANDARD OF PROOF

42. The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.¹⁸ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...¹⁹

¹⁸ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449-450 (Mason CJ, Brennan, Deane and Gaudron JJ).

¹⁹ *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362 (Dixon J).

BACKGROUND

43. Over recent years, a central platform of the state government's planning reforms has been to accommodate Adelaide's future growth.
44. To accommodate increasing population and urban development, in December 2007 the state government released the Planning Strategy for Metropolitan Adelaide and the Planning Strategy for Outer Adelaide which incorporated increased urban growth boundaries.

State Planning and Development Review

45. On 19 June 2007, the state government announced the State Planning and Development Review. The review's steering committee was chaired by Mr Michael O'Brien MP (then Parliamentary Secretary to the Premier); and the lead reviewer was Professor Jennifer Westacott of KPMG.
46. The review's report dated 27 March 2008 was provided to the then Minister for Urban Development and Planning, the Hon Paul Holloway MLC (**the Minister**) for consideration by Cabinet. It included 50 recommendations which provided a basis for planning and development reform strategies in the state.²⁰
47. In particular, Recommendation 3 proposed *inter alia* that the state's Planning Strategy²¹ should be revitalised and made up of two elements - a 25-30 year Regional Plan for Adelaide, and Non-Metropolitan Regional Plans. It provided that development of the Regional Plan for Adelaide should be completed by the June quarter of 2009.
48. Recommendation 4 proposed *inter alia* that in respect of the Regional Plan, the metropolitan and outer metropolitan volumes of the Planning Strategy²² should be merged into one plan covering Greater Metropolitan Adelaide, which would cover the area from Victor Harbour to the Barossa Valley, across to Murray Bridge.
49. Recommendation 9(b) proposed that the state government should adopt a policy of maintaining a 25 year total rolling programme of broadacre land supply, with 15 years of zoned land at any given time (for both residential and employment purposes).
50. Recommendation 9(c) proposed that a 10 per cent buffer should be built to take account of the long lead times to achieve higher densities in established and new suburbs, and to avoid land supply shortages and pressures on house prices and affordability.
51. Recommendation 14 proposed in particular:

Recommendation 14: Increasing the supply of broadacre land and fast-tracking rezonings

(a) The urban boundary should be further expanded to meet the 25-year target and the 10 per cent buffer for broadacre supply. This expansion should occur through the identification of new investigation areas. The identification of these areas should be based on the following principles:

- Proximity to existing corridors, particularly rail;
- Priority given to areas where there is minimal impact on high-value agricultural lands and high conservation value native vegetation; and
- Proximity to major employment lands.

²⁰ Report to the Minister for Urban Development and Planning and Development Review Steering Committee for Consideration by Cabinet, 27 March 2008.

²¹ See *Development Act 1993*, Part 3, Division 1.

²² 2006 Planning Strategy for Metropolitan Adelaide and the Planning Strategy for the Outer Metropolitan Planning Region.

(b) Planning SA should be charged with the responsibility of:

- Overseeing the investigation of potential growth areas;
- Reporting to the Minister on the proposed sequencing of investigations;
- Providing final advice on development capability of these areas and a detailed timeframe of structure plans; and
- Overseeing the preparation of structure plans for these sites and the resolution of issues such as native vegetation, which will result in referrals and concurrences being reduced.

(c) The Chief Executive Officers Planning and Development Forum should assist Planning SA to identify investigation areas and fast-track the preparation of structure plans and subsequent rezonings. Its role should be to assist with land use mapping and the resolution of conflicting issues between agencies.

(d) In respect of meeting the 15-year zoned capacity target, action should be taken immediately to fast-track the rezoning of land that was announced by the Minister for Urban Development and Planning in December 2007. This should be done through the preparation of structure plans and in close consultation with local government and the development industry.

Planning Reforms 2008

52. The state government endorsed the review's findings and recommendations. In response, the Minister initiated a planning reform agenda. Planning SA was responsible for implementing this agenda.
53. On 10 June 2008 in a News Release,²³ the Deputy Premier and the Minister announced the key elements of a planning and development reform strategy *Planning Reforms 2008*, which would involve:
- developing a 30 year plan to manage (greater) Adelaide's growth and development (the 30 Year Plan for Greater Adelaide) (**the 30 Year Plan**)
 - building new transport corridors and commuter friendly neighbourhoods
 - a 25 year rolling supply of broad acre land to meet the residential, commercial and industrial needs of a growing population and expanding economy
 - simplified assessment of housing development approvals and home renovations
 - five regional plans for development of areas outside of Adelaide.
54. The News Release continued:
- The government has also endorsed a strategy for the timely release of adequate land for residential, commercial and industrial use to better meet an expected rise in demand from an expanding economy and growing population.
- Mr Holloway says this sequencing will involve the introduction of a 25-year rolling supply of broad-acre land, with 15 years of zoned supply at all times, for residential, commercial and industrial land.
- Other measures to improve land supply and land use including careful expansion of Adelaide's urban growth boundary and fast tracking of rezoning.
55. The News Release announced that an expanded steering committee would 'continue to provide independent advice on the implementation of these important reforms.'
56. Professor Westacott and Mr Stuart Moseley were appointed by the Minister as members of this expanded steering committee, named as the Planning and Development Review Implementation Steering Committee. I understand that Mr Moseley was an employee of the Adelaide City Council at that time, and he later commenced employment with Connor Holmes in September 2008.

²³ Government of South Australia, News Release, 'Action Now to Create Australia's Best Planning System', 10 June 2008.

The GIA project

57. Following Recommendation 14 of the review and the *Planning Reforms 2008* initiatives, Planning SA had the responsibility for overseeing the investigation of potential growth areas; reporting to the Minister on these investigations; and providing advice on development capability of these areas and timeframes of structure plans.²⁴
58. This investigation project became known as the Growth Investigation Areas (GIA) project; and it was to feed into the 30 Year Plan. It was considered a 'major research and policy initiative.'²⁵ I understand that it was one of a number of 'technical analytical documents' commissioned to inform the development of the 30 Year Plan.²⁶
59. On 14 October 2008, Connor Holmes was awarded the consultancy for the GIA project. Connor Holmes named Mr Moseley as their Project Leader, and listed KPMG as one of four approved sub-contractors.²⁷ In their proposal, Connor Holmes named Professor Westacott as one of the four members of their 'Key Personnel' and 'Panel of Experts'.²⁸ The project was to be completed by 28 February 2009.
60. KPMG was awarded the 30 Year Plan project consultancy, also on 14 October 2008. KPMG had proposed Professor Westacott as its representative in its bid for the consultancy, and named Mr Moseley together with Professor Westacott as the project leadership team.²⁹ In the consultancy agreement, Connor Holmes was listed as the first of eight approved sub-contractors; and Mr Moseley was named as a member of KPMG's staff (together with other Connor Holmes' representatives and other approved sub-contractors.) The agreement required the final plan to be delivered to Planning SA for the Minister by no later than 31 July 2009.
61. On 6 November 2008, the Minister publicly announced the GIA project 'to identify broadacre land to provide a 25-year rolling supply for Adelaide'. He said 'Adelaide needs a 25-year rolling supply of land and 15 years of that supply needs to be zoned ready to go if we are going to be able to meet the future demand for new housing.' The GIA project initiative was to 'feed into the development of the new 30-Year *Plan for Greater Adelaide*, which is to be developed in collaboration with councils over the next nine months.'³⁰
62. The Minister's announcement included comments that the GIA project would assess land brought into the urban growth boundary in December 2007, as well as land in the vicinity of the proposed Buckland Park country township, Concordia, Gawler, Goolwa/Middleton/Port Elliott, Mount Barker/Littlehampton/Nairne, Murray Bridge, Nuriootpa, Dry Creek, Roseworthy, Strathalbyn, Two Wells and Victor Harbor. He commented that the initiative would begin by evaluating land in the Adelaide Hills in Mount Barker, Littlehampton and Nairne.

²⁴ DPTI response to 37 questions to Ombudsman dated 27 July 2012, p3.

²⁵ Project Brief - 'Identifying and Prioritising Potential Long Term Growth Options for Greater Adelaide', September 2008, p3.

²⁶ Letter from Chief Executive DPTI to Ombudsman dated 11 December 2012, p3.

²⁷ Other approved sub-contractors in the consultancy agreement were Kath Moore & Associates, Scholefield Robinson Horticultural Services, Environmental and Diversity Services.

²⁸ 'Proposal: Identifying and Prioritising Potential Long Term Growth Options for Greater Adelaide' prepared by Connor Holmes for Planning SA, September 2008, Executive Summary.

²⁹ 'Proposal for Lead Consultancy for the development of a 30-year Plan for Greater Adelaide', prepared by KPMG dated September 2008.

³⁰ News Release 'Growth Investigation Areas project announced', 6 November 2008, <http://www.planning.sa.gov.au/index.cfm?objectid=71B867FB-F203-0D46-AFEAED916E25FD2B> (as at 2 November 2012).

paragraph I (a) of the referral

**THE TENDER PROCESS
FOR THE PREPARATION OF THE GIA REPORT**

THE AIM OF THE GIA PROJECT

63. Planning SA's documentation at the relevant time shows that the GIA project was variously titled as the 'Identifying and Prioritising Potential Long Term Growth Options for Greater Adelaide' project; the 'Growth Investigations Analysis' project; or the 'Growth Options for Greater Adelaide Consultancy'. Any references in my report which include these titles should be read as references to the GIA project.
64. Documents show that the GIA project was to be a 'concurrent and linked project that would provide the background research and data necessary to inform decisions about land supply for the 30 year plan.'³¹
65. The Terms of Reference in the Project Brief for the GIA project were as follows:

The major output required is a detailed report that provides clear guidance regarding the full range of development options, primarily outside the current urban growth boundary established by the Planning Strategy for Metropolitan Adelaide, based on the priority areas identified by Planning SA, together with any additional areas recommended by the consultants. This will include a detailed assessment of the peri-urban areas around Metropolitan Adelaide, based on evaluation criteria also developed by the consultants. This is a major research and policy initiative.

The report will provide clear guidance to enable the Government to make informed decisions regarding future growth areas without additional investigative work. This is expected to include at least the following:

- Evaluation of a full range of urban development area options (including those areas defined below) to enable the Government's objectives for a rolling 25 year broad-acre land supply to be established and maintained. Note that the options recommended should go beyond the initial 25 year requirement and provide potential for additional land that will enable the land supply to be met in coming years as land is developed.
- Defining the desired boundaries of the areas / options.
- Establishing a comprehensive set of criteria (and weightings where appropriate) against which each of the options are to be assessed and ranked (see below).
- Detailed ranking of the options to enable the Government to determine the urban development options that should be facilitated in the short, medium and long term.
- Identifying in detail the opportunities and constraints for each of the development options.

The evaluation should at a minimum include land in the vicinity of the following areas and townships (inclusion of additional areas is not precluded):

- Nuriootpa
- Two Wells
- Buckland Park (as proposed for the major development)
- Gawler
- Concordia (beyond the existing urban boundary)
- Roseworthy
- Murray Bridge
- Mount Barker / Littlehampton
- Strathalbyn
- Goolwa
- Victor Harbor
- Penrice

Site evaluation criteria

The site evaluation criteria will be an important component of the methodology in assessing the various urban development options and should cover the following themes:

Economic Efficiency - minimising public and private costs by ensuring close proximity, efficient use and appropriate timing of provision of, social / physical infrastructure and economic opportunity.

³¹ Letter from Chief Executive, DPTI to Ombudsman dated 27 July 2012, p3.

Social Equity - consideration of the composition of existing socio-economic groups, employment opportunities and potential opportunities, services, education and impacts of additional population.

Environmental Quality - protection of the natural environment, agricultural opportunity and quality of land for primary production. This should include minimising the ecological footprint and consideration of climate change and green house gas emissions.

The evaluation should also include at least the following:

- A landscape and topography assessment.
- Assessment of impact on mineral resources, watershed areas, natural vegetation, agricultural/primary production areas.
- Assessment of infrastructure capability/capacity at a range of likely urban densities (this should include all forms of infrastructure both social and physical) and likely costs for the upgrading of this infrastructure as required.
- Proximity to employment lands and areas most likely to be appropriate for such purposes.

Consultants should note that the Planning Review has emphasised the following:

- Proximity to existing transport corridors, particularly rail;
- Priority given to areas where there is minimal impact on high value agricultural lands and high conservation value native vegetation; and
- Proximity to major employment lands.

Due priority should therefore to be given to these criteria. To assist in the process of evaluation criteria, Planning SA have developed a number of potential frameworks and will provide these to the consultant. The final criteria will be jointly developed by Planning SA and the consultant.³²

66. The GIA project was one of a number of technical analytical documents commissioned to inform the development of the 30-Year Plan for Greater Adelaide. These included:
- Activity Centres Review - Essential Economics, August 2008
 - Water Security, Urban development and Population Growth paper - Tonkin Consulting, September 2008
 - Transit Corridors Study - Parsons Brinckerhoff, October 2008
 - Metropolitan Adelaide Residential Development Criteria Study, Ruan Consulting, August 2008
 - Sustainability Modelling Framework - Kinesis, August 2008
 - Housing Affordability paper - SGS Economic and Planning, September 2008
 - Greater Metropolitan Adelaide Economy and Employment paper - SGS Economics and Planning, August 2008.
67. Subsequent to the development of these documents, the GIA project and the 30 Year Plan were commissioned as parallel consultancy procurements. Both procurements were finalised at the same time.

TIMING AND APPROACH OF THE GIA PROJECT PROCUREMENT

68. The Chief Executive of DPTI informed my investigation that there were 'critical timelines' in relation to the proposed GIA project, because of its connection with the 30 Year Plan, which was to be presented to Cabinet by July 2009. Also, the Minister wished to announce both projects on 14 October 2008.³³
69. Planning SA's documentation generated at the time confirms this urgency:

The draft *30 Year Plan for Greater Adelaide* is to be ready for Cabinet consideration by July 2009. In order to be ready to undertake community consultation and research to meet

³² Project Brief - 'Identifying and Prioritising Potential Long Term Growth Options for Greater Adelaide', September 2008.

³³ Letter from Chief Executive, DPTI to Ombudsman dated 27 July 2012, p3.

Cabinet's deadline, Planning SA requires a draft *Growth Options for Greater Adelaide* document to be available [sic] for discussion by December 2008. It is therefore urgent that the procurement process commences shortly.³⁴

70. Documents received in my investigation show that it was considered that Planning SA was short staffed and would not be able to deliver the GIA report within the tight time frame required. In addition, it was thought that there would be difficulty in attracting suitably qualified and experienced staff at short notice, and that an outside consultant would need to be engaged to assist to deliver the report.³⁵
71. It was because of these constraints that Planning SA chose the path of procuring a consultant to conduct the GIA project. This was also the case with the 30 Year Plan project.

PROCUREMENT IN STATE GOVERNMENT, PIRSA AND PLANNING SA

72. Procurement processes within state government public authorities are governed by the *State Procurement Act 2004* and the State Procurement Board's policies and guidelines.
73. The objects of the State Procurement Act are to 'advance government priorities and objectives', and provide a system of procurement for public authorities to:
- obtain value in the expenditure of public money
 - provide for ethical and fair treatment of participants
 - ensure probity, accountability and transparency in procurement operations.³⁶
74. The Act establishes the Board (section 6); and the Board's functions are set out in section 12(1) and (2):
- (1) The Board has the following functions:
- (a) to facilitate strategic procurement by public authorities by setting the strategic direction of procurement practices across government;
 - (b) to develop, issue and keep under review policies, principles and guidelines relating to the procurement operations of public authorities;
 - (c) to develop, issue and keep under review standards for procurement by public authorities using electronic procurement systems;
 - (d) to give directions relating to the procurement operations of public authorities;
 - (e) to investigate and keep under review levels of compliance with the Board's procurement policies, principles, guidelines, standards and directions;
 - (f) to undertake, make arrangements for or otherwise facilitate or support the procurement operations of public authorities;
 - (g) to assist in the development and delivery of training and development courses and activities relevant to the procurement operations of public authorities;
 - (h) to provide advice and make recommendations to responsible Ministers and principal officers on any matters relevant to the procurement operations of public authorities;
 - (i) to carry out the Board's functions in relation to prescribed public authorities and any other functions assigned to the Board under this Act.

³⁴ Procurement Report Part A- Acquisition Plan VO5, signed by Acting Chief Executive, Planning SA dated 15 September 2008, p1.

³⁵ 'Submission for Out of Session consideration, Purchase Recommendation-Growth Options for Greater Adelaide Consultancy', Accredited Purchasing Unit, PIRSA, October 2008.

³⁶ *State Procurement Act 2004*, section 3.

- (2) For the purpose of performing its functions, the Board may –
- (a) acquire, hold, deal with and dispose of real and personal property; and
 - (b) enter into any kind of contract or arrangement; and
 - (c) acquire or incur any other rights or liabilities; and
 - (d) direct a public authority to furnish to the Board documents or information relating to the operations of the authority; and
 - (e) exercise such other powers as are conferred on it under this Act or as are necessary for, or incidental to, the effective performance of its functions.
75. A ‘public authority’ is defined under the State Procurement Act to include *inter alia* an ‘administrative unit or other agency or instrumentality of the Crown’ (section 4). On 1 July 2008, Planning SA was established by proclamation as an administrative unit, just before the commencement of the GIA project procurement process.³⁷
76. Under section 19, a public authority is ‘bound to comply’ with ‘any applicable policies, principles, guidelines, standards or directions issued or given by the Board’; and ‘any directions given by the responsible Minister on the advice or recommendation of the Board’.³⁸
77. A principal officer (or chief executive) is ‘responsible for the efficient and cost effective management of the procurement operations of the authority subject to and in accordance with the policies, guidelines, standards and directions of the Board’ (section 20(1)).
78. Under the Board’s policy framework, the Board issues a procurement authority to public authorities that are subject to the Act and have a requirement to expend funds as part of their normal business.³⁹ Procurement authority levels are based on the business needs of individual public authorities. Procurement valued in excess of this authority must be submitted for approval by the Board.
79. On 12 April 2006, the Acting Chair of the Board approved a \$1.1m procurement authority to PIRSA. In doing so, the Acting Chair stipulated to the Chief Executive of PIRSA that PIRSA would:
- complete its action plans within the time frames specified by the Board or (where appropriate) PIRSA
 - issue a compliance statement by the Chief Executive for the period ending 30 June 2006, and each financial year thereafter and to provide the Board with an annual certification of PIRSA’s compliance with Board policies and directions
 - through the Chief Executive, notify the Board of any non-compliances or changes to the Chief Executive’s application.⁴⁰
80. After Planning SA was proclaimed as an administrative unit on 1 July 2008,⁴¹ Mr John Hanlon was appointed as Acting Chief Executive of Planning SA (**the Acting CE**).⁴² Documents show that on that same date, under Treasurer’s Instruction 8, the Minister gave written payment authorisation to the Chief Executive of Planning SA ‘or any person acting in his or her capacity’ not exceeding \$1.1m (GST inclusive), and authority to grant a payment authorisation to any officer of Planning SA, not exceeding this amount. Further, the Minister gave written authorisation to the Chief Executive ‘or the person

³⁷ *Public Sector Management (Planning SA) Proclamation 2008*, issued under section 7 *Public Sector Management Act 1995*.

