

# **Ombudsman investigation into the probity of the Kew Residential Services and St Kilda Triangle developments**

June 2010

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## LETTER TO THE LEGISLATIVE COUNCIL AND THE LEGISLATIVE ASSEMBLY

To

**The Honourable the President of the Legislative Council**

and

**The Honourable the Speaker of the Legislative Assembly**

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973*, I present to Parliament a report of an investigation into the probity of the Kew Residential Services and St Kilda Triangle developments.



G E Brouwer

**OMBUDSMAN**

**22 June 2010**

<b>CONTENTS</b>	<b>Page</b>
CHRONOLOGY: Kew	7
CHRONOLOGY: St Kilda Triangle	11
EXECUTIVE SUMMARY	14
Common themes	15
Recommendation	22
Kew Residential Services	22
St Kilda Triangle	24
Recommendations	28
PROBITY AND PROCUREMENT	29
The roles of the probity advisor and probity auditor	31
Recommendations	33
Conflict of interest principles and requirements	34
Gifts and hospitality	35
<b>KEW RESIDENTIAL SERVICES</b>	<b>36</b>
HISTORY	37
Establishment of Interdepartmental Steering Committee / Project Control Group	37
Establishment of City of Boroondara working party	38
Ministerial intervention	39
Appointment of probity advisor and auditor	39
Heritage Council listing	40
Announcement of preferred tenderer	40
Walker's request to transfer the development to Mirvac	42
Current status of the development	43
PROBITY PLAN, ADVICE AND AUDIT	44
Probity advisor and auditor appointment	44
Recommendation	45
Documents and reports	46
Conclusions	48
Recommendation	50
CONFLICT OF INTEREST	51
Consistency in the public service	54
Conclusions	57
Recommendations	58
FAIR, OPEN AND COMPETITIVE PROCESS	59
Approval processes	59
The business case and financial return for the project	60

Recommendation	62
The tender	63
Recommendation	65
The successful bidder	65
Recommendation	68
Local government processes	68
Ministerial intervention	69
Heritage issues	73
Recommendation	76
Role of the Government Land Monitor and the Valuer-General	76
Recommendation	79
<b>EXTERNAL INFLUENCE</b>	<b>80</b>
Political donations	80
Lobbying	81
Conclusions	82
<b>ST KILDA TRIANGLE</b>	<b>83</b>
<b>HISTORY</b>	<b>84</b>
Preparation of an urban design framework	85
Completion of a project development proposal	86
Removal of third party appeal rights	87
Establishment of the St Kilda's Edge Committee	87
Appointment of a probity auditor and adoption of a probity plan	87
Memorandum of Understanding	88
Expression of Interest	88
Land (St Kilda Triangle) Act	89
Request for Proposal	89
Vacant possession	89
Determination of preferred tenderer	90
Development plan	90
Status of the development	91
<b>PROBITY PLAN, ADVICE AND AUDIT</b>	<b>92</b>
Probity framework	92
Probity auditor appointment	94
Probity plan, processes and procedures	96
Briefings on probity and advice	99
Probity audit report	100
Conclusions	102
Recommendation	103

<b>FAIR, OPEN AND COMPETITIVE PROCESS</b>	<b>104</b>
The Memorandum of Understanding	104
Approval processes	105
Expression of Interest	106
Request for Proposal	109
Confidentiality	112
Delays	116
Recommendation	119
State oversight of the project	119
Transparency	120
Recommendations	124
Removal of third party appeal rights	124
<b>CONFLICT OF INTEREST</b>	<b>126</b>
Conflict of interest policies and procedures	127
Declarations of interest and confidentiality	127
Review of conflict of interest declarations	130
Conflicts of interest identified during my investigation	132
Gifts and hospitality	149
<b>EXTERNAL INFLUENCE</b>	<b>152</b>
Influence of Ministers	152
Political donations	154
<b>POOR PROCUREMENT AND CONTRACT MANAGEMENT PRACTICES</b>	<b>156</b>
Paradigm Advisory	156
SKE Committee and evaluation panel members	162
Conclusions	163
<b>OTHER ISSUES</b>	<b>165</b>
Breach of privacy	165
Secondary employment	165
<b>SUMMARY OF RECOMMENDATIONS</b>	<b>166</b>
<b>ATTACHMENT 1</b>	<b>172</b>
Kew final probity report	
<b>ATTACHMENT 2</b>	<b>174</b>
St Kilda Triangle expression of interest probity report	
<b>ATTACHMENT 3</b>	<b>176</b>
St Kilda Triangle final probity report	
<b>ATTACHMENT 4</b>	<b>178</b>
St Kilda's Edge Committee's conflict of interest framework	

## Chronology: Kew

Date	Event	Report reference
	2001	
May	Premier Bracks announces plans to redevelop the Kew site	Para 111
May	Interdepartmental Steering Committee established	Para 113
01 Oct.	Executive Director, Heritage Victoria advises Department of Human Services (DHS) regarding the heritage significance of the site	Para 280
	2002	
Feb.	City of Boroondara (COB) establishes working party - first meeting April 2002	Para 117
30 Nov.	State Election held	
	2003	
04 Aug.	COB adopts an urban design framework for the site	Para 118
Oct.	COB proposes C38 to rezone the site and apply its urban design framework	Para 119
Nov.	Minister for Planning adopts amendment C53, rendering COB's amendment C38 redundant – gazetted 13 November	Para 120, 264
25 Nov.	Government approves the redevelopment and sale of surplus land	Para 122
	2004	
Mar .	DHS appoints a probity advisor	Para 123
01 Apr.	Expressions of Interest close for Kew Residential Services development (KRS)	Para 124
21 Apr.	DHS appoints a probity auditor	Para 125, 150
Apr.	Probity advisor involvement concludes with DHS	Para 149
26 May	Probity auditor provides his report for the Expression of Interest phase	Para 164

Chronology: Kew – continued

Date	Event	Report reference
29 July	Request for Proposals process closes	Para 223
15 Oct.	Probity auditor provides his report for the Request for Proposal phase	Para 164
15 Nov.	Probity auditor provides his report for the parallel negotiation phase	Para 164
25 Nov.	Heritage Council includes the site on the Heritage Register – formally listed on the Victorian Heritage Register on 1 December	Para 127, 284
08 Dec.	DHS finalises its internal assessment process	Para 126, 225
09 Dec.	Government Land Monitor (GLM) approves development agreement with Walker	Para 303
	2005	
03 Mar.	Letter of intent signed	Para 129, 242
13 Apr.	Probity auditor provides his final report	Para 130, 164
03 June	Minister for Community Services announces development plan and Walker as developer	Para 131
05 June	DHS submits application to Heritage Victoria (HV) to demolish three buildings	Para 132, 291
Aug.	Project nominated by Orders under the <i>Project Development and Construction Management Act 1994</i>	Para 133
24 Aug.	DHS obtains probity auditor advice regarding heritage issues and ongoing negotiations	Para 165
09 Sept.	HV issues permit P9369 for demolition of three buildings	Para 134, 291
21 Oct.	DHS obtains probity auditor advice regarding changes to the development plan	Para 165
08 Nov.	DHS obtains probity auditor advice regarding the probity of the tender process	Para 165
Dec.	Second Walker development plan lodged with COB	Para 135



## Chronology: Kew

Date	Event	Report reference
	2006	
14 Feb.	DHS lodges application to HV to undertake stage one	Para 294
Mar.	Minister for Planning approves Walker development plan	Para 135
13 Apr.	HV issues permit (P10367) for stage one of the development	Para 294
13 June	GLM approves revised development agreement	Para 305
08 Aug.	Minister for Planning issues permit for subdivision of stage one of the development	
23 Oct.	Treasurer endorses revised tender price	Para 306
26 Oct.	State Government and Walker sign the KRS development agreement	Para 136
25 Nov.	State Election held	
29 Nov.	Walker media release – Mirvac has acquired rights to stage two	Para 137
12 Dec.	DHS obtains probity auditor advice on the acquisition of stage two by Mirvac	Para 165
14 Dec.	Minister for Major Projects meets with the Hon. Graham Richardson, former Senator	Para 139, 323
	2007	
May	Legislative Council establishes Select Committee on Public Land Development	Para 1
11 May	Major Projects Victoria rejects proposal for Mirvac to acquire stage two from Walker	Para 140, 326
	2008	
05 May	Major Projects Victoria moves from the Department of Infrastructure to the Department of Innovation, Industry and Regional Development	
30 June	Stage one of the development officially complete	

**Chronology: Kew – continued**

<b>Date</b>	<b>Event</b>	<b>Report reference</b>
Sept.	Select Committee tables its final report	Para 2
03 Dec.	Legislative Council refers the probity of the KRS development to the Ombudsman	Para 3

## Chronology: St Kilda Triangle

Date	Event	Report reference
	2002	
25 Feb.	Elected council approves the <i>St Kilda Foreshore Urban Design Framework</i>	Para 335
	2004	
Feb.	City of Port Phillip (CoPP) lodges a <i>Project Development Proposal and Business Case</i> for the St Kilda Triangle site with the State Government	Para 340
May	SGS Economics and Planning prepares an Economic Impact Assessment on behalf of CoPP	Para 344
24 May	Elected council approves changes to the <i>Port Phillip Planning Scheme (Amendment C36)</i> , including the removal of third-party appeal rights	Para 345
July	Minister for Planning incorporates the <i>St Kilda Foreshore Urban Design Framework</i> into the <i>Port Phillip Planning Scheme (Amendment C36)</i>	Para 345
02 Aug.	CoPP establishes the St Kilda's Edge (SKE) Committee under section 86 of the <i>Local Government Act 1989</i>	Para 346
	2005	
Mar.	SKE Committee adopts a probity plan	Para 350
01 Apr.	CoPP and the State Government execute a Memorandum of Understanding	Para 351, 379
08 Apr.	SKE Committee invites expressions of interest	Para 353
17 June	SKE Committee receives 15 expressions of interest	Para 354, 447
22 July	Probity auditor issues his report on the expression of interest process	Para 416
30 Aug.	Short list of three consortia announced by SKE Committee: <ul style="list-style-type: none"> <li>Babcock &amp; Brown/Citta (BBC)</li> <li>R Corporation with John van Haandle (RV Group)</li> <li>St Kilda Creative Hub (SKCH)</li> </ul>	Para 356, 449

Chronology: St Kilda Triangle – continued

Date	Event	Report reference
	2006	
Feb.	Land (St Kilda Triangle) Bill 2006 is introduced to Parliament	Para 357
30 Aug.	Final proposals lodged with CoPP	Para 360
Aug-Nov.	Evaluation panels evaluate final proposals	Para 361
29 Nov.	SKE Committee resolved that it could not select a preferred tenderer, but that the SKCH proposal was ranked third. SKE Committee resolved to invite the other two consortia to submit revised proposals and to invite SKCH to remain in reserve	Para 361
	2007	
09 Feb.	Revised proposals received from BBC and RV Group and evaluated by the evaluation panels	Para 362, 468
07 Mar.	SKE Committee determines that the BBC proposal performed better against the evaluation criteria, despite both panels indicating concerns and shortcomings with each proposal	Para 469
22 May	Probity auditor issues his report on the tender process	Para 479
24 May	Elected council approves the awarding of the tender to BBC	Para 364, 480
May	Legislative Council establishes Select Committee on Public Land Development	Para 1
01 July	Land (St Kilda Triangle) Act 2006 comes into effect	Para 359
01 July	CoPP becomes Committee of Management for the site	Para 359
31 Oct.	Development plan approval process commences, including 28 day public display period	Para 365
13 Dec.	Statutory Planning Committee of Council deferred approval of the development plan, pending further information	Para 366

## Chronology: St Kilda Triangle

Date	Event	Report reference
	2008	
07 Feb.	Statutory Planning Committee of Council approves the development plan, subject to changes	Para 368
08 Aug.	Manager, City Development, COPP endorses the development plan	Para 368
09 Sept.	unChain St Kilda Inc. challenges the validity of the development plan at the Victorian Civil and Administrative Tribunal (VCAT) under s149B of the <i>Planning &amp; Environment Act 1987</i>	Para 370
Sept.	Select Committee tables its final report	Para 2
17 Nov.	COPP publishes a redacted version of the development agreement on its website after a <i>Freedom of Information 1982</i> request and a VCAT ruling	Para 538
03 Dec.	Legislative Council refers the probity of the St Kilda Triangle development to the Ombudsman	Para 3
	2009	
18 May	VCAT dismisses unChain St Kilda Inc.'s s149B application	Para 370
14 Dec.	Elected council resolves to terminate the development agreement through a commercial settlement with BBC	Para 80, 372

## EXECUTIVE SUMMARY

1. In May 2007, the Legislative Council established a Select Committee on Public Land Development (the Select Committee). The Select Committee's terms of reference were to enquire into:
  - the sale or alienation of public land for development
  - the sale or alienation of public open space for the purposes of private development
  - the sale and development of public land and the relationship to the Melbourne 2030 policy and Green Wedges.
2. The final report from the Select Committee was made public in September 2008. It identified concerns with the Kew Residential Services (Kew) and St Kilda Triangle development projects, which it considered warranted further investigation. The report noted that certain witnesses did not attend its public hearings and that the Select Committee was unable to pursue avenues of enquiry and reach conclusions on some issues.
3. On 3 December 2008, the Legislative Council resolved to refer the following matters to my office for investigation under section 16 of the *Ombudsman Act 1973* (the Ombudsman Act):
  - the probity of the Kew Residential Services (Kew) development tender process followed by the State Government
  - the probity of the St Kilda Triangle development processes followed by the State Government and the City of Port Phillip.
4. Section 16 of the Ombudsman Act requires me to investigate any matter referred by a House of Parliament, other than a matter concerning a judicial proceeding, and to report to Parliament. It is the first time this section of the Ombudsman Act has been invoked by the Parliament.
5. I note that a high level of media interest was generated by public concern and speculation about planning processes and controls, as well as allegations of corruption and political interference in relation to both sites.
6. My investigators interviewed all relevant witnesses, including a number of witnesses not interviewed by the Select Committee. These included former members of the State and Commonwealth Parliaments and witnesses from both the public and private sectors. All witnesses were interviewed under oath or affirmation. In most instances, witnesses were cooperative and appeared on request at my office. In a few instances, I used my power to summons witnesses to attend.

7. Some witnesses have expressed concern to me that some of the issues identified in my report are not directly related to the probity of the two developments, for example, concerns surrounding secondary employment, privacy breaches, private business relationships and private use of public resources. They have also asked not to be named for fear of damage to their reputations and employment prospects.
8. However, those issues arose in the course of this investigation and are, in my view, inherently connected with the matters being investigated. Furthermore, it is not in the public interest for me to exclude from this report issues of concern identified during the investigation.
9. In the following section, I discuss common themes identified in my investigations of the Kew and St Kilda Triangle projects. I then discuss the two projects separately.

## Common themes

### *Probity and the process*

10. The Kew and St Kilda Triangle projects took different paths. The St Kilda Triangle project was managed by the City of Port Phillip on behalf of the Department of Sustainability and Environment. Kew was managed by the Department of Human Services on behalf of the State Government.
11. Although probity processes were considered by the Department of Human Services in respect of Kew, and the City of Port Phillip in respect of the St Kilda Triangle, the attention paid to significant matters associated with probity, such as conflict of interest and record management, was insufficient, particularly given the scale and complexity of these projects.
12. At interview, a number of people involved in the Kew and St Kilda Triangle projects did not display a sufficient understanding of probity. These issues could have been addressed by the exercise of proper process and better management. The State Government has progressed its administrative processes in this regard since the tenders for these projects were commenced.
13. My investigation also identified a lack of clarity regarding the project management of development projects declared as having State significance. In both cases, the evidence supports the view that the City of Port Phillip and the Department of Human Services lacked project management experience in large and complex projects and required ongoing advice and assistance. In the case of the St Kilda Triangle, consultants from the private sector were engaged to manage the project. For Kew, Major Projects Victoria was engaged as an advisor when the Expression of Interest phase commenced. However, both projects did not run smoothly. In my opinion, it is important that project management expertise is engaged very early in the life of a project.

*Although probity processes were considered, the attention paid to significant matters associated with probity, such as conflict of interest and record management, was insufficient, particularly given the scale and complexity of these projects.*

*My investigation also identified a lack of clarity regarding the project management of development projects declared as having State significance.*

*Both were major projects with the value of each development exceeding tens of millions of dollars; both were the ultimate responsibility of the State Government as the 'owner' of the Crown land; both involved public interest issues; and both potentially involved a high risk to the State Government.*

14. The examination of these two projects has also highlighted the differing approval and governance arrangements associated with projects undertaken by the State Government (Kew) and local government (St Kilda Triangle). There were obvious differences in the nature of the two proposals. The Kew development:
  - was in response to a state government policy commitment
  - was managed by a state government department and Major Projects Victoria
  - required a significant contribution of state government funds and a commitment to ongoing accommodation for a number of residents
  - required the sale of Crown land.
15. By contrast, the St Kilda Triangle development:
  - was initiated and managed by a local council on behalf of the State Government
  - received no state government funding, despite the public significance of the site and the need to refurbish the Palais Theatre
  - required the long-term lease of Crown land.
16. Despite these differences, both were major projects with the value of each development exceeding tens of millions of dollars; both were the ultimate responsibility of the State Government as the 'owner' of the Crown land; both involved public interest issues; and both potentially involved a high risk to the State Government. Each, however, took a significantly different pathway.
17. The Kew project was subject to a greater level of scrutiny than the St Kilda Triangle development. This was as a result of:
  - the State Government's financial contribution, which necessitated that the Kew project meet certain requirements, such as Gateway Reviews and sign-off by the Treasurer
  - the sale versus lease arrangement, where the Kew project required the involvement and approval of the Government Land Monitor and the Valuer-General.
18. In my view, a project the size of the St Kilda Triangle warranted a similar level of scrutiny as the Kew project.



### *The role of the probity advisor and probity auditor*

19. In relation to the appointment of probity practitioners, each project chose a different approach. In Kew, a probity advisor was engaged to assist in the development of the probity plan; to provide hands-on advice and assistance to the Department of Human Services on the adoption of probity principles; to provide practical guidance on the completion of conflict of interest statements and management of conflict of interest issues; and to work through the Expression of Interest phase of the project. A probity auditor was then engaged to oversee the Request for Proposal phase of the project, including the selection of the preferred tenderer.
20. In the case of the St Kilda Triangle, only a probity auditor was engaged. The probity auditor oversaw both the Expression of Interest and Request for Proposal phases. He played both an advisory and auditing role.
21. My investigation identified that despite the engagement and availability of a probity advisor and auditor in respect of Kew, and a probity auditor in respect of the St Kilda Triangle, and the fact that probity procedures were in place:
  - probity plans were not adequately followed and documented
  - conflict of interest statements were not completed by all relevant parties
  - conflict of interest issues were not adequately addressed and managed.
22. In addition, while the probity auditors' reports for both projects met the requisite standard at the time, they were not accompanied by sufficient detail for the St Kilda's Edge Committee (established by the City of Port Phillip elected council to deliver the St Kilda Triangle project), and the Department of Human Services (in the case of Kew), to be informed of the factual basis and reasoning for the probity auditor's conclusion that the processes met the probity requirements. I consider that the value of probity reports for future projects would be improved if they were accompanied by a document detailing the work completed by the probity auditor. The Victorian Auditor-General agrees with me in this regard.
23. While probity issues can arise up to and beyond the signing of the development agreement, the services of probity auditors in the public sector have generally been dispensed with at the announcement of the preferred tenderer – as was the case with the Kew and St Kilda Triangle projects. In my view, this is not in the public interest. I consider that probity auditors should sign-off on probity issues at least up to the signing of the development agreement. I also consider that agencies should make greater use of probity advisors for the life of significant projects to ensure that probity issues are regularly discussed, reviewed, considered, managed and documented.

*Despite the engagement and availability of a probity advisor and auditor in respect of Kew, and a probity auditor in respect of the St Kilda Triangle, and the fact that probity procedures were in place; probity plans were not adequately followed and documented; conflict of interest statements were not completed by all relevant parties; and conflict of interest issues were not adequately addressed and managed.*

*While probity issues can arise up to and beyond the signing of the development agreement, the services of probity auditors in the public sector have generally been dispensed with at the announcement of the preferred tenderer. In my view, this is not in the public interest.*

*Combining the probity auditor and advisor roles may result in confused accountabilities and weakened public confidence in the probity of a tender.*

24. My investigation also identified that combining the probity auditor and advisor roles may result in confused accountabilities and weakened public confidence in the probity of a tender. In this regard, I consider that the Department of Treasury and Finance should review the *Good Practice Guidelines – Conduct of Commercial Engagements* and the *Probity Risk Assessment Tool* to specify that for major projects, probity auditor and advisor functions be provided by different individuals.
25. This is consistent with a recommendation made by the Victorian Auditor-General (October 2007), as well as a recommendation made by the Public Accounts and Estimates Committee (May 2009), which was accepted by the State Government in May 2009. However, the *Good Practice Guidelines – Conduct of Commercial Engagements* and the *Probity Risk Assessment Tool* do not appear to have been updated. I recommend that the Department of Treasury and Finance update these documents. I also recommend that the Department of Planning and Community Development update its *Local Government Procurement Best Practice Guideline* to ensure that local government and state government policies are consistent in this regard.
26. In response to this issue, the Secretary, Department of Planning and Community Development stated ‘there was neither confusion of accountabilities nor weakened public confidence in the probity of the [Kew] tender’.

### *Delays*

*A significant number of witnesses did not recognise conflicts of interest during the tender processes. As a result, conflicts of interest were not declared or not managed adequately ... It was concerning that some senior public sector employees did not seem to understand the principles of conflict of interest.*

27. Both projects suffered from significant delays. In the case of Kew it was the impact of heritage issues and in St Kilda Triangle, the uncertainty around achieving vacant possession of the site. These delays led to unfortunate ramifications, especially in relation to perceptions of the probity of both projects.
28. Delays both during the Request for Proposal phase and prior to the signing of the development agreement have the potential to lead to protracted negotiations with developers and to perceptions that the process was flawed and subject to inappropriate influences. Once the competitive element of the tender phase has been completed – when the preferred bidder is announced – it is important that any subsequent exclusive negotiation period is kept to a minimum, as this is when the developer’s negotiation position becomes stronger.
29. Kew saw protracted negotiations following the selection of the preferred bidder. In the case of St Kilda, there was a significant delay between the time the development agreement was signed (May 2007) and the time the development plan was approved (August 2008). Such delays may also strengthen a developer’s negotiation position.

### *Conflict of interest*

30. In the public sector context, a ‘conflict of interest’ is a situation where a conflict arises between public duty and private interest. The term refers to circumstances where a public official could be influenced, or could be reasonably perceived to be influenced, by a private interest when performing an official function.
31. My investigation identified that a significant number of witnesses did not recognise conflicts of interest during the tender processes. As a result, conflicts of interest were not declared or not managed adequately. In particular, hospitality from the private sector was accepted inappropriately. It was concerning that some senior public sector employees did not seem to understand the principles of conflict of interest. Some individuals clearly did not give adequate consideration to what the community’s perception would be of their financial interest in companies bidding for a project; or their relationships with individuals connected to such companies.
32. It was evident from my investigation that some public sector employees and elected representatives failed to understand that the ‘perception’ of a conflict of interest – even when the conduct of a public sector employee or councillor is exemplary – may be as damaging to public trust as any misconduct.

### *Public interest issues*

33. Both projects have had significant media coverage and have sought to satisfy public interest issues. In the case of Kew, this related to the accommodation of 100 intellectually disabled residents; and for the St Kilda Triangle, the public interest was meeting the ongoing needs of public open space and the refurbishment of the Palais Theatre.
34. Where public interest issues are involved, public opinion will inevitably be divided, depending upon perspectives and values. Both projects attracted controversy and both provided opportunities for community input and participation at different times and in different ways. My investigation identified that in both cases, community groups expressed both strong interest and concern about the projects.
35. In the case of both projects, the respective urban design frameworks were incorporated into the local municipal planning schemes and third party appeal rights against building and planning permits were removed. While this did lead to greater certainty about the timing of each project, particularly for the developers, some community members considered that it provided too much latitude to the developer. A better balance needs to be in place to ensure community concerns can be and are adequately addressed in the planning phases for such major projects.

*In the case of both projects, the respective urban design frameworks were incorporated into the local municipal planning schemes and third party appeal rights against building and planning permits were removed. While this did lead to greater certainty about the timing of each project, particularly for the developers, some community members considered that it provided too much latitude to the developer.*

### *Transparency*

36. The State Government's policy statement, *Ensuring Openness and Probity in Victorian Government Contracts* and the subsequent Department of Treasury and Finance policy, *Disclosure of Contracts >\$100000 Policy*, require that contracts over \$10 million be published in full on the Contracts Publishing System website within 60 days of being awarded.
37. As a state government project, these policies applied to Kew. These policies also applied to the St Kilda Triangle development as the Memorandum of Understanding between the City of Port Phillip and the Department of Sustainability and Environment required that the City of Port Phillip comply with all 'relevant procurement policies of the State of Victoria'. Despite this, the St Kilda Triangle development agreement (redacted) was not made public until 18 months after it was signed. In the case of Kew, it was not made public for six months.
38. Kew's delay was due to an administrative oversight, while the St Kilda Triangle officers appeared to be unaware of the requirement. Its decision to subsequently publish the contract was in response to a request under the *Freedom of Information Act 1982* (the Freedom of Information Act).
39. In response to my concerns about the St Kilda Triangle delay, the Secretary, Department of Sustainability and Environment stated:

Publication was not within the time limit. However, this was a complex matter. Some time was spent in determining which parts of the overall could be published and which parts could not be. There were also delays in acting on advice received.
40. Whatever the reasons for the delays, they resulted in further public unease about the transparency of the process. While the evidence does not support that undue influences were brought to bear, early publication of the respective agreements would have assisted in allaying public concerns.