³⁸ *State Procurement Act 2004*, section 19.

³⁹ The relevant Procurement Authority Policy of the Board for the purposes of my investigation is version 2.0, September 2006. Letter from Acting Chair, State Procurement Board to Chief Executive, PIRSA dated 12 April 2006.

⁴¹ *Public Sector Management (Planning SA) Proclamation 2008*. The proclamation was issued by virtue of section 7 of the *Public Sector Management Act 1995*.

⁴² Letter from Deputy Chief Executive, Planning Division, DPTI to Ombudsman dated 11 October 2012. Response to Question 1. I understand that Mr Hanlon had previously been Acting Executive Director of Planning SA (when it was a business unit within PIRSA).

acting in that position' to negotiate contractual terms and conditions to a value up to \$1.1m. and execute contracts.

81. However, on 8 August 2008, following discussions with Planning SA, the Chief Executive of PIRSA wrote to the Chair of the Board requesting that Planning SA be included under PIRSA's existing procurement authority as an interim arrangement, while Planning SA established 'appropriate procurement capability'.⁴³
82. The Board approved this request for an interim period until 30 June 2009, or until Planning SA established a base level or other independent procurement authority with the Board (whichever was the sooner).⁴⁴ On 15 August 2008, a representative of the Board wrote to PIRSA's Chief Executive and advised that pursuant to section 12(1)(d) and (f) of the State Procurement Act, the Board gave the following directions relating to the procurement operations of Planning SA - which were to have immediate effect:

Subject to the conditions in this letter, the Principal Officer of the Department of Primary Industries and Resources SA (PIRSA):

- shall direct the procurement operations of Planning SA;
- may delegate to the Principal Officer of Planning SA, a level of procurement authority that is appropriate to the needs of Planning SA under such conditions as the Principal Officer of PIRSA decides;
- is responsible for the efficient and cost effective management of the procurement operations of Planning SA;
- shall ensure that all Board policies and guidelines are adhered to by Planning SA; and
- shall ensure that the procurement operations of Planning SA are reported in accordance with the requirements of the Board Procurement Reporting Policy.⁴⁵

83. On 23 September 2008, the Chief Executive of PIRSA authorised the Acting CE as the 'person who holds or occupies the position of Chief Executive, Planning SA':

To approve procurement where the total value of the procurement does not exceed \$275,000 (incl GST); and

To sub-delegate procurement authority (including disposal authority) to officers within Planning SA, not exceeding \$275,000 (incl GST).⁴⁶

84. The conditions included:

- Planning SA continues to be represented on PIRSA's Accredited Purchasing Unit (APU) to facilitate their participation in PIRSA procurement process and to assist with the development of procurement capability in Planning SA.
- Planning SA continues to follow PIRSA's procurement guidelines and procedures (including the use of PIRSA's Acquisition Plan and Purchase Recommendation templates).
- PIRSA's Procurement Advisory Unit (PAU) to continue providing Planning SA with procurement support services. It is envisaged that Planning SA will pay PIRSA for these services and that this will be resolved as part of the broader negotiations relating to Corporate Support for Planning SA.
- Copies of all Acquisition Plans and Purchase Recommendations for procurement within Planning SA's delegation (ie less than \$275,000 incl GST) approved are provided to PIRSA's PAU for reporting purposes.
- Acquisition Plans and Purchase Recommendations for procurement valued over \$275,000 (incl GST) to be forwarded to PIRSA's APU for procurement approval.

...

⁴³ Letter from Chief Executive, PIRSA to Chair, State Procurement Board dated 8 August 2008.

⁴⁴ Minute from Chief Executive, PIRSA to Acting Chief Executive, Planning SA dated 23 September 2008.

⁴⁵ Letter from Director, Contract Services, State Procurement and Support Operations, Department of Treasury and Finance to Chief Executive, PIRSA dated 15 August 2008.

⁴⁶ Instrument of Authorisation dated 23 September 2008, signed by Chief Executive, PIRSA.

85. The Acting CE's financial authorisation amount for procurement of \$275,000 was the same as that which he had been given as (acting) Executive Director of Planning SA, when Planning SA was a business unit within PIRSA.⁴⁷
86. Beyond that amount up to \$1.1 million, the Acting CE was to follow PIRSA's procurement policy and forward procurement reports for approval to the Accredited Purchasing Unit of PIRSA (the APU).⁴⁸
87. The basic documentation required to be generated in a procurement at the time in PIRSA included:
- Procurement Report - Part A (Acquisition Plan)
 - Procurement Report - Part B (Purchase Recommendation)
 - Contract prepared by PIRSA's Legal Unit
88. The Board provided my investigation with the following Board policies and guidelines which were operative at the time of the GIA project procurement:
- Procurement Authority Policy, Version 2.0, dated September 2006
 - Risk Management Policy Version, 1.0, dated November 2006
 - Risk Management Guideline, Version 1.0, dated November 2006
 - Approvals Process Policy, Version 4.0, dated February 2008
 - Acquisition Planning Guideline, Version 6.0, dated February 2008 (applicable to procurements over \$110,000)
 - Board Procurement Reporting Policy, Version 1.0, dated May 2008.
89. By summons dated 6 July 2012 to DPTI, my investigation sought copies of 'relevant polices and procedures, including risk management policies at the time' in relation to the GIA project procurement.⁴⁹ DPTI responded with copies of the following documents:
- PIRSA table and policy showing details about financial and procurement authorisations
 - a directive from the Chief Executive, PIRSA dated 2 February 2008 regarding involvement of the Crown Solicitor's Office in PIRSA contracts
 - PIRSA flowchart showing the process for a procurement purchase between \$275,000 to \$1.1 million (incl GST)
 - PIRSA 'Requesting and Receiving Offers Guide'
 - PIRSA summary table of procurement requirements
 - PIRSA 'Approaching the Market Guideline', version 1.1, 23 November 2009 (I note that this policy had not been developed at the time of the GIA project procurement)
 - the Board's Acquisition Planning Guideline, Version 6.0, dated February 2008.

PROCUREMENT AND RISK MANAGEMENT IN STATE GOVERNMENT

90. National standards describe risk management as:

The culture, processes and structures that are directed towards realizing potential opportunities whilst managing adverse effects...⁵⁰

... an integral part of good management practice and an essential element of good corporate governance. It is an iterative process consisting of steps that, when undertaken in sequence, enable continuous improvement in decision-making and facilitate continuous improvement in performance.⁵¹

⁴⁷ 2008/2009 Financial Authorisations, Planning SA signed by Chief Executive, PIRSA dated 20 June 2008. The Acting CE was also the Executive Director of the Office of Community & Local Government Relations.

⁴⁸ PIRSA 'Summary table of procurement requirements' dated 18 April 2008.

⁴⁹ Ombudsman summons, Item 1 of Schedule, dated 6 July 2012.

⁵⁰ AS/NZS 4360:2004 Risk Management, p4.

⁵¹ AS/NZS 4360:2004 Risk Management, pv.

91. Risk management enables an organisation to improve governance and stakeholder trust.⁵² Effective risk management in government ultimately protects public resources and helps instil public confidence in government.
92. Risk management within the state government in 2008 was governed by the Government of South Australia Risk Management Policy Statement 2003⁵³ and the Board's Risk Management Policy.⁵⁴ The Risk Management Policy Statement provided:
- It is government policy to protect and enhance [Government's] resources to enable the Government's economic, social and environmental objectives to be achieved.
- Risk management is the systemic identification of opportunities and threats to resources and the development of strategies which maximise opportunities and minimise adverse effects.
93. The statement further outlined the responsibility of chief executives to implement risk management practices 'whenever significant proposals are being submitted to a relevant Minister for decision, or are being considered internally within the department/agency.' The standard and practices were to reflect the processes in the national risk management standards AS/NZS 4360 or equivalent.⁵⁵
94. The government's updated 2009 Risk Management Policy Statement appropriately refers to risk management 'increasing community confidence in government performance'.⁵⁶
95. In relation to government procurement, the Board's 2008 Risk Management Guideline described risk management as:
- ... ensuring potential risks associated with the purchase of goods or services are identified, assessed and managed to ensure unexpected or undesirable outcomes are minimised whilst achieving maximum benefit for the procurement.⁵⁷
96. The Board's 2008 Acquisition Planning Guideline provided that 'potential areas of risk typically relate to supply availability and continuity, quality standards, safety and political issues'.⁵⁸
97. I note that in June 2011, the NSW ICAC identified procurement as a 'major risk area for corruption' in the NSW public service. In its publication 'Corruption Risks in NSW Government Procurement', the ICAC commented that 12% of complaints received by the ICAC included allegations of corruption in NSW government; and approximately 30% of its public inquiries make findings of corrupt conduct related to NSW government procurement activities.⁵⁹
98. The Board's 2008 Risk Management Guideline appropriately identified the following as the key components of risk management in procurement:
- Identifying Risks - considering potential risks associated with the procurement;
 - Assessing Risk - understanding the nature of the risk, likelihood of the risk occurring and the consequence or impact it may have; and

⁵² AS/NZS ISO 31000:2009 Risk Management - Principles and Guidelines, piv.

⁵³ Risk Management Policy Statement, signed by the Premier and Treasurer, September 2003. This has been superseded by Risk Management Policy Statement, November 2009.

⁵⁴ State Procurement Board, Risk Management Policy, Version 1.0, Issue Date: November 2006.

⁵⁵ Risk Management Policy Statement, September 2003. AS/NZS 4360:2004 Risk Management has been superseded by AS/NZS 31000:2009 Risk Management Principles and Guidelines.

⁵⁶ Risk Management Policy Statement, November 2009.

⁵⁷ State Procurement Board, Risk Management Guideline, Version 1.0, Issue Date: November 2006, p3.

⁵⁸ State Procurement Board, Acquisition Planning Guideline, Version 6.0, Date Issued: February 2008, p5.

⁵⁹ 'Corruption Risks in Government Procurement: Recommendations to Government', June 2011, p4.

- Managing Risk - identifying possible controls, courses of action, creation of a risk management plan, implementation and monitoring of risk management.⁶⁰

99. The guideline identified the key steps in managing risk in the procurement process as:

1. Communication Throughout the Process;
2. Establish the Context;
3. Identify Risks;
4. Analyse Risks;
5. Evaluate Risks;
6. Treat Risks; and
7. Monitor and Review Risks.

100. Under 'Identify Risks', the guideline provided common risk categories which relevantly included:

- under 'Procurement Process':
 - lack of probity/unethical behaviour
 - proper processes are not followed
 - risks are not adequately managed
 - government policies are not followed
- under 'Industry and Suppliers':
 - lack of interest in response to tender
 - limited number of potential suppliers
 - industrial disputes
 - lack of capacity of individual contractors
 - complacency in long term supplier relationships
 - non-performance of contractors.

101. The Board's current Risk Management Guideline provides similarly.⁶¹

102. In so far as they address risk management, PIRSA's 2008 procurement policies and guidelines contained a 'Request and Receiving Guide' which had a list of 'dos and don'ts' to assist in ensuring probity throughout the invitation and closing of offers phases of the procurement process.⁶²

103. In my view, failing to identify and manage risks in government procurement can result in:

- a break down in the government's relationship with the particular supplier and other potential suppliers in the industry
- unfavourable reporting, leading to the community's loss of confidence in government to do business or manage public resources
- the government having to expend further resources on potential litigation or an investigation into the failures in the procurement process, with a threat of adverse findings.

104. An important area in government procurement which needs identification and management is the risk of conflict of interest, in particular in relation to potential suppliers. This was one of the issues raised in the background to the referral by the Legislative Council; and I consider this in the context of the GIA project procurement process later in my report.

⁶⁰ State Procurement Board, Risk Management Guideline, Version 1.0, Issue Date: November 2006, p4.

⁶¹ State Procurement Board, Risk Management Guideline Version 3.0, Date Issued: December 2010.

⁶² Documents produced by DPTI in response to Item 1 of Schedule to Ombudsman summons dated 6 July 2012, Attachment E.

THE GIA PROJECT PROCUREMENT PROCESS

105. The Chief Executive of DPTI informed my investigation that because of time constraints and staffing numbers, Planning SA chose to go to the market and adopt a 'selective process' for the appointment of a consultant to lead the GIA project, rather than going to open tender (which would normally be required).⁶³ This approach was permitted by the Board's Acquisition Planning Guideline.⁶⁴
106. DPTI advised that Planning SA considered it had a 'well developed understanding' of the supply market for the types of services required for the GIA project, and 'the expertise and capabilities of the suppliers available' to carry out the project. This was reportedly due to a recent tender process in May 2008 inviting 16 companies to tender for the completion of seven technical papers. Further, Planning SA had reportedly been active in the market 'due to a shortage of planners and the large scale projects' which had been required to be completed in short time frames.⁶⁵
107. Planning SA's market research had included:
- ... the former Director of Planning Strategy and the Manager of Strategic Planning undertaking interstate visits to evaluate models used in Planning Strategies for Melbourne, Sydney, Brisbane and Perth. In the course of their investigations they interviewed 20 agencies and 5 consultancies involved in similar processes.⁶⁶

Planning SA's request for capability statements - 29 July 2008

108. By letter dated 29 July 2008, the Director, Planning Strategy, Planning SA invited 11 consultants or potential suppliers to 'submit an offer' to provide consultancy services for the 'Identifying and Prioritising Potential Long Term Growth Options for Greater Adelaide' project, in the form of a 2-3 page 'capability statement'.⁶⁷
109. These consultants were:
- GHD
 - Hassell Pty Ltd
 - Jensen Planning & Design
 - MasterPlan
 - Parsons Brinckerhoff
 - QED Pty Ltd
 - Sinclair Knight Mertz
 - Planning Solutions (URPS)
 - Nolan Rumsby Planners
 - Maunsell Australia Pty Ltd
 - Connor Holmes Pty Ltd
110. The letter stated that the capability statement would be used as the basis for a selective tender process,⁶⁸ but no information was provided about the basis on which the statements would be evaluated. The letter advised that the major output would be 'a detailed report that provides clear guidance regarding the full range of development options, primarily outside the current urban growth boundary established by the Planning Strategy for Metropolitan Adelaide, based on the priority areas identified by Planning SA.' The report was expected to include at least the following:

⁶³ Letter from Chief Executive, DPTI to Ombudsman dated 27 July 2012. Response to Question 8.

⁶⁴ State Procurement Board, Acquisition Planning Guideline, Version 6.0, Date Issued: February 2008, p7.

⁶⁵ Minute from Acting Chief Executive, Planning SA to Chair, Accredited Purchasing Unit, PIRSA dated 8 October 2008, p1.

⁶⁶ Minute from Acting Chief Executive, Planning SA to Chair, Accredited Purchasing Unit, PIRSA dated 8 October 2008, p1.

⁶⁷ Letter from the Chief Executive, DPTI to Ombudsman dated 27 July 2012, p3.

⁶⁸ Letter from Deputy Chief Executive, Planning Division, DPTI to Ombudsman, dated 11 October 2008, Appendix 2. DPTI could not locate copies of all of the letters.

- Evaluation of a full range of urban development area options (including those areas defined below) to enable the Government's objectives for a rolling 25 year broad-acre land supply to be established and maintained. Note that the options recommended should go beyond the initial 25 year requirement and provide potential for additional land that will enable the land supply to be met in coming years as land is developed.
- Defining the desired boundaries of the areas / options.
- Establishing the population and dwelling capacity of each of the areas based on a range of urban density options.
- Establishing a comprehensive set of criteria (and weightings where appropriate) against which each of the options are to be assessed and ranked.
- Detailed ranking of the options to enable the Government to determine the urban development options that should be facilitated in the short, medium and long term. Identifying in detail the opportunities and constraints for each of the development options.

The evaluation should at a minimum include land in the vicinity of the following areas and townships (inclusion of additional areas is not precluded):

- | | |
|-----------------|------------------------------|
| • Nurioopta | • Murray Bridge |
| • Two Wells | • Mount Barker/Littlehampton |
| • Buckland Park | • Strathalbyn |
| • Gawler | • Goolwa |
| • Concordia | • Victor Harbor |
| • Roseworthy | • Penrice ⁶⁹ |

111. The letter advised that the closing date for response was 6 August 2008. It also asked the consultants to enclose two copies of their statement in a sealed envelope, marked for the Tender Box of the proposal for 'Identifying and Prioritising Potential Long Term Growth Options for Greater Adelaide'; and advised that the successful consultant may be required to enter into an agreement with the Minister on terms acceptable to him.

Eight consultants' responses to the request, and the shortlisting process

112. On 6 August 2008, eight consultants responded to the 29 July 2008 letter (three did not submit a response).
113. Planning SA shortlisted the eight consultants to five (including Connor Holmes).⁷⁰
114. The Chief Executive of DPTI advised my investigation that the consultants were shortlisted using a range of criteria including 'similar experiences, local knowledge, skills of lead staff and depth of team skills'.⁷¹ This is reflected in the Acting CE's covering minute to the Chair of the APU dated 8 October 2008, and a document provided to my investigation showing the shortlisting process.⁷²
115. The copy of the shortlisting document shows that the shortlisting took place in August, and that this document was generated on 27 August 2008.⁷³ For the purposes of my investigation, I have assumed this to be the date on which the shortlisting process was finalised.