*My investigation has highlighted that both the media and the community may become concerned about the probity of a project where lobbyists are involved in seeking to influence decision-makers on behalf of their commercial clients. The actions of lobbyists can create the perception of bias.*

### *Role of lobbyists*

41. My investigation has highlighted that both the media and the community may become concerned about the probity of a project where lobbyists are involved in seeking to influence decision-makers on behalf of their commercial clients. The actions of lobbyists can create the perception of bias.
42. In relation to the St Kilda Triangle, the winning bidder, Babcock & Brown with Citta Property Group (BBC) engaged public relations consultants, Communications and Public Relations (CPR). During the tender process, CPR engaged a City of Port Phillip councillor as a consultant for unrelated projects. While both the councillor and the relevant CPR employees state that they did not discuss the St Kilda Triangle project, these relationships could give rise to the perception that the councillor provided confidential information to CPR/BBC during the tender process.

43. In Kew, a meeting between the Hon. Graham Richardson, a former Senator and lobbyist and the Hon. Theo Theophanous, then Minister for Major Projects, led to allegations in the media that inappropriate influence had been applied.
44. In both Kew and the St Kilda Triangle, my investigators examined all available evidence and could find no preferential treatment of bidders due to the involvement of lobbyists. However, the perception that some preferential treatment exists can be just as damaging to public confidence in the probity of the two projects, regardless of what took place.
45. I note that as of 1 December 2009, a lobbyist must be registered with the State Services Authority if they wish to make contact with a state government representative in that role. I also note that in September 2009, the Premier, the Hon. John Brumby MP, announced the *Victorian Government Professional Lobbyist Code of Conduct*.

### **Poor record-keeping**

46. In both matters, physical and electronic records were obtained from the public and the private sector. In some cases, I used my power to summons such information, although, for the most part, information was provided to me on oral or written request. I am satisfied that my office has inspected all available and relevant documents in relation to both matters.
47. I was disappointed with the standard of record-keeping, especially of the Department of Human Services, the City of Port Phillip and Major Projects Victoria. To some degree, my investigation was hampered because:
  - there were obvious gaps in the documents held on file
  - some important documents could not be located. For example, in the St Kilda Triangle project, the City of Port Phillip could not locate video recordings of tender presentations when requested and could not provide all conflict of interest statements. In the case of Kew, the Department of Human Services could not locate probity documents, including conflict of interest statements and the approved probity plan
  - some documents were not formally filed
  - file titling was haphazard
  - documents were not correctly numbered – indeed no files reviewed during the investigation had documents with folio numbers
  - documents were not ordered chronologically.
48. Given these issues and that certain aspects of each project fell within the responsibility of different agencies, it was very difficult to put together a complete documentary history of each project. A full set of records simply did not exist.

*In both Kew and the St Kilda Triangle, my investigators examined all available evidence and could find no preferential treatment of bidders due to the involvement of lobbyists.*

*I was disappointed with the standard of record-keeping, especially of the Department of Human Services, the City of Port Phillip and Major Projects Victoria. My investigation was hampered because there were obvious gaps in the documents held on file and some important documents could not be located.*

49. Therefore, I consider that the City of Port Phillip, the Department of Human Services and Major Projects Victoria should review their file management practices in relation to procurement processes, to ensure that these meet the requirements of the *Public Records Act 1973*.

## **Recommendation**

### **Recommendation 1**

I recommend that the City of Port Phillip, the Department of Human Services and Major Projects Victoria review their file management practices in relation to procurement processes to ensure the standards meet the requirements of the *Public Records Act 1973*.

#### ***City of Port Phillip response***

‘This recommendation is accepted in full and I will take immediate steps to review our file management practices’.

#### ***Department of Human Services response***

‘Noted and agreed’.

#### ***Department of Innovation, Industry and Regional Development response***

‘The Department of Innovation Industry and Regional Development accepts the recommendations pertaining to it (and Major Projects Victoria) and provides the following comments ... Over the last two years, considerable changes have occurred to document management processes within Major Projects Victoria. In particular, Major Projects Victoria, as part of a program being rolled out across the Department, has introduced a new electronic document management system – TRIM. In addition, project communications have been streamlined with the usage of *Aconex*’ (an online project management system).

## **Kew Residential Services**

50. In the tender process undertaken by the Department of Human Services, there was no evidence presented to me to show preferred treatment of one bidder over another. My investigation did, however, identify some probity and administrative issues where improvement is required by the Department of Human Services, Major Projects Victoria and Heritage Victoria. These are set out below.
51. I note that the project went through numerous approval stages during the course of the tender process, including sign-off by the Valuer-General, the Government Land Monitor and the Treasurer.

#### ***Lobbying***

52. My investigation examined an allegation that Mr Richardson lobbied Mr Theo Theophanous, then Minister for Major Projects, in an attempt to persuade the State Government to allow Mirvac’s intended purchase of the Kew project from Walker (the successful bidder).

53. My investigators examined all available and relevant documents, including those documents that the Select Committee was unable to obtain. My investigators also interviewed all relevant witnesses on oath, including Mr Richardson and other witnesses that the Select Committee was unable to interview. My investigation confirmed that Mr Richardson's attempts to persuade the State Government to allow Mirvac's intended purchase of the Kew project from Walker were unsuccessful.

### *Probity and record-keeping*

54. Both a probity advisor and probity auditor were appointed to the project. While this encouraged certain probity mechanisms and processes to be put in place, the probity plan and the conflict of interest register were not fully maintained and completed. The final version of the probity plan and the conflict of interest statements could not be produced by the Department of Human Services.

### *Heritage issues*

55. Heritage issues were not handled well and led to significant delays in the project. Prior to Heritage Victoria receiving a formal nomination for heritage registration of the site, the Executive Director of Heritage Victoria provided the Department of Human Services with a written, personal view of the significance of the site. In my view, this early advice was imprudent.
56. The Department of Human Services proceeded without certainty on the heritage status of the site until well into the negotiation phase with the preferred tenderer. This necessitated a number of changes to the bid and a revised development plan, which was significantly different to that originally scoped. In turn, this raised questions in the community and the media about the transparency of the process.

### *Conflict of interest*

57. Conflict of interest matters were neither well handled, nor understood. In relation to the Department of Human Services, the probity advisor instituted measures to educate relevant staff on conflict of interest principles and required that staff complete conflict of interest statements. The same could not be said of other agencies involved in the project, including Major Projects Victoria.
58. My investigation identified a lack of adequate training and policy advice on conflict of interest issues. In addition, most public sector staff interviewed failed to demonstrate a clear understanding of conflict of interest. This is of concern particularly in agencies such as Major Projects Victoria, which regularly deals with projects worth millions of dollars.

*Heritage issues were not handled well and led to significant delays in the project.*

*My investigation identified a lack of adequate training and policy advice on conflict of interest issues. In addition, most public sector staff interviewed failed to demonstrate a clear understanding of conflict of interest. This is of concern particularly in agencies such as Major Projects Victoria, which regularly deals with projects worth millions of dollars.*

### *Other complaints*

59. During my investigation, a number of issues were raised by community groups and residents in relation to the Kew Residential Services development, many of which did not relate to the terms of reference for my investigation; that is, to investigate the probity of the tender process followed by the State Government. As such, I have not discussed these additional issues in this report.

### *Status of the development*

60. I am advised that the current status of the project is that stage two has been released and construction will conclude in late 2010, subject to market conditions and pre-sales.

### **St Kilda Triangle**

61. In the tender process undertaken by the City of Port Phillip and the State Government, there was no evidence presented to demonstrate preferential treatment of one bidder over another. My investigation did, however, identify the following issues in relation to the tender process:
- conflicts of interest were not adequately declared or managed
  - failure to manage conflicts of interest allowed a perception that there was unfair treatment of tenderers
  - the development agreement was not published for 18 months, in contravention of the principle of transparency and state government policy.
62. My investigation identified the following inadequacies.

### *Conflict of interest*

63. One of the significant themes to emerge from my investigation into the St Kilda Triangle project was conflict of interest. I identified that some individuals involved in the project did not recognise the existence of conflicts of interest during the tender process. Some individuals focused on the *Local Government Act 1989* (the Local Government Act) provisions, rather than considering the broader ethical obligations of public sector employees. Others considered that they did not have a conflict of interest because they stood to gain no financial benefit; and most failed to recognise the damage to public confidence that a perception of a conflict of interest can have.
64. There was a failure by some individuals involved to declare their interests; to seek advice from the probity auditor; or to take sufficient action to address their conflicts. It was also concerning that conflict of interest declarations appear not to have been reviewed by the Chair of the St Kilda's Edge Committee. In addition, the Chair failed to take any steps to manage at least one conflict of interest, which involved a senior City of Port Phillip officer. The officer declared that he was related to an architect at ARM, BBC's architecture firm (the officer had also engaged the architect's private company, JLMA, to design his new home).

*There was no evidence presented to demonstrate preferential treatment of one bidder over another, however; conflicts of interest were not adequately declared or managed; failure to manage conflicts of interest allowed a perception that there was unfair treatment of tenderers and the development agreement was not published for 18 months, in contravention of the principle of transparency and state government policy.*



65. While the probity auditor denied ‘in the strongest terms’ that he failed to review the declarations, there was no evidence on his files that he had seen them. If he did review the declarations, his examination was not sufficient to identify the senior City of Port Phillip officer’s conflict of interest. The probity auditor did not recall being made aware of this conflict, or taking any steps to address it. I note, however, that the probity auditor did provide appropriate advice to the St Kilda’s Edge Committee in relation to other conflicts of interest brought to his attention throughout the tender process. He also provided a framework to assist the committee in testing whether a conflict of interest existed and assessing the risk (See Attachments).
66. In addition to the senior City of Port Phillip officer’s conflict, a councillor was engaged during the tender process by CPR – BBC’s public relations firm.
67. My investigation did not find evidence that the individuals involved had engaged in corrupt practices – for example, by providing BBC with information not available to other bidders – or that the final decision to award the tender to BBC would have changed had these conflicts been managed appropriately. However, I am concerned that BBC could be perceived to have received an advantage from some of the relationships as detailed later in my report. The conflicts of interest identified would, in my view, damage community confidence in what was already a controversial project and decision.

#### *Limited expertise and poor planning*

68. The processes employed by the St Kilda’s Edge Committee to achieve the proposed development of the St Kilda Triangle site were not developed at the commencement of the project. While there were over-arching policies in place, there was no clear guide to identify which officer or group of officers was ultimately accountable for each key decision in the tendering process or to assist in ensuring that all necessary approval and probity checks were undertaken. In my view, having such a guide was particularly important given the uniqueness of the project and the fact that the City of Port Phillip had not previously conducted such a large tender and development process.
69. I also question whether the City of Port Phillip had either the capacity or the expertise to manage the tender process. While the City of Port Phillip said in its business plan for the site that it had ‘significant expertise, capability and a history of successfully managing’ assets along the St Kilda Foreshore, it did not have such experience in large, complex tenders. The St Kilda Triangle development was a high-risk, complex and controversial project. In addition, the project was not subject to the same high level of checks and approvals associated with a state government development.

*Some individuals involved in the project did not recognise the existence of conflicts of interest during the tender process. Some individuals focused on the Local Government Act 1989 provisions, rather than considering the broader ethical obligations of public sector employees. Others considered that they did not have a conflict of interest because they stood to gain no financial benefit and most failed to recognise the damage to public confidence that a perception of a conflict of interest can have.*

*St Kilda's Edge Committee negotiated exclusively with BBC after receipt and evaluation of revised bids from BBC and another bidder in February 2007. While the Request for Proposal documentation appears to permit the St Kilda's Edge Committee to conduct exclusive negotiations, I consider that it should have negotiated with both RV Group and BBC to maintain adequate competition and to in turn ensure that the tender process achieved the best outcome and value for money for the community and the State Government.*

70. I note that the City of Port Phillip conducted the tender process on behalf of the State Government, through the Department of Sustainability and Environment. I consider that given the size of the project and its responsibility as 'site owner', the Department of Sustainability and Environment should have played a more hands-on role in the administration and management of the tender process and development project.

71. In response to this, the Secretary, Department of Sustainability and Environment stated:

Management of Crown Land is devolved to various managers such as Parks Victoria, Committees of Management for major public venues and Municipal Councils such as the City of Melbourne and the City of Port Phillip who manage significant assets in their own right. It is not unusual to have these authorities manage significant projects since these managers have both hands on experience and ability to relate proposed developments to their site, local community and broader needs.

72. I remain of the view that the Department of Sustainability and Environment should have played a more hands-on role in the administration and management of the tender process and development project.

#### ***Exclusive negotiations***

73. My investigation identified that the St Kilda's Edge Committee negotiated exclusively with BBC after receipt and evaluation of revised bids from BBC and another bidder, R Corporation with John van Haandle (RV Group), in February 2007. While the Request for Proposal documentation appears to permit the St Kilda's Edge Committee to conduct exclusive negotiations, I consider that it should have negotiated with both RV Group and BBC to maintain adequate competition and to in turn ensure that the tender process achieved the best outcome and value for money for the community and the State Government.

74. I do not consider it was desirable to negotiate with only one bidder, particularly when neither met the evaluation criteria and the St Kilda's Edge Committee considered that both submissions 'were of an extremely high quality'.

75. I also note that BBC was informed that its bid was preferred at least one month prior to the 25 May 2007 decision. I consider that this knowledge provided BBC with an advantage in negotiations with the St Kilda's Edge Committee.

#### ***Poor procurement and contract management practices***

76. My report, *A report of investigations into the City of Port Phillip*, tabled in Parliament in August 2009 identified that the City of Port Phillip at the time had:

- poor procurement and contract management practices
- poor record-keeping practices
- failed to achieve good governance, including its own requirement that ‘Council decision-making ... exhibit transparency, honesty and probity’
- failed to adopt a conflict of interest policy until September 2008
- failed to identify a number of conflict of interest issues or respond to them appropriately in relation to procurement and contracting.

77. The council’s poor procurement and contract management practices were further highlighted during my investigation into the St Kilda Triangle. I identified that the City of Port Phillip appeared to have breached section 186 of the Local Government Act in relation to the engagement of project managers for the St Kilda Triangle project. The project managers, Paradigm Advisory, were paid in excess of \$800,000 prior to the City of Port Phillip tendering for the project management contract – five years after Paradigm Advisory’s appointment. In order to avoid the Local Government Act requirement in place at the time that contracts for over \$100,000 go to public tender, the City of Port Phillip ‘cut’ the contract for project management services into five separate contracts.

78. In response to this, Paradigm Advisory stated:

At no time did we believe we had any guarantee of contracted work beyond the stage then current. We therefore had no reason to believe that the contracts did not comply with the Local Government Act.

79. In this regard, I note that it was the responsibility of the City of Port Phillip, not Paradigm Advisory, to ensure that the council met its obligations under the Local Government Act.

### *Status of the development*

80. During my investigation, on 14 December 2009, the elected council voted to end the controversial St Kilda Triangle development, agreeing to a \$5 million commercial settlement with BBC. BBC will also be given a five-year lease to continue to manage the Palais Theatre as part of the settlement.

81. In a media statement, Mayor Frank O’Connor stated:

We were elected on a clear mandate to bring an end to the Development Agreement for the St Kilda Triangle. Unfortunately the Agreement was legally binding and water-tight leaving us with a commercial settlement as the only realistic option. Not only do we feel we have delivered on our promise to the community, we believe a far better solution can be found by working with the community and other relevant parties.

*The council’s poor procurement and contract management practices were highlighted during my investigation into the St Kilda Triangle.*

*To avoid the Local Government Act requirement in place at the time that contracts for over \$100,000 go to public tender, the City of Port Phillip ‘cut’ the contract for project management services into five separate contracts.*

## Recommendations

82. I have made a number of recommendations, including that:

- The Department of Treasury and Finance conduct regular reviews of the state government probity practitioner panel to ensure probity auditors appointed to medium and high-risk projects are upholding its probity principles.
- The Department of Treasury and Finance review the *Good Practice Guidelines – Conduct of Commercial Engagements* to include the following as functions of a probity auditor:
  - the probity auditor is to endorse a procurement conduct plan (probity plan) at the beginning and conclusion of the auditor's involvement, which sets out the probity principles and the tasks required to ensure probity is achieved
  - the probity auditor is to endorse a conflict of interest register, to be completed by the agency, at the conclusion of the auditor's involvement to confirm that any conflict of interest issue has been appropriately managed by the agency
  - the probity auditor's interim and final probity reports are to be accompanied by a signed document detailing the work completed by the probity auditor.

These requirements will ensure that the probity of projects can withstand independent scrutiny and that the probity auditor is accountable for their conclusion on the probity of the project.

- The Department of Treasury and Finance review the *Good Practice Guidelines – Conduct of Commercial Engagements* and the *Probity Risk Assessment Tool* to specify that:
  - major projects require both a probity advisor and probity auditor and that these functions are provided by different parties
  - medium-risk projects require that, at a minimum, a probity auditor be appointed
  - in medium and high-risk projects, agencies consider extending the role of the probity advisor and/or auditor past the announcement of the successful tenderer.

83. In response to these recommendations, the Department of Treasury and Finance stated that 'the probity practitioner panel is currently under review, with a new panel arrangement to be implemented in November 2010' and that my recommendations regarding a review of the *Good Practice Guidelines – Conduct of Commercial Engagements* and the *Probity Risk Assessment Tool* will be taken into account at the time the new panel is finalised.

## PROBITY AND PROCUREMENT

84. Probity has been a topic of considerable importance across all jurisdictions in Australia and has been the subject of numerous policies and papers in government and the private sector. In simple terms, an effective way to understand probity is to think of the principles of honesty, ethical conduct and a transparent process.<sup>1</sup>
85. In 1998, the Victorian Government Purchasing Board introduced its *Probity Guidelines for Tendering and Contracting*, which applies to non-construction goods and services. This document, which has since been updated, is considered the best practice document on which all other state government procurement documents are based. It describes probity as having the following elements:
- fairness and impartiality
  - use of competitive process
  - consistency and transparency of process
  - security and confidentiality
  - identification and resolution of conflicts of interest
  - development of a probity plan.
86. In October 2000, the State Government released a statement about probity titled *Ensuring Openness and Probity in Victorian Government Contracts*. The policy statement provided details of the State Government's intention to improve probity and 'have a consistent set of rules on probity ... across the entire public sector'. The State Government stated that it would:
- ensure probity standards are subject to consistent, rigorous standards and independent oversight across the Victorian public sector
  - legislate to lock in the disclosure of state government contracts
  - remove the ambiguity that previously surrounded commercial-in-confidence matters
  - promote a culture of openness at all levels of government
  - ensure that Parliament, the Auditor-General and the Ombudsman are able to exercise their powers without unjustified obstruction from politicians and bureaucrats.
87. This led to the development of more detailed policies by state government agencies.

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<sup>1</sup> The Victorian Government Purchasing Board uses these words to define 'probity'.

88. On 1 February 2002, the Minister for Planning issued *Ministerial Directions 1 – Tendering Provisions for Public Construction* and *Ministerial Directions 2 – Contractual Provisions for Public Construction*. These directions were made under Part 4 of the *Project Development and Construction Management Act 1994* (the Project Development and Construction Management Act) and provided policy direction on state government construction projects, which do not fall within the jurisdiction of the Victorian Government Purchasing Board. Hence, the Kew tender was subject to these Ministerial Directions and the Project Development and Construction Management Act. These Ministerial Directions espoused similar probity principles as those outlined in the Victorian Government Purchasing Board's probity guidelines. Local councils are not subject to these Ministerial Directions.
89. At the Commonwealth level, the Department of Finance issued *Guidance on Ethics and Probity in Government Procurement (Financial Management Guidance No 14)* in January 2005. It states:
- Good probity management aims to:
- minimise conflicts/problems and the potential for litigation;
  - avoid the potential for corrupt practices to occur;
  - produce better outcomes against stated objectives; and
  - maintain public sector integrity.
90. It also states:
- Ethics and probity are a consideration throughout the entire process of procurement ... Probity is the evidence of ethical behaviour in a particular process.
91. The St Kilda Triangle development proceeded under a Memorandum of Understanding signed by the City of Port Phillip and the State Government, through the Department of Sustainability and Environment, dated 1 April 2005. The document specified that the City of Port Phillip was required to manage the tender process in accordance with the 'relevant procurement policies of the State of Victoria including ... the Victorian Government Purchasing Board procurement principles'.
92. Numerous reports and policies about probity have been released subsequent to the commencement of the St Kilda Triangle and Kew projects; however, the basic principles have not changed.
93. For example, in October 2007, the Victorian Auditor-General developed its good practice guide *Public Sector Procurement: Turning Principles into Practice* to assist Victorian public sector agencies with their procurement activities. It states:

Probity in procurement relates to the fairness, impartiality and integrity of the process. Consistency in the treatment of, and interaction with, potential suppliers is important in ensuring probity standards are met. Probity is also critical in achieving value-for-money. Potential suppliers may choose not to participate in tenders if they doubt the fairness or impartiality of the process. This diminishes the range of solutions available and the competitiveness of the bids.

94. In August 2008, the Department of Planning and Community Development issued its *Local Government Procurement Best Practice Guideline*. This guideline states:

Probity means ensuring: fairness and impartiality; use of competitive process; consistency and transparency of process; security and confidentiality; identification and resolution of conflicts of interest ... In all commercial dealings, the highest standards of honesty must be observed ... must conduct business in a fair, honest and open manner, demonstrating the highest levels of integrity consistent with the public interest.

95. It was within this broad policy framework and understanding of probity that my investigation was undertaken.

## **The roles of the probity advisor and probity auditor**

96. The Department of Treasury and Finance *Good Practice Guidelines – Conduct of Commercial Engagements* identify two main probity roles: that of the probity advisor and the probity auditor. According to the guidelines, the probity advisor and probity auditor selected should have experience and have completed state government-accredited procurement training. Each should report to the Secretary or nominee.
97. The Kew probity advisor and the Kew and St Kilda Triangle probity auditor stated that at all stages of the tender process, agencies seek probity advice from probity auditors and therefore, the auditor role involves more than auditing the process. Neither the Kew probity advisor nor the Kew and St Kilda Triangle probity auditor considered that it was necessary for advice on the preparation and completion of a probity plan to be separated from the audit of that plan.
98. The Department of Treasury and Finance *Good Practice Guidelines – Conduct of Commercial Engagements* did not require that the probity auditor and probity advisor functions be provided by different parties. However, the guidelines stated:

Where the procurement process is very large and/or involves highly complex risks, the responsible accountable officer [for the tender] may consider it necessary to engage more than one probity practitioner to either ensure an adequate breadth of probity experience or to undertake different roles.

*Both the Kew and St Kilda Triangle projects were large and involved complex risks. Both a probity advisor and a probity auditor were engaged in relation to Kew; while the St Kilda's Edge Committee only engaged a probity auditor. In my view, this provided a higher level of assurance about the standard of tender probity for the Kew project.*

99. Both the Kew and St Kilda Triangle projects were large and involved complex risks. Both a probity advisor and a probity auditor were engaged in relation to Kew; while the St Kilda's Edge Committee only engaged a probity auditor. In my view, this provided a higher level of assurance about the standard of tender probity for the Kew project.
100. In this regard, I note that in October 2007, the Victorian Auditor-General stated in his report, *New Ticketing System Tender*:

In a major tender, the role of a Probity Advisor is to establish and manage the probity approach, while the role of a Probity Auditor is to independently review the nature and conduct of the probity approach ... While combining the roles may benefit a tendering authority through cost savings and efficiencies, having a separate Probity Auditor role provides a higher level of assurance about the standard of tender probity. Combining the roles serves to confuse accountabilities and may weaken public confidence in the probity of a tender.

101. In addition, the Victorian Auditor-General's report identified specific functions for the probity auditor and advisor:

**Table 1: The role of the probity auditor and probity advisor**

Probity Auditor	Probity Advisor
<ul style="list-style-type: none"> <li>• monitoring compliance with processes established to identify conflicts of interest</li> <li>• investigating and reporting to the governing body on conflicts of interest identified and any other probity issues</li> <li>• monitoring the tendering authority's adherence to the probity plan</li> <li>• monitoring adequacy of staff training in tender probity requirements</li> <li>• checking completeness of registers and records of meetings and communications with tenderers</li> <li>• providing assurance to the governing body on the integrity of the tender process</li> <li>• furnishing a final probity clearance report</li> </ul>	<ul style="list-style-type: none"> <li>• establishing a process to monitor and identify any conflicts of interest</li> <li>• reviewing and advising on important project documentation, such as:                             <ul style="list-style-type: none"> <li>• the terms of reference of various project groups</li> <li>• the probity policy and plan</li> <li>• security arrangements</li> <li>• confidentiality documentation</li> <li>• administrative processes and plans for the procurement</li> <li>• other procurement documentation</li> </ul> </li> <li>• providing probity training for staff</li> <li>• implementing and completing conflict of interest documentation</li> <li>• attending meetings, and ensuring that the attendees have been appropriately briefed on their terms of reference and that proceedings are conducted to agreed ethical standards</li> <li>• providing briefings, advice and reports on probity issues such as conflicts of interest and communication issues</li> </ul>

Source: Victorian Auditor-General's Office



102. In October 2007, the Victorian Auditor-General recommended that the Department of Treasury and Finance and the Victorian Government Purchasing Board amend its *Good Practice Guidelines – Conduct of Commercial Engagements* to require that the probity auditor and advisor functions be provided by different parties. The Department of Treasury and Finance did not accept this recommendation, stating that the policy was considered ‘industry standard practice and [was] therefore appropriate’.
103. Since then the State Government has accepted a recommendation from the Public Accounts and Estimates Committee (May 2009) that the probity auditor and advisor functions be provided by different parties for major projects.
104. I note, however, that the *Good Practice Guidelines – Conduct of Commercial Engagements* and the *Probity Risk Assessment Tool* (which allows agencies to conduct a self-assessment of tender probity risk) do not appear to have been updated. I recommend that the Department of Treasury and Finance update these documents. I also recommend that the Department of Planning and Community Development update its *Local Government Procurement Best Practice Guideline* to ensure that local government and state government policies are consistent.