Approval by the Acting Chief Executive of Planning SA for a selective tender process

116. In a minute dated 28 August 2008, the Director, Business and Information Services, Planning SA recommended to the Acting CE that he:

⁶⁹ Letter from Deputy Chief Executive, Planning Division, DPTI to Ombudsman dated 11 October 2012, Appendix 2.

⁷⁰ Letter from Deputy Chief Executive, Planning Division, DPTI to Ombudsman dated 11 October 2012. Response to Question 12.

⁷¹ Letter from Chief Executive, DPTI to Ombudsman dated 27 July 2012. Response to Question 3.

⁷² Letter from Deputy Chief Executive, Planning Division DPTI to Ombudsman dated 11 October 2012, Appendix 6.

⁷³ Letter from Deputy Chief Executive, Planning Division, DPTI to Ombudsman dated 11 October 2012, Appendix 6.

[a]pprove Planning SA to engage a consultant through the selective tender process for the Growth Options for Greater Adelaide project.⁷⁴

117. The copy of the minute provided to my investigation shows the Acting CE's handwritten approval of this recommendation.⁷⁵

Approval of the first Acquisition Plan, and invitation to five consultants to submit an offer

118. On 1 September 2008, the Acting CE approved the procurement's Acquisition Plan, which proposed that offers be sought for consultancy services for the development of 'Identifying and Prioritising Potential Long Terms Growth Options for Greater Adelaide'.⁷⁶
119. On the same date, Planning SA invited the shortlisted five consultants to submit a proposal, with a 15 September 2008 closing date. The letter enclosed a Project Brief and a Conditions of Offer document. The Project Brief listed the criteria which would be used to evaluate the proposals.

Approval of the final Acquisition Plan, and three responses submitting proposals

120. On 15 September 2008, the Acting CE approved an amended version of the 1 September 2008 Acquisition Plan, which altered the names of the evaluation panel, to include himself.⁷⁷
121. That same date, out of the five consultants invited to submit a proposal, Planning SA received three responses. Two had combined their proposal, and two responded individually (including Connor Holmes).

Evaluation of the proposals

122. On 16 September 2008, the three responses received were reportedly opened. The evaluation panel finalised scoring the proposals on 23 September 2008.⁷⁸
123. The documents provided to my investigation showing the evaluation consideration, reveal Connor Holmes as having the strongest proposal.

Purchase Recommendation to the APU for approval

124. By cover minute dated 8 October 2008, the Acting CE requested the Chair of the APU's urgent 'out of session' consideration of a Purchase Recommendation to approve awarding the GIA project consultancy to Connor Holmes.
125. The documentation shows that the Acting CE forwarded the Purchase Recommendation to the APU, because it had become evident that the initial estimated amount for the consultancy would go above the limit of the Acting CE's procurement authorisation given by the Chief Executive of PIRSA acting under the Board's direction (\$275,000 incl GST).⁷⁹
126. On 13 October 2008, the Chair of the APU provided his approval.⁸⁰

⁷⁴ Minute from Director, Business & Information Services, Planning SA to Acting Chief Executive, Planning SA dated 28 August 2008.

⁷⁵ Minute from Director, Business & Information Services, Planning SA to Acting Chief Executive, Planning SA dated 28 August 2008.

⁷⁶ Minute from Acting Chief Executive, Planning SA to Chair, Accrediting Purchasing Unit dated 8 October 2008.

⁷⁷ This is referred to in the Minute from Chair, Accredited Purchasing Unit, PIRSA to Acting Chief Executive, Planning SA dated 14 October 2008.

⁷⁸ Procurement Report-Part B- Purchase Recommendation signed by Acting Chief Executive, Planning SA dated 13 October 2008.

⁷⁹ Instrument of Authorisation signed by Chief Executive, PIRSA dated 23 September 2008.

⁸⁰ Minute from the Chair, Accredited Purchasing Unit, PIRSA to Acting Chief Executive, Planning SA dated 14 October 2008.

127. The consultancy agreement for the GIA project was signed by Connor Holmes and a representative of the Minister on 14 October 2008.

CONSIDERATION OF THE GIA PROJECT PROCUREMENT PROCESS

Compliance with the Acquisition Planning Guideline

128. In considering the acquisition planning process above, I note that the Board's Acquisition Planning Guideline at the time stresses the importance of planning and devoting resources and effort in the planning phase of the procurement process, such that successful acquisition planning will result in the selection of:

the most appropriate procurement strategy, improved management of procurement, improved risk identification and risk management, better value for money outcomes and improved relationships with suppliers.⁸¹

129. The guideline comments that:

Historically, the least amount of procurement activity and time is spent in the planning and contract management phase of the procurement process. This guideline seeks to address this imbalance by emphasising the importance of planning and by devoting greater resources and effort in the planning phase of the procurement process. ...⁸²

130. Under 'Key Elements of an Acquisition Plan' and '4. Procurement Process', the guideline says:

Planning

Supply Market Analysis/Research - understand the market place including market structure, competition, availability, supplier preferencing and the supply chain, etc. **It is important that proposals, including formal Expressions of Interest (EOI), not be sought from the market before the acquisition plan is approved. However, for the purposes of market research and intelligence gathering, public authorities may choose to undertake an informal Request for Information (RFI), which does not require formal approvals prior to commencement.** In addition, public authorities may choose to undertake, if required, informal discussions (without obligation) with potential suppliers ...⁸³ (my emphasis)

131. Further, the guideline states:

All acquisition plans must adhere to the full requirements outlined in this guideline regardless of the approving authority.⁸⁴

132. In my provisional report, I expressed the view that the 29 July 2008 letter requesting a capability statement from the 11 consultants could not be described as 'market research and intelligence gathering'; and nor could it constitute 'informal discussions' with the consultants within the meaning of the guideline. I considered that the letter could be more accurately described as a request for 'formal Expressions of Interest'. I considered that the 29 July 2008 letter effectively marked the commencement of the selective tender process for the GIA project.

133. I noted that the delegate or Acting CE's approval to engage a consultant through a selective tender process for the GIA project was not given until 28 August 2008. By this time, four weeks had passed - Planning SA had requested the capability statements from

⁸¹ State Procurement Board, Acquisition Planning Guide, Version 6.0, Issue Date: February 2008, p3.

⁸² State Procurement Board, Acquisition Planning Guide, Version 6.0, Issue Date: February 2008, p3.

⁸³ State Procurement Board, Acquisition Planning Guideline, Version 6.0, Issue Date: February 2008, p7.

⁸⁴ State Procurement Board, Acquisition Planning Guideline, Version 6.0, Issue Date: February 2008, p8.

the 11 consultants; received and assessed the capability statements from the eight responding consultants; and shortlisted the eight consultants to five.

134. Furthermore, I noted that the Acquisition Plan had not, at that time, been approved by the Acting CE as the delegate. (The Acting CE did not approve the first Acquisition Plan until 1 September 2008 and the final plan until 15 September 2008.)
135. It was my provisional opinion that these actions and omissions were in breach of the Board's Acquisition Planning Guideline.
136. I also noted that that the Director, Business and Information Service's minute dated 28 August 2008 seeking the Acting CE's approval, spoke as if a selective process had yet to commence - when in my view, it effectively had, four weeks previously. The minute recorded:

Although a procurement of this value would normally require an open tender process, the critical timelines and the dependence of the forthcoming 30 Year Plan for Greater Adelaide on this document, Planning SA proposes that a selective process will be used.

Planning SA will seek a Request for Proposal from eleven consultants that have been identified through market research as having the capabilities to deliver the product required.⁸⁵

137. Both the 1 September and final 15 September 2008 Acquisition Plan reflected the wording of this minute, under the title 'Provide a rationale for the proposed method':

Although a procurement of this value would normally require an open tender process, the critical timelines and the dependence of the forthcoming 30 Year Plan for Greater Adelaide on this document, Planning SA proposes that a selective process will be used.

Planning SA will seek a Request for Proposal from eleven consultants that have been identified through market research as having the capabilities to deliver the product required.⁸⁶

138. By 15 September 2008, Planning SA had requested the capability statements from 11 consultants; received and assessed the capability statements from eight responding consultants; shortlisted the eight consultants to five; and invited the five consultants to submit a proposal. Furthermore, the consultant's proposals were due and received on that date.
139. During my investigation, I put my concern to the Chief Executive of DPTI about the timing of Planning SA's 29 July 2008 letter, as well as the issue of authorisation to seek the capability statements. The Deputy Chief Executive, Planning Division, DPTI informed my investigation in reply, that:

Due to the required timing and urgency of the project, the sending of these letters and gaining sign-off from the Acting CE were out of sequence.⁸⁷

140. Despite this, DPTI responded to my provisional report commenting that the capability statements were requested and considered by Planning SA in the belief that 'such an exercise would constitute market research and intelligence gathering in accordance with the State Procurement Board's Acquisition Planning Guideline', and thus no formal

⁸⁵ Minute from Director, Business & Information Services, Planning SA to Acting Chief Executive, Planning SA dated 28 August 2008.

⁸⁶ Procurement Report Part A - Acquisition Plan - V04 'Growth Options for Greater Adelaide', PIRSA signed by the Acting Chief Executive, Planning SA dated 1 September 2008, p4; Procurement Report Part A - Acquisition Plan - V05 'Growth Options for Greater Adelaide', PIRSA signed by Acting Chief Executive, Planning SA dated 15 September 2008, p4.

⁸⁷ Letter from Deputy Chief Executive, Planning Division, DPTI to Ombudsman dated 11 October 2012. Response to Question 5. I note that Mr John Hanlon is the Deputy Chief Executive.

authorisation was required. Further, DPTI commented that ‘... there was no intent as such to subvert the usual process by staff and ... there was equally no intent to deceive or provide false information to the Accredited Purchasing Unit.’⁸⁸

141. I accept that Planning SA staff acted in good faith; that there was no intent to undermine the procurement process in seeking the capability statements; and that there was no intent to deceive the APU.
142. In response to my provisional report, DPTI and the former Director, Planning Strategy put several arguments to counter my view that the request for the capability statements did not constitute ‘market research or intelligence gathering’. DPTI referred me to the wording of the Board’s updated Acquisition Planning Guideline and to the capability statements themselves (they did not include the types of particulars that would usually form part of a detailed tender submission); and it commented that the Board ‘has not determined at any stage that the request for capability statements was in fact a non-compliance with the [B]oard’s Acquisition Planning Guideline or Market Approaches Guideline notwithstanding the Ombudsman’s provisional opinion.’ DPTI invited me to take expert procurement advice from the Board prior to finalising my report.
143. In my view, the fact that Planning SA used criteria to assess the capability statements and shortlist consultants suggests that the letter requesting the statements on 29 July 2008 was the commencement of the procurement process.
144. In addition, based on the wording of the Director, Business and Information Service’s minute and the Deputy Chief Executive of DPTI’s response which I have highlighted above, on balance, I am not persuaded that the letter requesting capability statements (from 11 consultants) merely constituted ‘market research and intelligence gathering’. The minute refers to seeking a request for proposal from 11 consultants; suggests that ‘market research’ had concluded; and that this research had revealed that these 11 consultants had ‘the capabilities to deliver the product’. Further, the Deputy Chief Executive’s response during my investigation that ‘the sending of these letters and gaining sign-off from the Acting CE were out of sequence’⁸⁹ appears to contradict DPTI’s response to my provisional report.
145. I also note that the Chair of the APU commented in his minute to the Acting CE dated 14 October 2008 when he approved the Purchase Recommendation, that Planning SA had not complied with ‘the usual procurement process’ and that the ‘initial selection process’ was undertaken prior to the Acquisition Plan being signed off.
146. During my investigation, I invited DPTI to comment on my understanding that the Chair’s words ‘initial selection process’ was referring to the selecting of 11 consultants; requesting capability statements from them; and then assessing and shortlisting the responses. In response, DPTI did not disabuse me of my understanding.⁹⁰
147. I also note that as the authority responsible for Planning SA’s procurement in relation to the GIA project, PIRSA did not object to my views and provisional opinion in this regard, in its response to my provisional report.⁹¹
148. I also consider that Planning SA breached the Board’s Acquisition Planning Guideline by requesting the five shortlisted consultants to submit a proposal for the GIA project, prior to the final Acquisition Plan being completed and signed off.

⁸⁸ DPTI response to provisional opinion 1, Ombudsman provisional report.

⁸⁹ Letter from Deputy Chief Executive, Planning Division, DPTI to Ombudsman dated 11 October 2012. Response to Question 5.

⁹⁰ Letter from Deputy Chief Executive, Planning Division, DPTI to Ombudsman dated 11 October 2012. Response to Questions 15 and 16.

⁹¹ Letter from Chief Executive, PIRSA to Ombudsman dated 9 December 2012.

149. In saying the above, I note that the Chair of the APU commented that Planning SA had not been compliant with 'the usual procurement process'; but that '... the actual process undertaken appears to be sound'. This was reiterated by DPTI during my investigation and in response to my provisional report. DPTI also submitted that the reason for not following the normal process was the dependence of the forthcoming 30 Year Plan on the GIA project, where:

Both projects needed to start at the same time so that Planning SA could set up a project management structure and project initiation strategy that would allow them to run concurrently. Both projects were planned to be announced on 14 October 2008.⁹²

150. I appreciate that time was of the essence during the GIA project procurement. However, I am not persuaded that the 30 Year Plan's dependence on the GIA project was a sound reason for Planning SA failing to follow proper procurement processes. It seems to me that because of political and time pressures, Planning SA fell into the very trap the Board appears to warn about in the Acquisition Planning Guideline.

Communicating the evaluation criteria and weightings to the potential consultants

151. The 11 consultants approached by Planning SA to provide a capability statement to conduct the GIA project were not informed of the basis on which their responses would be evaluated. As I have previously stated, Planning SA's criteria for shortlisting the statements were 'similar experiences, local knowledge, skills of lead staff and depth of team skills'.

152. However, the five consultants shortlisted from the eight who responded with capability statements were informed of basis on which their proposals would be assessed (in the Project Brief). These were 'in no particular order':

1. Appreciation of deliverables and legislative requirements
2. Experience in successfully conducting projects of similar scale & complexity
3. Relevant Knowledge and expertise of members of the proposed team
4. Relevant back up specialists and resources
5. Proposed methodology for conducting the project - extent of innovation and collaboration.
6. Project management key roles - skills/experience/availability
7. Conformance with time parameters set for the project
8. Value for money⁹³

153. At no stage were consultants advised of the weightings which Planning SA would attribute to the evaluation criteria.

154. In response to my provisional report, the Chief Executive of PIRSA commented that he had been advised that under the Board's guidelines, it was 'not a mandatory requirement to advise consultants of the criteria and weighting for which a tender would be assessed'. He had also been advised '... it is not a requirement to use the same evaluation criteria when seeking capability statements and for the final proposals, as these processes are considered to be different and should be assessed accordingly.'⁹⁴ I accept this submission.

155. DPTI responded that my concerns about communicating evaluation criteria and weighting to the 11 consultants invited to submit capability statements depended upon the status of the capability statements: if they were part of 'market research and intelligence gathering' and not part of the procurement process, then the methods by

⁹² Letter from Deputy Chief Executive, Planning Division, DPTI to Ombudsman dated 11 October 2012. Response to Question 15, p11.

⁹³ Project Brief - 'Identifying and Prioritising Potential Long Term Growth Options for Greater Adelaide', dated September 2008, pp5-6.

⁹⁴ Letter from Chief Executive, PIRSA to Ombudsman dated 9 December 2012.

which staff 'assessed and filtered' the information in the statements was 'irrelevant'.⁹⁵ DPTI also noted that the more detailed criteria used to consider the final proposals were an expansion of the broader criteria used to evaluate the capability statements. I accept this submission. However, I reiterate my view that I consider that the request for capability statements was the commencement of the procurement process, and not mere 'market research and intelligence gathering'.

156. Following my receipt of these submissions, my investigation conducted further research and communicated with the Board. The Board advised that the 2008 Acquisition Planning Guideline at the time of the GIA project procurement did not provide advice for agencies on the publishing of evaluation criteria and weightings. However, the Board's recently published Supplier Selection Guideline (January 2013) now contains a requirement to release evaluation criteria to tenderers. The guideline is silent on the issue of publishing weightings.
157. In my view, communicating evaluation criteria (at both the selection and award stages) and their respective weightings to prospective consultants in a procurement process, ensures transparency and helps preclude the risk of arbitrary decision making.
158. I accept that it was not mandatory under the Board's guideline at the time, for Planning SA to have communicated to the 11 consultants the basis on which it would assess their capability statements. But I maintain my view that in the interests of openness and transparency, it would have been helpful and appropriate for Planning SA to have conveyed the basis on which the statements would be evaluated (noting that in light of my views above, I consider this was the commencement of the procurement process). This would also have assisted the consultants to provide a more targeted response, and ultimately Planning SA in their assessment of the statements.
159. Despite my views above, I comment that I found no evidence to suggest any substantive unfairness to any of the potential consultants or any capricious decision making by Planning SA, as a result of Planning SA not communicating the evaluation criteria in the letter requesting the capability statements, or the weightings.
160. To strengthen transparency, I also consider that the Board should reflect on the issue of requiring release of weightings to potential suppliers during the procurement process. I note that in the United Kingdom (as a result of case law and EU directives), as a matter of procurement policy, public bodies are required to publish details of evaluation criteria at the selection and award stage of the procurement process and the weightings attached to them.

PIRSA's procurement oversight of Planning SA and the Acting CE's procurement authority

161. On a different matter, I note that PIRSA became responsible for the procurement operations of Planning SA on 15 August 2008, as a result of the Board's directive. In my view, it appears that there was therefore a window period between 1 July 2008 (when Planning SA changed from being a business unit within PIRSA to being an administrative unit in its own right) and 15 August 2008, when Planning SA was responsible for its own procurement operations.
162. Nevertheless, I understand that the GIA project and the other 'sub-projects' of the 30 Year Plan commenced while Planning SA was a business unit within PIRSA and that Planning SA continued to use PIRSA's systems, policies, procedures and templates to guide its procurement processes during the window period (and after 1 July 2008, until it developed its own corporate capabilities).⁹⁶

⁹⁵ DPTI response to provisional opinion 1, Ombudsman provisional report.

⁹⁶ Letter from Chief Executive, DPTI to Ombudsman dated 11 December 2012, p9.