## Recommendations

### Recommendation 2

I recommend that the Department of Treasury and Finance review the *Good Practice Guidelines – Conduct of Commercial Engagements* and the *Probity Risk Assessment Tool* to specify that:

- major projects require both a probity advisor and probity auditor and that these functions are provided by different parties
- medium-risk projects require that, at a minimum, a probity auditor be appointed
- in medium and high-risk projects, agencies consider extending the role of the probity advisor and/or auditor past the announcement of the successful tenderer.

### ***Department of Treasury and Finance response***

'The issues you raise will be taken into account at the time the new probity auditor panel is finalised [by the Department of Treasury and Finance in November 2010]. Further, the Government is currently undertaking a major review of the *Financial Management Act 1973* [sic – 1994] with the intent of establishing the Public Finance and Accountability Bill (PFAB) currently before Parliament. A new procurement environment is to be established under the Bill, and probity issues, including matters raised by your draft report, will be addressed by the new governance arrangements and, the complexity / capability framework that departments will be required to apply in conducting open tenders. I also note that "probity" is defined in the PFAB as a fundamental principle to apply to Government procurement and DTF will review and issue further guidelines on this topic following passage of the Bill'.

### **Recommendation 3**

I recommend that the Department of Planning and Community Development update its *Local Government Procurement Best Practice Guideline* to ensure that local government and state government policies are consistent in relation to the appointment of probity advisors and auditors for major projects.

### ***Department of Planning and Community Development response***

'Local Government Victoria has scheduled a review of the *Local Government Procurement Best Practice Guideline* to commence in June this year. The broad principle of consistency between Local Government and State Government requirements will inform that review. It needs to be borne in mind however that there will remain some necessary points of divergence. For example, in the role played by the Victorian Government Purchasing Board which does not extend to local government procurement'.

### **Conflict of interest principles and requirements**

*Conflict of interest in the public sector remains an issue requiring improvement not only in respect of declaring conflicts, but also managing and documenting conflicts.*

105. One of the critical components of probity is the management of conflict of interest issues. A conflict may arise where the public duty and the private interest of a public sector employee intersect. In March 2008, I reported to Parliament on *Conflict of interest in the public sector*. I noted that conflict of interest is a critical matter for government.
106. Conflict of interest in the public sector remains an issue requiring improvement not only in respect of declaring conflicts, but also managing and documenting conflicts. If conflicts of interest are not identified and managed, they have the potential to undermine not only the integrity and probity of the tender process, but also importantly, public confidence in that process.

107. In addition to the probity framework established by the Victorian Government Purchasing Board, the *Public Administration Act 2004* (the Public Administration Act) requires public servants to act with integrity; make decisions based on merit, without bias or self-interest; and avoid 'any real or apparent conflicts of interest'.
108. Likewise, the Codes of Conduct issued by the Public Sector Standards Commissioner promote adherence to the public sector values found in the Public Administration Act and are binding statements prescribing the expected behaviour of public sector employees. All state government employees are bound by the relevant Code of Conduct. Contractors bound by individual contracts must abide by the terms of their contracts.

### **Gifts and hospitality**

109. Another area of importance in the probity context is the treatment of gifts and hospitality received or offered to public officials. Gifts and hospitality should only be accepted when it is in the public interest. In addition, gifts of a nominal value, even if given to express gratitude, should be avoided as they may influence, or be seen to influence, the actions of public officials by creating a sense of obligation.

*Another area of importance in the probity context is the treatment of gifts and hospitality received or offered to public officials. Gifts and hospitality should only be accepted when it is in the public interest.*

# KEW RESIDENTIAL SERVICES

## HISTORY

110. The Kew redevelopment site is a 27-hectare piece of land in Kew near the Yarra Bend and Studley Park environs, some five kilometres from the Melbourne central business district. The site was previously the location of Kew Cottages, which opened in 1887 in the grounds of Kew Lunatic Asylum. Kew Cottages housed young adults and children with intellectual disabilities.
111. In May 2001, the then Premier announced that the site was to be redeveloped by the State Government. The State Government's intention was to re-house 50 to 100 of the 462 former Kew Cottages residents in new homes on the site as part of a wider relocation of residents into community houses across Victoria. The State Government planned to sell the surplus land and retain ownership of the community houses for the Kew residents. The land at this time was zoned Public Use Zone 3,<sup>2</sup> and would have to be re-zoned in order for this to occur. In a media release on 4 May 2001, the Office of the Premier said that the residents would benefit from living in a community, as opposed to an institutionalised environment.
112. The Kew redevelopment was a complex project from the outset due to the demands of developing the site while the Kew residents continued to live there. The State Government considered it was a significant development for Victoria; the Kew residents and their families believed it represented an opportunity for better living conditions; and the local council, the City of Boroondara, recognised the significance of redeveloping a large site close to the central business district.

### **Establishment of Interdepartmental Steering Committee / Project Control Group**

113. An Interdepartmental Steering Committee was established in May 2001. It was chaired by representatives of the Department of Human Services and also comprised representatives of the Department of Treasury and Finance, the Department of Infrastructure and the Department of Premier and Cabinet. Its fundamental task was to progress a brief on the business and commercial options and the nature of the commercial arrangement for the development.

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<sup>2</sup> Public Use Zone 3 is a planning term that describes a parcel of land that is designated by the *Boroondara Planning Scheme* to be used for public utility and community services and facilities. See <[www.dpcd.vic.gov.au](http://www.dpcd.vic.gov.au)> for planning scheme information.

114. To progress this, the Interdepartmental Steering Committee commissioned reports covering environmental, financial, historical and site-specific data. It identified that the land would need to be re-zoned to Residential Zone 1, under the *Boroondara Planning Scheme*, and that a planning framework would be required for the design of the development. Consequently, the Department of Human Services contracted the Urban Land and Development Corporation, now known as VicUrban, to facilitate these processes on behalf of the State Government.
115. Documents show that the State Government chose a development agreement model after the Expression of Interest and the Request for Proposal phase had closed. It appears that this strategy was determined as the one likely to bring best value to the State Government. Prior to this, the State Government approved the project as a Public Sector Asset Investment Initiative to be managed by the Department of Human Services' Capital Management Branch.
116. The Department of Human Services also established and chaired a Project Control Group for day-to-day management, comprising representatives from the Department of Human Services, Major Projects Victoria and the Department of Treasury and Finance. The key task for the Project Control Group was to undertake the tender process, including the management of probity.

### **Establishment of City of Boroondara working party**

117. On 21 May 2001, the Department of Human Services briefed the City of Boroondara on the role and progress of the Interdepartmental Steering Committee. City of Boroondara documents show it considered that the State Government should have included it in the discussions to that point. The City of Boroondara decided to initiate its own planning process by establishing a working party to produce an urban design framework. It invited key stakeholders to be part of this process. The working party included councillors; City of Boroondara officers; community representatives; and state government personnel from the Department of Human Services, the Department of Infrastructure and, after the 2002 state election, the Department of Sustainability and Environment. The Kew Cottages Parents' Association was also represented. The working party met for the first time in April 2002. Community feedback was sought as part of the consultation process.
118. Some 16 months later, on 4 August 2003, the elected council approved the urban design framework. The framework represented a combination of the recommendations of the working party, City of Boroondara officers and the elected council. Notably, the final council-approved urban design framework required a minimum 50 per cent open space (excluding roads and footpaths) and height restrictions.

119. In response, the State Government requested that the elected council reconsider its position and proposed its own amendment to the *Boroondara Planning Scheme*, which later became Amendment C53. The elected council resolved to proceed with its own planning process and requested that the Minister for Planning authorise its urban design framework as Amendment C38.

### **Ministerial intervention**

120. In November 2003, the Hon. Mary Delahunty, then Minister for Planning, intervened in this process by adopting and approving Amendment C53 to the *Boroondara Planning Scheme* and making herself the responsible authority for the Kew Residential Services site. This meant that the elected council's amendment was not proceeded with. The Minister's decision effectively took the matter out of the control of the City of Boroondara.
121. On that date, the Minister also used her powers under section 20(4) of the *Planning and Environment Act 1987* to exempt herself from the operations of sections 17, 18 and 19 of that Act, which relate to 'Exhibition and notice of an amendment'. Section 19 provides that notice is given to relevant persons, who are then able to make submissions and challenge an amendment pursuant to Division 2, Part 3 of the *Planning and Environment Act*. The Minister's action, therefore, removed residents' access to the normal challenge process under the *Planning and Environment Act*.
122. Also in November 2003, the State Government approved funding of \$86.5 million for redevelopment of the site and the other off-site community houses, thus providing up-front funds to progress the project.

### **Appointment of probity advisor and auditor**

123. In March 2004, the Department of Human Services appointed Avanti Consulting Group as probity advisor. The role of the probity advisor was to assist in the development of a probity plan and to provide probity advice to the department on the processes to be undertaken during the Expression of Interest phase.
124. On 13 March 2004, the Department of Human Services listed the Expression of Interest on the Victorian Government Tender website as tender E-2982. Expressions of Interest closed on 1 April 2004 and seven bidders were subsequently requested to respond to a Request for Proposal. The short-listed bidders were forwarded an extensive brief and requested to make a detailed submission in response to key criteria. The closing date for the Request for Proposal submissions was 29 July 2004.

125. In April 2004, prior to the Request for Proposal closure date, Avanti Consulting Group concluded its contract and the Department of Human Services appointed Pitcher Partners as the probity auditor to oversee the probity of the tender process; to provide advice to the Department of Human Services on probity issues; and to provide audit reports up to the announcement of the preferred tenderer. Pitcher Partners began by auditing the Expression of Interest process.
126. At the conclusion of the initial assessment of the Request for Proposal process, preliminary parallel negotiations were initiated with Walker/ Kevin Hunt consortium (Walker) and Boulderstone/ Hornibrook, which both received the highest ratings overall. During the next phase of the tender process, parallel negotiations were progressed with these two bidders. A further assessment of the Walker and Boulderstone/ Hornibrook bids was subsequently conducted and Walker was noted as scoring higher. By 8 December 2004, the Department of Human Services had finalised its internal assessment process.

### **Heritage Council listing**

127. On 1 December 2004, the Heritage Council of Victoria listed the Kew site on the Victorian Heritage Register. The registration was significant to the timing of the project as it was determined well after the Expression of Interest phase and during the parallel negotiation phase.
128. The Department of Human Services responded to this registration by seeking further conservation reports with a view to applying to Heritage Victoria for a permit to demolish four of the six listed buildings. This would bring the registration in line with the original tender brief specifications. The Department of Premier and Cabinet arranged for a heritage consultant, Ms Helen Lardner, to provide advice to the Department of Human Services on its submission to Heritage Victoria.

### **Announcement of preferred tenderer**

129. On 3 March 2005, a letter of intent was signed by the State Government and the preferred tenderer, Walker.
130. The probity auditor produced a final audit report on 13 April 2005, stating:

The Valuer-General has advised that the Walker bid is considered reasonable and the Land Monitor has granted approval for a development agreement to be entered into with Walker Corporation ... In my view the work of the evaluation teams was properly focussed in accord with the RFP and probity plan. In all material respects and based on the probity framework, the process has been in accordance with identified probity principles covered in the probity plan.



131. On 3 June 2005, the Hon. Sherryl Garbutt, then Minister for Community Services, announced the redevelopment plan of the site and Walker as the developer. The plan showed a modern housing estate featuring a community leisure centre, parkland and purpose-built housing for people with disabilities. The Minister also stated that any surplus funds from the sale of the land would be re-invested in services and infrastructure for people with a disability.
132. On 5 June 2005, the Department of Human Services submitted an application to Heritage Victoria for a permit to demolish three buildings. This was based on a recommendation from Ms Lardner.
133. In August 2005, the project was nominated by Orders under the Project Development and Construction Management Act, which specified:
  - the Minister for Community Services was to be the responsible Minister for the project. Thus, the Department of Human Services (which advised the Minister for Community Services) was to perform the function of 'client department'
  - the Department of Infrastructure was to be the 'facilitating agency' for the project, which allowed Major Projects Victoria (then part of the Department of Infrastructure) to conduct the project.
134. On 9 September 2005, Heritage Victoria issued Permit P9639 allowing the demolition of three of the six listed buildings. This left three buildings – one more than the original specification. As a consequence, Walker issued a new development plan in October 2005.
135. In December 2005, further development plans were put forward by Walker and in March 2006, the Minister for Planning approved the development plan.
136. On 23 October 2006, the then Treasurer signed the revised development plan and commercial agreement, noting that the Valuer-General and the Government Land Monitor had approved the agreement. The Treasurer also noted that the Valuer-General's valuation had decreased from \$74.6 million to \$57.9 million, which resulted from a reduction in yield from 570 to 380 dwellings. In addition, he noted that the Valuer-General indicated the plan was not the highest and best use of the land, but that the Department of Treasury and Finance considered the plan still met the criteria that led Walker to win the bid. On 26 October 2006, Mr Sean Sweeney, Executive Director, Major Projects Victoria, signed the development agreement with Kew Development Corporation Pty Ltd and Walker on behalf of the State Government and the Department of Human Services.

## Walker's request to transfer the development to Mirvac

137. On 29 November 2006, Walker released a media statement asserting that Mirvac had bought a substantial proportion of Walker's property assets, including the rights to stage two of the Kew redevelopment.
138. During the Select Committee hearings, Mr John Hughes, Managing Director, Walker outlined that the agreement reached between Walker and Mirvac was that Walker had the right to offer the stage two development phase to Mirvac and Mirvac had the right to seek the stage two development from Walker. However, both parties had agreed that should they proceed with a transfer of the stage two development, state government approval was required.
139. On 14 December 2006, Mr Theophanous, then Minister for Major Projects, met with Mr Richardson, lobbyist and former Senator, to discuss the proposal that the State Government consent to the transfer of the Kew development project from Walker to Mirvac.
140. However, Mr Richardson was unable to convince Mr Theophanous to consent to the transfer and on 11 May 2007, Major Projects Victoria wrote to Walker and Mirvac to advise of the State Government's position. The letter stated:

In accordance with its rights under the project Development Agreement the State has determined that it will not consent to an assignment [from Walker to Mirvac] until both Stage 1 and 2 have been completed. Accordingly, the State hereby gives you notice that it does not consent to any proposed assignment of the Project Development Corporation Pty Ltd to Mirvac prior to Stages 1 and 2 being completed.

141. The letter contained a reference to clause A18 of the agreement, which states:

(a) Prior to completion of Stage 1 and Stage 2, the Developer shall not assign, novate or transfer all or any part of its Rights or Obligations relating to the Project under this Agreement without the prior written consent of the State which consent may be granted or withheld in the State's absolute discretion.

(b) After completion of Stages 1 and 2 the Developer shall not assign, novate or transfer all or any part of its Rights or Obligations relating to the Project under this Agreement without the prior written consent of the State, which consent shall not be unreasonably withheld provided the developer complies with clause A18.4.

142. Clause A18.4 states:

the State will not unreasonably withhold its consent to an assignment under clause A18.1(b) if:

(a) the assignee is of comparable financial standing to the Developer and has a demonstrated capacity and expertise to complete the Project in accordance with this Agreement;

(b) the assignee enters into a deed of covenant in a form satisfactory to the State, acting reasonably, under which the assignee agrees to observe the Obligations of the Developer under this Agreement, subject to any Claim against the Developer which arises before the release;

(c) satisfactory probity investigations of the relevant third parties are completed including investigations of any criminal records, involvement of activities;

(d) the relevant assignee executes a confidentiality deed in the form reasonably acceptable to the State;

and the State (acting reasonably) may impose conditions on the assignment including:

(i) restrictions or conditions on the rights of access of third parties to the Project having regard to the nature of access required by the third parties; and

(ii) restrictions on further assignment.

143. Based on the detailed information in the contract regarding a transfer, I consider that the State Government was and is in a strong position to ensure that any change in developer is in the public interest.

### **Current status of the development**

144. I am advised that stage two has been released and construction will conclude in late 2010, subject to market conditions and pre-sales.

*My investigation revealed a satisfactory level of probity management for the Kew project.*

*My examination of documentation and witnesses gives me no reason to believe that preferential treatment was given to any bidder in this process. However, my investigation did find areas for improvement.*

## **PROBITY PLAN, ADVICE AND AUDIT**

145. My investigation revealed a satisfactory level of probity management for the Kew project. Probity was an important factor in the redevelopment processes and the awarding of the tender. My examination of documentation and witnesses gives me no reason to believe that preferential treatment was given to any bidder in this process. However, my investigation did find areas for improvement.

### **Probity advisor and auditor appointment**

146. In the Kew project, both a probity advisor and probity auditor were appointed. In relation to the appointment of the probity advisor, my investigation identified that Ms Josie Thwaites (Avanti Consulting Group) submitted a fee proposal to the Department of Human Services on 1 March 2004 and received a letter of appointment dated 3 March 2004.

147. While the State Government's approved panel of advisors and auditors (the State Purchase Contract) was in existence at the time, the Department of Human Services did not use it. Ms Thwaites and Avanti Consulting Group were not on the panel. I stress that there is no evidence that Ms Thwaites performed her role inappropriately.

148. At interview, the Project Director, Department of Human Services told my investigators that the appointment of Ms Thwaites followed a recommendation from a Major Projects Victoria contractor. The contractor recommended several people whom he thought could perform the role of advisor. The contractor said that his recommendation of Ms Thwaites was based on his professional experience with her on other Major Projects Victoria work. As the proposal put forward by Avanti Consulting Group was less than \$15,000, the Department of Human Services was not required to seek more than one written quote.

149. Apart from providing general probity advice and attending meetings with staff and potential developers, my investigators were advised that the probity advisor assisted the Department of Human Services with the preparation and implementation of a probity plan; and that she introduced and oversaw the explanation of conflict of interest principles, the completion of conflict of interest declarations and the management of any probity issues until the time of her departure in April 2004.

150. In April 2004, the Project Director, Department of Human Services appointed the probity auditor. The probity auditor attended meetings with the developers short-listed to advance to the Request for Proposal stage, the assessment teams and the Project Control Group. He provided advice to ensure that probity principles and practices were followed and he was available for bidders to contact him direct about any probity concerns.

151. In relation to the appointment of the probity auditor, my investigation identified that the Project Director, Department of Human Services asked three companies on the State Government's approved panel of advisors and auditors to submit a proposal. Two responded and Mr Geoff Walsh of Pitcher Partners was appointed. At interview, the Project Director, Department of Human Services said that the appointment was based on price. He also informed my investigators that he considered the panel provided 'vetted' contractors and that no further checks were necessary. I consider this was not an unreasonable decision to make in the circumstances.
152. My enquiries of the Victorian Government Purchasing Board identified that there was little scrutiny associated with the contract renewal process for the advisors and auditors on the panel. I have been informed by the Victorian Government Purchasing Board that at the most recent renewal in December 2005, scant review was conducted of the panel members, including Pitcher Partners. The review involved assessing feedback surveys completed by public servants who had engaged the panel members. It did not include any independent assessment of the work conducted by panel members.
153. The Department of Treasury and Finance has since stated that the management of the panel is undertaken by the department and that the panel is under review.
154. I consider that there is a need for the Department of Treasury and Finance to strengthen its process for the renewal of probity advisors and auditors contracted on the panel to ensure the standards required by the State Government have been upheld.

*There is a need for the Department of Treasury and Finance to strengthen its process for the renewal of probity advisors and auditors contracted on the panel to ensure the standards required by the State Government have been upheld.*

## **Recommendation**

### **Recommendation 4**

I recommend that the Department of Treasury and Finance conduct regular reviews of the probity practitioner panel to ensure probity auditors and advisors appointed to medium and high-risk projects are upholding its probity principles.

#### ***Department of Treasury and Finance response***

The Department of Treasury and Finance 'regularly reviews the quarterly activity reports from departments using the panel, which includes customer feedback of the performance of those appointed in the reporting period. The probity practitioner panel is currently under review, with a new panel arrangement to be implemented in November 2010. The approach to market will include provisions on how probity practitioner services shall be defined and the appropriate method for allocating probity practitioners having regard to the complexity of the project'.

*The Department of Human Services was unable to locate and provide me with a finalised probity plan dated post-May 2004, apparently due to poor record-keeping.*

*My investigators examined the probity auditor's files and I note that he did not complete an internal probity checklist that covered similar issues to the probity plan. However, the document the probity auditor refers to was not located on the Department of Human Services' files. Therefore, any independent examination of those files does not provide a complete picture of the probity process followed.*

## Documents and reports

155. My investigation noted the existence of a probity plan, with the latest copy dated May 2004. At this stage it was still a draft.
156. According to Pitcher Partners, the probity auditor was appointed on 21 April 2004 and provided with the probity plan (prepared by the probity advisor) on 28 April 2004. The plan was given endorsement (subject to a minor clarification) by the probity auditor at the Project Control Group meeting of 18 June 2004. The Department of Human Services was unable to locate and provide me with a finalised probity plan dated post-May 2004, apparently due to poor record-keeping.
157. The probity plan was structured with four columns titled:
- probity requirement
  - project arrangements
  - task accountability and documentation
  - date reviewed and comments.
158. It was designed to be a dynamic document and updated regularly as the project progressed. As such, at the conclusion of the tender process, I would have expected the plan to be completed; signed-off by the probity auditor and the Project Control Group; and filed by the Department of Human Services in accordance with the Public Records Act. There is no evidence that this occurred.
159. In response to this Pitcher Partners stated:
- It is not a requirement for the Probity Auditor to physically sign the probity plan on completion and we reject the necessity to do so.
160. The probity auditor stated at interview that he did not refer to the probity plan and that it was a document for the Department of Human Services to use. It is my view that if a plan is produced to detail a framework for the process, then it should be used by the agency and its use should be audited by the auditor.
161. In response, the probity auditor stated that his comments had been 'misinterpreted' and that his point was that:
- the document was for the use of the Department of Human Services and as indicated ... my probity checklist evidenced the framework had in fact been audited and appropriately evidenced.
162. My investigators examined the probity auditor's files and I note that he completed an internal probity checklist that covered similar issues to the probity plan. However, the document the probity auditor refers to was not located on the Department of Human Services' files. Therefore, any independent examination of those files does not provide a complete picture of the probity process followed.

163. In the context of this issue, Pitcher Partners stated:

The files provided by our office to your officers clearly indicate that we had a probity check-list which was used to ensure that the probity framework for the process was appropriately followed.

164. The probity auditor provided reports at key stages of the project. They met the standard required by the Victorian Government Purchasing Board. The reports were provided to the Department of Human Services on:

- 26 May 2004 – Expression of Interest phase
- 15 October 2004 – Request for Proposal phase
- 15 November 2004 – Parallel negotiation phase
- 13 April 2005 – Final report.

165. In addition, following the final report, the Department of Human Services engaged the probity auditor to provide advice and sign-off on issues that developed post-April 2005, as follows:

- 24 August 2005 – The probity auditor was consulted and reported on a decision by the Project Control Group to proceed negotiating with the preferred developer following decisions by the Heritage Council. The Heritage Council had decided to retain additional trees and a total of six heritage buildings on the Kew site, rather than the two buildings identified in the original specification. The decision taken by the Project Control Group, and endorsed by the probity auditor, was based on the view that this variation was of insufficient significance to materially change the outcome of the evaluation process.
- 21 October 2005 – The Department of Human Services sought advice from the probity auditor on how changes to Walker's October 2005 development plan affected the probity of the tendering process and whether the tender process should be recommenced. The department was advised to re-assess the Baulderstone/Hornibrook bid. The department did this and concluded that the Walker plan constituted the better plan. Documentation provided by both the department and the auditor show the auditor oversaw the process.
- 8 November 2005 – The probity auditor provided advice when Mirvac Pty Ltd wrote to the Department of Human Services to complain that the delay in the tender process and the change from the original project specification necessitated a new tender process. All witnesses that my investigators interviewed about this were unanimous that the decision to accept the October 2005 development plan did not impact negatively on the probity of the process.

*With the Kew redevelopment I note that the final negotiated and agreed contract with the developer was signed almost 18 months after the Minister announced the preferred developer.*

*The contract signed with Walker was markedly different from its initial proposal, and due to the timing issues, the proposal was also changed after the probity auditor's sign-off on the heritage issues.*

- 12 December 2006 –The probity auditor provided advice to Major Projects Victoria on the issues surrounding Walker selling its interest in the project to Mirvac.

166. Further to this point, my investigation identified that it is common practice in construction projects for the role of the probity auditor to conclude when the preferred contractor is confirmed. The rationale for this relates to the conclusion of the competitive process. Where the contract is signed in a timely manner shortly after this and/or there are no major changes to the environment in which the tender was first staged, I consider this is a reasonable approach.
167. However, with the Kew redevelopment I note that the final negotiated and agreed contract with the developer was signed almost 18 months after the Minister announced the preferred developer. In addition, changes to the heritage status of the site after the Request for Proposal specifications were released meant that the environment had altered since the first stage of the tender. As a result, the contract signed with Walker was markedly different from its initial proposal, and due to the timing issues, the proposal was also changed after the probity auditor's sign-off on the heritage issues.
168. Where tender processes are delayed, or the environment alters, there is added value in obtaining further probity auditor or advisor involvement to ensure that the principles of probity – honesty, uprightness and transparency – are managed and considered throughout the life of the project, not just at the earlier tender evaluation stages. I consider that the Department of Human Services and Major Projects Victoria acted reasonably by engaging further assistance from the probity auditor from 13 April 2005, the date of the final audit report, to 12 December 2006 when issues arose with the selling of Walker assets.
169. I note that the state government's October 2000 policy statement, *Ensuring Openness and Probity in Victorian Government Contracts*, requires that the final audit report provided by Pitcher Partners should be made available to the public on request. When interviewed by my investigators, the probity auditor could see no reason for withholding the final audit report. I have included it as an attachment to my report (see Attachment 1).

## Conclusions

170. My investigation revealed a satisfactory level of probity management in that:
- governance structures set up to manage the project matched the complexity of the project and provided for cross departmental input
  - external contractors were used to provide specialised and independent advice



- once the urban design framework was formalised, the project moved in a timely manner through to the Request for Proposal stage
- probity practitioners were appointed
- the tender process was made public
- external probity audits were completed
- Gateway Reviews were conducted
- the Government Land Monitor was involved in the early stages of the project and again later at the required sign-off points
- the tenders were evaluated by three sub-assessment teams and then by a lead assessment team, and were approved by the Project Control Group
- the final signed contract was posted on the State Government's Contracts Publishing System website as required by the Victorian Government Purchasing Board
- the Valuer-General, the Government Land Monitor and the Treasurer all signed-off on the final financial arrangements prior to the State Government entering into a development agreement.

171. All of these aspects lead me to believe that probity was an important factor in the redevelopment processes and the awarding of the tender. My examination of documentation and witnesses gives me no reason to believe that preferential treatment was given to any bidder in this process.

172. However, my investigation did identify areas for improvement. These were:

- the probity plan was still being developed by the Department of Human Services, with the support of the probity advisor, when the Expression of Interest process began
- the final probity audit report was not made available for scrutiny as required by the state government's October 2000 policy statement, *Ensuring Openness and Probity in Victorian Government Contracts*
- conflict of interest declaration forms and the conflict of interest register were not filed and held by the Department of Human Services in accordance with good record management processes
- the final signed contract did not appear on the Contracts Publishing System website until six months after it was signed

- there was an extended delay between the announcement of the preferred tenderer and the development agreement being signed
- the early works contract and the demolition contract were not published on the Contracts Publishing System website.

173. I also note that the final probity plan was not formally signed-off and placed on a departmental file by the Department of Human Services. In this regard, I consider that the Department of Treasury and Finance should mandate that probity auditors engaged on projects over \$10 million be required to endorse the probity plan (procurement conduct plan) both prior to the Expression of Interest phase and prior to the final audit report. Probity auditors should also endorse a conflict of interest register at the conclusion of the auditor's involvement to confirm that any conflict of interest issue has been appropriately managed by the agency and the probity auditor's reports should be accompanied by a signed document detailing the work completed by the probity auditor. These requirements will ensure that the probity of projects can withstand independent scrutiny and that the probity auditor is accountable for their conclusion on the probity of the project.

174. The Victorian Auditor-General agrees with my recommendations in this regard.

## **Recommendation**

### **Recommendation 5**

I recommend that the Department of Treasury and Finance review the *Good Practice Guidelines – Conduct of Commercial Engagements* to include the following as functions of a probity auditor:

- the probity auditor is to endorse a procurement conduct plan (probity plan) at the beginning and conclusion of the auditor's involvement, which sets out the probity principles and the tasks required to ensure probity is achieved
- the probity auditor is to endorse a conflict of interest register, to be completed by the agency, at the conclusion of the auditor's involvement to confirm that any conflict of interest issue has been appropriately managed by the agency
- the probity auditor's interim and final probity reports are to be accompanied by a signed document detailing the work completed by the probity auditor.

### ***Department of Treasury and Finance response***

'The issues you raise will be taken into account at the time the new probity auditor panel is finalised'.

## CONFLICT OF INTEREST

175. Attention to conflict of interest issues began when the probity advisor was appointed in early March 2004 and a probity plan was initiated. The probity plan identified the need to manage conflict of interest effectively. Specifically it stated:
- all relevant staff and external consultants will complete conflict of interest declarations as required
  - conflict of interest declarations will be held in a central file by the Project Manager
  - a process for management of conflict of interest will be documented. This will include the requirement that conflict of interest should be reviewed at key milestone points
  - a register of identified conflicts of interest and actions required if any to manage these conflicts will be established.
176. The Department of Human Services was unable to provide the central file that should have contained the conflict of interest declarations as it could not be located. Consequently, I am unable to verify the status of any conflict of interest matters in relation to the tender process from the Expression of Interest phase to the completion of the Request for Proposal phase. As a key component of the probity plan, these missing declarations constitute a failure to comply with the Public Records Act.
177. Witnesses interviewed by my investigators stated that they did complete declarations at the time of the Expression of Interest and Request for Proposal phases. As the departmental files were unable to be provided, my investigators examined the probity auditor's documents relating to the Kew project and located one document that showed a list of names and ticks under columns titled 'Conflict of Interest' and 'Deed of Confidentiality'. According to this document, 17 people signed a conflict of interest form; 10 people signed deeds of confidentiality; and two people did not sign either. I note that the members of the assessment teams were on the list.
178. Of concern was that the dates demonstrate the earliest signing was on 30 March 2004 and the latest was on 30 April 2004 – a month after the Expression of Interest closed. On a positive note, however, the document demonstrates that the probity auditor reviewed the completed conflict of interest statements after the Expression of Interest list was announced to confirm that no new conflicts had arisen.
179. I note from my investigators' interviews with those directly involved in the tender assessment and other witnesses, that there was a reliance on:
- the completion by senior Victorian Public Service officers of annual declaration of interest statements

*The Department of Human Services was unable to provide the central file that should have contained the conflict of interest declarations as it could not be located ... As a key component of the probity plan, these missing declarations constitute a failure to comply with the Public Records Act.*

- other Victorian Public Service officers abiding by the *Code of Conduct for Victorian Public Sector Employees* and taking it upon themselves to raise conflict of interest concerns
- contractors taking it upon themselves to raise conflict of interest concerns.

180. My office examined and analysed the register of conflicts of interest. Like the probity plan, it was designed to be a dynamic document over the life of the tender process. The last entry was 30 June 2004, shortly after the appointment of the auditor and some 24 months before the contract was signed. No conflicts of interest were recorded between 30 June 2004 and 26 October 2006 (date of contract). As the probity auditor did not sign-off on the register, I was unable to confirm that no conflicts of interest arose during this time.
181. On this issue, the probity auditor responded that ‘project team members were aware of their responsibilities to update the register if there was a change in their circumstances’. Pitcher Partners further stated that ‘the absence of any record of conflict between June 2004 and October 2006, indicates that project team members had no new matters to report ... The register of conflict of interests was audited’.
182. One example of the register being used appropriately was that it shows the probity advisor considered that a conflict of interest existed with the Department of Human Services’ selection of a particular legal firm to represent its interests in the project. The Department of Human Services accepted this advice.
183. The probity advisor stated to my investigators that she was satisfied that the processes followed by the Department of Human Services during the Expression of Interest phase of the project were ethical and transparent. Unfortunately, the processes instigated by her were not completed by the Department of Human Services after her departure.
184. The probity auditor informed my investigators that he reviewed the conflict of interest statements. There was evidence in his files that he had sighted a number of, but not all, conflict of interest declarations. In response to this, Pitcher Partners stated:

Your comment that the Probity Auditor’s files did not include reference to all conflicts of interest is incorrect. All project team members had completed conflict of interest declarations. Your officers in reviewing the schedule of project team members, conflict of interest and confidentiality undertakings have failed to understand that all project team members had completed conflict of interest undertakings and in the case of the three project team members who did not separately sign a Deed of Confidentiality that they were senior employees of Department of Human Service [sic] who were covered under the Victorian Public Service Code of Conduct which obliges them to maintain confidentiality.

185. Pitcher Partners' statement that all project team members completed conflict of interest undertakings does not appear to be supported by the probity auditor's working papers.
186. My investigators were unable to view the original statements and declarations associated with this exercise as the Department of Human Services was unable to locate them.
187. Some witnesses suggested it was only at the tender phase that conflict of interest issues are likely to arise. While I acknowledge the potential for pecuniary interests in particular to be at the forefront of minds at this time, there are other, many and varied occasions throughout the life of a project when conflict of interest issues need to be identified and, if necessary, addressed.
188. I am concerned at the lack of understanding and attention given to the management of potential conflict of interest issues in this process. With regard to major procurement processes, I consider that certain events and circumstances should trigger a conflict of interest re-assessment and that such a process should be signed-off by the probity auditor. For example:
- all staff engaged on a major project should be briefed and required to complete a conflict of interest statement covering pecuniary, non-pecuniary, actual and perceived interests before assignment or appointment
  - the above process should also be completed when:
    - o new public sector employees or contractors are engaged to work on the project
    - o there are changes in the individuals or companies involved in the consortia bidding for the project
  - for major projects that exceed one year, public sector employees should confirm that no conflict has arisen or exists annually for the life of the project.
189. My investigators asked all witnesses whether they had a conflict of interest in this project. All available documents were examined to determine whether there was any evidence of a conflict of interest. One officer stated they did not have a conflict – I have a contrary view.
190. The former Project Director, Major Projects Victoria stated under affirmation that he held shares in a property development company, Mirvac, and that he had declared this on his annual conflict of interest form. However, my examination of his annual form, dated July 2004, showed no declaration of shares had been made.

*Some witnesses suggested it was only at the tender phase that conflict of interest issues are likely to arise. While I acknowledge the potential for pecuniary interests in particular to be at the forefront of minds at this time, there are other, many and varied occasions throughout the life of a project when conflict of interest issues need to be identified and, if necessary, addressed.*

*I consider that it is inappropriate for persons working in Major Projects Victoria to hold shares in property development or related industry companies. At the very least, such shareholdings must be disclosed.*

191. As Mirvac was one of the initial companies involved in expressing an interest for the Kew project, and as it is often a company bidding for tenders managed by Major Projects Victoria, it is an interest that should have been disclosed on the annual form. It also highlights that the annual form provides only a snapshot of the status of a particular moment and, unless the officer is alive to the issue, the form has no currency.
192. The former Project Director, when questioned about this matter, did not believe he had a conflict because the share-holding was not significant. He also stated that he did not complete a conflict of interest form specifically for the Kew redevelopment. He subsequently stated that he recalled completing such a declaration. However, the probity auditor's list of declarations did not support this.
193. The former Project Director responded to my draft report by stating:
- It is my view that your conclusion incorrectly assumes that my very minor holding of shares valued at less than \$10,000 with minor dividends paid and in recent times negative growth, is a sufficient motivator to influence decision making/independence is influenced [*sic*]. My view is that a reasonable person would not reach this conclusion.
194. I consider that it is inappropriate for persons working in Major Projects Victoria to hold shares in property development or related industry companies. At the very least, such shareholdings must be disclosed.
195. The former Project Director was in a position to influence aspects of the project and he failed to declare his interests. I have examined his interests to ensure the conflict had no material effect on the project. I consider that it did not. However, best practice should be to declare an interest so it can be managed and resolved. In my view, his explanation was not satisfactory and his position indicates a lack of understanding of perceived conflicts of interest.

### **Consistency in the public service**

196. Major Projects Victoria sees itself at the public/private interface of the construction industry and that to compete and negotiate with its industry counterparts, it is necessary to pay salaries beyond normal Victorian Public Service levels.
197. Mr Sean Sweeney, Executive Director, Major Projects Victoria (who was the Executive Director at the time of signing the contract with Walker) responded to this:
- MPV operates in a commercial environment and it is important that the salaries paid reflect that and enable MPV to attract and retain competent personnel. This may result, on occasions, in personnel being paid beyond normal VPS levels ...

The salaries are a result of a need to get appropriated [sic] experienced and skilled personnel, not are [sic] part of a predetermined policy to pay above VPS [Victorian Public Service] rates.

198. In addition, it is clear that officers and contractors of Major Projects Victoria liaise and socialise regularly with other industry players. At interview, Mr Sweeney expressed the view that relationship-building with the private sector was important and that it was necessary for Major Projects Victoria to operate in a similar fashion in order to have credibility.

199. Mr Sweeney has since stated:

Beyond industry functions such as conferences, awards evenings and the like, I believe it would be much more accurate to state that MPV officers/contractors socialise occasionally with other industry players. To state that MPV socialises regularly gives a completely incorrect impression and one that has the potential to be misconstrued or misused.

200. I note that Major Projects Victoria operates within a closed environment in that it does not compete in open tender processes for its work. With Kew, it was asked to provide a proposal for its work, which it calculated in 2004 to be \$350,000 for advisory services to the completion of the project. Notwithstanding the project's management structure has substantially changed, my investigation into the current invoicing practices between Major Projects Victoria and the Department of Human Services shows a lack of diligence in accounting processes on both sides in that the amount for management costs has now exceeded \$1 million.

201. To this Mr Sweeney stated:

MPV operates on a cost recovery fee for service basis. The fee that is charged is a direct result of the time required to be expended managing a project on behalf of a client – no more, no less.

202. The Secretary, Department of Innovation, Industry and Regional Development further stated:

Major Projects Victoria's management fees are disclosed to the relevant client department/agency on an ongoing basis.

203. My investigation also identified other practices adopted by Major Projects Victoria that give me cause for some concern. These are as follows:

*Major Projects Victoria operates within a closed environment in that it does not compete in open tender processes for its work.*

*Some individuals within Major Projects Victoria are not public servants, but are engaged directly, or through intermediary companies, as independent contractors. This appears to be a means to avoid the State Government's 'cap' on the number of executive officer positions.*

- Some individuals within Major Projects Victoria are not public servants, but are engaged directly, or through intermediary companies, as independent contractors. This appears to be a means to avoid the State Government's 'cap' on the number of executive officer positions. Mr Sweeney, the Executive Director, is one example. The contracts appear to be a means to pay above Victorian Public Service standard salaries and in my view, may leave the State Government open to the legal obligations associated with a standard employer-employee relationship, such as superannuation, payroll tax and long-service leave etc. In the case of Mr Sweeney, the contract is with 'Sean Sweeney and Associates', not with Mr Sweeney.

Mr Sweeney explained:

For MPV to discharge its duties it is essential that appropriately experienced and skilled personnel are used. Many such people do not wish to join the public service but do wish to make a contribution to public service and choose to do so by working as a contractor ... MPV uses contractors to ensure it can engage appropriately skilled and experienced personnel to then discharge its responsibilities. The contractors who join MPV usually join at a considerable discount from their existing market rate, they do so due to their wish to work on important public projects for a period.

The Secretary, Department of Innovation, Industry and Regional Development further stated:

As Mr Sweeney explained, some independent contractors are engaged to ensure that the appropriate levels of skills and experience are available to effectively manage the often complex projects undertaken by Major Projects Victoria.

- Some Victorian public servants are paid gratuity payments to increase their salary to executive officer levels, overcoming the State Government's 'cap' on executive officer positions. For example, a former Project Director of Major Projects Victoria was paid a gratuity payment of \$44,961 and \$44,258 in the financial years 2007-08 and 2008-09 respectively.
- Contracts for contractors do not refer to the *Code of Conduct for Victorian Public Sector Employees* or require that the contractor complies with this code.
- Mr Sweeney, according to his contract, is permitted to engage in 'outside' employment and in 2006 he worked for BP Australia while on contract with Major Projects Victoria. Mr Sweeney acknowledged at interview that as Executive Director he had not sought approval to engage in outside employment. In my view, it is inappropriate for an Executive Director employed by the Victorian Public Service to have outside employment, particularly without prior approval.



- Mr Sweeney stated in response:

When I joined MPV I joined with the specific agreement that I could undertake limited other work. This was reflected in my contract. The ability to do this was agreed with the manager who negotiated my contract. Your draft implies that I acted outside my agreed arrangements. Obviously contract terms apply beyond changes in management personnel – however I agreed [at interview] I did not discuss this matter with my new manager, this was an oversight and I have since done so and they are comfortable with my position and my contract. The level of outside employment I have engaged in is miniscule and never ever place [sic] my role with MPV in any form of conflict.

- Accepting hospitality is seen as part of the industry norm and offers of hospitality, including meals, attendance at functions and invitations to sporting events, are regarded as acceptable within limits decided by the individual officer (on a case-by-case basis). For example, Mr Sweeney acknowledged that he regularly attended functions as Executive Director of Major Projects Victoria. My investigators also examined documentation from industry companies to confirm several invitations from and acceptances to events such as the Melbourne Cup and other sporting and cultural events.

## Conclusions

204. My investigation identified that conflict of interest was not managed in accordance with the probity plan and that the application of essential principles set out in the *Code of Conduct for Victorian Public Sector Employees* were either not applied, or were being inconsistently applied.
205. The Public Administration Act states that public officials should demonstrate integrity by avoiding any real or apparent conflicts of interest (section 7(1)(b)). I consider that in the Kew project, the Department of Human Services and Major Projects Victoria paid insufficient attention to maintaining a culture that upholds the public sector values outlined in the Public Administration Act.
206. It is my view that the public expects public servants to be employed to carry out their duties and to be accountable to the values that bind all public servants. Where departments require flexibility in employment arrangements, these should be met in a way that requires non-public servants to adhere to the same public service values and standards in order to preserve the public interest. Such circumstances should be rare, monitored and disclosed.

*It is my view that the public expects public servants to be employed to carry out their duties and to be accountable to the values that bind all public servants. Where departments require flexibility in employment arrangements, these should be met in a way that requires non-public servants to adhere to the same public service values and standards in order to preserve the public interest. Such circumstances should be rare, monitored and disclosed.*

## Recommendations

### Recommendation 6

I recommend that Major Projects Victoria improve its financial accounting processes to include disclosure of project management fees prior to and on completion of each project.

#### *Department of Innovation, Industry and Regional Development response*

'The Department of Innovation Industry and Regional Development accepts the recommendations pertaining to it (and Major Projects Victoria).'

### Recommendation 7

I recommend that the State Services Authority examine and report to the Premier on the circumstances in which it is necessary for individuals to perform public servant duties when not engaged as a public servant.

### Recommendation 8

I recommend that the State Services Authority examine and report to the Premier on the circumstances in which it is necessary for public servants to be paid gratuity payments.

### Recommendation 9

I recommend that the Department of Innovation, Industry and Regional Development implement annual training programs for Major Projects Victoria's contractors and public servants on conflict of interest principles and requirements, and the acceptance of gifts and hospitality, to ensure adherence to the *Public Administration Act 2004* and the *State Services Authority's Code of Conduct for Victorian Public Sector Employees*.

#### *Department of Innovation, Industry and Regional Development response*

'The Department of Innovation Industry and Regional Development accepts the recommendations pertaining to it (and Major Projects Victoria) and provides the following comments ... Understanding and managing potential and actual conflicts of interest is treated as an important part of the operations of Major Projects Victoria. This matter is raised on a regular basis at staff meetings and in staff training. We will review these arrangements to ensure all staff and ongoing contractors have a clear understanding of these matters'.

## FAIR, OPEN AND COMPETITIVE PROCESS

### Approval processes

207. The processes followed by the Department of Human Services evolved during the course of the project. There was no overall project plan available at the outset detailing the steps necessary for completion of the project.
208. Despite this, my investigators identified that the project was subject to considerable oversight and approval processes, including the:
- establishment of an Interdepartmental Steering Committee chaired by the Department of Human Services and comprising representatives of the Department of Human Services, the Department of Infrastructure, the Department of Treasury and Finance and the Department of Premier and Cabinet. This committee provided advice and guidance on early considerations associated with the sale of the land and submitting a bid for state government funding
  - establishment of a Project Control Group chaired by the Department of Human Services and comprising representatives of the Department of Human Services, Major Projects Victoria and the Department of Treasury and Finance
  - engagement of a probity advisor and probity auditor
  - completion of probity reports by the probity auditor
  - establishment of Expression of Interest and Request for Proposal assessment teams comprising representatives of the Department of Human Services and other departments, and supported by an independent financial evaluation report by KPMG and a legal report by Corrs Chambers Westgarth
  - completion of three Gateway Reviews
  - assessment and approval of the Valuer-General
  - assessment and approval of the Government Land Monitor
  - approval of the Treasurer.
209. Throughout the project and certainly up to the stage when the preferred developer was selected, the project was clearly subject to numerous approval processes, which I consider appropriate for a project of this nature and complexity.

## The business case and financial return for the project

210. The business case prepared by the Interdepartmental Steering Committee recommended that a Partnerships Victoria approach had the best potential to deliver value for money to the State Government. The business case also recommended that should the Expression of Interest/Request for Proposal exercise identify solutions for the site that would provide better value than a Partnerships Victoria approach, then other options should be considered. These may have included traditional procurement of community houses; or construction of community houses with or without the disposal of the site and the facilities management component. I note that in 2003, the financial consultant provided estimates of \$65.1 million for a straight sale of the site 'as is' and \$65.3 million for a development agreement approach.
211. However, the anticipated return to the State Government changed over the next two years. In a briefing to the Treasurer in March 2005, departmental officers advised:
- The net revenue of \$67.8m is the nominal value of the guaranteed land payment component and excludes the forecast profit share of \$2.55 m. The resulting \$18.7m difference between the costs of the off-site community houses (\$86.5 m) and net revenue (\$67.8m), therefore, could be the cost to budget of the total KRS development.
212. In that same briefing, it was recommended:
- The preferred bidder's offer is accepted [as it] meets DHS's financial criteria for the construction of the Community Residential Units.
213. The briefing also stated that if a demolition permit application to Heritage Victoria failed, 'the price offered by the bidder will fall'.
214. It is clear that at this time, the State Government viewed a development agreement/joint venture as the preferred option and the one offering best value for money. The net value of the bid, \$67.8 million (total bid of \$74.6 million less upgrade costs to two heritage buildings and site value for the 20 community houses) met the Valuer-General's valuation criteria and exceeded the financial consultant's estimate. While the State Government had stated that any surplus funds would be directed to disability services, it was acknowledged by Department of Treasury and Finance officers at the time that it was unlikely there would be a surplus.

215. As time moved on, heritage issues had an impact on the nature and size of the development and revised marketing strategies further refined the development plan. Consequently, the net value to the State Government and the guaranteed land payment component changed. In November 2003, the total bid was \$74.6 million, of which the direct guaranteed land value was put at \$51.3 million and non-cash items (e.g. refurbishment of heritage buildings) at \$23.3 million. By June 2006 when the Government Land Monitor approved the final proposal, the net present value of the land (guaranteed payment) was \$30.9 million, with the State Government to receive a further revenue share of 10 per cent of net receipts (gross revenue less selling costs) for each dwelling where gross revenue exceeded \$1.5 million for that dwelling; and a profit share of 50 per cent on all surplus revenue once the returns to the developer exceeded 18 per cent return on costs.
216. I consider that the preferred bidder for Kew negotiated significant changes from the original bid to the final agreement. While some of the changes were generated by the State Government, some were also generated by the developer. Witnesses stated that it is not uncommon for developers to seek to renegotiate the deal after they have achieved successful bidder status.
217. The cost to the State Government was significant. Of the total approved amount of \$86.5 million, to date some \$81 million has been expended. This includes an amount of \$380,000 for the Urban and Regional Land Corporation and over \$1 million for Major Projects Victoria's costs to date.
218. Many of these costs were budgeted and approved by the State Government prior to the Expression of Interest phase of the tender process. In particular, the capital cost of new homes; the cost of the relocation exercise; the recurrent cost of the services to, and maintenance of, the community houses; and direct project management costs have all been costed and approved.
219. However, I note that the budget costs and expenditure do not account for:
- general overhead costs for the project in the Department of Human Services. For example, the cost of the time of the Executive Director, Disability Services; Capital Management Branch staff; and staff in other departments, such as the Department of Treasury and Finance, and the Department of Premier and Cabinet
  - costs incurred by the City of Boroondara. Some of these costs would necessarily accrue for any new development proposal in the municipality; however, other costs proved unnecessary given the Minister's decision to determine her own planning scheme amendment

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*There is uncertainty on the final financial outcome for the State Government. The revenue from the proceeds of the Kew site will possibly fall short of the capital and project management outlay. In this regard, I consider that the Department of Human Services should track the overall expenditure to ascertain the final cost to the State Government.*

- costs borne by the Department of Planning and Community Development to assess, approve and, as necessary, enforce planning applications and permits
- costs associated with the management of the heritage issues on the site. Again, these costs would necessarily be borne by Heritage Victoria regardless of the owner and developer of the site. In this case, the sensitivity and interest surrounding the heritage issues at Kew has engaged Heritage Victoria in considerable and ongoing work to assess and approve heritage permits; and to monitor and inspect the developer's adherence to the permit conditions
- costs for a number of reports commissioned by the Department of Human Services early in the project, which pre-dated funding approval and are not accounted for in the overall project expenditure.

220. There is uncertainty on the final financial outcome for the State Government. The revenue from the proceeds of the Kew site will possibly fall short of the capital and project management outlay. In this regard, I consider that the Department of Human Services should track the overall expenditure to ascertain the final cost to the State Government and report annually on the financial return to the State Government from the Kew Residential Services project.

### **Conclusions**

221. My enquiries with the Department of Treasury and Finance on the nature of projects like Kew, lead me to conclude that there is no particular formula for complex projects. In the case of Kew, the State Government held the view that it was a significant project and one that required a balance between competing objectives of accommodation needs and financial return.

### **Recommendation**

#### **Recommendation 10**

I recommend that the Department of Human Services report on the financial return to the State Government from the Kew Residential Services project in its Annual Report.

#### **Department of Human Services response**

'Agree in Principle – The Department of Human Services will discuss options for the annual public release of revenue details of the Kew Residential Services Redevelopment with Major Projects Victoria'.

## The tender

222. The Department of Human Services received 20 responses to the Expression of Interest prior to closure. It established an Expression of Interest evaluation team, comprising representatives from the Department of Human Services, Major Projects Victoria and KPMG. The role of the team was to critique the submissions based on the following seven criteria and weightings:
- capability and experience of working on projects for people with diverse needs (20 per cent)
  - documented evidence of project experience (20 per cent)
  - financial capacity (20 per cent)
  - corporate structure (20 per cent)
  - ability to maintain the project over the long term (10 per cent)
  - experience in delivering projects meeting design standards (10 per cent)
  - consent to probity checks (Yes/No).
223. Of the 20 submissions, seven consortia were asked to participate in the Request for Proposal process. A specific weighting and criteria table for this process was developed and endorsed by the Project Control Group at its meeting on 15 July 2004. The meeting was attended by the probity auditor. The closing date for the Request for Proposal process was 29 July 2004.
224. Of the seven consortia, two voluntarily withdrew from the process. Another was deemed to be non-conforming. The probity auditor noted and approved the process for the removal of the non-conforming bid on 5 August 2004. The remaining four were analysed by three sub-assessment teams. Each team had a specific focus: the Kew residents' requirements; planning, compliance and design; and financial and commercial aspects. In addition, a lead assessment team, comprising an external financial advisor and representatives of the Department of Human Services and Major Projects Victoria, reviewed the assessments and put forward recommendations to the Project Control Group.
225. At the conclusion of this assessment process, the Project Control Group reported that each of the four bids had strengths and weaknesses, and there was value in conducting an extended process with all four. An additional phase of negotiation called 'preliminary parallel negotiation' was therefore initiated.
226. To do this, specific questions on each bidder's proposal were sent to the relevant bidder on 24 August 2004 and responses were due by 7 September 2004. This process was also checked and approved by the probity auditor.