163. I comment also that it was not until 23 September 2008 that the Chief Executive of PIRSA implemented the Board's 15 August 2008 directive and limited the Acting CE's authorisation to approve procurement up to \$275,000 (incl GST).
164. However, in my view, there was no statutory or policy bar to the Acting CE conducting procurement operations, including the GIA or 30 Year Plan project prior to this date. Up to that date, the Acting CE was able to conduct and approve procurement up to an amount which was limited only by the Minister's financial payment authorisation given to him as a person acting in the capacity of Chief Executive of Planning SA on 1 July 2008 (\$1.1m including GST). In this respect, the Chief Executive of PIRSA's implementation of Board's directive merely served to limit the Acting CE's level of procurement authorisation.
165. I note that the Acting CE complied with the directive after 23 September 2008 by forwarding the GIA project procurement's Purchase Recommendation to the APU, after it had become apparent that the procurement amount exceeded his authorisation.

OPINION

1

There were probity failures in the acquisition planning process of the GIA project Procurement.

- Planning SA approached potential consultants and requested, received and shortlisted their 'capability statements' prior to the delegate giving formal approval for a selective tender process to occur. This was contrary to the State Procurement Board's Acquisition Planning Guideline.
- Shortlisted consultants were requested to submit a proposal for the GIA project consultancy, prior to the final Acquisition Plan being completed and signed off. This was contrary to the State Procurement Board's Acquisition Planning Guideline.
- Consultants who were asked to provide capability statements should have been informed of the basis on which their statements would be evaluated. This would have enabled the consultants to provide a more targeted response, and ensured transparency in the procurement process. I note that this was not a requirement under the Board's Acquisition Planning Guideline at the time; and the Board's recent guidelines have been amended to require the publishing of selection criteria during procurement.
- Despite the failings above, there is no evidence to suggest any substantive unfairness to any of the potential consultants in the GIA project procurement process, or that Planning SA officers did not act in good faith.
- To further transparency and accountability in government procurement and in developing its policies and guidelines, the Board should consider requiring release of weightings to potential suppliers.

REPORTING NON-COMPLIANCE TO THE STATE PROCUREMENT BOARD

166. At the time, there was (and still is) a requirement by the Board's Board Procurement Reporting Policy⁹⁷ for public authorities to provide the Board with an Annual Certificate of Compliance, and submit an annual procurement report.
167. My investigation was provided with a copy of PIRSA's Annual Certificate of Compliance for the 2008-2009 reporting year, as well as its Non-compliance Report. It appears that

⁹⁷ State Procurement Board, Board Procurement Reporting Policy, Version 1.0, Issue Date: May 2008.

the failures in the GIA project procurement process outlined above were not reported to the Board.

168. This is despite PIRSA's Chair of the APU commenting to the Acting CE that the non-compliance with the 'usual procurement process' would need to be reported to the Board as part of the 2008/2009 Annual Procurement Report.⁹⁸
169. It appears that as the agency responsible for Planning SA's procurement processes, PIRSA failed to comply with the Board's Procurement Reporting Policy and report the error in the GIA project acquisition planning process.
170. In his response to my provisional report, the Chief Executive of PIRSA did not object to my opinion.⁹⁹

OPINION

2

PIRSA failed to report its non-compliance in the GIA project procurement process with the State Procurement Board's Acquisition Planning Guideline, in its 2008-2009 Annual Procurement Compliance Report to the Board. This was contrary to the State Procurement Board's Reporting Policy.

PROCUREMENT AND CONFLICT OF INTEREST IN STATE GOVERNMENT AND PLANNING

171. One of the key risk areas in government procurement is conflict of interest. Conflicts of interest are not wrong in themselves,¹⁰⁰ and are not uncommon in government procurement. In my view, what is wrong is if conflicts of interest are not properly identified and managed before the commencement of the procurement process.¹⁰¹
172. The Queensland Crime and Misconduct Commission has commented that:
- It is when a conflict of interest has been ignored, improperly acted on, or has influenced actions or decision making, that the **conduct** (not the conflict itself) could be seen as misconduct, abuse of office or even corruption.¹⁰²
173. It is commonly thought that there are three types of conflicts of interest - actual, potential and perceived. The decision of the Federal Court in *Hughes Aircraft Systems International v Airservices Australia*¹⁰³ shows that a party's conflict of interest, whether potential, actual or perceived can infect a procurement process.
174. Definitions of what comprises a conflict of interest are numerous, and can relate to many different situations. An actual conflict of interest can be said to be a situation in which a person or organisation has a private interest in a matter which is sufficient to influence the objective exercise of their official duties.
175. A potential conflict of interest can exist when the person or organisation has an interest (or duty) that does not presently conflict with their official duties; but in view of the types

⁹⁸ Minute from Chair, Accredited Purchasing Unit to Acting Chief Executive, Planning SA (copied to Chief Executive and Executive Director Corporate, PIRSA) dated 14 October 2008.

⁹⁹ Letter from Chief Executive, PIRSA to Ombudsman dated 9 December 2012.

¹⁰⁰ See 'Ethics, Probity and Accountability in Procurement', Queensland Crime and Misconduct Commission, October 2006, p9.

¹⁰¹ See Conflicts of Interest 'Managing procurement processes, tenders and contracts', Integrity Coordinating Group, WA Government, <http://www.publicsector.wa.gov.au/ICG/Documents/scenario1.pdf> (as at 15 September 2012).

¹⁰² 'Ethics, Probity and Accountability in Procurement', Queensland Crime and Misconduct Commission, October 2006, p9.

¹⁰³ (1997) FCA 558 (30 June 1997).

- of matters in which they are involved, could reasonably be expected to give rise to a conflict at some time in the future.
176. A perceived conflict of interest is one which a fair minded and informed member of the public might perceive as existing. A perceived conflict of interest may not relate to what is in reality a potential or an actual conflict of interest. It may only ever be a 'perception' of a conflict of interest. The management of perceived conflicts of interest is as important for the integrity of a procurement process as an actual conflict of interest.
177. There is also the notion of a 'conflict of duty'. A conflict of duty may arise where a person or organisation owes a duty to act in the interests of two bodies, and in effect is required to wear two hats in the exercise of their duties. Tensions will arise where the duty to act in the interest of one conflicts with the other.
178. In government procurement, the focus of concern in relation to conflict of interest appears commonly to be on public officials, and the need to ensure that they perform their duties in a fair and impartial way by disclosing occasions when their private interests come or might potentially come into conflict with their duty to act in the public interest.¹⁰⁴ The *Public Sector Act 2009*, the *Public Sector (Honesty and Accountability) Act 1995* and the Code of Ethics for the South Australian Public Sector¹⁰⁵ require public sector employees and members of corporate agency or advisory boards to disclose their conflict of interest in relation to the exercise of their public duties.
179. Less attention is paid to conflict of interest on the part of suppliers or consultants who seek to engage with government.
180. In my view, conflicts which go undeclared or unmanaged in this area can be just as damaging as conflicts involving public officials, and can impact on project outcomes, community confidence in government, and reputations of all of the parties. As state government outsourcing and consultancy engagement with the private sector increases, this is an area which requires more attention.
181. I note the view of the NSW ICAC that:
- ... when the private sector is engaged to perform public sector duties, there is an obligation to ensure that conflicts of interest are disclosed and effectively managed.¹⁰⁶
182. Similarly, the Queensland Crime and Misconduct Commission comments about supplier probity:
- A focus on internal probity issues should not overshadow the importance of external probity issues related to the business practice, past conduct and performance of offerors.¹⁰⁷
183. Managing conflict of interest in this area is also a corruption prevention issue. Article 12 of the UN Convention against Corruption which Australia signed in 2003 and ratified in December 2005, recommends the development of a code of conduct to regulate private sector dealings and their contractual relationships with the public sector.¹⁰⁸
184. The NSW ICAC has produced a helpful publication 'Developing a Statement of Business Ethics'¹⁰⁹ which provides a guide for raising awareness in the private sector about doing

¹⁰⁴ See, for example, State Procurement Board, 'Probity and Ethical Procurement, Guideline, Version 1.0, Issue Date: September 2012, p5.

¹⁰⁵ Issued by the Commissioner for Public Sector Employment under Part 4, *Public Sector Act 2009*.

¹⁰⁶ 'Probity and probity advising', ICAC NSW, November 2005 p9.

¹⁰⁷ 'Ethics, Probity and Accountability in Procurement', Queensland Crime and Misconduct Commission, October 2006, p17.

¹⁰⁸ See http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf 9 (as at 17 September 2012).

¹⁰⁹ 'Developing a Statement of Business Ethics', NSW Independent Commission Against Corruption, May 2004.

business with the public sector, and the respective obligations of public officials and private sector contractors and consultants.

185. The publication suggests 13 issues that a public sector agency should address in its 'statement of business ethics' to assist its private sector providers, including setting out:
- statements of the agency's business principles
 - what can be expected from the agency's staff
 - what the agency expects of its private sector partners
 - the agency's rules regarding incentives, gifts, benefits and hospitality
 - the agency's policies on conflicts of interest; defining conflicts of interest which are relevant to the agency's main area of operation; when these conflicts might occur; and how they will be managed
 - confidentiality and intellectual property rights
 - ethical communication.
186. I note also the helpful publication of the 'Statement of Business Ethics' of Railcorp in New South Wales, which outlines for its private sector suppliers: 'What we expect of you' and 'What you can expect of us'.¹¹⁰
187. In the context of my investigation, neither the Board's 2008 Risk Management Guideline nor PIRSA's policies and guidelines specifically drew attention to supplier conflict of interest as being a risk factor for consideration in procurement.¹¹¹
188. I acknowledge the more recent steps taken by the Board on its website to communicate expectations to suppliers about providing incentives and gifts:

Expected standards of conduct

Suppliers to the South Australian Government are expected to act in an ethical and professional manner. The Government's publication Code of Ethics for the South Australian Public Sector sets out the high standards of professional conduct expected of every public sector employee in South Australia, and states that *"the public expects the public sector and its employees to be impartial and not to be improperly influenced in the performance of their duties"* and *"public sector employees will not, for themselves or others, seek to accept gifts or benefits that could be reasonably perceived as influencing them"*.

Consequently, any personal or private benefit gained in relation to procuring from a supplier will be in breach of the Government's Code of Ethics.

Suppliers are to refrain from making such offers to government employees. Government contracts have been updated to ensure that these offers to public servants are recognised as a breach of contract.¹¹²

189. I also note the Board's recently published Probity and Ethical Procurement Guideline in September 2012, which relevantly provides:

Ethical Procurement - Suppliers

Public authorities must not seek to benefit from supplier practices that may be dishonest, unethical or unsafe.

Suppliers to the South Australian Government are required to maintain ethical practices in their dealings with Government.

The Board's standard contracts (as well as purchase orders used by public authorities) require suppliers to conduct themselves in a manner that does not invite, directly or indirectly, the purchaser's officers, employees or agents or any public sector employee to

¹¹⁰ http://www.railcorp.info/_data/assets/pdf_file/0016/3364/RailCorp_Business_Ethics.pdf (as at 20 September 2012).

¹¹¹ See previously under 'PROCUREMENT AND RISK MANAGEMENT IN STATE GOVERNMENT'; or State Procurement Board, Risk Management Guideline, Version 1.0, Issue Date: November 2006; State Procurement Board, Risk Management Guideline Version 3.0, Date Issued: December 2010.

¹¹² http://www.spb.sa.gov.au/site/information_for_suppliers.aspx (as at 25 October 2012).

behave unethically, to prefer private interests over the purchaser's interests or to otherwise contravene the *Code of Ethics for the South Australian Public Sector*.

If the supplier fails to comply with this requirement, the purchaser may terminate the procurement.¹¹³

190. In my view, the guideline could go further to deal with supplier or consultant conflict of interest, and set out, for example:
- the meaning of conflict of interest - potential, actual and perceived, and conflict of duty in a procurement context
 - examples of these different types of conflicts of interest
 - when the different types of conflicts of interest might occur, and at what stages of the procurement process
 - how they will be managed
 - what can happen if they are not declared or identified.
191. In my experience as Ombudsman, while the term 'conflict of interest' is generally known to be a threat to the probity of government processes, it is often the case that people do not fully understand its meaning in particular contexts.
192. Turning to government planning, it appears that consultants are often relied upon in planning matters. My investigation took evidence from the president of the Planning Institute of Australia, SA Division (**PIA**) during the time of the GIA project procurement. It is relevant to note that the president disclosed at the outset to my investigation, that the consulting company for which she works provided a capability statement during the GIA project procurement process.
193. The president commented in her evidence that PIA members do 'a lot of the work that government staff did in the old days'.¹¹⁴ Further, in her view, resource shortage within government planning is driving a 'closer than usual relationship between consultants and government'.¹¹⁵
194. I accept this evidence; and confirm that my office has received anecdotal information which accords with this evidence.
195. Being a smaller state, I surmise that there would be a smaller pool of suppliers in South Australia than in the larger states, and that the same planning consultants might represent developers, government and private sector commercial interests at different times and sometimes in the same geographical areas. The responses of the consultants in the GIA project procurement process show this. In addition, it is not hard to imagine that government planning staff would inevitably become more familiar with some consultants than others.
196. This is all the more reason for the government planning agencies to have clear policies dealing with consultants' conflict of interest to ensure procurement probity.
197. Consultants of course may be bound by their particular professional code of conduct, which will usually address conflict of interest.¹¹⁶ I note that the national secretariat of the PIA has a Code of Professional Conduct which covers individual planners' respective ethical obligations and conflict of interest.¹¹⁷

¹¹³ Probity and Ethical Procurement Guideline, State Procurement Board, Issue Date: September 2012. Version 1.0, p6.

¹¹⁴ Transcript of evidence, former President, Planning Institute of Australia, SA Division, 26 July 2012, p34.

¹¹⁵ Transcript of evidence, former President, Planning Institute of Australia, SA Division, 26 July 2012, p34.

¹¹⁶ Australian Solicitor's Conduct Rules - http://www.lawsocietysa.asn.au/PDF/rules_of_professional_conduct.pdf; Architectural Practice Board of South Australia - <http://www.archboardsa.org.au/assets/PdfList/2012-08-08-Draft-Code-of-Conduct.pdf>; Australian Psychological Society - Code of Ethics, <http://www.psychology.org.au/Assets/Files/APS-Code-of-Ethics.pdf>.

¹¹⁷ Code of Professional Conduct, Planning Institute of Australia, National Secretariat, August 2002, <http://www.planning.org.au/documents/item/1025> (as at 16 September 2012).

3.2 Conflicts of Interest

8. Members shall not act in circumstances where there is a potential conflict between their own private interest and the interest of their client or public interest.

9. **Members employed by or acting for a planning authority on any matter or in relation to any land shall not:**

- act for any other person or client in relation to that matter or any part of that land;
- where a conflict of interest could exist, engage in or advise any third party on any planning matters within that area until such time as the member's employment or commission is concluded and the results of the work are made public by the planning authority. (my emphasis)

10. Members who are undertaking planning work for a client must not undertake work for another client if either client is likely to be prejudiced.

11. Members shall disclose to their employees or clients any gifts, commissions or discounts received from or offered by any third parties in connection with their work as planners, and shall not accept any such gifts, commissions or discounts where their receipt may, or may be perceived to, influence their advice.

12. Members shall not undertake paid professional work from any authority or organisation of whose governing body, board of directors or the like they are members.

13. Members may only in exceptional circumstances, such as where the member alone possesses the required expertise, act where a potential conflict of interest exists or may arise. Prior to accepting any such engagement the member shall disclose the relevant details to the client or clients concerned, and to the State Divisional Committee, in writing, and shall accept the directions of the State Division Committee, which may include a requirement to publicly disclose the relevant details prior to acting.

198. Be this as it may, when engaging consultants and whatever their field, public authorities need to be alert to protecting the public interest; and they cannot always solely rely on consultants to discharge their professional obligations and disclose their interests in the procurement process.

199. I note the Department of Education and Child Development's policy procurement document 'Engagement and Management of External Consultants', which refers to the need for vigilance in engaging external consultants:

When engaging consultants, public authorities must be particularly diligent in addressing the issue of conflicts of interest.

A conflict of interest arises where a consultant has (or appears to have) obligations or interests that may conflict with the consultant's contractual duties to the public authority. Potential consultants are required to declare that they are not aware of any reason why their proposed involvement would create a conflict of interest or otherwise lead to a perception of a conflict of interest. If a consultant is used to develop a project brief, specification, terms of reference or anything similar, prior consideration needs to be given to potential conflicts of interest should the consultant be likely to tender for the project.¹¹⁸

200. After the GIA project procurement process, concerns were expressed by some in the community and the Hon Mark Parnell MLC in the Parliament, that Connor Holmes had a conflict of interest in the GIA project consultancy, in particular in relation to Mount Barker - which had been identified in the procurement process by Planning SA as one of the GIA project areas.¹¹⁹

¹¹⁸ <http://www.decd.sa.gov.au/docs/documents/1/EngagementandManagementof.pdf>, p6 (as at 13 September 2012).

¹¹⁹ See, for example, 'Not for sale - The fight for the future of Mt Barker', *SA Weekend Magazine, The Advertiser* (Adelaide), 21 August 2009, 8; South Australia, *Parliamentary Debates*, Legislative Council, 3 June 2009, 2485-89; 17 June 2009, 2648-51; 23 September 2009, 3337-43 (Hon M Parnell).

201. I understand it was these concerns which prompted the referral for my investigation by the Legislative Council. I consider this later in my report.

OPINION

3

- Government agencies must be vigilant about the probity of potential consultants during their procurement processes, in particular in relation to conflict of interest.
- The State Procurement Board's policies and guidelines should provide more detailed guidance to assist to address this issue,
- I commend the New South Wales ICAC publication 'Developing a Statement of Business Ethics' as a guide.