*My investigation found no evidence that the demolition contracts were advertised on the State Government's tender website. All contracts were awarded to City Circle Demolitions and only one contract was evident on the State Government's contract website. The development agreement and the early works agreement were also missing from the contract website.*

227. Analysis of the documents at this stage demonstrate that KPMG Corporate Finance, on behalf of the Department of Human Services, conducted extensive financial checks of the bidders and made assessments of their capacity to undertake the project. The Department of Human Services' documents reveal the scoring system used during this process. Walker and Kevin Hunt consortium (Walker) and Boulderstone/Hornibrook were the highest scorers overall. A recommendation was accepted by the Project Control Group to enter the next phase of the tender process – parallel negotiations – with these two bidders.
228. Further assessment was conducted by the assessment teams on both the Walker and Boulderstone/Hornibrook bids. Walker was noted as scoring higher. By 8 December 2004, the Department of Human Services had finalised its internal assessment process.
229. Major Projects Victoria entered into four other Kew related contracts in addition to the development agreement. They were:
- the early works agreement between the State Government and Walker/Kew Development Corporation valued at over \$10 million
  - a demolition contract for the removal of 10 houses valued at \$41,200
  - a demolition contract valued at \$358,173
  - a demolition contract for preparation for Stage 1 works valued at \$533,300.
230. My investigation found no evidence that the demolition contracts were advertised on the State Government's tender website. All contracts were awarded to City Circle Demolitions and only one contract was evident on the State Government's contract website. The development agreement and the early works agreement were also missing from the contract website.
231. My investigation heard from witnesses that the failure to publish the development agreement in a timely manner, as required under the State Government's October 2000 policy statement, *Ensuring Openness and Probity in Victorian Government Contracts*, had a negative impact on the public's confidence in the transparency of the tender process.
232. At interview, staff from Major Projects Victoria acknowledged that the development agreement had not been uploaded on the Contracts Publishing System website for some six months after the signing, but said this was an administrative error. They also explained that the developer's financial spreadsheet was excluded as being commercially sensitive.



233. I note that the Department of Treasury and Finance's *Disclosure of Contracts >\$100000 Policy* required that the contract be listed on the website within 60 days and that Major Projects Victoria did not meet this requirement.

### **Conclusions**

234. Major Projects Victoria has not met its obligations to list contracts on the State Government website.
235. I also consider that the Department of Innovation, Industry and Regional Development should conduct a review of Major Projects Victoria's current projects to ensure that it meets its obligations in relation to procurement tendering and disclosure.
236. I have examined the financial spreadsheet that was excluded from the development agreement on the public website and conclude that it was reasonably withheld.

## **Recommendation**

### **Recommendation 11**

I recommend that the Secretary of the Department of Innovation, Industry and Regional Development conduct a review of Major Projects Victoria's current projects to ensure that the State Government's obligation to disclose contracts on the Contracts Publishing System website is met.

### ***Department of Innovation, Industry and Regional Development response***

'The Department of Innovation Industry and Regional Development accepts the recommendations pertaining to it (and Major Projects Victoria) and provides the following comments ... A review will be conducted of Major Projects Victoria's current projects to ensure that the Government's commitment to disclose contracts on the Contracts Publishing System website is met'.

## **The successful bidder**

237. In the Expression of Interest papers, the Walker bid was referred to as a consortium bid led by Mr Kevin Hunt, with Walker as the other member (Hunt/Walker).
238. As part of the evaluation exercise, the evaluation team sought clarification from Mr Hunt as to the nature of this relationship. The papers state that 'Kevin [Hunt] committed to a single entity between himself and Walker'. It is also clear that following this clarification, the Hunt/Walker bid received a higher rating and, as a result, was short-listed to advance to the Request for Proposal stage.

*I note that the Department of Treasury and Finance's Disclosure of Contracts >\$100000 Policy required that the contract be listed on the website within 60 days and that Major Projects Victoria did not meet this requirement.*

239. In October 2004, a key legal issues assessment of the Request for Proposal bids noted:
- Walker Group Holdings Pty Ltd which is the development arm of the Walker Group [and] the Walker Group Trust will guarantee the performance of Walker Group Holdings Pty Ltd.
240. This followed confirmation from Hunt/Walker that:
- The contracting entity will be Walker Group Holdings Pty Ltd which is the development arm of the Walker Group.
241. In November 2004, the lead assessment team stated:
- The Walker proposal also offers the security of a Corporate Guarantee of the performance of the project entity by the parent Walker Group.
242. On 3 March 2005, the Department of Human Services wrote to Mr Hunt, care of Walker, confirming the appointment of Walker Group Holdings Pty Ltd (ACN 001 215 069) as the successful proponent; and nominating the contracting entities to be Walker Group Holdings Pty Ltd as the appointed developer and Walker Group Trust as guarantor.
243. A draft copy of the early works agreement and the development agreement signed on 26 October 2006 cite Kew Development Corporation Pty Ltd as the developer and Walker Group Holdings Pty Ltd as the guarantor.
244. It is not clear what led to this change in contracting entities. Some interviewees stated that it is normal practice in the industry to establish a separate development entity for the life of the project, but none were able to confirm what benefit this might provide to the developer other than suggestions of limited liability and tax advantages. I do note that in the Magistrates' Court case relating to infringement of the heritage permit, Walker was not the entity that the court ruled against – it was the Kew Development Corporation Pty Ltd.
245. In a related matter regarding personnel changes, some officers of Major Projects Victoria considered that Mr Hunt was an important and crucial element of the bid and the success of the project, and took the view that he should be nominated as a Key Person in the development agreement. While this was initially agreed, the development agreement was subsequently altered in section A8.5 to enable the developer to employ any person with the relevant skills if the State Government was reasonably satisfied with the arrangement.

246. Mr John Hughes, Managing Director, Walker has since stated that Mr Hunt was ‘just an employee’ of Walker’s, a fact that he says was ‘not known to Major Projects Victoria’ when it considered that Mr Hunt should be nominated as a Key Person in the development agreement. Mr Hughes stated that ‘Mr Hunt ... represented to them [Major Projects Victoria] that he had formed a Hunt Walker Consortium to bid for the project’.
247. At the time this aspect of the development agreement was being negotiated, the relationship between Mr Hunt and Walker was a strained one and in 2007, the two parted ways. The relationship was damaged to the extent that legal proceedings were initiated by Mr Hunt. While there is no documentary evidence of the rift in the relationship at that time, many witnesses spoke of it at interview and stated that Mr Hunt would have wanted to be indelibly linked to the project, while Walker would have wanted the opposite.
248. At interview, Mr Hunt suggested that Walker had used Mr Richardson, lobbyist and former Senator, to influence the State Government to moderate their key personnel contractual conditions.
249. Mr Hunt has subsequently drawn my attention to the evidence of Mr Hughes at the Select Committee hearings. In that evidence, Mr Hughes was of the view that Mr Richardson was engaged to assist in negotiating key personnel provisions regarding Mr Hunt. Mr Hughes also thought that Mr Richardson had a meeting with ‘the chap in charge of major projects’ – but qualified his views stating, ‘I could be wrong’.
250. It is apparent that Mr Hughes did not have great familiarity with the activities of Mr Richardson as he was not aware that Mr Richardson had met with Mr Theophanous and that that meeting was for a different purpose. Both Mr Theophanous and Mr Richardson gave evidence to my investigation on oath that they had met to discuss one issue regarding the Kew Residential Services contract, which did not relate to Mr Hunt. This is dealt with later in this report. Moreover, Mr Richardson was quite clear that his involvement in the Kew Residential Services contract was limited to that one issue. I found no evidence to the contrary.

### *Conclusions*

251. My investigation concluded that the change to the agreement relating to key personnel was a decision taken at officer level following legal advice.
252. It is clear that the Department of Human Services anticipated the need for independent financial advice during the tender process. By engaging KPMG to provide information on the entities responding to the tender, the Department of Human Services was fulfilling a vital step in the tender evaluation process. However, if the entity expressing an interest in the project changes during the tender process, this alters the fundamental building blocks for an open process.

*If the entity expressing an interest in the project changes during the tender process, this alters the fundamental building blocks for an open process.*

*My view is that by accepting the changes to the Hunt/Walker consortium, the Department of Human Services weakened the probity of its own process. If this is a normal practice in the construction industry, as suggested by some witnesses, I consider there is scope for improvement in this area of the tender process.*

253. My view is that by accepting the changes to the Hunt/Walker consortium, the Department of Human Services weakened the probity of its own process. If this is a normal practice in the construction industry, as suggested by some witnesses, I consider there is scope for improvement in this area of the tender process.

## **Recommendation**

### **Recommendation 12**

I recommend that the Minister for Finance consider options to strengthen probity in the procurement process in instances where an entity expressing an interest in a project changes during the tender process.

## **Local government processes**

254. As noted earlier in my report, the City of Boroondara established a working party in February 2002 to develop an urban design framework. The working party comprised four councillors, including the ward councillor; a representative of the Kew Cottages Parents' Association; three City of Boroondara officers; four state government representatives; and three members of the community. The City of Boroondara conducted a nomination and assessment process to select the community members.
255. The terms of reference for the working party were:
- to explore the range of issues and influences that will inform the redevelopment of the site
  - to develop guidelines for the use and development of the site.
256. The Department of Human Services contracted VicUrban to assist with the development of an urban design framework. VicUrban officers attended some working party meetings, but were not officially members of the working party.
257. Section 86 of the Local Government Act refers to special committees of a council. Later sections of the Local Government Act describe how a local council may set up such a committee and what its functions are to be. The working party discussed above was not set up as a special committee; however, it was similar to a special committee in that it:
- held its meetings open to the public
  - kept minutes of the meetings
  - had a chairperson
  - advised the public of its meeting dates
  - was comprised of councillors and council staff.

258. My investigators questioned the Director of Urban Planning, City of Boroondara about the processes associated with the working party. He said that it was the normal practice of the City of Boroondara to set up such a working party and that at the outset of the process, members were advised it was an informal committee with no delegated authority. He said that the working party would report to him and that he would, as Director, put forward a report to the elected council.

259. In my report titled *Corporate Governance at the Moorabool Shire Council*, I recommended that councillors should not be assigned to informal working parties as such parties provide opportunities for councillors to influence staff in the working parties and for decisions to be made without requisite transparency.

260. In response to my draft report, Dr Catherine Dale, Chief Executive Officer, City of Boroondara stated:

Council is satisfied that its process includes the appropriate checks and balances to ensure transparency, impartiality and objectivity in decision making. In addition to Councillors, the working group included both state government and community representatives. The group conducted its meetings in public with regular attendees. The Director who was responsible for submitting a report to Council for consideration was not a member of the working group. The meeting at which the working group's recommendations were considered by Council was an open meeting to which any interested party was entitled to make submissions prior to a decision being made.

261. I remain of the view that a councillor's role is to participate as an elected representative; to act as a decision-maker at the end of a process; and to perform functions as prescribed by the Local Government Act.

262. While I note that the working party meetings were open to the public and included both state government and community representatives, I consider that councillors should not be assigned to informal working parties. Rather, special committees should be established in accordance with the Local Government Act.

## Ministerial intervention

263. The Select Committee concluded that the Minister for Planning and the State Government had a conflict of interest in relation to the Kew redevelopment, as the State Government was the planning authority, responsible authority and enforcement authority pursuant to the Planning and Environment Act. The State Government was also the 'site owner' and joint developer.

*Councillors should not be assigned to informal working parties as such parties provide opportunities for councillors to influence staff in the working parties and for decisions to be made without requisite transparency.*

264. The Minister for Planning became involved in the redevelopment in early November 2003. On 5 November 2003, Ms Garbutt, then Minister for Community Services, wrote to Ms Delahunty, then Minister for Planning, requesting that she prepare and adopt an amendment to the *Boroondara Planning Scheme* to facilitate the redevelopment of the Kew site. Among other factors, she specifically noted that 'the redevelopment of the KRS [Kew Residential Services] site is a project of State significance'. The Minister for Community Services initiated this request as the land was the location of the Kew Cottages and was managed by the Department of Human Services.

265. On 11 November 2003, officers from the Department of Sustainability and Environment submitted a briefing note to the Minister for Planning recommending that she:

Prepare, adopt and approve Amendment C53 to the Boroondara Planning Scheme under section 20(4) of the Planning and Environment Act 1987 by signing the attached documents.

266. On that same day, the Minister for Planning signed five documents:

- a 'decision to prepare an amendment' (in accordance with section 8 of the Planning and Environment Act)
- the 'preparation of amendment' (in accordance with section 8 and having regard to sections 12(2)(a), 12(2)(aa), 12(2)(ab) and 12(2)(b) of the Planning and Environment Act)
- the 'adoption and approval' under section 20(4) (exempting herself from the requirements of sections 17, 18 and 19 of the Planning and Environment Act)
- the 'waiving of fee for preparation, adoption and approval' pursuant to section 13(2) of the Planning and Environment Act (the date on this document is unclear, but it is assumed that Ms Delahunty, Minister for Planning signed the relevant documents on the same date)
- the 'ministerial powers of intervention in planning and heritage matters – reasons for decision to exercise power of intervention' (commonly known as the Practice Note) (the date on this document is unclear, but it is also assumed that Ms Delahunty, Minister for Planning signed the relevant documents on the same date).

267. I note that section 20(4) of the Planning and Environment Act states:

The Minister may exempt himself or herself from any of the requirements of sections 17, 18 and 19 and the regulations in respect of an amendment which the Minister prepares, if the Minister considers that compliance with any of those requirements is not warranted or that the interests of Victoria or any part of Victoria make such an exemption appropriate.

268. The Practice Note applies to the use of section 20(4) and states, *inter alia*:

Where a person other than a planning authority or responsible authority proposes the intervention, expect that person to have consulted the relevant planning authority or responsible authority about the proposal.

269. In this case, the relevant planning authority, the City of Boroondara, was not consulted, nor does it appear that this requirement was made clear to the Minister for Planning in documentation provided to her at the time. It appears that the City of Boroondara suspected that the Minister for Planning might take this action, as the Mayor wrote to the Minister on 18 August 2003 requesting that she not intervene. The Minister did not respond to this letter until after her decision, when she wrote to advise that the decision had been taken.

270. The Practice Note also states:

The Minister will make publicly available written reasons for each decision, including an explanation of how the circumstances of the matter responded to this Practice Note and the legislative criteria for that decision.

271. In addressing the Practice Note, the Minister stated she was satisfied she met these criteria because:

The proposal, as articulated by the UDF [urban design framework], has been through a thorough comprehensive consultation process and the views of the Council and local community are known; and

The matter is of genuine State significance as the closure of Kew Residential Services and the relocation of its residents to new housing is a key Government commitment.

272. I note that the Minister for Planning was required to gazette Amendment C53 and to observe a formal objection period by laying the amendment before each House of Parliament for 14 days. The Minister met this requirement and my investigation has confirmed that no objections were made in Parliament during this period.

273. The Minister for Planning's decision resulted in a strong reaction from the Kew Cottages Parents' Association, the Kew Cottages Coalition and the City of Boroondara. They considered that the democratic process had been negated and that it was inappropriate for the planning, responsible and development authority to be vested in the one entity, with the removal of the usual submission and challenge rights.

*My investigators examined the basis upon which submission and challenge rights were removed in this case. Certainly, there was no mention in any of the briefing papers sent to the Minister for Planning of the removal of submission and challenge rights that would result from the Minister's decision to intervene on this matter.*

274. My investigators examined the basis upon which submission and challenge rights were removed in this case. Certainly, there was no mention in any of the briefing papers sent to the Minister for Planning of the removal of submission and challenge rights that would result from the Minister's decision to intervene on this matter. It is noted that under the provisions of clause 43.04-2 of the pre-existing *Boroondara Planning Scheme*:

an application under any provision of this scheme which is generally in accordance with the development plan is exempt from the notice requirements of section 52(1) (a), (b) and (d), the decision requirements of section 64(1), (2) and (3) and the review rights of section 82(1) of the Act.

### **Conclusions**

275. It is clear that the Planning and Environment Act and the *Boroondara Planning Scheme* provided a lawful avenue for the Minister for Planning to remove challenge rights for the Kew redevelopment. The Kew redevelopment was often referred to as a project of State significance and this was used to support the intervention. The Planning and Environment Act, the regulations made pursuant to that Act and the Practice Note do not define the term 'State significance'. I note that the Department of Planning and Community Development is reviewing the Planning and Environment Act in relation to the term 'State significance'. I support the clarification of this term.
276. The Planning and Environment Act also provides other means of ministerial intervention in the planning process, including the ability for the Minister to 'call in' applications for planning permits pursuant to section 97B. Ministerial intervention in a planning process can result in one agency or person, the Minister, performing roles which would normally and desirably be handled by different persons or bodies so as to provide effective checks and balances on exercises of power. That is, the Minister can perform the numerous functions of planning authority, responsible authority and enforcement agency.
277. I note that this has been permitted by the Planning and Environment Act for many years. While I do not hold concerns about the manner in which the Minister exercised her functions in relation to the Kew development, I consider that generally such concentration of functions can create a conflict of duties that requires careful and planned management if public confidence in planning matters is to be maintained.
278. I note that in both the Kew and St Kilda Triangle developments, the removal of third party appeal rights caused significant disquiet in the community. Public confidence is strengthened when third parties have the opportunity to engage in debate and have legal avenues of redress. The Select Committee and the communities involved in these projects raised this as an area of concern.



279. The Secretary, Department of Planning and Community Development stated:

I am satisfied that the existing safeguards strike an appropriate balance. It is true that a degree of discretion is retained by the Minister in relation to the exercise of these intervention powers. However I regard this as a desirable feature of the system, which requires a degree of flexibility enabling a more tailored approach to the assessment and determination of the wide array of planning proposals that are submitted.

## Heritage issues

280. As early as 2001, consultants to the Department of Human Services had written to Heritage Victoria seeking advice on the heritage status and potential of Kew Cottages. In response, Mr Ray Tonkin, Executive Director, Heritage Victoria stated in a letter to the Department of Human Services on 1 October 2001:

I cannot make definitive statements about the heritage significance or potential of the place ... Nonetheless, after preliminary inspections by officers of Heritage Victoria and after consulting the Gary Vines report it would seem to me that a nomination would struggle to make a case for State significance and registration of Kew Cottages.

281. Unfortunately, this view proved to be imprudent. In retrospect, it would have been preferable for the Department of Human Services to have formally nominated the site for heritage consideration by Heritage Victoria at the time. This would have provided a level of certainty on heritage status prior to the Expression of Interest and Request for Proposal processes. It is clear from interviews with Department of Human Services' staff that it did not consider nominating the site at this time because of the advice offered by Heritage Victoria.
282. At interview, Mr Tonkin conceded that such advice is no longer provided by Heritage Victoria. Rather, in such circumstances, a developer would be encouraged to make a formal nomination to Heritage Victoria. He recalled feeling some pressure from the Department of Human Services to express an opinion on the matter and also acknowledged that in so doing, it might have led the Department of Human Services to conclude that a nomination was unnecessary and would fail. I understand it is also possible for the Executive Director, Heritage Victoria to initiate his own nomination. This may have been an appropriate action in this case.

283. Mr Tonkin's advice had a significant negative impact on the project as the Department of Human Services relied on his advice when preparing the Expression of Interest and Request for Proposal briefs. This became a probity issue as the briefs specified that only two buildings were anticipated as having heritage significance.
284. On 25 November 2004, the Heritage Council included numerous trees, memorials and six buildings on the Heritage Register, following two nominations from local residents and other submissions. These nominations were dated 22 January and 22 June 2004.
285. There was no documentary evidence provided by Heritage Victoria to explain the delay in considering the initial nomination dated 22 January 2004. In addition, Mr Tonkin could not recall, at interview, why there was a delay. However, he considered it prudent in any case to amalgamate the two nominations. He also stated that a more expeditious handling of the first nomination would not have brought more certainty to the site, because the listing, if approved, would have only covered vegetation issues. This would leave open the opportunity for nominating the dwellings on the site at any time.
286. The Department of Human Services' files show that following Heritage Victoria's advice that the site was being considered for registration, a recommendation was made to the Minister for Community Services that she request that the Minister for Planning call in the project under Division 4, Clause 43 of the *Heritage Act 1995* (the Heritage Act).
287. Consequently, prior to the Heritage Council making its decision, the Minister for Community Services wrote to the Minister for Planning on 14 October 2004 stating:

As a project of State Significance, it is critical that the redevelopment be completed in a timely manner. It is also important to ensure that there is certainty to the KRS residents and their families/relatives. I therefore request that you become the Responsible Authority to determine the heritage outcomes for the site to ensure the timely delivery of the project.

288. The Minister for Planning replied on 14 December 2004, after the Heritage Council had registered the site, stating, 'I have decided not to proceed with such a "call-in"'. The Minister for Planning also stated in her letter:

I am cognisant of the importance placed on this project and as the Responsible Authority for the site under the provisions of the Planning and Environment Act I will be anxious to ensure that the decisions on the heritage issues are not at odds with the planning decisions that I otherwise have to make.

289. The Department of Premier and Cabinet contacted Ms Helen Lardner, a heritage consultant. Subsequently, Ms Lardner provided the Project Director, Department of Human Services with a desktop review of the previous heritage reports. She later developed the Department of Human Services' application for a Heritage Victoria demolition permit.
290. In May 2005, the then Premier was further briefed and noted the advice that Ms Lardner had been appointed by the Department of Human Services to conduct the desktop review; and that she had proposed that the development plan be modified to retain three of the buildings, rather than two.
291. On 9 September 2005, in response to the Department of Human Services' application received by Heritage Victoria on 6 June 2005, Heritage Victoria approved a permit (P9639) for the demolition of three of the six listed buildings and the 'proposed development of Stages I and II'.
292. Section 73 of the Heritage Act requires a range of considerations, other than those relating purely to cultural heritage significance, to be taken into account in a decision to determine an application, including:
- the impact on the reasonable or economic use of the place
  - undue financial hardship to the owner
  - whether a refusal would unreasonably detrimentally affect the ability of the public authority to carry out a statutory function.
293. At interview, Mr Ray Osborne, Director Operations, Heritage Victoria confirmed the difference in the assessment criteria between a nomination for heritage status and an application for demolition. He acknowledged that this can cause confusion as some individuals may assume that inclusion on the Heritage Register means that no demolition can occur. He stated that it is possible, although not common, that a nomination for heritage status and an application for demolition for the same site are simultaneously processed by Heritage Victoria: the nomination for heritage status is considered by the Heritage Council on the recommendation of the Executive Director, Heritage Victoria; and the application for demolition is determined by the Executive Director, Heritage Victoria.
294. On 14 February 2006, the Department of Human Services lodged a further application for a permit to undertake Stage 1 of the proposed development. The Executive Director, Heritage Victoria approved this permit (P10367) on 13 April 2006.

*The heritage issues led to uncertainty, considerable delays and significant additional costs for all associated with the project. It is unfortunate that a nomination was not made by the Department of Human Services at the beginning of the exercise.*

### **Conclusions**

295. The heritage issues led to uncertainty, considerable delays and significant additional costs for all associated with the project. It is unfortunate that a nomination was not made by the Department of Human Services at the beginning of the exercise.
296. A considerable amount of time was expended by Heritage Victoria officers in handling the compliance issues following the issue of permits at the Kew site. It is clear that this role has been a reactive one, responding to residents' concerns about actions undertaken by the developer. Indeed, had the residents not reported issues, it appears quite possible that further damage could have occurred to heritage listed trees. The Executive Director, Heritage Victoria acknowledged this and stated that he is not resourced to proactively inspect and monitor compliance with heritage permits.
297. In my view, it was unfortunate that the then Executive Director, Heritage Victoria provided informal advice on the site early in the project.

### **Recommendation**

#### **Recommendation 13**

I recommend that the Secretary of the Department of Planning and Community Development review the policies of Heritage Victoria to ensure that officers do not express opinions on the heritage significance of a place.

#### ***Department of Planning and Community Development response***

'The current practice of Heritage Victoria is that officers do not offer opinions or advice as to the Heritage significance of a place. The Executive Director of Heritage Victoria is preparing a directive to his staff to formalise this requirement'.

### **Role of the Government Land Monitor and the Valuer-General**

298. The role of the Government Land Monitor is described in the August 2000 *Policy and instructions for the purchase, compulsory acquisition and sale of land*, which states:
- the primary role of the Government Land Monitor is to provide the State Government with an assurance of accountability and integrity in land transactions. It must ensure that transactions are legal, are in the public interest and provide best results for State Government. To achieve this outcome, agencies are required to obtain GLM [Government Land Monitor] approval to conduct transactions
  - Government Land Monitor approval must be obtained for all transactions of \$250,000 or more.

299. The policy also requires that where the value of the land is greater than \$500,000, it is mandatory to obtain two valuations: one from the Valuer-General and the second from a member of the Valuer-General's Panel of Valuers. In addition, in cases where the land is to be sold through an Expression of Interest, as in this case:

the reserve price must be fixed before receipt of offers and must not be disclosed to any potential purchaser before sale. The reserve price must be approved by the Government Land Monitor.

300. The Government Land Monitor first became involved in the project in June 2001 as a member of the Interdepartmental Steering Committee considering the Kew project and later when the Expression of Interest process commenced.

301. On 26 March 2004, the Government Land Monitor met with the Department of Human Services. It was noted that:

the Department of Human Services would immediately instruct the VG [Valuer-General] to provide a valuation and procure a check valuation of the property ... After the valuations are completed and any necessary internal conferences are held, the VG [Valuer-General] will be requested to review and report on the reasonableness of bids being considered by the Department of Human Services.

302. On 8 July 2004, a further meeting was held with the Department of Human Services and Major Projects Victoria, where the Expression of Interest documents were reviewed and the Government Land Monitor noted:

The valuation process may continue past the tender close date. This was acceptable on the basis that the details of the bids are quarantined from the Valuer-General until their valuations are provided ... After the Valuer-General have tabled their initial valuations, the Department of Human Services are to provide the Valuer-General with one or more bids for review and comparison back to base valuation.

303. On 2 December 2004, the Valuer-General granted certification to the Walker bid, following receipt of a revised valuation report dated 25 November 2004. At this stage, the Department of Human Services had determined that the Walker bid was the preferred bid and it had entered into a period of exclusive negotiation. Subsequently on 9 December 2004, the Government Land Monitor approved the Department of Human Services entering into a development agreement with Walker.

304. The Department of Human Services wrote to the Valuer-General on 10 May 2005 requesting that a further valuation be undertaken. Two further valuations were undertaken: in June 2005 and, following additional changes, in November 2005. A check valuation was also prepared in November 2005. On 22 November 2005, the Valuer-General advised that the revised valuation was acceptable.
305. In May 2006, a valuation by the Valuer-General's valuer was undertaken. It was accepted by the Valuer-General on 16 May 2006; subject to a check valuation presented on 1 June 2006; and was approved by the Government Land Monitor on 13 June 2006.
306. On 23 October 2006, the Treasurer endorsed the revised tender price. Three days later, on 26 October 2006, the development agreement was signed.
307. During this process:
- the assessed price per lot reduced from \$203,000 at the time of initial benchmark assessment to \$122,000 at final assessment
  - the number of dwellings, including apartments, planned for the site reduced from 550 in November 2004 to 380 in November 2005 (both numbers include 20 community houses)
  - the probity auditor 'signed-off' on the tender process in April 2005, some 11 months before the final valuation
  - the assessment of the Walker bid changed from \$68,685,000 (total bid) in November 2004 to \$28,960,516 in May 2006 (guaranteed land value) plus profit sharing arrangement.
308. In its advice to the Treasurer, the Department of Treasury and Finance stated:
- While the Valuer-General noted that the master plan is not the highest and best use of the land from a valuation point of view, the Department of Treasury and Finance consider that the revised development plan still meets the key criteria which resulted in Walker Corporation originally being accorded preferred developer status.
309. The Treasurer endorsed the revised tender bid on 23 October 2006. My investigation identified that the advice provided to the Treasurer relied on a valuation provided on 1 June 2006 and approved by the Government Land Monitor on 13 June 2006, which was outside the three-month validity period. The Department of Human Services provided advice to the Treasurer that it considered there was no material change to impact the valuation.

## Conclusions

310. The information available to me demonstrates that the Valuer-General, the Government Land Monitor and Major Projects Victoria held the view that the development agreement signed with Walker represented the best outcome for the State Government in meeting its overall objectives.
311. Witnesses also advised that valuations will change with time and circumstances; and the valuation placed on the development plan for Kew was reasonable and acceptable from a state government perspective. All agreed that had the State Government chosen to sell the site 'as is', then its financial return would have been significantly improved.
312. I note that the Treasurer endorsed the revised tender bid on 23 October 2006. The advice provided to the Treasurer relied on a valuation provided outside the three-month validity period. In my view, and that of the Government Land Monitor and valuers, advice should have been sought from the Government Land Monitor (or the Valuer-General), not the Department of Human Services, as to whether there was any material change to impact the valuation.

## Recommendation

### Recommendation 14

I recommend the Government Land Monitor review his *Policy and instructions for the purchase, compulsory acquisition and sale of land* to specify the treatment of land in respect to matters including:

- heritage issues
- environmental aspects
- legal and contractual arrangements
- Valuer-General requirements

to ensure that all these factors are managed by the agency prior to the Expression of Interest phase.

### *Department of Planning and Community Development response*

'The Government Land Monitor has advised that Section 2.4 of the *Policy and Instructions* ... captures the matters to which you refer and that in practice Section 2.4 operates so that matters such as heritage overlays, soil contamination, planning requirements, terms and conditions of the sale and development agreements, leases and other encumbrances are considered during the valuation process. I have requested, however, the Government Land Monitor examine making the treatment of these issues more explicit in the *Policy and Instructions*'. The Secretary, Department of Planning and Community Development stated that the Government Land Monitor is reviewing his *Policy and instructions for the purchase, compulsory acquisition and sale of land*. The Secretary also noted that this policy provides the Government Land Monitor with 'a right of access and inspection of all files, notes and documents which relate to the land transaction'.

## EXTERNAL INFLUENCE

313. Allegations reported in the media and elsewhere suggested that the timing of donations to the Australian Labor Party influenced the Kew tender process. The Select Committee stated in its final report, 'the community cannot be confident that donations made by Walker to the Australian Labor Party had no improper influence in the tender process'. It made a recommendation that the Electoral Matters Committee examine 'issues relating to donations from organisations or individuals engaged in a tender process with the State'.
314. A meeting between Mr Richardson, lobbyist and former Senator, and Mr Theophanous, then Minister for Major Projects, also led to allegations in the media that inappropriate influence had been applied.
315. The allegations can be summarised as follows:
- the State Government awarded the contract to Walker because of donations Walker made to the Victorian Branch of the Australian Labor Party
  - Mr Theophanous met with Mr Richardson to discuss the sale of the Kew redevelopment project from Walker to Mirvac. Donations made to the Australian Labor Party by both Mirvac and Walker were to pave the way for the Minister's approval of the sale.

### Political donations

316. My investigation reviewed donations made by parties involved in bidding for Kew to determine if there was a correlation between the timing of the donations and the tender; and, therefore, if the probity of the process was likely to be affected in any way.
317. Key dates of interest for the Kew redevelopment are 1 April 2004 (when the Expression of Interest submissions closed) through to 3 June 2005 (when the formal announcement of the preferred developer was made). Another date of significance is 26 October 2006, when the contract was signed.
318. According to data disclosed to the Australian Electoral Commission, Mirvac donated \$15,000 to the Victorian Branch of the Australian Labor Party on 15 June 2004 and then another \$15,000 on 14 February 2005. I note that at the meeting of the Project Control Group of 16 September 2004, it was agreed that negotiations would only continue with Baulderstone/Hornibrook and Walker. This meant that Mirvac was unsuccessful long before its donation in February 2005.



319. By comparison, Walker made no donations to the Victorian Branch of the Australian Labor Party during the same timeframe; and Boulderstone/ Hornibrook donated \$1,000 on 16 June 2004 to the Victorian Branch of the Australian Labor Party and \$2,760 to the Progressive Business Association. The Progressive Business Association is a fundraising arm of the Victorian Branch of the Australian Labor Party.
320. The Australian Electoral Commission data shows no donations made by other bidders (Citta Group, Australand and Delfin) to the Victorian Branch of the Australian Labor Party from 1 April 2005 to 3 June 2005.
321. On 4 September 2006, prior to finalisation of the contract (October 2006), Walker donated \$100,000 to the Victorian Branch of the Australian Labor Party. On 31 October 2006 (five days after the signing of the contract), Mirvac donated \$50,000.
322. Other key events at this time included the state election on 25 November 2006, which returned the Australian Labor Party to office.

## Lobbying

323. Mr Theophanous confirmed, at interview under oath, that he had met with Mr Richardson, lobbyist and former Senator, in December 2006 and that the Kew redevelopment was the subject of the meeting. He stated that he was not aware of the donations that had been made by either Mirvac or Walker and only became aware of them from the media reports. On the issue of whether he would have met with Mr Richardson had the agreement not been signed, he replied 'no'. He also stated his reasons for this were:

Where there is an actual tender process in play then it's not appropriate to meet people as a Minister who are directly involved who may benefit from that tender process.

324. My investigators interviewed Mr Richardson regarding his involvement in the meeting. He advised under oath that he only met with the Minister on one occasion to ask him to consider the proposition of transferring the Kew project from Walker to Mirvac. He stated:

I went in and I put my case and I think it took months and months to get an answer which was finally 'no', they, they the government actually didn't do what I asked them to do but that didn't, that wasn't instant they said they'd consider it – I'll look at it as they always say and they looked and looked for a long time before deciding that they wouldn't do it and that was the only meeting I had with Theo [Theophanous].

325. Mr Sean Sweeney, Executive Director, Major Projects Victoria, who was also present at the meeting, stated to my investigators, 'I got asked to attend a meeting with Minister Theophanous' office at which Graham Richardson turned up ... and he said, "all I ask is that you consider the offer reasonably"'.
326. Mr Richardson was unsuccessful with his approach to the Minister and on 11 May 2007, Major Projects Victoria wrote to Walker and Mirvac to advise of the State Government's position. The letter stated:
- In accordance with its rights under the project Development Agreement the State has determined that it will not consent to an assignment [from Walker to Mirvac] until both Stage 1 and 2 have been completed. Accordingly, the State hereby gives you notice that it does not consent to any proposed assignment of the Project Development Corporation Pty Ltd to Mirvac prior to Stages 1 and 2 being completed.
327. I note that the State Government, in September 2009, introduced the *Victorian Government Professional Lobbyist Code of Conduct* and that from 1 December 2009, a register of lobbyists will be maintained by the State Services Authority.

## Conclusions

328. Witnesses to this investigation stated, at interview, that the Walker bid was successful as its innovative design was superior to the other bids and it blended the community houses into the new environment. I have examined the tender process and conclude that the view of the witnesses is supported by the documentation and evaluations of the bids.
329. I am also satisfied on the available evidence that, despite the allegations of inappropriate lobbying, the approach by Mr Richardson to Mr Theophanous did not result in a benefit to Walker or Mirvac.

ST KILDA TRIANGLE

## HISTORY

330. The St Kilda Triangle is a parcel of Crown land in St Kilda, bounded by Jacka Boulevard, the Upper Esplanade and Cavell Street. It comprises the Palais Theatre, the former Palace nightclub and the adjoining car park.
331. At the Select Committee hearings, Mr David Spokes, former Chief Executive Officer, City of Port Phillip and Chair of the St Kilda's Edge Committee, reflected on the history of the St Kilda Triangle site. He stated that the site was identified in 'the Kennett government's Gateway to the bay policy 1999' as a location for 'higher-density residential development in St Kilda and Port Melbourne through the sale of public land and private development'. The proposal was unsuccessful at that time, largely due to resistance from the local council and community.
332. Subsequently, the City of Port Phillip considered other options for developing the St Kilda Triangle site, as well as a number of other sites along the St Kilda Foreshore. As part of the consideration of the foreshore development, an urban design framework sub-committee was formed.
333. In 2001, the City of Port Phillip also commissioned MacroPlan, a research consultancy firm, to undertake an economic analysis of the St Kilda Foreshore development, which included the St Kilda Triangle site. MacroPlan reported in October 2001:

The development of the triangle site is the key driver for the viability of the integrated framework as it offsets the short-term costs of the public domain and civic improvements projects. Additionally it provides a long term stimulus to the area and importantly achieves the objective of increasing the long-term viability of the Palais Theatre.

334. I understand that the economic indicators supported development of the foreshore and the State Government, the City of Port Phillip and the community appeared to agree that there was a need for development in the area. In February 2001, the City of Port Phillip publicly displayed the *St Kilda Foreshore 20-20 Vision*. This resulted in a public consultation process, including community 'think tents' where the community was invited to express their aspirations for the St Kilda Foreshore. In addition to the 'think tents', professional/stakeholder workshops and four Community Reference Panel meetings in September and November 2001 were used to inform the development of a *St Kilda Foreshore Urban Design Framework* (the urban design framework). The urban design framework was the subject of further community comment through a number of 'think tents' designed to assist in developing values and objectives for the urban design framework.

## Preparation of an urban design framework

335. In 2002, with this information in hand, a number of consultants were engaged to develop the urban design framework. On 25 February 2002, the elected council approved the urban design framework and resolved to place Amendment C36, an amendment to the *Port Phillip Planning Scheme*, on public exhibition for comment. Amendment C36 included changes to the *Port Phillip Planning Scheme* to facilitate implementation of the urban design framework, including making the urban design framework an Incorporated Document.
336. During the preparation of the urban design framework, the community was afforded a number of opportunities to express its views and to provide input into the process. While documentary evidence from the City of Port Phillip suggests that this consultation process provided considerable information and was a significant influence on the urban design framework, one community group, the Esplanade Alliance, expressed another view at the time:
- The current consultation process minimises the role of the community. It puts the community in a reactive position, as a commentator on ideas generated behind closed doors. For an important project such as this we should be allowed a proactive role – as generators of ideas.
337. In addition to consideration in the urban design framework process, in October 2003 the St Kilda Triangle site was the subject of a Preliminary Feasibility Study Workshop (attended by local and state government representatives) and a number of costing options were prepared by specialist quantity surveyors. These, plus further costings undertaken in November 2003, led to a revision of the draft urban design framework. At this time, the City of Port Phillip was working closely with the Department of Sustainability and Environment, which had 'ownership' of the Crown land situated along the St Kilda Foreshore.
338. In late 2003, the then Mayor met with the then Premier to outline the projects being undertaken by the City of Port Phillip. Subsequently, on 18 December 2003, the then Premier wrote to the then Mayor stating:

As I indicated in the meeting, the Government congratulates the City of Port Phillip for its leadership in developing the St Kilda Urban Design Framework. I encourage you to continue working closely with the Department of Sustainability and Environment to take the revitalisation projects forward and realise aspects of the Framework.

339. On 29 September 2003, the City of Port Phillip engaged Paradigm Advisory (a project management consultancy firm) to progress the implementation of the urban design framework and to provide project management services for the St Kilda's Edge project, which included the St Kilda Triangle development and other St Kilda Foreshore projects.

### Completion of a project development proposal

340. In late January 2004, Paradigm Advisory completed a project development proposal for the St Kilda's Edge project, including a business case for the St Kilda Triangle site. In February, the then Mayor forwarded this proposal to the Premier, the Deputy Premier, the Minister for Planning, and the Department of Sustainability and Environment.
341. The Department of Sustainability and Environment was charged with the responsibility of managing consideration of the project development proposal and business case within the State Government, and distributed a copy of the documentation to the Department of Premier and Cabinet, and the Department of Treasury and Finance. The proposal stated:

The Council has assumed the role of *Lead Agent and Champion* for the SKE Project (St Kilda's edge – soul and sand strategy, previously known as the St Kilda Foreshore UDF) ... the Council has significant *expertise, capability and a history* of successfully managing these assets.

342. The project development proposal noted that the Department of Sustainability and Environment was landlord and manager of Luna Park, the Palais Theatre, the Palace Nightclub, the Sea Baths and Westbeach; while the City of Port Phillip was the Committee of Management for the remainder of land and buildings within the foreshore. The City of Port Phillip proposed that management be transferred to it to 'allow a holistic approach to the renewal and long-term management of the entire site'.
343. The project development proposal and the business case also sought state government funding to assist in developing the St Kilda Triangle site. I note that the State Government did not contribute funds to the development. The project development proposal also proposed that legislative changes be made to enable 'crown land sites to be leased for up to 50 years or by negotiation of an extension to a maximum of 99 years'. Additionally, the business case stated:

The benefits of the [Commonwealth] PPP (Public Private Partnership) method are significantly greater than the Council delivery method. It is therefore proposed that the Project be delivered using the PPP method. While it is proposed that the principles and structures of PPPs will be adopted, the Project will not be delivered under the State's *Partnerships Victoria* policy.

344. In 2004, the City of Port Phillip commissioned SGS Economics and Planning to prepare an independent economic impact assessment of the St Kilda Triangle site, which found (May 2004) that the benefits of the development to the Victorian and metropolitan Melbourne economies would increase by around \$116 million per year, and that the negative impact of not investing would be around \$47 million. In June 2004, SGS Economics and Planning provided a cost-benefit report for the development indicating a net present value of \$129 million.

### **Removal of third party appeal rights**

345. On 24 May 2004, the elected council approved changes to the urban design framework – removing third party appeal rights – and forwarded the document to Ms Delahunty, Minister for Planning for consideration. The Minister approved the urban design framework on 1 July 2004 and it was incorporated into the *Port Phillip Planning Scheme* (Amendment C36) under Section 35 of the Planning and Environment Act. This provided site specific planning controls for the St Kilda Triangle site to allow for the development of an entertainment and leisure precinct with significant public spaces.

### **Establishment of the St Kilda’s Edge Committee**

346. On 2 August 2004, the elected council formally established the St Kilda’s Edge Committee with terms of reference ‘to deliver the St Kilda’s Edge Project and promote and co-ordinate market interest and participation in the various components of the Project’. The elected council delegated powers to the St Kilda’s Edge Committee pursuant to section 86(3) of the Local Government Act.
347. The St Kilda’s Edge Committee, the successor to the urban design framework sub-committee, was to comprise nine members: the Chief Executive Officer, City of Port Phillip; the Manager, City Strategy, City of Port Phillip; up to three councillors; two state government representatives; and up to three independent members.

### **Appointment of a probity auditor and adoption of a probity plan**

348. In early 2005, following approval from the Department of Sustainability and Environment as the ‘site owner’, the St Kilda’s Edge Committee organised contracts for a number of consultancies related to heritage and site conditions. It also prepared to engage a probity auditor for the project. The engagement of a probity auditor was approved by the Department of Sustainability and Environment. The St Kilda’s Edge Committee sought fee proposals from three probity auditors from the State Government’s approved panel of advisors and auditors, and selected Pitcher Partners.

349. Mr Geoff Walsh, Pitcher Partners commenced his engagement with the City of Port Phillip in March 2005 as the probity auditor. On 17 March and 4 April 2005, he gave presentations to the St Kilda's Edge project team on 'St Kilda Triangle Site Project – Probity Principles'. These presentations were to City of Port Phillip and state agency staff involved in the project delivery and focussed on conflict of interest and confidentiality issues.
350. On 20 March 2005, the St Kilda's Edge Committee adopted the first probity plan for the project, as amended and agreed by the probity auditor.

### **Memorandum of Understanding**

351. Also in March 2005, the State Government approved the lease of Crown land on the St Kilda Triangle site, subject to testing the market during the Expression of Interest process, and approved of the City of Port Phillip managing the project on behalf of the State Government. The Department of Sustainability and Environment was to manage state government interests in the development.
352. This arrangement was managed by a Memorandum of Understanding, drafted by the Victorian Government Solicitor's Office; and signed by the City of Port Phillip and the State Government, through the Department of Sustainability and Environment on 1 April 2005.

### **Expression of Interest**

353. On 8 April 2005, the City of Port Phillip published an invitation for Expressions of Interest for redevelopment of the St Kilda Triangle site. This invitation was released internationally.
354. On 17 June 2005, 15 Expressions of Interest were received by the City of Port Phillip. The probity auditor was on hand to witness and register receipt of submissions. During June 2005, the probity auditor briefed all evaluation panel members on probity issues associated with the Expression of Interest process.
355. In July 2005, the City of Port Phillip continued a series of forums with key interested parties to provide an opportunity for the community to be briefed and to comment on St Kilda's Edge projects.
356. On 30 August 2005, the short list was announced by the City of Port Phillip and the Request for Proposal documents were provided to the short-listed consortia:
- R Corporation and John van Haandle (RV Group)
  - Babcock & Brown with Citta Property Group (BBC)
  - St Kilda Creative Hub.



## Land (St Kilda Triangle) Act

357. On 7 February 2006, the Land (St Kilda Triangle) Bill 2006 was introduced into Parliament. The legislation was drafted in response to a number of respondents to the Expression of Interest process requesting 50 or 99-year lease arrangements – no respondents sought a freehold option.
358. Mr Spokes wrote to the Hon. Rob Hulls MP, then Minister for Planning on 30 June 2005, stating:

It is worth noting that our mandate from the government has been to maximize the value of the Site while addressing the need to refurbish the Palais and to maintain an appropriate balance between the public facilities and private development. This will only be achieved by providing a lease term that is commensurate with the amount of investment required on the Site to meet these objectives.

359. The *Land (St Kilda Triangle) Act 2006* came into operation on 1 July 2007. It sought to revoke current Crown land reservations on the St Kilda Triangle site and to reserve the land as one parcel. The legislation also provided for a lease term of 50 years, with 21-year extensions up to a maximum of 99 years; and for the City of Port Phillip to be provided with Committee of Management powers over the site.

## Request for Proposal

360. On 30 August 2006, the Request for Proposal submissions were received. The probity auditor was present at the time of receipt.
361. On 29 November 2006, the St Kilda's Edge Committee met and discussed the evaluation reports and recommendations. The St Kilda's Edge Committee resolved to invite RV Group and BBC to address issues in a re-submitted proposal; and to invite St Kilda Creative Hub to remain in reserve.
362. On 9 February 2007, revised bids were received from the two consortia. The probity auditor was present when the two submissions were received.

## Vacant possession

363. Lessees of the Palais Theatre and Palace Nightclub disputed the State Government's right to vacant possession of the buildings. However, on 11 May 2007, vacant possession of the Palais Theatre and the Palace Nightclub was achieved when Bradto and Palais De Danse's application for leave to appeal was heard by the Court of Appeal and refused. Costs were ordered in favour of the State Government.

## Determination of preferred tenderer

364. On 24 May 2007, a Special Meeting of the elected council accepted the St Kilda's Edge Committee recommendation to approve BBC as the developer. Contractual documents were signed on 25 May 2007 by the City of Port Phillip, the State Government and BBC.

## Development plan

365. On 31 October 2007, the development plan detailing the development and use of the land known as the St Kilda Triangle site was put on public display for comment for 28 days. Over 5,500 submissions were received. In response, the City of Port Phillip engaged Matrix consultants to independently assess the submissions. Matrix found that a number of the submissions held significant merit.
366. On 13 December 2007, the Statutory Planning Committee of Council met to discuss the proposed development plan for the site, including a number of recommendations to vary the plan to account for concerns raised in the public submissions. The Statutory Planning Committee of Council had available to it the Matrix report and a report prepared for the St Kilda's Edge Committee by the Chair of the Design Review Committee. The Statutory Planning Committee of Council decided to defer consideration of the development plan until 24 January 2008 pending receipt of two further reports: an economic impact assessment; and a further report from the Design Review Committee.
367. The SGS Economics and Planning *Economic and Community Impact Statement* was completed in January 2008 and placed on the City of Port Phillip website on 16 January 2008. The Design Review Committee report was placed on the website on 21 January 2008. During January, the St Kilda's Edge Committee convened four meetings between BBC and key community groups to discuss the proposed development plan. BBC responded to many of the concerns raised at the community meetings and to other criticisms of the project. BBC also made some changes to the development plan.
368. On 7 February 2008, the Statutory Planning Committee of Council approved the development plan subject to a number of changes being made. The development plan was subsequently amended and on 8 August 2008, under delegated authority from the elected council, the Manager, City Development, City of Port Phillip approved the *St Kilda Triangle Development Plan, 6 August 2008*.
369. On 8 September 2008, the Statutory Planning Committee of Council noted the delegate's report on the changes to the St Kilda Triangle development plan required by the Statutory Planning Committee of Council's resolution of 7 February 2008.

370. On 9 September 2008, unChain St Kilda Inc. made application to the Victorian Civil and Administrative Tribunal seeking declarations under section 149B of the Planning and Environment Act challenging the validity of the development plan. On 18 May 2009, the Victorian Civil and Administrative Tribunal dismissed the application.

## Status of the development

371. In November 2008, local council elections were held. The future of the St Kilda Triangle project was a key focus for many candidates during the election. Only two existing councillors were re-elected. Five new councillors were elected.
372. On 14 December 2009, the elected council voted six to one to end the controversial St Kilda Triangle development, agreeing to a \$5 million commercial settlement with BBC. BBC will also be given a five-year lease to continue to manage the Palais Theatre as part of the settlement.
373. In a media statement, Mayor Frank O'Connor stated:

We were elected on a clear mandate to bring an end to the Development Agreement for the St Kilda Triangle. Unfortunately the Agreement was legally binding and water-tight leaving us with a commercial settlement as the only realistic option. Not only do we feel we have delivered on our promise to the community, we believe a far better solution can be found by working with the community and other relevant parties.

*While a probity plan and related procedures were in place, the probity of the process was at risk when relevant parties failed to seek, or accept, the probity auditor's advice on probity issues and conflicts of interest. Probity was diminished by the probity auditor's failure to review conflict of interest declarations.*

## PROBITY PLAN, ADVICE AND AUDIT

374. My investigation identified that while a probity plan and related procedures were in place, the probity of the process was at risk when relevant parties failed to seek, or accept, the probity auditor's advice on probity issues and conflicts of interest. In addition, probity was diminished by the probity auditor's failure to review conflict of interest declarations, which is discussed later in my report.
375. In response to my draft report, Pitcher Partners stated:
- The content of your draft report is based upon detailed investigations and interrogations undertaken by your office. It does not recognise that the Probity Auditor does not have investigative powers and, in fact, this is not the intended role or function of the Probity Auditor.
376. I accept that the probity auditor's role is not an investigative one. However, I consider that a key function of the probity auditor's role is to review conflict of interest declarations to ensure that any conflicts of interest are identified and managed. The evidence suggests that the probity auditor did not fulfil this function.
377. In addition, I consider that the probity auditor's reports did not provide sufficient information to support the auditor's conclusion that the tender process met the probity requirements. However, in this regard I note that the reports met the Victorian Government Purchasing Board standards at the time.
378. In response to my draft report, the probity auditor stated, 'In all material respects the process was undertaken in accordance with identified probity principles and I reported accordingly'.

### Probity framework

379. The probity requirements placed on the City of Port Phillip in relation to the St Kilda Triangle project were outlined in the 1 April 2005 Memorandum of Understanding with the State Government, through the Department of Sustainability and Environment. Section 8 of that Memorandum of Understanding stated:

The Tender Process must accord with all relevant procurement policies of the State of Victoria including the following Victorian Government Purchasing Board procurement principles:

- (a) the State's policy in relation to tendering including:
- (i) value for money;
  - (ii) open and fair competition;
  - (iii) accountability;
  - (iv) risk management; and
  - (v) probity and transparency.