202. In response to my provisional report, the Chief Executive of PIRSA in did not object to my opinion above;¹²⁰ and DPTI considered that tenderer conflict of interest is 'well addressed' in its current procurement policies.¹²¹

203. The Chair of the Board responded to my opinion (and my later opinion about the need to ensure that internal controls are in place to identify and manage consultant's conflicts of interest prior to embarking on a procurement process¹²²):

Whilst there are many references in the Board's guidelines relating to conflicts of interest and the duty of government employees, the Board's Standard Tender and Contract Documents (including the Bid Rules and Response Schedule) requires suppliers to disclose any actual or perceived conflicts of interest. Notwithstanding these requirements, the Board will also consider your recommendation to consider the [NSW ICAC] publication 'Developing a Statement of Business Ethics guide as part of its policy review remit.'¹²³

CONSIDERATION OF THE GIA PROJECT PROCUREMENT PROCESS - CONFLICT OF INTEREST

204. In the following, I consider the documentation promulgated and received by Planning SA during the GIA project procurement process; and whether appropriate attention was given to the issue of conflict of interest generally, on the part of potential consultants.

Planning SA's request for capability statements - 29 July 2008

205. I have previously set out the substance of Planning SA's initial 29 July 2008 letter to the 11 consultants, requesting a capability statement to undertake the GIA project. I note that the letter did not ask the consultants to identify any conflicts of interest in relation to the proposed project. I can find no identifiable instance in the letter, which appears to address any risk management issue.
206. The letter set out the 'major output' expected of the project (a detailed report providing guidance regarding development options, primarily outside the current urban growth boundary and based on identified priority areas); and what the report would be required to address.
207. DPTI informed my investigation that Planning SA did not specifically request the consultants to identify any conflict of interest, because:

¹²⁰ Letter from Chief Executive, PIRSA to Ombudsman dated 9 December 2012.

¹²¹ DPTI response to provisional opinion 3, Ombudsman provisional report.

¹²² Numbered as 'Opinion 9' in my report.

¹²³ Letter from the Chair, State Procurement Board to Ombudsman dated 4 December 2012, p2.

The department was not aware of any requirement to make such a specific request ... it was the department [sic] belief that [sic] consultancy template adequately dealt with this issue.¹²⁴

208. In response to this, I note that clause 17.7 of the 'consultancy template' used for the GIA project consultancy agreement reads:

17.7 (Conflict of Interest)

The Consultant must disclose to the Minister in writing, all actual and potential conflicts of interest that exist, arise or may arise (either for the Consultant or the Consultant's Staff) in the course of performing the Services as soon as practical after it becomes aware of that conflict.¹²⁵

209. While this is appropriate, I comment that the requirement for disclosure of conflicts in clause 17.7 does not capture the procurement process conducted prior to the execution of the agreement. It can only refer to future relations between the consultant and the Minister. In this sense, the consultancy template cannot be said to have 'adequately dealt with the issue'.

210. DPTI also advised my investigation that it obtained advice from the Crown Solicitor in relation to the 30 Year Plan tender and the possible conflict of interest of Professor Westacott (of KPMG), Mr Moseley (of Connor Holmes), and the former Director, Planning Strategy of Planning SA. This was by virtue of Professor Westacott's and Mr Moseley's engagement on the State Planning and Development Review and/or the Planning and Development Implementation Steering Committee, and the fact that the former Director, Planning Strategy had left Planning SA and was employed by one of the consultants seeking to tender for 30 Year Plan consultancy.

211. DPTI advised my investigation that clause 17.7 of the consultancy template combined with the advice received from the Crown Solicitor, 'was seen as an appropriate way of managing any conflict of interest that may arise in regard to all of the Planning Consultants'.¹²⁶

212. I deal with the Crown Solicitor's advice later in my report. But I comment that the documentation received by my investigation shows that the conflict of interest issue above was raised with the Crown Solicitor only in relation to the 30 Year Plan procurement, and not the GIA project. Further, Planning SA did not approach the Crown Solicitor until 15 September 2008. By this time, Planning SA was in the final stages of the GIA project procurement, having requested and received (on that date) the final three consultants' proposals.

213. I note that the Board's Acquisition Planning Guideline at the time mentions that a public authority may choose to engage in 'informal discussions' with potential suppliers prior to the formal procurement process, utilising the 'Potential Supplier Engagement Checklist' provided at Appendix 2 of the guideline.¹²⁷

214. One of the items included in this checklist reads:

All conflicts of interest have been resolved before discussions were held.¹²⁸

215. While Planning SA's 29 July 2008 letter requesting capability statements and the subsequent shortlisting process were beyond the 'informal discussion' stage of the GIA project procurement process, this item in the checklist demonstrates the need for public

¹²⁴ DPTI response to 37 questions to Ombudsman dated 27 July 2012, Question 10.

¹²⁵ Consultancy Agreement between Connor Holmes and the Minister for Urban Development and Planning dated 14 October 2008.

¹²⁶ DPTI response to 37 questions to Ombudsman dated 27 July 2012, Question 10.

¹²⁷ State Procurement Board, Acquisition Planning Guideline, Version 6.0 Issue Date February 2008, p7.

¹²⁸ State Procurement Board, Acquisition Planning Guideline, Version 6.0 Issue Date February 2008, Appendix 2, p21.

authorities to not only identify but resolve any conflicts of interest prior to the commencement of the procurement process. This did not occur.

216. In my opinion, the issue of potential consultants' conflict of interest should have been expressly addressed by Planning SA in the 29 July 2008 letter.

Eight consultants' responses to the request

217. Of the eight out of 11 consultants that responded on 6 August 2008, none specifically identified any 'conflict of interest' as such in their capability statements in relation to the GIA project.
218. Having said this, seven out of the eight referred to their experience or expertise in one or more of the 12 GIA project areas identified in the 29 July 2008 letter. Each of the seven identified that they had experience working on projects in one, two, four, six, seven, eight and nine GIA project areas, respectively.
219. In all cases, they put forward this experience as demonstration of their knowledge of the GIA areas and their capability to lead the GIA project, rather than in the context of the possibility that they were potentially conflicted. In saying this, I do not say that the consultants necessarily had a conflict of interest (there is insufficient information in the responses to identify this) - merely that they did not express their involvement in these terms.

Shortlisting of the eight consultants to five

220. Planning SA's shortlisting document showing the eight responding consultants being narrowed down to five, reveals that the assessment criteria used was 'Similar Experience Elsewhere'; 'Local Knowledge of Area(s)'; 'Skills of Lead Staff'; and 'Depth of Team Skills'.¹²⁹
221. The document does not indicate that any consideration was given during the shortlisting process to possible conflicts of interest on the part of any of the eight consultants.
222. In my view, the mere criterion of 'Local Knowledge of Area(s)' and the fact that seven of the eight consultants had identified in their responses that they had worked or were currently working in one of the 12 GIA project areas, was sufficient to suggest the possibility of any one of the seven being potentially conflicted.

The Acquisition Plan(s)

223. Both the initial and final Acquisition Plans for the GIA project dated 1 and 15 September 2008 note the application of the Board's Acquisition Planning Guideline and Risk Management Guideline in the procurement process.
224. Under paragraph 3.1 'Risk Management', the Acquisition Plans record that:
- Key elements of Risk Management (as per State Procurement Board Guidelines) have been factored into the Briefing Document for consultants.¹³⁰
225. I note in the Acquisition Plans that Planning SA assessed the GIA procurement as a 'Quadrant 2' procurement (i.e. low value/high risk), and as such, a separate Risk Management Plan was prepared. For such a level of risk, the Acquisition Planning Guideline advises:

¹²⁹ Letter from Deputy Chief Executive, Planning Division, DPTI to Ombudsman dated 11 October 2012, Appendix 6.

¹³⁰ Procurement Report Part A - Acquisition Plan - V05, p3.

Probity

Document, and include with the acquisition plan, a comprehensive probity plan which considers issues such as potential or actual conflict of interest, how these issues will be managed and systems and procedures proposed to meet audit requirements.

Appoint an independent probity advisor and/or auditor **if required**.¹³¹

226. I note from the Risk Management Plan attached to the final Acquisition Plan that there is no reference to probity issues, including conflict of interest.
227. In my view, the mere fact that seven out of eight consultants identified experience or expertise in one or more of the 12 GIA project areas in their capability statements was sufficient for Planning SA to consider the possibility of any one of the consultants having a potential conflict of interest, and to then document a probity plan about how it was going to deal with this. This is all the more so given that four of the consultants had referred to their experience working in at least half of the identified GIA project areas. In my view, this was a failing which undermined the integrity of the procurement process.

Invitation to five consultants to submit a proposal

228. Planning SA's 'Request for Offer' letter to the shortlisted five consultants dated 1 September 2008 attached a 'Service' or 'Project Brief' and a 'Conditions of Offer' document.

Project Brief - 'Identifying and Prioritising Potential Long Term Growth Options for Greater Adelaide'

229. The Project Brief¹³² provided information which included:

- the Terms of Reference for the GIA project
- Planning SA's role in the project
- the outputs required of the consultant
- what the consultants should include in their proposal
- how the tender would be evaluated.

230. I have previously set out the Terms of Reference, showing Planning SA's five dot point requirements of the consultant's report and the 12 GIA project areas required for evaluation.¹³³ These had also been set out in the 29 July 2008 letter requesting capability statements.

231. The Project Brief required the consultants to include in their proposal, as follows:

8. CONTENT OF THE PROPOSAL

Proposals should be succinct but include the following:

- a) Details of relevant experience of the specific staff to be used on this project:
 - Town planning/urban design expertise, with demonstrated experience in large-scale urban development plans.
 - The consultant musty also demonstrate experience and understanding of infrastructure requirements, demographics, structure planning, housing policy, economic modelling and social and cultural planning.
 - Project management skills of a high order.
 - The consultant must be able to demonstrate a multi-disciplinary approach.
- b) A Project plan, which identifies the proposed approach for managing this project, associated timeframes and methods of consultation with planning SA (including a Gantt

¹³¹ State Procurement Board, Acquisition Planning Guideline, Version 6.0, Issue Date: February 2008, Appendix 1, p14.

¹³² 'Project Brief - 'Identifying and Prioritising Potential Long Term Growth Options for Greater Adelaide' dated September 2008.

¹³³ See previously 'TIMING AND APPROACH OF THE GIA PROJECT PROCUREMENT'.

diagram, critical path and key milestones/review points). The Consultant is able to suggest some changes to the scope but not to the final deadline.

- c) Details of how the consultant will organise their availability and liaison with Planning SA i.e. office logistics and availability for this project. It is essential that the Consultant has an office presence in Adelaide.
- d) Details of experience of the organisation relevant to this project
- e) Fee (hourly rate and estimated number of hours to complete the project)
- f) Evidence that the specific insurances are held ¹³⁴

232. The Project Brief advised the consultants that their tenders would be evaluated using the following criteria:

9. TENDER EVALUATION

Tenders will be evaluated on the following criteria (in no particular order):

- 1. Appreciation of deliverables and legislative requirements
- 2. Experience in successfully conducting projects of similar scale & complexity
- 3. Relevant Knowledge and expertise of members of the proposed team
- 4. Relevant back up specialists and resources
- 5. Proposed methodology for conducting the project - extent of innovation and collaboration.
- 6. Project management key roles - skills/experience/availability
- 7. Conformance with time parameters set for the project
- 8. Value for money ¹³⁵

Conditions of Offer

233. The 'Conditions of Offer' document attached to the 1 September 2008 letter required the consultants to declare 'any actual or potential conflict of interest':

8. PROBITY AND PUBLICITY

- 8.1 The Minister expects that you will:
 - 8.1.1 declare any actual or potential conflict of interest;
 - 8.1.2 not collude with any other bidder or any other supplier who is a potential bidder;
 - 8.1.3 comply with all laws in force in South Australia applicable to the Process ..., including but not limited to, the Trade Practices Act
 - 8.1.4 not attempt to influence the outcome of this Process by offering an employment, payment or any other incentive to or in any way seek to improperly influence any person employed by the Minister or engaged by the Minister;
 - 8.1.5 not make any news releases or responses to media enquires [sic] and questions pertaining to this Process without the Minister's written approval.
- 8.2 If you act contrary to these expectations, the Minister reserves the right to:
 - 8.2.1 terminate consideration of your offer and;
 - 8.2.2 terminate any contract that may have been executed by the Minister and you without any obligation on the Minister to make payment to you.

The three responses to Planning SA submitting proposals

234. The three responses submitting proposals to Planning SA showed that their respective consultants had prior or current involvement in six, eight and nine out of the 12 GIA project areas, respectively.

¹³⁴ 'Project Brief - Identifying and Prioritising Potential Long Term Growth Options for Greater Adelaide', dated September 2008, pp5-6.

¹³⁵ 'Project Brief - Identifying and Prioritising Potential Long Term Growth Options for Greater Adelaide', dated September 2008, p6.

235. Only one of the consultants specifically 'identified' a conflict of interest in relation to working on a project in one of the areas. While not expressly termed as such, the consultant disclosed that they were currently providing 'strategic, planning and development advice' to a (named) developer on a proposal to develop a township in a (named) GIA project area.
236. The consultant commented that they had 'considerable knowledge of this proposal and the area', and 'believe that it would be important to apply an independent assessment to this site during the assessment process.' For this reason, the consultant nominated another planner to take 'primary responsibility' for that area. The consultant added: 'In addition, the scrutiny of other study team members will also be applied to ensure that this area is assessed in an independent manner relative to other potential growth areas.'¹³⁶
237. While the other two proposals identified their consultants' involvement in projects within GIA project areas, they did not articulate this involvement in the cautionary terms used by the consultant above; and they did not identify any 'conflicts of interest'. Again, and as with the responses to the capability statements on 6 August 2008, it appears that their involvement in the GIA project areas was used to bolster the strength of their proposals and their chances of winning the consultancy.

Planning SA's evaluation of the three proposals

238. The documents provided to my investigation showing the evaluation of the three proposals do not record that the evaluation panel considered any issues relating to conflict of interest. This is despite the fact that the consultants had respectively identified in their proposals that they had been involved working in six, eight and nine of the 12 GIA project areas. Furthermore, one of them had specifically drawn attention to one project where they considered they had a conflict of interest (although not specifically expressed in these terms). In my view, and as with the shortlisting process of the eight capability statements, this was a failing which compromised the probity of the procurement process.
239. Connor Holmes provided sufficient information to indicate that they may have had a potential conflict of interest in relation to at least six of the 12 areas to be considered in the GIA project. This should have been identified and dealt with by Planning SA prior to awarding the consultancy to Connor Holmes.

The Purchase Recommendation recommending Connor Holmes

240. In the GIA project Purchase Recommendation dated 13 October 2008 under 'Other Relevant Information' and 'Explain any conflict of interest matters that have been declared and how they have been dealt with', it is recorded:
- While the Crown Solicitors office representative confirmed that no conflict of interest exists with representatives from Connor Holmes a confidentiality declaration to [sic] a member has been signed as they are currently part of the Planning and Development Implementation Steering Committee. This advice was received for the Greater Adelaide [the 30 Year Plan] project.
241. I refer to this later in my report; but I comment that this is the only documented record of any conflict of interest concerns about any of the potential consultants in the GIA project procurement process.
242. While this record properly deals with a possible conflict of interest (albeit in relation to the 30 Year Plan), it does not address what I consider to be another and more significant

¹³⁶ 'Identifying & Prioritising Potential Long Term Growth Options for Greater Adelaide' project submission dated 15 September 2008, p17.

conflict of interest concern in relation to Connor Holmes and the GIA procurement. I deal with this concern in the following parts of my report.

OPINION

4

The GIA project procurement documentation shows that no consideration was given to potential consultants' conflict of interest, contrary to the State Procurement Board's Acquisition Planning Guideline. This failure compromised the integrity of the procurement process.

- Potential consultants were not asked to address conflict of interest in their capability statements.
- Seven out of eight consultants disclosed in their capability statements past or current project work in one or more of the proposed 12 GIA project areas, but no consideration was given to these consultants' potential conflict of interest when their capability statements were shortlisted.
- No consideration was given to conflict of interest when the final three consultants' proposals were evaluated. This was despite the fact all three had disclosed that they had worked in at least half of the 12 identified GIA project areas. This was also despite the fact that one consultant had specifically drawn attention to one project where they may have been conflicted.

243. My opinions above reflect those which I expressed in my provisional report. In response, DPTI considered that while the GIA project procurement process could have been 'improved with more explicit attention given to the issues of conflict of interest', my (provisional) opinion:

- overemphasises the nature and importance of the GIA study as a decision-making document such that a conflict of interest would compromise public policy
- fails to acknowledge the extensive governance and project management process put in place for the GIA study in common with all projects and consultancies associated with the development of the *30-Year Plan for Greater Adelaide*
- fails to acknowledge that these arrangements were developed and put in place before the select tender process for the GIA study was concluded
- fails to acknowledge that all three tender proposals would have had conflicts of interest owing to the small pool of available consultants and that this was a key reason why strong internal governance processes were established
- incorrectly suggests that, at the capability stage, there was a need for conflict of interest matters to be addressed (on the assumption, addressed above, that this stage represented the commencement of the procurement process)
- fails to acknowledge that there is no evidence that would suggest an ethical breach or offence was committed in these matters, and
- ignores the fact that there were several organisational and staffing changes that occurred during the process that had an impact on the manner in which the procurement process was undertaken.¹³⁷

244. These submissions have not persuaded me to change my provisional opinion. Principally, I note DPTI's submissions about the GIA project's strong linkages with the 30 Year Plan. These do not take into account the fact that the GIA project was nonetheless a discrete procurement process, requiring consideration of its own risk management and conflict of interest issues in its Acquisition Plan. Further, I note DPTI's response about

¹³⁷ DPTI response to provisional opinion 4, Ombudsman provisional report.

‘the extensive governance and project management process’ put in place by Planning SA for the GIA project:

... to ensure that conflicts of interest were appropriately addressed-the GIA study was subject to a number of internal governance arrangements, in common with all of the work associated with the development of the *30-Year Plan for Greater Adelaide*.¹³⁸

245. However, no substantiating evidence was provided by DPTI of these governance arrangements addressing consultant conflict of interest in relation to the GIA project itself, during the procurement process.
246. DPTI also submitted that Planning SA staff ‘were aware’ that all three consultants who submitted a tender proposal had experience working in the areas to be considered as part of the GIA study. This was (understandably) seen as one of the criteria which would ‘add benefit’ to a tender. However DPTI added:
- The awareness of the conflict of interest that this would give rise to is precisely why the [GIA] report was seen as an input only into the 30-Year Plan process itself and not for public release; and it is also why a number of governance filters were established.¹³⁹
247. In my view, this ‘awareness’ of potential consultant conflict of interest should have been addressed during the GIA project procurement and recorded in the Acquisition Plan (and the Risk Management Plan) and Purchase Recommendation.
248. Finally, while I appreciate that there were ‘several organisational and staffing changes’ during the GIA project procurement, my opinion remains that Planning SA failed to properly address the consultants’ potential conflict of interest.

CONNOR HOLMES’ RESPONSES IN THE GIA PROJECT PROCUREMENT PROCESS

249. Connor Holmes’ initial response to Planning SA in their capability statement on 6 August 2008 mentioned areas in which they had worked. Apart from interstate and international projects, they listed the following areas in South Australia where they had been involved in ‘large scale urban growth structure and strategic planning projects’:
- Buckland Park
 - Roseworthy
 - Gawler East
 - Cheetham Salt Works
 - Mount Barker
 - Victor Harbor
 - Goolwa North
 - Playford North/Blakeview/Penfield
 - Mawson Lakes
 - Greater Edinburgh Parks
 - Northfield/Walkley Heights
 - Seaford
 - Munno Para.
250. After being shortlisted, in their proposal to Planning SA dated 15 September 2008, Connor Holmes submitted in their cover letter *inter alia* that they:
- had expertise and experience in ‘most growth areas in metropolitan Adelaide’
 - had ‘current involvement in nearly all of the growth areas identified in the preliminary list of target areas/townships, providing detailed knowledge of the opportunities and

¹³⁸ DPTI response to provisional opinion 4, Ombudsman provisional report.

¹³⁹ DPTI response to provisional opinion 4, Ombudsman provisional report.

constraints impacting upon development capacity and capacity in those areas and offering Planning SA potential cost and/or time savings as a result of that knowledge base'.¹⁴⁰

251. Further in the body of their proposal, Connor Holmes proposed Mr Moseley as the project leader with Mr Dwyer as the project manager. Professor Westacott was also named as a member of their 'panel of experts' on the project. They indicated *inter alia* that they had undertaken large scale urban growth structure planning and strategic planning projects including (relevantly):

- Buckland Park
- Roseworthy
- Gawler East
- Cheetham Salt Works
- Mt Barker
- Victor Harbour
- Goolwa North
- Playford North/Blakeview/Penfield
- Mawson Lakes
- Greater Edinburgh Parks
- Northfield/Walkley Heights
- Seaford
- Munno Para West.

252. They advised that these projects:

... typically involved spatial evaluations and definition of development areas; establishment of and assessment against key criteria (physical, servicing, environmental and cultural); structure planning, calculation of population and dwelling capacities; evaluation of a range of density outcomes; calculation of employment needs and the retail, commercial, community, education and recreational requirements of those proposed populations; definition of the spatial consequences of those requirements; land and floorspace supply / demand analysis and market investigations; and staging / programming prioritisation.¹⁴¹

253. Connor Holmes referred to their proposal for the 30 Year Plan consultancy:

A process is underway to appoint a consultant to develop the 30 year plan for the Greater Adelaide. Connor Holmes, in association with KPMG, has submitted a separate proposal to Planning SA to act as the lead consultancy for this separate but intrinsically linked project. Clearly a close relationship will need to be established between the project team(s) that may ultimately be selected to deliver each project.

Accordingly, Connor Holmes have partnered with KPMG in both project bids with Jennifer Westacott, Brendan Rynne and Bernard Salt (all senior KPMG representatives) proposed to sit on a 'Panel of Experts for this Growth Options study to engage with the project on a number of occasions at critical milestone points where insightful direction and decisions are required'.¹⁴²

CONNOR HOLMES' INVOLVEMENT IN MOUNT BARKER - CONFLICT OF INTEREST

254. In their response to Planning SA's request for a capability statement on 6 August 2008 and in their proposal dated 15 September 2008, Connor Holmes identified that they had

¹⁴⁰ Cover letter from Connor Holmes to Planning SA dated 15 September 2008; Connor Holmes Proposal - 'Identifying and Prioritising Potential Long term Growth Options for Greater Adelaide', September 2008, p1.

¹⁴¹ Connor Holmes Proposal - 'Identifying and Prioritising Potential Long Term Growth Options for Greater Adelaide', September 2008, p26.

¹⁴² Connor Holmes Proposal - 'Identifying and Prioritising Potential Long Term Growth Options for Greater Adelaide', September 2008, p2.

been involved in six of the 12 identified GIA project areas. One of these areas was Mount Barker.

255. Four other of the eight consultants who responded with capability statements identified involvement either past or current in the Mount Barker area; and the other two final proposals for the GIA project also identified Mount Barker as an area in which they had past or current project involvement.
256. I have previously expressed my view that the procurement documentation shows that Planning SA failed to identify potential consultant conflict of interest when it considered those responses which identified consultant involvement in the proposed GIA project areas.
257. Connor Holmes identified that they had 'current involvement in nearly all of the growth areas identified in the preliminary list of target areas/townships'.¹⁴³ They did not articulate the precise names of any projects or their clientele; and I note that they were not specifically required to.
258. However, such was the nature of Connor Holmes' involvement in Mount Barker that in my view, they had a clear conflict of interest. Documents provided to my investigation show that prior to and throughout the duration of the GIA project procurement process, Connor Holmes were acting as a planning consultant for five developers in the Mount Barker area (**the Mount Barker Consortium**) and making representations to the Minister on behalf of the Consortium to encourage expansion and development in the area. This was known by relevant Planning SA officers.
259. Despite this, no documentation relating to the procurement process provided to my investigation shows any mention of Connor Holmes' involvement in Mount Barker and its representation of the Consortium, let alone that this presented a conflict of interest, potential or otherwise.
260. I set out below, communications involving Connor Holmes, the Minister and Planning SA and DPLG¹⁴⁴ concerning Mount Barker, prior to, during, and subsequent to the GIA project procurement process.

Letter dated 1 April 2008 from Connor Holmes to the Minister

261. By (an unsigned) letter dated 1 April 2008, Connor Holmes wrote to the Minister advising of their representation of five land developers (the Mount Barker Consortium) in the area and bringing to his attention 'the urgent need to review the boundary of the Mt Barker township'. They write that these 'five land developers with substantial property interests':

... have come together to forward a proposition regarding the comprehensive expansion of Mt Barker to meet the future needs of the metropolitan market.¹⁴⁵

262. They write that some of the developers had approached the District Council of Mount Barker (**the council**) regarding the need to rezone these landholdings; but:

... there is a sense that the Council is unlikely to move on this matter at this time and possibly not in the future as well. The perception is that many councillors consider that Mt Barker is, and should remain, a small country township ... the reality is that Mt Barker

¹⁴³ Cover letter from Connor Holmes to Planning SA dated 15 September 2008; Connor Holmes - 'Identifying and Prioritising Potential Long Term Growth Options for Greater Adelaide', September 2008, p1.

¹⁴⁴ Planning SA's name was changed to the Department of Planning and Local Government (DPLG) on 16 October 2008, two days after the GIA project consultancy was awarded to Connor Holmes.

¹⁴⁵ Letter from Connor Holmes to the Minister dated 1 April 2008, p2.

functions as part of the metropolitan area and pressure for its development is only likely to increase.¹⁴⁶

263. They advise that the Mount Barker Consortium:

... control the majority (but not all) of the land on the southern and eastern boundaries of the Mt Barker township. By combining their interests, it has been possible to evolve a comprehensive plan for the future expansion of Mt Barker. That concept plan and the analysis of factors pertinent to the future development of the area are contained in the attached plans. In summary, the concept delivers the following:

- expansion of the township boundary by some 1130 hectares;
- delivery of more than 700 hectares of residential land, capable of providing up to 7700 dwellings at 'township' densities;
- creation of a comprehensive of an open space network of some 350 hectares and linking all key activity nodes, schools and recreation facilities, including linkages with the existing township;
- delivery of a series of activity nodes to serve the schooling, recreation, community, commercial and convenience retailing needs of the growth areas;
- creation of employment precincts within the activity nodes to meet the commercial and service activity needs of the surrounding population;
- provision for expansion of key stormwater detention and sewerage treatment capacity;
- provision of a second freeway access to Mt Barker (at Bald Hills Road), reducing reliance on the single access point currently available (Adelaide Road) and avoiding the need to direct commercial traffic through the centre of the township;
- provision of key linkages in the secondary road network to improve connectivity within and around the township.¹⁴⁷

264. The plans attached to the letter by Connor Holmes were:

- a Summary of Development Activity Population Growth and Prices in Metropolitan Adelaide and Mount Barker
- Township Expansion Assessment Criteria
- Mount Barker - Potential Residential Development - Traffic Review (prepared by QED Pty Ltd for Connor Holmes)

265. On behalf of the Mount Barker Consortium, Connor Holmes sought the Minister's consideration of a 'Ministerial Review of the Township Boundary'; a Ministerial Development Plan Amendment under the Development Act; or 'declaration as a Major Development'. They further comment that:

Should the Minister favour the rezoning approach, then the Mt Barker Consortium would be willing to fund the Development Plan Amendment and provide the consultant team expertise to undertake the investigations and deliver the necessary documentation for the rezoning, always recognising that a decision to accept the document and proceed with the rezoning remains the absolute discretion of the Minister.¹⁴⁸

Letter dated 16 June 2008 from Connor Holmes to the Minister

266. On 16 June 2008 apparently following discussions, Connor Holmes wrote to the Minister providing advice on alternative approaches 'to facilitate the proposed township boundary review' at Mount Barker, in the form of a Ministerial Development Plan Amendment, a Major Development declaration, or (now) a council Development Plan Amendment.

267. Connor Holmes concluded that 'it would be appropriate for the proposed expansion of Mount Barker township to be progressed as either a Ministerial DPA or a Major Development ...'.

¹⁴⁶ Letter from Connor Holmes to the Minister dated 1 April 2008, p2.

¹⁴⁷ Letter from Connor Holmes to the Minister dated 1 April 2008, p2.

¹⁴⁸ Letter from Connor Holmes to the Minister dated 1 April 2008, p4.

268. They recommended against a council Development Plan Amendment, questioning the council's abilities to appreciate the need for, and advantages of, the proposed expansion of the Mount Barker township; and/or understand and address the key issues associated with a 1,130 hectare 'master-planned' development.¹⁴⁹ They comment:

... it will be particularly difficult to attract the support of the District Council of Mount Barker to undertake a Council DPA to rezone the subject land to facilitate a planned expansion of the township of Mount Barker in a timely manner, if at all.¹⁵⁰

Meeting between Connor Holmes and Planning SA on 4 July 2008

269. On 4 July 2008, it appears that Connor Holmes (Mr Holmes and Mr Dwyer) met with two Planning SA officers. The hand written notes of this meeting suggest that Connor Holmes were following up their 1 April 2008 letter to the Minister, and making representations about what the Mount Barker Consortium might contribute to expansion and development, including funding, in the Mount Barker area.

Letter dated 6 August 2008 from the Minister to Connor Holmes

270. By letter dated 6 August 2008, the Minister responded to Connor Holmes advising that he was '... very encouraged that the industry is able to respond to the challenge of land supply and readily provide options such as the Mount Barker proposal you have put forward.'

271. The Minister advised that land at Mount Barker would be part of the GIA project, that is: 'amongst a range of areas considered in a detailed analysis of options to meet the Government's 25 year land supply target.' He added that:

The Government is undertaking growth area investigations which will involve a range of options across a number of localities. This work is to commence shortly and is a very high priority for the Government.¹⁵¹

272. The Minister directed Connor Holmes to contact the Director, Planning Strategy, Planning SA, should they require further information.¹⁵²

273. I comment at this juncture that Planning SA had already invited Connor Holmes (and ten other consultants) to provide a capability statement for the GIA project consultancy (in the 29 July 2008 letter); and Connor Holmes had submitted their capability statement dated 6 August 2008 to Planning SA.

Letter dated 14 August 2008 from Connor Holmes to the Minister

274. On 14 August 2008, Connor Holmes responded to the Minister's 6 August 2008 letter, expressing concern about 'the timelines for delivery of new land and housing to the Mt Barker market as a result of the process now proposed by Government'.

275. Connor Homes wrote that 'urgent action' was required to redress the residential land supply shortage in Mount Barker:

You will note that even under the most rapid turnaround possible, the first dwelling on the first subdivision would not be occupied by a new household for another 4 years. In the case of the process proposed by you, that delivery time frame is likely to be somewhere in the period 2014-2017, by which time, it is expected that land and housing costs may have spiralled out of reach of the low to middle income earner altogether.

¹⁴⁹ Letter from Connor Holmes to the Minister dated 16 June 2008, p3.

¹⁵⁰ Letter from Connor Holmes to the Minister dated 16 June 2008, p4.

¹⁵¹ Letter from the Minister to Connor Holmes dated 6 August 2008.

¹⁵² Letter from the Minister to Connor Holmes dated 6 August 2008.

276. They also expressed concern that if the development process was delayed, the members of the Mount Barker Consortium would be unlikely to stay together:

We also advise that the prospect of holding the Mt Barker Consortium together during a possible further 5 years of uncertainty is slim. The ability of the Consortium to underpin construction of key infrastructure for the township, such as the Adelaide bound on-off ramps to a Bald Hills Road interchange, will diminish if the Consortium members pull out during this hiatus. Further, the value and impact of structure planning for Mt Barker will also be greatly diminished if the land ownership is fragmented over the next few years.¹⁵³

277. Connor Holmes suggested that specific action should be taken to capture the opportunity to progress the expansion of Mount Barker, either through a Ministerial Development Plan Amendment or a Major Development declaration:

We believe the circumstances at Mt Barker require specific action to capture the opportunity that is now available to plan and deliver land required for development over the next 15+ years. Ideally that action would be to proceed with a Ministerial DPA forthwith, however, as noted in our correspondence of 16 June 2008, the process could also be instigated by way of a Major Development declaration, which provides an alternative mechanism to that being proposed for other growth corridors to be investigated by the Planning SA consultancy.¹⁵⁴

278. By the end of August 2008, Planning SA had shortlisted Connor Holmes (and four other consultants) in the procurement process. Then on 1 September 2008, Planning SA invited Connor Holmes and the other four consultants to submit a proposal for the GIA project.
279. On 8 October 2008, the Acting CE signed the minute enclosing the Purchase Recommendation to the Chair of the APU recommending Connor Holmes as the consultant for the GIA project.

Minute from Planning SA to the Minister dated 8 October 2008

280. That same day in a minute to the Minister, the Acting CE and the Director, Strategic Development, Planning SA advised that:
- Connor Holmes represented a consortium of developers that had requested a review of growth options for the Mount Barker township claiming that at current growth rates, there is only 5 years supply of zoned land to accommodate housing demand
 - the proposed development by the Mount Barker Consortium to the east and south of the existing Mount Barker township, involved approximately 1130 hectares of land and would accommodate some 7700 dwellings
 - Connor Holmes had made several submissions on this matter during the public consultation process for the metropolitan Urban Boundary conducted in mid to late 2007, and had undertaken investigations into the impact of expansion
 - the latest correspondence from Connor Holmes, whilst appreciating that Mount Barker had been included as one of the growth options to be investigated, has expressed concern that 'the process proposed will not deliver land to the market in the timeframe it will be required, let alone meeting the admirable targets proposed by the Planning Review'
 - flowcharts provided by the Mount Barker Consortium indicated that '...under the proposed Government processes, growth options consultancy, Planning Strategy preparation and DPA preparation and authorisation, the timeframe could be as long as 5 years, with another 2 to 3 years for subdivision approval, engineering

¹⁵³ Letter from Connor Holmes to the Minister dated 14 August 2008, p1.

¹⁵⁴ Letter from Connor Holmes to the Minister dated 14 August 2008, p2.

and construction. Conversely, the proposal by the Consortium for a Ministerial DPA is estimated to be 2 years for preparation and authorisation of rezoning, with a further 2 to 3 years for subdivision approval, engineering and construction'

- tenders for the GIA project procurement process had been called following receipt of Connor Holmes' correspondence.

281. The minute did not mention that Connor Holmes had tendered for the GIA project, nor that by that date (8 October 2008), Planning SA had evaluated Connor Holmes' proposal for the GIA project (on 27 August 2008) and determined that they were the preferred consultant for the project.¹⁵⁵
282. The minute attached a draft response for the Minister to send to Connor Holmes, which indicated that given the GIA project work was about to begin (which included Mount Barker); that this should be completed within 3 months; and that the Minister was 'not willing at this time to prejudice the outcomes of this work'. It is unclear if this draft letter was finalised and sent to Connor Holmes.
283. Four working days after this minute (on 14 October 2008), Connor Holmes and a representative of the Minister signed the GIA project consultancy agreement.
284. In my view, there was a conflict of interest in Connor Holmes being charged with the task of investigating growth potential in Mount Barker in the GIA project, and their representation of the Mount Barker Consortium seeking to expand and develop in the area.
285. None of the GIA project procurement documentation provided to my investigation made any mention of Connor Holmes' representations to the Minister on behalf of the Consortium about expanding Mount Barker, let alone identify this as a conflict of interest in the procurement's Acquisition Plan and Risk Management Plan.
286. It is clear from the documentation that before and during the GIA procurement process, relevant Planning SA officers knew of Connor Holmes' representation of the Mount Barker Consortium and their advocacy for expansion and development in the area to the Minister. However, it was not identified that Connor Holmes were conflicted in relation to GIA project work in the area. In my view, this failure infected the integrity of the procurement.
287. As a result, the matter later became the subject of debate in the Legislative Council, discussion in the media, and representations by the community to the Minister. It appears that it left some in the Mount Barker community feeling, quite understandably, suspicious of the process.¹⁵⁶

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- Before and during the GIA project procurement process, Connor Holmes were making concerted representations to the Minister about expanding and developing Mount Barker, on behalf of five developers, the Mount Barker Consortium. Further, Connor Holmes had identified in the procurement process that they had involvement in the Mount Barker area. In my view, Connor Holmes were therefore conflicted in relation to the proposed GIA project work concerning Mount Barker.

¹⁵⁵ See cover minute from Acting Chief Executive, Planning SA to Chair Accredited Purchasing Unit, PIRSA dated 8 October 2008, p2.