(b) the State's Environmental Purchasing Policy, which has as its goal the minimisation, to the extent practicable, of the environmental impacts that result through the choices made in the purchase of goods and services;

(c) the State's Ethical Purchasing Policy, to ensure that the contractor satisfies the Government's ethical employment standard that requires a business to meet its obligations under applicable industrial instruments and legislation.

The following key requirements must be met in the Tender Process:

- (a) fairness and impartiality;
- (b) use of competitive process;
- (c) consistency and transparency of process;
- (d) security and confidentiality;
- (e) identification and resolution of conflicts of interest; and
- (f) development of a probity plan.

380. I note that in its January 2004 draft business case for the site, the City of Port Phillip stated it considered that:

The benefits of the [Commonwealth] PPP (Public Private Partnership) method are significantly greater than the Council delivery method. It is therefore proposed that the Project be delivered using the PPP method. While it is proposed that the principles and structures of PPPs will be adopted, the Project will not be delivered under the State's *Partnerships Victoria* policy.

381. The *Partnerships Victoria Policy* 'provides the framework for a whole-of-government approach to the provision of public infrastructure and related ancillary services through public-private partnerships' in Victoria. Major stages of a Partnerships Victoria project are as follows:

- the service need
- option appraisal
- business case
- project development (including appointment of a steering committee project director, procurement team)
- bidding process
- project finalization review
- final negotiation
- contract management.

382. It was within the broad Public Private Partnerships framework that the City of Port Phillip developed and managed its processes, and instituted its probity principles.

## Probity auditor appointment

383. The Memorandum of Understanding between the City of Port Phillip and the Department of Sustainability and Environment stated that:

Port Phillip will engage an Adviser to provide advice on probity issues throughout the Tender Process, including to ensure that the Tender Process is fair, open and demonstrates the highest levels of integrity consistent with the public interest.

384. The Memorandum of Understanding required that the City of Port Phillip obtain written approval from the Department of Sustainability and Environment prior to engaging an advisor, unless the advisor belonged to a firm listed on the Whole of Government Probity Advisors Panel.

385. While the Memorandum of Understanding required that 'an Adviser' be engaged, the City of Port Phillip engaged a probity auditor to both advise and audit the process.

386. The City of Port Phillip's *Purchasing Guidelines* (<\$100,000) required at the time that three written quotations be obtained for purchases between \$10,001 and \$100,000. In accordance with this policy and the Memorandum of Understanding, the St Kilda's Edge Committee sought fee proposals from three probity auditors from the Whole of Government Probity Advisors Panel. The probity auditors were recommended by Mr Graham Cunningham, Paradigm Advisory, who requested that he be part of the selection process as he considered there was a need to be 'careful talking probity auditors! You can end where process takes over from progress'.

387. Two of the three probity auditors provided fee proposals in February 2005, while the third did not respond. An evaluation of the proposals stated, 'both companies have experience in dealing with probity auditing and services for the public sector'. However, while Pitcher Partners had the requisite public liability insurance (\$5 million), the other firm only had \$3 million. The St Kilda's Edge Committee subsequently decided to appoint Mr Geoff Walsh, Pitcher Partners on 25 February 2005.

388. I note from a record-keeping perspective that the City of Port Phillip file for the appointment of a probity auditor did not include copies of the briefs and letters sent to the three firms; and that it was unclear who evaluated the proposals. Similar issues are discussed further in the chapter titled, *Poor procurement and contract management practices*.

389. The probity auditor's role for the St Kilda Triangle development was described in the *Probity Auditor Brief* (prepared by the City of Port Phillip) as follows:

- 1) to provide advice to Council during the tendering process on probity related issues...
- 2) to provide independent scrutiny of the tendering process...
- 3) to provide a report at the end of the process which records an independent professional view of the way in which it was managed, from a probity perspective.

390. Importantly, the probity auditor's role was to prepare a probity plan, provide advice throughout the process and then audit the process that was followed. In effect, Mr Walsh fulfilled the role of both probity advisor and probity auditor. In major projects, I consider that the probity auditor and probity advisor functions should be provided by different parties, as discussed earlier in my report.

391. The probity auditor's contract was to end upon 'completion or termination of the tender process for the redevelopment of the Triangle Site', which in this case was 25 May 2007 when the contract was executed between the State Government, the City of Port Phillip and BBC.

392. Witnesses interviewed during my investigation stated that the involvement of a probity advisor and/or auditor normally finishes with the appointment of the preferred tenderer. However, it is clear that probity issues that could bring into question whether all bidders were provided with the same opportunities and treated equally, continued to arise between the time the contract was executed and the approval of the development plan.

393. One such example related to concerns expressed by the City of Port Phillip that BBC was attempting to alter the size or scale of the proposal that won them the tender. On 28 August 2007, Mr Jim Holdsworth, Chair of the Design and Functionality Panel emailed Mr Spokes and relevant City of Port Phillip officers stating:

In the winning scheme, the 'Linden' building is shown as two storeys high; one facing the Palais plaza and one facing the 'grassy slopes'. The design presented for the first time to the DRC [Design Review Committee] on Monday bore no resemblance to the February scheme and is a total of three-four storeys in height.

394. Mr Spokes responded stating, 'I do not like the sound of this. We may need to give an early signal to the developers about the rules of the game they signed up to'.

*In major projects, I consider that the probity auditor and probity advisor functions should be provided by different parties.*

*Witnesses interviewed during my investigation stated that the involvement of a probity advisor and/or auditor normally finishes with the appointment of the preferred tenderer. However, it is clear that probity issues that could bring into question whether all bidders were provided with the same opportunities and treated equally, continued to arise between the time the contract was executed and the approval of the development plan.*

*It is important for a probity advisor or auditor to be available to ensure that negotiations do not lead to the acceptance of a development plan that is fundamentally different to the tender specifications that all bidders responded to.*

395. I note that legal advice was sought from Minter Ellison Lawyers about BBC's contractual obligations. However, I consider that these proposed changes also raise a significant probity issue, for which probity advice should have been sought. I consider that it is important for a probity advisor or auditor to be available to ensure that negotiations do not lead to the acceptance of a development plan that is fundamentally different to the tender specifications that all bidders responded to. Accepting such a plan would compromise the requirement that all bidders are treated equally.
396. Another example related to the decontamination risk on the site, which the development agreement placed on the developer. In January 2008, Mr Oulton, Executive Director, Community Development and Planning, City of Port Phillip emailed Mr Spokes a draft resolution that could be put to the elected council to 'facilitate a request to the State Government for funds'. Mr Oulton stated:

We need to be careful that this does not constitute a variation to the development agreement and does not raise any probity issues.

397. At interview, on 6 July 2009, Mr Spokes said he sought advice about this issue and was advised that the City of Port Phillip needed to identify the 'commercial issues ... that arose from the decision, and seek to negotiate those with the parties'. He said this 'could have arisen with any of the party [sic] at a point where you're trying to conclude the negotiation'. When asked who provided this advice, he said he sought advice from Paradigm Advisory, and possibly Pitcher Partners.

### **Probity plan, processes and procedures**

*While an adequate probity framework was in place, the failure of individuals to follow the required procedures raised issues about the probity of the process and inevitably the fairness of the process and the quality of the outcome.*

398. My investigation identified that the St Kilda's Edge Committee had in place a number of processes designed to effectively meet probity requirements, to ensure fairness, transparency, equity and a competitive process. However, while an adequate probity framework was in place, the failure of individuals to follow the required procedures raised issues about the probity of the process and inevitably the fairness of the process and the quality of the outcome.
399. The probity plan was a requirement of the Memorandum of Understanding. The Victorian Public Construction Probity Plan Template defines a probity plan as follows:

The control framework document that establishes tasks, procedures and treatment options for managing probity-related aspects of the project.



400. The probity auditor prepared a draft probity plan in early March 2005. The document was amended after comments from the City of Port Phillip and it was adopted by the St Kilda's Edge Committee on 20 March 2005. The probity plan was updated on 27 July 2006, which referred readers to relevant procedures for further information. These procedures were prepared with the assistance of the probity auditor.
401. The probity plan (March 2005) discussed:
- probity and project objectives
  - the responsibilities of the elected council, the St Kilda's Edge Committee and the State Government
  - the project management structure and process
  - security of information
  - confidentiality
  - conflict of interest
  - media
  - communication protocol
  - the role of the probity auditor.
402. The document provided commentary about these issues and the requirements throughout the process. However, in my view, best practice would be for the plan to include a checklist of the tasks to be completed and provision for the probity auditor to declare that each task has been completed.
403. I note that the probity plan for the Kew Residential Services development included a table of probity requirements, an explanation of how those probity requirements had been or would be satisfied, specific task accountability and a column to document that the tasks for each key activity had been completed. The following is a snapshot of the table:

Table 2: Kew Residential Services probity plan			
Probity requirement	Project arrangements	Task accountability and documentation	Date reviewed and Probity Advisor's comments
Project documentation should be archived and stored to ensure that adequate documentation remains which demonstrates that the process was managed in accordance with the Government's principles	Project documentation will be registered and filed in accordance with statutory, policy and DHS requirements in order to provide an adequate "paper trail" of the process for future information	Project Director/ Project Manager  Probity Plan and File list	

404. The table was designed as a living document to be updated regularly throughout the process. As such, I would expect that at the conclusion of the tender process, the plan would be completed, signed-off by the probity auditor and filed in accordance with the Public Records Act.
405. There was no such checklist in the probity plan for the St Kilda Triangle, nor was I able to find such a checklist on the probity auditor's files. The probity auditor said he did not complete a checklist.

### **Conclusions**

406. In response to my draft report, the probity auditor noted that criteria and expectations were documented in the probity plan (as outlined earlier) and that three procedure manuals were prepared to guide the process. He stated:

By observation at meetings and review of reports and other materials I ensured the process addressed probity principles contained in the probity plan.

407. However, I consider that there is more to a probity auditor's role than attending meetings, preparing manuals and setting expectations. In my view, a probity audit requires that:

- criteria and expectations are set
- the processes followed are assessed against those criteria and expectations, and the assessment is documented
- the probity auditor provides sign-off at relevant stages that the criteria and expectations have been met, or otherwise.

408. Without this, it was difficult for me to determine how the probity auditor reached his conclusion that the processes followed by the City of Port Phillip and the State Government met probity standards. A checklist, such as the one provided in the Kew Residential Services probity plan, would assist the agency conducting the tender by providing a set of tasks that must be completed to ensure probity standards are met. A checklist signed-off by the probity auditor also provides the agency with confidence that the required tasks were completed and thus the probity requirements were met.

409. In response to this, Pitcher Partners stated:

The probity plan is for the benefit of the project team and puts in place processes and procedures to ensure the integrity of the processes maintained throughout the period. It is not an audit program which is designed to be completed as a check-list with the auditor declaring each task completed ...

*I consider that there is more to a probity auditor's role than attending meetings, preparing manuals and setting expectations. In my view, a probity audit requires that criteria and expectations are set; the processes followed are assessed against those criteria and expectations, and the assessment is documented; and the probity auditor provides sign-off at relevant stages that the criteria and expectations have been met, or otherwise.*

Mr Walsh determined in his professional opinion that a check list was unnecessary ... Mr Walsh drafted the probity plan and as a consequence was familiar with its content, he attended numerous meetings during both the EOI and RFP phase and was aware of all the processes contained in the probity plan. In addition, it must be acknowledged that Mr Walsh has had extensive experience in the conduct of probity audits ...

The processes undertaken by the Probity Auditor are based ultimately on professional skill and judgement. There are no mandated audit standards by which audits are undertaken and as such probity audits are opinion-based outcomes. The Auditor-General has endorsed the probity approach adopted by Mr Walsh – refer The New Royal Childrens Hospital report.

410. While I note that there was no requirement for the probity auditor to complete a checklist or to sign-off on the probity plan, I consider that these measures would have supported the auditor's position that the probity standards identified in the probity plan were met.

### **Briefings on probity and advice**

411. On 17 March and 4 April 2005, the probity auditor made presentations to the St Kilda's Edge Committee, advisors and City of Port Phillip staff on 'St Kilda Triangle Site Project Probity Principles'. I note that not all of those involved in evaluating the Expression of Interest responses attended.
412. The presentations focused on conflict of interest and confidentiality issues. The probity auditor stated that the issue of perceived conflicts of interest was part of the presentations. This is of particular importance given the 'perception risk' associated with the conflicts of interest identified during my investigation (discussed later in this report).
413. I also note in the context of councillors, that the interpretation of conflict of interest principles under the Local Government Act differs from that in a development exercise such as this. My interviews with councillors identified that they considered they did not have a conflict of interest because they did not have a pecuniary interest. It is important that probity discussions throughout the process emphasise the decision-maker's broader obligations to declare conflicts of interest in accordance with what a reasonable person would consider is a conflict. These distinctions need to be drawn to ensure councillors, in particular, are cognisant of their conflict of interest responsibilities. In this regard, I refer to my report, *Conflict of interest in local government* tabled in Parliament in March 2008.

414. The probity auditor conducted two further briefings in June 2005, prior to the receipt of Expressions of Interest: one with the chairs of the evaluation panels; and another with the St Kilda's Edge Committee and all the evaluation panel members. Another briefing was conducted on 23 August 2006 to explain 'probity obligations' during the Request for Proposal process.
415. The probity auditor's advice was also regularly sought on probity issues and process, primarily by the Senior Project Officer, City of Port Phillip. I examined a number of issues documented in the probity auditor's files and consider that the probity auditor's advice to the St Kilda's Edge Committee on these issues was appropriate.

### Probity audit report

*I consider that the probity auditor's reports lacked sufficient detail for the St Kilda's Edge Committee and the elected council (in addition to the Department of Sustainability and Environment, which was responsible for supervising the relevant processes) to be informed of the factual basis and reasoning for the probity auditor's conclusion that the process met the probity requirements.*

416. The probity auditor provided Mr Spokes, Chair of the St Kilda's Edge Committee with two probity reports: one at the end of the Expression of Interest process, dated 22 July 2005; and the other at the end of the Request for Proposal process, dated 22 May 2007. The reports met the standard required by the Victorian Government Purchasing Board. A copy of the report is attached to my report.
417. Except for general details about the process that each report relates to (i.e. either the Expression of Interest process or the Request for Proposal process), the content of the reports is the same. In each report, the probity auditor briefly stated:
- I have attended various meetings of the SKE Committee and Evaluation Panels, reviewed minutes and other documents which record the process undertaken and evaluation of respondents ...
- In all material respects and based on the probity framework, the process has been undertaken in accordance with identified probity principles covered in the Probity Plan and meets the probity requirements and expectations set out in the VGPPB Probity Policy.
418. I consider that the probity auditor's reports lacked sufficient detail for the St Kilda's Edge Committee and the elected council (in addition to the Department of Sustainability and Environment, which was responsible for supervising the relevant processes) to be informed of the factual basis and reasoning for the probity auditor's conclusion that the process met the probity requirements.
419. The descriptions of the tasks carried out do not provide the reader with enough information to understand what in fact was done by the probity auditor. For example, the probity auditor stated, 'I have attended various meetings'. However, it is not clear which meetings the probity auditor attended and the reasons for his attendance. Further, while the probity auditor considered that the process met the probity requirements, his reports provide no explanation of the criteria he applied or his reasons for reaching his conclusion.

420. In my view, a probity report that does not provide sufficient information to support the auditor's conclusion fails to fulfil the purpose of a probity report – that is, in this case, to instil confidence in the St Kilda's Edge Committee, the elected council, the Department of Sustainability and Environment, and the community that the tender process met the probity requirements.

421. In response to my concerns, the probity auditor stated:

It is not normal practice for a company auditor or the Auditor General to detail in their audit reports the full scope of work undertaken and detailed explanation of the criteria applied in their conclusions. You are seeking to apply a test which is not required in an audit environment.

422. Pitcher Partners further stated:

The audit reports met the standard required by the Victorian Government Purchasing Board. This was a probity audit not an investigation. The report involved the application of professional judgement. The audit report properly records an independent professional view of the way the process was managed from a probity perspective. Your views are not supported by the VGPB or Auditor General.

423. I accept the position of the probity auditor and Pitcher Partners in that it was not normal practice to detail the work undertaken in the probity report and that the reports issued for the St Kilda Triangle development met the required standards. However, I consider that probity reports should be accompanied by a signed document detailing the work completed by the probity auditor so that the public agency and the community can be satisfied that the tender process met the probity requirements. I consider that this will improve the value of probity reports in the future.

424. The Victorian Auditor-General agrees with my recommendation in this regard.

425. I also note that the probity auditor reported to the Chair of the St Kilda's Edge Committee, not the Department of Sustainability and Environment on whose behalf the City of Port Phillip conducted the tender process. In this regard, I note that the Victorian Auditor-General recommended in his report *New Ticketing System Tender* that:

where the procurement is being undertaken by a non-departmental public entity, the Probity Auditor should be engaged by the portfolio Department, with the tendering authority reimbursing the Department for the cost of the Probity Auditor role at the end of the tender process.

426. I note that the Department of Treasury and Finance did not accept the Victorian Auditor-General's recommendation, stating that it considered 'the current policy on the Conduct of Commercial Engagements in relation to probity auditors is considered industry standard practice and is therefore appropriate'.

## Conclusions

427. My investigation identified that while a probity plan and related procedures were in place, the effectiveness of the process was diminished when relevant parties failed to seek, or accept, the probity auditor's advice on probity issues and conflicts of interest. Examples of such issues are discussed later in my report. In addition, probity was diminished by the probity auditor's failure to review conflict of interest declarations, which is discussed later in my report.
428. I consider that there is added value in obtaining further probity advisor or auditor involvement where tender processes are delayed, or the environment alters. This assures the public that the principles of probity – honesty, uprightness, and transparency – are managed and considered throughout the life of the project, not just at the earlier tender evaluation stages.
429. For future major projects, agencies should develop probity plans that include scope for further advice and assessment from probity advisors and/or auditors up to and including the signing of the contract or the approval of the development plan. The rationale for this relates to the conclusion of the competitive process. Where the contract is signed in a timely manner shortly after the conclusion of the competitive process and/or there are no major changes to the environment in which the tender was firstly staged, it is reasonable for the probity auditor's involvement to end when the contract is signed.
430. In the case of the St Kilda Triangle, the contract was signed; however, there continued to be significant negotiations for the next 18 months in relation to the development plan approval. The involvement of a probity advisor or auditor during these negotiations would have helped ensure that the development plan was consistent with the tender specifications that all bidders responded to.
431. I consider that the probity auditor's reports did not sufficiently detail the factual basis and reasoning for the probity auditor's conclusion that the process met the probity requirements. In this regard, I have recommended earlier in my report that the Department of Treasury and Finance review the *Good Practice Guidelines – Conduct of Commercial Engagements* to include a requirement that an auditor's interim and final probity reports be accompanied by a signed document detailing the work completed by the probity auditor.

*I consider that there is added value in obtaining further probity advisor or auditor involvement where tender processes are delayed, or the environment alters. This assures the public that the principles of probity are managed and considered throughout the life of the project, not just at the earlier tender evaluation stages.*

432. I also consider that the independence of the probity auditor's role would have been enhanced had he reported to the Department of Sustainability and Environment, which had oversight of the project on behalf of the State Government. It would also have provided a mechanism to ensure the Department of Sustainability and Environment was satisfied with the probity of the processes followed by the City of Port Phillip.

433. In response to this, the probity auditor stated:

This comment ignores the Memorandum of Understanding (MOU) between City of Port Phillip and Department of Sustainability [and Environment] in which management of the Tender Process was the responsibility of Port Phillip. In accordance with the MOU the Probity Auditor was engaged by City of Port Phillip.

434. I consider that for similar future projects, the probity auditor should be engaged by the portfolio department and therefore report to that department in order to strengthen the independence of the probity auditor's role. This is consistent with the position of the Victorian Auditor-General.

## Recommendation

### Recommendation 15

I recommend that the Department of Treasury and Finance review the *Good Practice Guidelines – Conduct of Commercial Engagements* to require that the probity auditor be engaged by the portfolio department and report to that department.

#### *Department of Treasury and Finance response*

'DTF [Department of Treasury and Finance] does not accept this recommendation, as the proposal that the probity auditor be engaged by the portfolio department, rather than the entity conducting the tender, has the potential to blur the legal lines of accountability and responsibility between the contracting entity and the portfolio department'.

435. I remain of the view that the probity auditor should be engaged by the portfolio department in order to strengthen his or her independence. I note that this is consistent with the position of the Victorian Auditor-General.

*I remain of the view that the probity auditor should be engaged by the portfolio department in order to strengthen his or her independence. I note that this is consistent with the position of the Victorian Auditor-General.*

## FAIR, OPEN AND COMPETITIVE PROCESS

### The Memorandum of Understanding

436. In March 2005, the State Government approved the lease of Crown land on the St Kilda Triangle site, subject to testing the market during the Expression of Interest process, and approved of the City of Port Phillip managing the project on behalf of the State Government. The Department of Sustainability and Environment was to manage state government interests in the development.
437. On 1 April 2005, the City of Port Phillip and the State Government, through the Department of Sustainability and Environment, entered into a Memorandum of Understanding to manage the above arrangement.
438. The Memorandum of Understanding was signed by Mr Spokes, Chief Executive Officer, City of Port Phillip; and Professor Lyndsay Neilson, Secretary, Department of Sustainability and Environment. The purposes of the Memorandum of Understanding were stated as follows:

to regulate and administer the exercise and performance of the rights and obligations of DSE and Port Phillip by setting out their respective roles and responsibilities to enable each of them to carry out those roles and responsibilities in relation to the management of the Tender Process;

to articulate the Parties' intention to operate in a transparent, co-operative and collaborative way to ensure the Tender Process is effectively managed and successfully delivered for the benefit of the Parties and the community of Victoria; and

to ensure the benefits and risks arising under or out of the Tender Process are appropriately managed.

439. Among other things, the Memorandum of Understanding stated that 'the following key requirements must be met in the Tender Process':
- fairness and impartiality;
  - use of competitive process;
  - consistency and transparency of process;
  - security and confidentiality;
  - identification and resolution of conflicts of interest; and
  - development of a probity plan.



## Approval processes

440. The processes followed by the City of Port Phillip evolved during the course of the project. There was no overall project plan available at the outset, detailing the steps necessary for completion of the project.
441. The tender process (both the Expression of Interest and Request for Proposal phases) had in place a probity framework, although elsewhere in this report I outline a number of deficiencies in the management of this framework.
442. The project was subject to oversight and approval processes, including the:
- establishment of the St Kilda's Edge Committee, comprising representatives from the State Government and the City of Port Phillip, as well as independent members
  - engagement of a probity auditor
  - adoption of a probity plan, which was updated in August 2006
  - adoption of procedures to manage communication with bidders and the media etc., the receipt of Expressions of Interest, and the registration and evaluation of Request for Proposal responses
  - availability of clear documentation for bidders
  - establishment of evaluation teams
  - preparation of evaluation guidelines and criteria that had been approved by state government officials
  - attendance by the probity auditor at various meetings with bidders, the evaluation teams and the St Kilda's Edge Committee
  - opportunity for community groups to meet with the short-listed consortia
  - completion of independent evaluation team reports, which were provided to the St Kilda's Edge Committee for consideration
  - completion of probity reports by the probity auditor.
443. The City of Port Phillip also ensured the availability of expert advice from outside sources. In this regard, however, I note that the St Kilda's Edge Committee requested that Paradigm Advisory (the project managers) conduct a financial evaluation of the preferred bid. I question the involvement of Paradigm Advisory in the financial evaluation given that its representative, Mr Graham Cunningham, was a member of the relevant evaluation panel. In my view, the financial evaluation would have been more useful had it been conducted by an independent person who was not involved in assessing the bids. In this regard, Paradigm Advisory stated it 'was asked to provide expert advice, not independent advice'.

*I do not consider the City of Port Phillip had the relevant experience and expertise to undertake such a significant project, especially when it was not subject to the same high level of checks and approvals associated with a state government development.*

444. I also note that in approving the management of the project by the City of Port Phillip, some financial and project controls normally demanded in the state government sector were not undertaken. Such controls add more rigour and transparency to the process. One example of such controls is the use of Gateway Reviews, which are generally undertaken for high-risk or complex projects, or those with a project value exceeding \$10 million. The Gateway Review Process is a 'structured process whereby reviews are carried out at key decision points in a program or project's life cycle, known as Gateways, by a team of experienced people, independent of the project team'.<sup>3</sup> I consider that Gateway Reviews may have enhanced the probity of the St Kilda Triangle development process.
445. While my investigation identified concerns with aspects of the process, there were also elements of the processes pursued during the project development exercise that were appropriate and met probity and transparency requirements.
446. On the face of it, the City of Port Phillip met its obligations under the Memorandum of Understanding and at interview senior staff of the Department of Sustainability and Environment considered that the project was well run. However, I do not consider the City of Port Phillip had the relevant experience and expertise to undertake such a significant project, especially when it was not subject to the same high level of checks and approvals associated with a state government development. I address a number of concerns as follows.

### Expression of Interest

447. When the Expression of Interest process closed, the City of Port Phillip had received 15 Expressions of Interest. The probity auditor was on hand to witness and register receipt of submissions.
448. The City of Port Phillip established two evaluation teams to assess the bids based on set criteria and to report independently to the St Kilda's Edge Committee. The two evaluation teams were:
- *Finance and Commercial Panel*: chaired by Mr David Elsum, an independent representative, and comprising two other independent representatives (one from Paradigm Advisory) and a City of Port Phillip staff member
  - *Design and Functionality Panel*: chaired by Mr Jim Holdsworth, a former City of Port Phillip staff member, and comprising two independent members; a City of Port Phillip staff member; and one staff member from the Department of Sustainability and Environment.

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3 <www.gatewayreview.dtf.vic.gov.au>.

449. On 20 July 2005, the St Kilda's Edge Committee met to discuss the reports and recommendations of the evaluation panels and to endorse the leading three consortia. The elected council was briefed to this effect on 25 July 2005. The three consortia were:

- R Corporation and John van Haandle (RV Group)
- Babcock & Brown with Citta Property Group (BBC)
- St Kilda Creative Hub.