¹⁵⁶ See South Australia, *Parliamentary Debates*, Legislative Council, 3 June 2009, 2485-89; 17 June 2009, 2648-51; 23 September 2009, 3337-43 (The Hon. M. Parnell); 'Not for sale - The fight for the future of Mt Barker', *SA Weekend Magazine*, *The Advertiser* (Adelaide), 21 August 2009, 8; Evidence of Mr Ian Grosser, transcript of the Environment Resources and Development Committee, Mount Barker Urban Growth DPA, 27 January 2011, p22.

- This conflict of interest was not identified by Planning SA in any of the procurement documentation, including the Acquisition Plan and Risk Management Plan.
- This failure tainted the procurement process and became the subject of debate in the Legislative Council and the media; and it left some in the Mount Barker community feeling understandably suspicious of the process.

288. In response to my provisional report expressing my opinion above, DPTI commented that Planning SA staff would have been aware that Connor Holmes had contact with the Minister about development at Mount Barker before the start of the GIA procurement, and that 'this was not a circumstance that was unique':

In fact, all of the consultants who were approached as part of the select tender process has, at various times represented clients who owned land in one or more of the potential growth areas that would be the subject of the GIA study.

Indeed, it was for this very reason that the then Director, Strategy and Sustainability ... and Acting Chief Executive ... put in place the integrated governance arrangements with multiple filters to mitigate against conflicts of interest - whoever the successful tenderer would be.¹⁵⁷

289. Despite this response, the fact remains that during the procurement process Connor Holmes' conflict of interest in relation to Mount Barker was not and should have been identified and managed.

CONFLICT OF INTEREST IN THE GIA PROJECT PROCUREMENT - SEEKING LEGAL ADVICE

290. In their bid for the GIA project, as I have previously reported, Connor Holmes named Mr Moseley as their leader of the project, and KPMG was listed as one of the sub-contractors in the project.¹⁵⁸ Connor Holmes listed Professor Westacott as one of the four members of its 'Key Personnel' and its 'Panel of Experts'.¹⁵⁹ In relation to the 30 Year Plan tender, KPMG proposed Professor Westacott as its representative, and listed Mr Moseley together with Professor Westacott as the project leadership team.¹⁶⁰ In the 30 Year Plan contract, Connor Holmes was listed as the first of eight approved sub-contractors.

291. The GIA project procurement was run concurrently with the 30 Year Plan procurement. The 30 Year Plan Acquisition Plan was approved on 30 July 2008; requests for offer were sought on 18 August 2008; offers were evaluated between 9-17 September 2008; and a Purchase Recommendation was approved by the State Procurement Board on 13 October 2008.¹⁶¹ This procurement was ultimately forwarded to the Board for approval, because it went above PIRSA's procurement authorisation of \$1.1m.

292. I understand that during the procurement process for the 30 Year Plan, no potential consultants identified any conflicts of interest in their tender bids.¹⁶²

293. Documents provided to my investigation show that on 15 September 2008, the day the proposals for the GIA project were received by Planning SA, PIRSA's Procurement

¹⁵⁷ DPTI response to provisional opinion 5, Ombudsman provisional report.

¹⁵⁸ Other approved sub-contractors in the consultancy agreement were Kath Moore & Associates, Scholefield Robinson Horticultural Services, Environmental and Diversity Services.

¹⁵⁹ 'Proposal: Identifying and Prioritising Potential Long Term Growth Options for Greater Adelaide' prepared by Connor Holmes for Planning SA, September 2008, Executive Summary.

¹⁶⁰ KPMG 'Proposal for Lead Consultancy for the development of a 30-year Plan for Greater Adelaide' dated September 2008.

¹⁶¹ Section 1, Contract Management Plan of the 'Consultancy for 30 Year Plan for Greater Adelaide', p3.

¹⁶² Email from Director, Strategy and Sustainability, Planning, SA to PIRSA dated 7 October 2008.

Advisor Unit sent an email to the Crown Solicitor's Office. The email stated that after three offers had been received for the 30 Year Plan tender, 'a concern [was] raised by Minister Holloway's office that there may be a perception that there is a conflict of interest ...'. This was because:

- One of the consultancies was responsible for recent review of South Australia's Planning and Development System (and the lead reviewer from that project has been proposed as a member of the team for this project)
- Members of one of the other consultancy teams are former employees of Planning SA.¹⁶³

294. Subsequently, on 29 September 2008, the Crown Solicitor provided advice to Planning SA. The advice considered:

- Professor Westacott's involvement as lead reviewer in the Planning and Development Review (and her partnership at KPMG) and her membership of the steering committee formed to advise the Minister on the implementation of the *Planning Reforms 2008* package
- Mr Moseley's recent resignation from the review's steering committee and his subsequent employment by Connor Holmes, which together with KPMG, was one of the potential consultants in the 30 Year Plan consultancy
- the recent resignation of the Director, Planning Strategy, Planning SA¹⁶⁴ and his employment by one of the bidders for the 30 Year Plan consultancy.

295. In relation to both Professor Westacott and Mr Moseley, the Crown Solicitor considered that their engagement on the 30 Year Plan may give rise to perceptions of conflict of interest or breach of confidence concerns.

296. As a result, Mr Moseley signed a confidentiality declaration in relation to information to which he had had access or would have access as a member of the Planning and Development Review Implementation Steering Committee. He undertook not to disclose or use this information to secure a benefit for Connor Holmes, any Connor Holmes client or any other party. Mr Moseley also stated in the declaration that he had not 'disclosed any Confidential Information to Connor Holmes' for the purposes of the tender bid for the 30 Year Plan 'or any other tender bid'.¹⁶⁵

297. Professor Westacott and the former Director, Planning Strategy also signed confidentiality declarations on 10 and 8 October 2008 respectively.¹⁶⁶

298. I note that the Board approved the 30 Year Plan consultancy on the understanding *inter alia* that the advice provided by the Crown Solicitor in relation to the management of conflict of interest had been followed.

299. I have previously referred to Planning SA's GIA project Purchase Recommendation to the APU dated 13 October 2008, and the recording in the Acquisition Plan under 'Other Relevant Information' and 'Explain any conflict of interest matters that have been declared and how they have been dealt with':

While the Crown Solicitors office representative confirmed that no conflict of interest exists with representatives from Connor Holmes a confidentiality declaration to [sic] a member has been signed as they are currently part of the Planning and Development Implementation Steering Committee. This advice was received for the Greater Adelaide project.

¹⁶³ Email from Procurement Development Officer, PIRSA to Crown Solicitor's Office dated 15 September 2008.

¹⁶⁴ My investigation was informed that the Director, Planning Strategy resigned from Planning SA on 8 August 2008 and ceased work on 22 August 2008.

¹⁶⁵ Confidentiality Declaration of Mr Stuart Moseley, Connor Holmes dated 1 October 2008.

¹⁶⁶ Section 1 of the Contract Management Plan of the 'Consultancy for 30 Year Plan for Greater Adelaide', p3.

300. While Mr Moseley's (and Professor Westacott's) declaration addresses potential or perceived conflicts of interest in relation to his position on the review's implementation steering committee and KPMG and Connor Holmes' bid for the 30 Year Plan project, it does not address the potential conflict of interest in Connor Holmes' representation of the Mount Barker Consortium and Connor Holmes' tender for the GIA project (on which Mr Moseley was proposed as Project Leader of the consultancy).
301. There is no suggestion from the documentation obtained in my investigation that Planning SA alerted or requested advice about conflict of interest from the Crown Solicitor about Connor Holmes' involvement in the GIA project - about Mr Moseley and Professor Westacott or Connor Holmes' representation of the Mount Barker Consortium - when they sought advice in relation to Mr Moseley (and Professor Westacott and the Director, Planning Strategy) and the 30 Year Plan tender. In my view, Planning SA should have, given that the GIA and 30 Year Plan procurements were running concurrently; the fact that Connor Holmes and Mr Moseley (and KPMG) were key players in both; and the high stakes of the 30 Year Plan, and the GIA project being a 'major research and policy initiative'.¹⁶⁷
302. At this juncture, I record that in response to my provisional report, Connor Holmes were concerned to advise that one of the arrangements that they had put in place to help manage 'any conflict between our Government (GIA and 30 Year Plan) and our Mt Barker Consortium commission' was to 'nominate Mr Moseley as project leader of the of the former and to "insulate" him from any involvement in the latter'. Connor Holmes were concerned that an (incorrect) inference could be drawn that Mr Moseley had acted contrary to the PIA Code. I comment that this is not a matter which is the subject of my investigation.
303. I note that PIRSA's Procurement Advisor Unit rightly questioned Planning SA in an email dated 9 October 2008, whether advice had been sought from the Crown Solicitor's Office in relation to the conflict of interest issues associated with the GIA project. It is not clear which aspect of conflict of interest the email is referring to. My investigation found no response to this email in the procurement documentation.
304. By notifying and seeking advice from the Crown Solicitor about the GIA project, in particular, Connor Holmes' representation of the Mount Barker Consortium, any probity risk that Connor Holmes' appointment may have presented to the Mount Barker aspect of the project might have been mitigated.
305. It is also evident from the documentation that Planning SA provided no information to the Board about Connor Holmes' potential conflict of interest in the GIA project, when the 30 Year Plan Purchase Recommendation was provided for probity approval by the Board on 13 October 2009. I appreciate that under the Board's guidelines that it was not required to, as it did not exceed PIRSA's procurement authorisation. However, given the link between the two procurements, the involvement of Connor Holmes, and the advice from the Crown Solicitor, Planning SA would have been well advised to notify the Board of the additional GIA project procurement.
306. I note the Board's Acquisition Planning Guideline at the time invited public authorities to approach the Board to seek an independent assessment of their acquisition plans, where the political risks were high:

... public authorities may choose to voluntarily forward the procurement acquisition plan (irrespective of value) to the Board to seek an independent assessment, where the procurement presents either an extremely high level of residual risk to government (including political risk) or where it has a potential across government impact.¹⁶⁸

¹⁶⁷ Project Brief - Identifying and Prioritising Potential Long Term Growth Options for Greater Adelaide, September 2008.

¹⁶⁸ State Procurement Board, Acquisition Planning Guideline, Version 6.0: Date Issued: February 2008, p4.

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Planning SA should have alerted the Crown Solicitor and sought advice about the probity implications of Connor Holmes' conflict of interest in relation to Mount Barker, at the same time as it requested and received advice about conflict of interest involving a Connor Holmes' representative in respect of the 30 Year Plan procurement.

This may have mitigated any risk that the appointment of Connor Holmes as the GIA project consultants presented, in relation to the Mount Barker aspect of the project.

307. DPTI responded to my opinion above in my provisional report, and advised that it regarded it as 'misleading'. It commented:

It ignores the reality that the GIA study was managed as a sub-project for the development of the 30-Year Plan, along with a number of other associated studies It also ignores the fact that the issues of conflict of interest were being handled through the integrated governance arrangements that had been put in place for all of the 30-Year Plan projects.¹⁶⁹

308. This response fails to recognise that the GIA project procurement was a discrete tender process, with its own requirements to follow the Board's policies and guidelines and its own unique risk factors. No evidence was presented to my investigation to show how the issue of Connor Holmes' conflict of interest in relation to Mount Barker was 'handled through the integrated governance arrangements' during the GIA procurement process.

IDENTIFICATION OF CONNOR HOLMES' CONFLICT OF INTEREST AND CONTINUED INVOLVEMENT IN MOUNT BARKER - AFTER THE PROCUREMENT PROCESS

309. Documents provided to my investigation show that after the GIA project procurement process and the awarding of the consultancy to Connor Holmes, it was acknowledged that Connor Holmes had a conflict of interest in relation to Mount Barker. However, in my view, this still was not dealt with or managed by DPLG (formerly Planning SA)¹⁷⁰ in a timely way.
310. By email dated 6 November 2008, three weeks after Connor Holmes had been awarded the GIA consultancy, Mr Dwyer of Connor Holmes commented to the Director, Strategy and Sustainability, Planning SA that when Connor Holmes tendered for the GIA project 'there may be some perceived conflicts of interest within the existing projects we are (or have) undertaken for the private sector.' Mr Dwyer referred to Connor Holmes' tender documents in which they had identified the 'large scale urban growth structure planning and strategic planning projects being undertaken'.¹⁷¹
311. This is confirmed in a letter dated 18 November 2008 from Connor Holmes to the Deputy Chief Executive of DPLG.¹⁷²
312. Nonetheless, it appears that by 17 November 2008, Connor Holmes had been requested to produce an analysis of Mount Barker 'as a growth investigation area' earlier than the

¹⁶⁹ DPTI response to provisional opinion 6, Ombudsman provisional report.

¹⁷⁰ Planning SA became the Department of Planning and Local Government (DPLG) on 16 October 2008, two days after the GIA consultancy was awarded to Connor Holmes.

¹⁷¹ Email from Mr Richard Dwyer, Connor Holmes to Director, Strategy and Sustainability, DPLG dated 6 November 2008. These locations are quoted previously in my report, from Connor Holmes' capability statement dated 6 August 2008 and their response to the request for offer dated 15 September 2008.

¹⁷² Letter from Mr Stephen Holmes, Connor Holmes to Deputy Chief Executive Officer, DPLG, Mr John Hanlon dated 18 November 2008. Connor Holmes confirm that Mr Dwyer emailed the Director, Strategy and Sustainability, DPLG on 12 November 2008 detailing Connor Holmes' 'involvement in a range of current and possible future urban development projects'.

other areas listed in the consultancy agreement. It was hoped that this analysis would be delivered to the Minister by December 2008.¹⁷³

Letter from the Chief Executive, DPLG to Connor Holmes dated 18 November 2008

313. By letter dated 18 November 2008, the Chief Executive, DPLG, Mr Ian Nightingale (**the Chief Executive**) wrote to Mr Moseley ‘in relation to the Growth Investigation Areas consultancy you are undertaking on behalf of the Minister for Urban Development and Planning.’¹⁷⁴
314. The Chief Executive noted that the Minister had requested that ‘investigations into Mount Barker be accelerated such that a Ministerial Development Plan Amendment can be initiated prior to the end of the year.’¹⁷⁵
315. The Chief Executive expressed DPLG’s requirements to Connor Holmes, for:
- a revised project plan for Mount Barker
 - a preliminary report by 19 December 2008 identifying the opportunities and constraints for future development at Mount Barker
 - the findings for Mount Barker to be incorporated into the final GIA project report due by 13 February 2009 and into the 30 Year Plan.
316. The Chief Executive added in the letter that he trusted that ‘... this does not require a formal amendment to the [GIA] contract.’¹⁷⁶
317. There is no reference in this letter to Connor Holmes’ representation of the Mount Barker Consortium, or the need to deal with Connor Holmes’ conflict of interest in conducting the accelerated investigations in relation to Mount Barker.

News release dated 6 November 2008

318. I note that in the News Release on 6 November 2008, the Minister had announced that the GIA project would begin by ‘evaluating land in the Adelaide hills in the vicinity of Mount Barker, Littlehampton and Nairne.’ It read:

‘Mount Barker is one of the most rapidly growing areas in Australia,’ Mr Holloway says.

‘Not surprisingly there has been strong interest in further developing Mount Barker to the south and east, which requires a thorough evaluation of the township boundaries to enable appropriate rezoning and planning, such as the requirement for additional access to the South east freeway.

‘The review of the township boundaries in this fast growing part of the Adelaide hills will include input from the District Council of Mount Barker as well as relevant government agencies.’¹⁷⁷

319. In my view, it is reasonable to conclude that this ‘strong interest in further developing Mount Barker’ was Connor Holmes and the Mount Barker Consortium’s representations to the Minister. I note also from a minute to the Minister in May 2009 recommending the initiation of a Ministerial Development Plan Amendment at Mount Barker, that it is recorded that the ‘GIA project analysis was “fast-tracked” by the Department in late 2008 ...’¹⁷⁸

¹⁷³ See email from Director, Strategy and Sustainability, DPLG to Chief Planning Officer, DPLG dated 17 November 2008.

¹⁷⁴ Letter from Chief Executive, DPLG, to Mr Stuart Moseley, Connor Holmes dated 18 November 2008.

¹⁷⁵ Letter from Chief Executive, DPLG to Mr Stuart Moseley, Connor Holmes dated 18 November 2008.

¹⁷⁶ Letter from Chief Executive, DPLG to Mr Stuart Moseley, Connor Holmes dated 18 November 2008, p2.

¹⁷⁷ News Release ‘Growth Investigation Areas project announced’, 6 November 2008, <http://www.planning.sa.gov.au/index.cfm?objectid=71B867FB-F203-0D46-AFEAED916E25FD2B> (as at 2 November 2012).

¹⁷⁸ Minute to the Minister ‘Initiation- Mount Barker Township Expansion Development Plan Amendment’ dated 14 May 2009.

Letter from Connor Holmes to the Chief Executive, DPLG dated 27 November 2008

320. Connor Holmes confirmed the Chief Executive's arrangements above in a letter dated 27 November 2008, advising that they would be pleased to assist the Minister:

... by accelerating GIA investigations in Mount Barker. In particular, we would be pleased to provide investigations on the opportunities and constraints for the future development of Mount Barker as well as background analysis to assist the Minister in potentially initiating a Ministerial DPA for the township.

We appreciate your intention to 'marry' this into the existing GIA work plan in order to avoid the need for any contract variation.

We therefore propose to submit an 'interim report' which outlines the findings to date of the GIA work as it relates to Mount Barker, together with such additional analysis as can be feasibly 'brought forward' given the tight timeframes applying to the GIA project.¹⁷⁹

321. Connor Holmes proposed that this work would be under the auspice of the GIA consultancy agreement (and for the agreed fixed fee outlined in Schedule 3 of the GIA project contract), and that the preliminary report would be provided on 19 December 2008.
322. After proposing a time frame for completion of their tasks and confirming that the 'full findings of Mount Barker' would be reported by 24 February 2009, Connor Holmes added in the letter:

We trust these arrangements will be acceptable to you and that the proposed accelerated output and deliverables for Mount Barker will satisfy your immediate needs and be sufficient to enable the potential initiation of a Ministerial DPA for Mount Barker in 2008.¹⁸⁰

323. It is hard to see from this email whose interests Connor Holmes are serving at this time - the government's, in conducting the GIA project analysis or the Mount Barker Consortium and their desire for a Ministerial Development Plan Amendment.

Letter from Connor Holmes to the Chief Executive, DPLG dated 8 December 2008

324. Documentation received by my investigation shows that in a letter dated 8 December 2008, Connor Holmes confirmed to the Chief Executive that they would not make representations on behalf of their clients to the Minister or DPLG in respect of possible Development Plan Amendments in relation to GIA project areas 'until such time as [the GIA] report is submitted to DPLG'. Connor Holmes reaffirmed in the letter that they had disclosed their involvement in projects which may include land contained within possible GIA project areas, prior to being selected to undertake the GIA project.¹⁸¹

Minutes of DPLG project meeting - 12 December 2008

325. Minutes of a DPLG project meeting on 12 December 2008 show that there was more overt recognition of Connor Holmes' 'dual role'. It is recorded that the Deputy Chief Executive, DPLG advised the meeting that:

Connor Holmes have undertaken not to be making any representations to state and local government on behalf of their other clients until February 2009, when the GIA work is scheduled for completion.¹⁸²

¹⁷⁹ Letter from Mr Stephen Holmes, Connor Holmes to Chief Executive, DPLG dated 27 November 2008.

¹⁸⁰ Letter from Mr Stephen Holmes, Connor Holmes to Chief Executive, DPLG dated 27 November 2008, p2.

¹⁸¹ Letter from Mr Stephen Holmes, Connor Holmes to Chief Executive, DPLG dated 8 December 2008. This is recorded in a letter dated 19 May 2009 from Mr Stuart Moseley, Connor Holmes to Director, Strategy and Sustainability, DPLG.

¹⁸² Minutes of Plan for Greater Adelaide Project Control Group meeting, 12 December 2008, p3.

326. The minutes further record that Connor Holmes 'dual role' was discussed during council workshops, with attendees 'expressing general comfort with their involvement on the GIA project and a general view that their work has been very good'.
327. The minutes also record concerns about the Mount Barker Development Plan Amendment and the GIA project being progressed in the same time frame. A DPLG officer:
- ... raised the matter of Mt Barker Council's DPA being progressed during the same time frame as the GIA work in the area was progressing, causing un-necessary political difficulties in achieving the results sought. John Hanlon advised that his view on this was that all of the key stakeholders in this matter had a strong preference for the DPA to await finalisation of the GIA project.¹⁸³
328. I note from the minutes that the Deputy Chief Executive was to seek deferral of the Mount Barker Development Plan Amendment during the GIA project time frame.
329. It appears that Connor Holmes' preliminary report on Mount Barker was completed by 23 December 2008.¹⁸⁴ I note that the Chief Planning Officer reported that he had a 'number of misgivings'. One, for example, was that the proposed urban boundary was 'the same as that put to the Minister earlier in the year by the consortium of developers'.¹⁸⁵
330. Five months after submitting their draft recommendations on the GIA project to DPLG, Connor Holmes advised DPLG:
- ... any future commissions we might receive in relation to affected land are not subject to the same risk of a perception of conflict of interest. For this reason, where we receive a new commission in relation to land affected by the GIA recommendations that have been presented to you, we would not propose to disclose this involvement in writing.¹⁸⁶
331. However, they undertook to advise of their involvement in additional areas not previously itemised, if those areas were reflected in their final recommendations.¹⁸⁷
332. The events which I have recounted above from the available documentation suggests that there developed a greater awareness of Connor Holmes' conflict of interest in their role as a representative of the Mount Barker Consortium and their role as the GIA project leader. Steps were put in place to try and manage or mitigate this conflict, such as Connor Holmes' agreeing not to make representations to the government regarding Development Plan Amendments.
333. In my view, this was too little and too late.
334. I note and agree with the comments of the Crown Solicitor in this regard:
- In any Government procurement process the basic starting point should be that, unless there are compelling reasons to the contrary, a conflict of interest situation whether actual or perceived should not be permitted ...
- ...
- ... in the context of Government procurement processes the generally accepted principal [sic] is that processes must be free, and be seen to be free, of conflict and bias in decision-making. This is essential for maintaining public confidence in the integrity of these

¹⁸³ Minutes from Plan for Greater Adelaide Project Control Group meeting, 12 December 2008, p3.

¹⁸⁴ See email from Chief Planning Officer, DPLG to Director, Strategy and Sustainability and Deputy Chief Executive, DPLG dated 23 December 2008.

¹⁸⁵ Email from Chief Planning Officer, DPLG to Director, Strategy and Sustainability, DPLG and Deputy Chief Executive, DPLG dated 23 December 2008.

¹⁸⁶ Letter from Mr Stuart Moseley, Connor Holmes to Director, Strategy and Sustainability, DPLG dated 19 May 2009.

¹⁸⁷ Letter from Mr Stuart Moseley, Connor Holmes to Director, Strategy and Sustainability, DPLG dated 19 May 2009.

processes. Public perception as to the operation of such processes is of the utmost importance.¹⁸⁸

335. On 1 May 2009, Connor Holmes submitted the draft GIA project report to DPLG and the final report was provided on 12 June 2009.

OPINION

7

It was only after the conclusion of the GIA project procurement process and the engagement of Connor Holmes as the consultant to conduct the project (on 14 October 2008), that it was formally acknowledged that Connor Holmes had a conflict of interest in relation to the GIA study area of Mount Barker.

Before this acknowledgement and Connor Holmes' subsequent undertaking not to make representations on behalf of their clients in relation to Development Plan Amendments, Connor Holmes were requested to 'fast track' an analysis of Mount Barker as a growth investigation area by December 2008, so that a Ministerial Development Plan Amendment could be initiated prior to the end of 2008

Furthermore, this analysis was conducted and concluded by 23 December 2008, under the auspice of the GIA project consultancy agreement.

336. In response to my provisional report, Connor Holmes were concerned that I point out in my report that in relation to both their GIA and the Mount Barker work, their investigations and advice were 'not determinative in and of themselves, much less did they constitute a delegated decision or predetermine a final outcome'.

Neither the GIA nor the 30 Year Plan constitute rezoning instruments. They ... constitute statements of policy direction, the implementation of which is subject to subsequent statutory decisions by Government and others.

...

Connor Holmes' work on the accelerated Mt Barker investigations was undertaken at the instruction of the Department and, as is clear from your report, was independently scrutinised by the Department prior to deciding whether and how this work should be carried forward in any DPA that the Minister might consider. In addition, Ministerial deliberations on the DPA were subject to another layer of independent review via the Development Policy Advisory Committee.¹⁸⁹

337. DPTI responded to my opinion above in my provisional report, that:
- officers involved in the process of planning and delivering the GIA study procurement did not intend that the study would be used to support any rezoning
 - the decision to 'fast track' the rezoning of Mount Barker was taken separately from the GIA study
 - staff involved were acting in accordance with those decisions
 - staff noted the potential for the two separate processes to be 'conflated' and raised these issues.¹⁹⁰

338. DPTI also commented that:

... consistent with the technical nature of the GIA study, the function performed by the consultants in respect of the GIA study was to analyse the capability of the land at Mount Barker to support urban growth. This was done consistent with the methodology agreed between DPLG and the consultants for assessment of all growth areas identified for analysis as part of the GIA study. This process also included detailed discussions with

¹⁸⁸ Advice of the Crown Solicitor dated 29 September 2008.

¹⁸⁹ Letter from Connor Holmes to Ombudsman dated 3 December 2012, p3.

¹⁹⁰ DPTI response to provisional opinion 7, Ombudsman provisional report.

representatives of the District Council of Mount Barker as part of the consultation undertaken with all councils throughout the GIA study timeframe. Ultimately, the question of inclusion of this land in a rezoning exercise was a separate decision.¹⁹¹

339. These submissions have not changed my views.

¹⁹¹ DPTI response to provisional opinion 7, Ombudsman provisional report.

paragraph I (b) of the referral

**THE PROBITY INVESTIGATION UNDERTAKEN BY THE STATE
PROCUREMENT BOARD IN RELATION TO THE DECISION
AWARDING A CONTRACT TO CONNOR HOLMES
FOR THE PREPARATION OF THE
GIA REPORT**

MY INVESTIGATION'S COMMUNICATIONS WITH THE BOARD AND DPTI

340. In my notice of investigation to the Chair of the Board dated 30 June 2012, I posited questions about the 'probity investigation' as described in paragraph I (b) of the referral by the Legislative Council.

341. The Chair of the Board's response dated 12 July 2012 appeared to confuse the GIA project procurement with the 30 Year Plan procurement. It became apparent to my investigation that the Board did not conduct any probity investigation in relation to the GIA project procurement. This was confirmed by the Board's Director, Procurement Policy and Governance with the Deputy Ombudsman at a meeting on 7 August 2012, and also by the Chair in his response to my provisional report, dated 4 December 2012.

342. Further, in my notice of investigation to DPTI dated 5 July 2012, I asked the Chief Executive to address concerns about 'the probity investigation undertaken by the State Procurement Board in relation to the decision awarding a contract to Connor Holmes for the preparation of the Growth Investigation Areas report, including the findings and advice arising from that probity investigation'.¹⁹² In response, DPTI advised:

To the best of our knowledge, no investigation was undertaken on this matter.¹⁹³

Due to the size and nature of the procurement the approving body was in fact PIRSA Accredited Purchasing Unit and not the State Procurement Board.¹⁹⁴

343. In response to my question: 'What in the department's view is the "probity investigation" by the Board, referred to in the terms of reference of the Legislative Council in paragraph I (b)...', DPTI advised:

The department is unsure of what probity investigation by the Board is being referred to in the motion.¹⁹⁵

344. In addition, no documentation received in my investigation suggested that any 'probity investigation' was conducted by the Board into the GIA project procurement.

345. I also note the Board's response to my provisional report:

As you have established, the Board was not aware of and did not approve the GIA procurement. The authority to manage and approve this particular procurement was within the procurement authority of the then Department of Primary Industries and Resources SA (PIRSA) and under the Board's policy framework PIRSA was not required to present the acquisition plan to the Board for approval.¹⁹⁶

346. I accept this response. I am satisfied that for the purposes of paragraph I (b) of the referral, the Board did not conduct any probity investigation into the GIA project procurement, and nor was it required to.

OPINION

8

The State Procurement Board did not conduct a 'probity investigation' of the GIA project procurement process (and nor was it required to), as described in paragraph I (b) of the referral for investigation by the Legislative Council under section 14(1) of the Ombudsman Act.

¹⁹² Letter from Ombudsman to Chief Executive, DPTI dated 5 July 2012.

¹⁹³ Letter from Chief Executive, DPTI to Ombudsman dated 27 July 2012, p6.

¹⁹⁴ DPTI response to 37 questions to Ombudsman dated 27 July 2012, p30.

¹⁹⁵ DPTI response to 37 questions to Ombudsman dated 27 July 2012, p31.

¹⁹⁶ Letter from Chair of the Board dated 4 December 2012, p1.

**ADDITIONAL COMMENT
IN RELATION TO THE GIA PROJECT REPORT**

CONNOR HOLMES' RESPONSE TO CONCERNS ABOUT CONFLICT OF INTEREST

347. Around the time of the finalisation of the GIA project report, the Hon Mark Parnell MLC raised concerns in the Legislative Council about Connor Holmes' representation of the Mount Barker Consortium and their GIA project consultancy, particularly in relation to Mount Barker.¹⁹⁷

348. In response to a Ministerial statement in reply that Connor Holmes had identified GIA project areas in which they had conducted consultancies,¹⁹⁸ Mr Parnell stated:

I think probably the most important point to come out of that is that disclosing a list of commercial clients and then continuing to do government work, as well as working for the commercial clients, does not remove a conflict of interest ...

... Declaring an actual or potential conflict of interest does not make it go away.¹⁹⁹

349. I agree with Mr Parnell. First, however, the conflict of interest needs to be recognised and articulated as such; and second, in the interests of transparency, the conflict needs to be addressed and managed prior to the formal procurement process. In this case, the documents provided to my investigation about the GIA project procurement show that neither occurred in relation to Mount Barker.

350. On 24 July 2009, I note that Connor Holmes wrote to the president of PIA responding to Mr Parnell's allegations of conflict of interest (and their privileged access to information). They wrote *inter alia*:

If involvement on behalf of a private client in one or more parts of a (potentially very large) region is to disqualify PIA members from bidding for major planning studies, then the Government will be deprived of the expertise it is seeking and PIA members will be deprived of the opportunity to contribute. PIA members cannot be expected to sever ties with private clients as this would jeopardise their livelihoods once the Government commission is over.

Disclosure of interests is the appropriate course to follow in these cases, as it allows the client to determine whether and how to commission the work. This was the course of action followed by Connor Holmes in relation to the recent Growth Investigations Study.

Secondly, it must be recognised and understood that PIA members are bound - legally and ethically - to abide by confidentiality requirements imposed by their clients.

Where a consultancy contract - be it with Government or any other party - specifies that information is confidential, PIA members are contractually bound not to disclose that information or to use it for the benefit of other clients.

Connor Holmes - in common with any of the larger planning consultancies - has within the firm information that is confidential to one client and cannot be used to benefit another. There is nothing sinister or unusual about this.

It is my view that PIA members should be able to accept commissions from Government subject to appropriate disclosure, and that having accepted such a commission, PIA members can be trusted to be responsible custodians of any confidential information related to that project.

351. I agree with these views; and I appreciate that given the size of the planning market in this state and the use of consultants in government, planning consultants will inevitably represent both government and commercial interests at varying times. However, this serves to reinforce my earlier comments that probity of consultants and their potential conflicts of interest must be at the forefront of a government planning agencies' thinking

¹⁹⁷ South Australia, *Parliamentary Debates*, Legislative Council, 3 June 2009, 2488 (Hon Mark Parnell).

¹⁹⁸ South Australia, *Parliamentary Debates*, Legislative Council, 3 June 2009, 2475 (Hon Paul Holloway).

¹⁹⁹ South Australia, *Parliamentary Debates*, Legislative Council, 3 June 2009, 2489 (Hon Mark Parnell).

and rigorously considered before they embark on a procurement process. Agencies need to ensure that appropriate internal controls are in place. This may be achieved through more robust policies and ongoing training; and registers showing details of past and current consultancies, which should be considered in relation to potential conflict of interest issues, prior to consultancy engagement.²⁰⁰

OPINION

9

In view of the government's reliance on consultants in the planning sector and the smaller size of the sector in the state, the agency responsible for planning must ensure that internal controls are in place and rigorously applied in order to identify and manage consultants' conflicts of interest prior to embarking on a procurement process.

RELEASE OF THE GIA REPORT

352. To date the state government has not publicly released the GIA report. In 2009, DPLG made a determination to refuse access to the report under the FOI Act; and in 2010, I reviewed this determination under the Act. I made a determination that the report is exempt from disclosure because of its Cabinet document status.²⁰¹
353. Despite this, I noted in my determination that the 30 Year Plan document was also a Cabinet document and that it had been publicly released. I intimated that Cabinet confidentiality would not be undermined if the GIA report was also released, and noted the objects and principles of administration of the FOI Act.
354. Prior to this, the president of the PIA had expressed concerns on behalf of the PIA membership about the secrecy of the GIA report, in a letter to the editor of 'The Advertiser' on 10 August 2009:

The SA division of the Planning Institute of Australia urges the Minister for Urban Development and Planning Paul Holloway to release the Growth Areas Investigation Report undertaken to inform the development of the 30-year Plan for Greater Adelaide.

For consultation on the plan to be genuinely robust and meaningful, the people of South Australia need to have access to the research that underpins the rationale for the urban growth directions proposed by the Plan for Greater Adelaide.

As a professional organisation, PIA considers that the release of this background information will allow a transparent assessment of the impact of the proposed urban growth areas on the protection of primary production land and biodiversity habitat.

It also will allow us to evaluate the ability of new residential areas to be adequately served by the infrastructure and community services essential to a sustainable quality of life.

Planners take our responsibility to involve people in decisions that affect their lives most seriously. We have a code of conduct which governs our actions in this regard.

When governments act to deny citizens the right to access important information that would assist them to understand and contribute to the planning process, democracy is compromised.

As planners we know that this can result in a cynical community that no longer trusts the planners that make the plans and the politicians that promote them.

²⁰⁰ I note that agencies are already required to disclose consultancies in their annual reporting requirements (PC 013) and their disclosure of government contracts (PC027).

²⁰¹ Determination of Ombudsman *Parnell and the Department of Planning and Local Government* (Ombudsman ref: 2010/00091) dated 7 July 2010.

Is this really the Adelaide we all want?

355. The president confirmed these views to my investigation, commenting that the government's refusal to release the GIA report created 'unease because people couldn't see what had gone into the maps in the 30 Year Plan'.²⁰²
356. Given my concerns about Connor Holmes' conflict of interest in relation to Mount Barker during the GIA project procurement and Planning SA's failure to adequately address this conflict, I consider it would be in the public interest for the government to revisit its views and consider releasing the GIA report.

OPINION

10

It would be in the public interest for the government to revisit its views, and consider releasing the GIA project report, in recognition of:

- the probity failures in the acquisition planning process of the GIA project procurement
- the failure to identify and address Connor Holmes' conflict of interest in relation to Mount Barker during the procurement process
- transparency and accountability concerns expressed at the time by the president of the SA Division of the Planning Institute of Australia on behalf of the membership.

357. In response to my provisional report, DPTI commented that it did not agree with my provisional opinions regarding probity failures or the management of conflict of interest. In support of its response, DPTI noted that the APU regarded the GIA project procurement as 'sound' (despite a departure from 'the usual procurement process'). DPTI again highlighted that 'the governance arrangements for the 30-Year Plan projects were designed to manage conflict of interest that any successful tenderer for the GIA study would have had'.²⁰³
358. I am not persuaded by this response. First, I accept that the APU advised at the time that the procurement was 'sound'. However, I understand that the APU would not have been apprised of the issues of Connor Holmes' conflict of interest in relation to Mount Barker. Further, I note that as the authority responsible for Planning SA's procurement operations, PIRSA did not dispute my findings and opinions relating to the breaches of the Board's Acquisition Planning Guideline in my first two opinions in my provisional report. Second, although it is not clear to me what the 'governance arrangements' were to manage Connor Holmes' conflict of interest in relation to Mount Barker and the GIA project, the central issue in my investigation was that this conflict was not properly identified and managed in the project's procurement process.

²⁰² Transcript of evidence, former President, Planning Institute of Australia, SA Division, 26 July 2012, p21.

²⁰³ DPTI response to provisional opinion 10, Ombudsman provisional report.



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