### *Independence of the evaluation panels*

450. On 29 June 2005, Mr Jim Holdsworth, Chair of the Design and Functionality Panel emailed the Senior Project Officer stating:

David Elsum suggested to me that he and I (with Graham C[unningham] and maybe Geoff Walsh) meet with David S[pokes] to informally check whether each Panel is likely to make the same recommendations. This would enable us to sort out any potential problems before they arise or get to the SKE Ctte [St Kilda's Edge Committee]. Such should happen after the Panel's [sic] meet on 6 July, by which time we'll be pretty well settled as to our recs [recommendations].

451. While the probity auditor initially agreed to attend the meeting in an email to the Senior Project Officer, he later suggested to the Senior Project Officer that such a meeting might be 'putting "the cart before the horse"'. He asked, 'shouldn't the panels progress their individual assessments before the meeting with David [Spokes]?' The Senior Project Officer subsequently postponed the meeting until after each of the evaluation panels had finalised their recommendations.

452. The proposed meeting had the potential to undermine the usefulness of the evaluation process as it is clear from the *Communication Procedures*, adopted by the St Kilda's Edge Committee on 21 September 2005, that:

The Evaluation Panels may advise the SKE Committee or the Chair of the progress of the evaluations but are not to provide information on the details of the evaluation until this work is completed ...

This approach is based on "need to know" and minimises the risks of inadvertent leakage of information. This process also preserves the segregation of the Evaluation Panels and the impartiality of the evaluation process.

453. Mr Elsum has since stated to me:

I sought to define the process going forward, not to know the details of the recommendations ... It is wrong to say the probity of the process was at risk; the process worked as was intended. That is the reason the Probity Auditor was included and opinion sought.

454. Mr Elsum further stated, 'Mr Holdsworth's email is hearsay. I did not say the words as quoted'. I note, however, that at interview, Mr Elsum said he was a 'proponent' of the proposed meeting.
455. I remain concerned that the parties involved in organising the proposed meeting did not recognise that such a meeting would risk the probity of the process and the independence of the two evaluation panels, or that such meetings were explicitly proscribed in the *Communication Procedures* – a document that they should all have been familiar with. I am pleased that the meeting was cancelled on the advice of the probity auditor.

*Communication with bidders – failure to act*

456. At interview, Mr Darren Ray, City of Port Phillip councillor from 1999 to November 2008, stated that he was telephoned by a principal contact for one of the bidders, just prior to the short-listing of the three bidders.
457. According to Mr Ray, the principal contact rang him in late August 2006 and said, 'I hope that our bid is successful. We are the only local people who really know St Kilda's culture well'. Mr Ray said he responded, 'this process is as tight as any process that I've ever been involved in. You should not be making this comment - this call' and then ended the call. Mr Ray did not report the telephone call to the Chair, St Kilda's Edge Committee.
458. The confidentiality declaration for the project required that individuals involved in the project declare to the Chair of the St Kilda's Edge Committee:
- any direct or indirect contact which I have with any bidder, or any employees or advisers of any bidder, which is not officially authorised.
459. I note that Mr Ray had not signed a confidentiality declaration when he was telephoned by the principal contact. He did not sign one until 13 March 2007, despite being on the St Kilda's Edge Committee in 2004-05. In response to this, Mr Ray stated that he 'had not been requested or advised to sign one any earlier in the process'.
460. Mr Ray was not a member of the St Kilda's Edge Committee at the time of the principal contact's call nor had he signed a confidentiality declaration. However, I consider that he should have been aware of the need to report all unauthorised contact from bidders in order to protect the integrity of the tender process as councillors were to vote on whether to accept the committee's recommendation in relation to the winning bidder.

### *Probity report*

461. On 22 July 2005, the probity auditor provided his probity report in respect of the Expression of Interest process. The probity auditor stated that the process had been conducted in accordance with the probity principles and the Victorian Government Purchasing Board probity policy.

### **Request for Proposal**

462. On 30 August 2005, the short list was announced by the City of Port Phillip and the Request for Proposal documents were provided to the short-listed consortia. The Request for Proposal documentation was vetted and agreed to by the Department of Sustainability and Environment; the Department of Treasury and Finance; the Victorian Government Solicitor's Office; the City of Port Phillip and its lawyers (Minter Ellison Lawyers); and the probity auditor.
463. In March 2006, the St Kilda's Edge Committee held forums for interested parties for each of the three consortia to meet with key members of the community. These forums were to provide the opportunity for interested parties to express their vision and concerns for St Kilda and the St Kilda Triangle site direct to the three short-listed bidders.
464. On 30 August 2006, the Request for Proposal submissions were received. The probity auditor was present at the time of receipt. During September 2006, the three consortia briefed the evaluation panels on their bids.
465. In October 2006, the evaluation panels were assisted by the provision of a legal evaluation of the bids by Minter Ellison Lawyers (the City of Port Phillip's lawyers); a report on the proponents' construction costs by WT Partnership; and independent advice on issues such as traffic and parking, statutory planning compliance, urban heritage and compliance with the St Kilda's Edge strategy.
466. Also in October 2006, the St Kilda's Edge Committee established a Negotiating Team, comprising representatives of the City of Port Phillip, Paradigm Advisory, Minter Ellison Lawyers, and the Department of Sustainability and Environment. The role of the Negotiating Team was to negotiate the resolution of shortcomings in the three proposals. In accordance with the requirements of the Memorandum of Understanding, the Department of Sustainability and Environment endorsed the establishment of these arrangements.
467. On 29 November 2006, the St Kilda's Edge Committee met and discussed the evaluation reports and recommendations. The St Kilda's Edge Committee resolved to invite RV Group and BBC to address issues in a re-submitted proposal; and to invite St Kilda Creative Hub to remain in reserve.

468. On 9 February 2007, revised bids were received from the two consortia. The probity auditor was present when the two submissions were received.

*Exclusive negotiations*

469. On 7 March 2007, the evaluation panels reported to the St Kilda's Edge Committee that the BBC proposal was preferred. However, the committee noted that there remained some concerns and shortcomings with the BBC bid, which were referred to the Negotiation Team (and Reference Group) for further negotiation. Further negotiations were only undertaken with BBC.
470. While the Request for Proposal documentation appears to permit the St Kilda's Edge Committee conducting exclusive negotiations, I consider that it should have negotiated with both RV Group and BBC to maintain adequate competition, and in turn to ensure that the tender process achieved the best outcome and value for money for the community and the State Government.
471. Mr Spokes has since stated:

It is a matter of judgment in the circumstances as to how these matters should be conducted, with no particular competitive tendering approach necessarily being the best ...

The Council's solicitors and project managers, together with the Department of Sustainability and Environment and their solicitors guided the process.

472. Mr Spokes has also argued:

The process undertaken was in accordance with the legal requirements of the tender process and also in accordance with government policy; any subsequent departure from the agreed process would have exposed the Council to legal claims.

473. Despite Mr Spokes' comments, I remain of the view that it was not desirable to negotiate with one bidder, particularly when neither met the evaluation criteria and the St Kilda's Edge Committee considered that both submissions 'were of an extremely high quality'.
474. I also note that the St Kilda's Edge Committee informed BBC as early as April 2007 that its bid was preferred. Mr Stephen McMillan, Managing Director, Citta Property Group (BBC) said at interview that the St Kilda's Edge Committee told BBC 'about a month before' the announcement of a preferred tenderer on 25 May 2007 that it 'would like to make you [BBC] the winner but we have to negotiate'. My enquiries with RV Group indicate that they were aware that they were not the preferred bidder in March 2007, when exclusive negotiations commenced.

*While the Request for Proposal documentation appears to permit the St Kilda's Edge Committee conducting exclusive negotiations, I consider that it should have negotiated with both RV Group and BBC to maintain adequate competition, and in turn to ensure that the tender process achieved the best outcome and value for money for the community and the State Government.*

475. On the face of it, this contravenes the Memorandum of Understanding, which stated that 'Port Phillip will not advise a Tenderer that it is to be appointed Contractor unless written approval of the Minister for Planning has been issued to Port Phillip'. There is no evidence that such approval had been provided at this time. In addition, the knowledge that its bid was preferred placed BBC in a stronger position to negotiate.
476. I note that in the 'last few weeks of negotiation', BBC successfully negotiated to extend the development under the Upper Esplanade, which was not included as part of the St Kilda Triangle site in the Request for Proposal documentation. In order to facilitate the extension of the site, the elected council sought an amendment to the *Port Phillip Planning Scheme (C65)* to rezone a strip of the road reserve from a Residential 1 Zone to a Special Use Zone 3; and to apply the Development Plan Overlay to the same land.
477. In June 2007, City of Port Phillip staff discussed whether the amendment should be sought under section 20(4) of the Planning and Environment Act in order to get it 'approved without [public] exhibition, to avoid public discussion given the sensitivities', noting that the disadvantage of this would be a 'lack of transparency'. The Statutory Planning Committee of Council subsequently resolved to seek the amendment under section 20(4) and the amendment was approved by the Minister for Planning. It came into operation on 22 November 2007.

### *Announcement of preferred tenderer*

478. On 14 May 2007, following ongoing negotiations between BBC and the Negotiation Team in early May 2007, the key issues were signed-off by the Reference Group. The elected council was also briefed on the tender process; however, the preferred bidder was not disclosed.
479. On 22 May 2007, the probity auditor issued his probity report on the Request for Proposal process, stating that the process was conducted in accordance with probity principles.
480. On 24 May 2007, a Special Meeting of the elected council accepted the St Kilda's Edge Committee recommendation to approve BBC as the developer.
481. On 24 and 25 May 2007, Mr Madden, Minister for Planning received Ministerial Briefings on the St Kilda Triangle development recommending that he execute the project documents, including the development agreement. Contractual documents were signed on 25 May 2007 by the City of Port Phillip, the State Government and BBC.

### *The role of the Valuer-General*

482. The Ministerial Briefings provided to Mr Madden on 24 and 25 May 2007, stated:

Although the leading bid is yet to be finalised, the commerciality of the bid is considered by the CoPP's commercial advisers and DTF to be satisfactory. The financial offerings to the CoPP are, on the face of it, modest. However the mandatory requirement that a significant public benefit be included in the development drew bids that were not based on a highest and best valuation basis. Valuations have therefore been based on consideration of tangible public benefit as well as commercial benefits.

483. I note that there was no up-to-date independent valuation of the property by the Valuer-General. The financial benefits of the BBC bid were compared against a valuation undertaken by the Valuer-General in 2004, some three years beforehand. In other instances, I note that such valuations generally only have currency for some three months.

### **Confidentiality**

484. The release of confidential information can compromise the integrity of the project and the perceived fairness of the decision. My investigation identified that the confidentiality of the St Kilda Triangle project was breached on a number of occasions during the Request for Proposal process, despite individuals signing confidentiality declarations.

#### *Leaks to the media*

485. During the tender process, there were several articles in *The Age* about the project, two of which strongly suggested that members of the St Kilda's Edge Committee or the evaluation panels had leaked information in breach of their confidentiality declarations.

486. In an article titled, 'St Kilda foreshore a mini-Chadstone by the bay?' on 14 October 2006, *The Age* reported:

St Kilda's prized triangle site is at risk of becoming a "mini-Chadstone by the bay" ...

Well-placed sources said it was hard to separate the three bids, although clear concerns are emerging about the proposal from the group including developer Mirvac, trucking magnate Lindsay Fox and architect Daryl Jackson, believed to be the most intensive and retail-based of the bids.

487. That day, Mr Spokes emailed the councillors about the article:

Doubtless you will have seen today's article in the *Age* [*sic*] regarding the Triangle site.

*The release of confidential information can compromise the integrity of the project and the perceived fairness of the decision. My investigation identified that the confidentiality of the St Kilda Triangle project was breached on a number of occasions during the Request for Proposal process, despite individuals signing confidentiality declarations.*



It is very disappointing to see the reference to information from “well placed Council sources”. It appears to follow the recent briefing of the Committee by the chairs of the evaluation panels. There has clearly been a significant breach of the agreed procedures. It risks damage to our ability to manage this [sic] process and undermines the confidence of key stakeholders in the Council. To date this has been our biggest asset.

488. On 15 October 2006, Mr Cunningham emailed the Senior Project Officer stating:

I have now had a chance to read the most unfortunate article in the Age. Once things start to leak it can only get worse as people believe they can get away with it.

489. Mr Cunningham has since stated that his ‘recollection of the articles in The Age’ was that ‘they were negative towards the Triangle Site and could have undermined the tendering process’.

490. On 16 October 2006, the probity auditor said he ‘wholeheartedly’ endorsed Mr Spokes’ comments to the councillors and suggested that a similar note be sent to ‘other Council & DSE project participants/consultants reminding them of the continuing confidentiality’. In his internal files, he noted ‘council insider. David has written to all Councillors’.

491. I note that following the article, Mr Frank McGuire, St Kilda Creative Hub, expressed concern to the Senior Project Officer that there had been a leak from the City of Port Phillip and that ‘the evaluation committee [sic] would be influenced by the term “Chadstone by the sea”’. The Senior Project Officer responded that the St Kilda’s Edge Committee had ‘pursued an internal investigation’ and ‘had formed the view that the information in the age article that they were referring to was an amalgam of information already in the public realm and speculation’. Despite this, it is clear that Mr Spokes and the probity auditor considered that there was a leak.

492. Another significant article appeared in *The Age* on 15 March 2007, titled, ‘Favourite for St Kilda triangle set’. The article stated:

Sources confirmed that the bid by ARM, with developer Citta Property Group and Babcock & Brown, was now clearly favoured over the remaining proposal ...

The sources said both bids were strong ... However, it is believed special committees advising on design and finance have backed the ARM-Citta bid [BBC].

493. I note that this article followed a meeting of the St Kilda’s Edge Committee on 7 March 2007, at which it was ‘determined that the BBC Proposal had performed better against the relevant evaluation criteria’.

494. On the day of the article, the Senior Project Officer emailed Mr Spokes' 'formal response to the media [sic]' to the St Kilda's Edge Committee, its legal representatives, Mr Cunningham and the probity auditor. It stated that:

My comment will be

There has been no decision on a preferred tendered [sic]. We have very strong bids which we are continuing to evaluate. We remain in a competitive process which has not been concluded.

495. Despite this, it is clear from St Kilda's Edge Committee documents that evaluations had been completed and the committee considered BBC the preferred tenderer.

496. On 15 March 2007, the probity auditor emailed the Senior Project Officer stating:

Clearly someone has spoken at length with the reporter for him to have such detail ... I think this important that David [Spokes] seek to establish who has breached the confidentiality/communication protocols.

497. At interview, when asked whether he investigated the leaks, Mr Spokes said:

I spoke to all of the members of the committee, and staff who had access to the information, directly asking them whether they were the source of the leak, whether they had passed on any information inappropriately. And I received undertakings from all of those people that they had not done so.

498. Mr Spokes said he contemplated getting further advice about the leak, but did not do so as he considered that while 'it would have been better if it hadn't happened ... it really didn't go to the substance of the - of the decision'.

499. He has since added:

[I] did seek to trace the leaks but was not able to do so; and ... in the context of the size and complexity of the project, the leaking was, whilst unfortunate and undesirable, relatively insignificant.

500. My investigation did not identify the source of the leaks. In any event, I do not consider that the leaks to the media compromised the probity of the process as it was decided early in the Request for Proposal process that the St Kilda Creative Hub bid did not meet the Request for Proposal criteria. I do not consider that the leaked information assisted the successful tenderer (BBC) to win the bid. I do, however, note the concern raised by Mr McGuire, St Kilda Creative Hub, that the evaluation panels may have been influenced by the term 'Chadstone by the sea'. I consider that the leaks may have damaged the perceived integrity of the process.

### *Release of information to the ALP St Kilda branch*

501. My investigation identified that on 9 May 2007, Mr Darren Ray, then councillor, emailed a confidential document titled, 'CONFIDENTIAL Triangle Site Redevelopment Key Project Milestones & Processes – 6 March 2007' to members of the Australian Labor Party St Kilda Branch, of which Mr Ray was Secretary.
502. The confidential document outlined the process to date and tentative dates for the next steps, including the announcement of the preferred bidder and the commencement of the planning process. Also attached to the email were three other documents related to the St Kilda Triangle development and the City of Port Phillip.
503. The Senior Project Officer informed my investigators that the confidential document was provided to all councillors at a briefing in March or April 2007. The Senior Project Officer said she believed all the councillors returned their copies after the briefing. The confidential document provided information about the tender negotiations and an economic impact assessment for the St Kilda Triangle site, which was not publicly available.
504. On 1 September 2009, Mr Ray told my investigators that Mr Spokes gave him the document because 'he knew we were going to discuss (the St Kilda Triangle Site) at the Labor Party meeting'. Mr Ray stated that Mr Spokes was comfortable with the document being in public circulation.
505. Mr Ray should have known that the document was confidential. Apart from the document being titled 'CONFIDENTIAL', it was also provided to the councillors on pink paper. I understand that pink documents, or 'pinks' as they are referred to, are recognised at the council as confidential documents.
506. In response to this, Mr Ray stated, 'I made a specific and clear request to the then CEO for non Confidential information that could assist me in community deliberations, including with the St Kilda ALP Branch as an interested local entity'. He further stated, 'I acknowledge that the word CONFIDENTIAL remains on one of the 8 attachments to my email. This was not my understanding at the time the information was given to me by the then CEO'.

*The City of Port Phillip approved an urban design framework in February 2002 after a community consultation process. However, it was another 18 months to two years before the elected council resolved to submit an urban design framework to the Minister on 24 May 2004.*

*While the essence of the urban design framework may have remained unchanged, it appears that the public perception was that with the passage of time, significant 'behind-doors' changes had occurred.*

507. Mr Spokes has since added that 'Mr Ray had seen the document in his capacity as a councillor ... It was appropriate for Mr Ray to explain the process'.
508. Section 77 of the Local Government Act makes it an offence for a councillor, or member of a special committee, to 'release information that the person knows, or should reasonably know, is confidential information'. I consider that councillors need to be mindful of their obligation to maintain confidentiality. They also need to ensure that they do not make improper use of information acquired as a result of their position.

## **Delays**

### ***Urban design framework***

509. The City of Port Phillip approved an urban design framework in February 2002 after a community consultation process. However, it was another 18 months to two years before the elected council resolved to submit an urban design framework to the Minister on 24 May 2004. The delay appears to have resulted from the Department of Sustainability and Environment's preference for third party appeal rights to be removed to allow 'a more streamlined planning permit process for development on the Triangle site than what was originally proposed in the Amendment' to the *Port Phillip Planning Scheme*.
510. The delay was also occasioned by the Department of Sustainability and Environment's requirement that the submission to the Minister be accompanied by a project development proposal.
511. While the essence of the urban design framework may have remained unchanged, it appears that the public perception was that with the passage of time, significant 'behind-doors' changes had occurred. This is unfortunate and again suggests that delays in the process do little to assist public confidence in the transparency of the process.

### ***Vacant possession***

512. The State Government's failure to achieve vacant possession of the Palais Theatre and Palace Nightclub also caused considerable delays and issues for the St Kilda Triangle project. The State Government had issued proceedings at the Victorian Civil and Administrative Tribunal after Tymbook Pty Ltd (Palais Theatre) and Bradto Pty Ltd (Palace Nightclub) refused to deliver possession. Vacant possession was not achieved until 11 May 2007.
513. Due to the dispute between the State Government and the lessees of the Palais Theatre and Palace Nightclub, the St Kilda's Edge Committee was unable to provide respondents to the Request for Proposal process in 2005 with a Heritage and Conservation Management report to detail the work to be done to the Palais Theatre.

514. It was evident that the issue of vacant possession was of concern to the consortia bidding for the project. In March 2006, an internal committee document was presented to the St Kilda's Edge Committee stating:

- one tenderer was questioning whether the State Government could, in fact, deliver vacant possession and whether the tenderer should spend additional funds on preparing its Request for Proposal if vacant possession was not guaranteed
- the delays had 'unsettled all the tenderers and may have had some influence on the withdrawal of Mirvac' from the process
- one tenderer indicated it was 'difficult to get interest from potential operators and tenants' with the uncertainty around vacant possession.

515. As a result of the dispute between the State Government and the lessees of the Palais Theatre and Palace Nightclub, it was some 12 months between the date the Request for Proposals were sought (30 August 2005) and the date submissions were received (30 August 2006).

516. The dispute also delayed negotiations with BBC. On 7 March 2007, the evaluation panels reported to the St Kilda's Edge Committee that the BBC proposal was preferred. A number of issues with BBC's bid were referred to the Negotiation Team (and Reference Group) for further negotiation.

517. However, further negotiations with the BBC were put on hold because the vacant possession issues in relation to the Palais Theatre were still before the Supreme Court. On 15 March 2007, the Senior Project Officer emailed the Department of Sustainability and Environment, and the Victorian Government Solicitor's Office, stating:

Our legal advisers have indicated that there is a real risk to the probity of the project if we embark upon negotiations at this stage in the knowledge that we may not be able to contract for at least another 6 weeks. It has also been advised that the competitive tension is strongest when negotiations are short and are undertaken in a competitive environment.

518. In response to my draft report, the Secretary, Department of Sustainability and Environment stated:

Reports submitted on 7 March 2007 recommended there be no preferred bidder at that stage but that negotiations should be conducted with BBC as the leader of the two bids but with work also to continue on the RV negotiations[.] Negotiations commenced with BBC on an exclusive basis on 30 April 2007 with a deadline of 7 May 2007. The aim was to have the contracts executed by the 11 May 2007 although execution did not occur until 25 May 2007.

519. However, it is clear from the minutes of a St Kilda's Edge Committee extraordinary meeting on 7 March 2007 that negotiations were to be conducted with BBC exclusively. The minutes stated that negotiations may be undertaken with RV Group if negotiations with BBC did not progress 'in a timely manner to the satisfaction of the Chair'. However, further negotiations with RV Group did not occur.

### *Conclusions*

520. Delays in the implementation of such a major project did little to enhance community confidence in the process and in this case, led to uncertainty around the availability of these two sites; the condition of the sites; and the costs associated with meeting the heritage requirements related to the Palais Theatre. This added unnecessary complications to the Request for Proposal process and resulted in additional costs for the short-listed bidders.
521. Such delays in state government tenders may also have an impact on the private sector's confidence and willingness to participate in a public tender process.
522. I consider that the St Kilda's Edge Committee proceeded with undue haste to commence the process when there was uncertainty about the State Government's ability to achieve vacant possession and the condition of the Palais Theatre. This type of uncertainty has an impact on a tender process as bidders must respond to a brief that lacks specific information on key issues. I recommend that prior to commencement of any Expression of Interest phase of a major development project of this nature, there is a degree of certainty about the site, its condition and availability.
523. I consider that the delays in the process could have been avoided by better planning prior to inviting Expressions of Interest to ensure that vacant possession could be achieved.
524. In response to this, the Secretary, Department of Sustainability and Environment stated:
- Notice to quit was provided to tenants on December 3, 2004, with the property to be vacated at the end of the lease on 31 March 2006. Expressions of interest were sought in April 2005, with a short list announced in August 2005. While achieving compliance [with the notice to quit] was protracted to an unexpected extent, particularly given the vindication of the State's right to possession at every level of court, it is inappropriate to suggest vacant possession should have been achieved prior to inviting expressions of interest. There needs to be preplanning for the subsequent use of a site. Tender processes for a major project take many months and it is appropriate for them to occur prior to vacant possession.

525. In this regard, I consider that for future projects the responsible departments should ensure there is a degree of certainty around the availability of the site prior to inviting Expressions of Interest or Requests for Proposal. This does not require that the site be vacant before commencing such a process.

## Recommendation

### Recommendation 16

I recommend that prior to commencement of any Expression of Interest or Request for Proposal phase of a major development project of this nature, departments ensure that there is a degree of certainty about the site, its condition and availability.

### State oversight of the project

526. The Memorandum of Understanding between the City of Port Phillip and the State Government, through the Department of Sustainability and Environment, provided that the Department of Sustainability and Environment had a significant management role in the administration and management of the project to protect the State Government's interests.
527. The Department of Sustainability and Environment managed the State's interests in the project through its representation on the St Kilda's Edge Committee. Additionally, the Department of Sustainability and Environment received regular monthly written reports from the St Kilda's Edge Committee about the progress of the project.
528. I consider that given the size of the project, the Department of Sustainability and Environment should have played a more hands-on role in the administration and management of the project. This was particularly important given that the project was not subject to the same high level of checks and approvals associated with a state government development, such as Gateway Reviews.
529. I also note that the development agreement signed by the State Government, BBC and the City of Port Phillip, included a co-ordination structure to monitor commitments:
- a Project Control Group to co-ordinate project delivery (comprising City of Port Phillip staff and developer members)
  - a Design Review Team to provide independent expert architectural and urban design advice (comprising three independent members)
  - a Tenancy Review Committee to achieve the Tenancy Guidelines (comprising state government, City of Port Phillip and developer members).

*A lack of transparency can fuel allegations of impropriety, as has occurred with the St Kilda Triangle development. A significant source of concern for witnesses interviewed by my office was the failure of the City of Port Phillip and the State Government to make public the development agreement with BBC, signed on 25 May 2007.*

530. According to Ministerial Briefings provided to Mr Madden, Minister for Planning on 24 and 25 May 2007, a Memorandum of Understanding was to be developed between the Department of Sustainability and Environment and the City of Port Phillip to 'manage governance issues' and 'minimise the risk of government parties inadvertently causing a breach of the Projects Documents'.
531. It does not appear that the Memorandum of Understanding was prepared or executed. I also note that the Department of Sustainability and Environment was not a member of the Project Control Group. In my view, this placed the State Government at risk and suggests that with the conclusion of the tender process and the engagement of the preferred bidder, the Department of Sustainability and Environment saw its participation ending. This is despite written advice to the Department of Sustainability and Environment from the Victorian Government Solicitor's Office on 29 July 2005 that:

Contract management arrangements will need to be put in place between DSE and the Council that gives DSE appropriate control to manage the liability that the State has as the principal and the owner of the site. Ineffective governance arrangements and poor contract management have been a contributing factor to projects which have not gone well for government.

532. I note that the elected council and BBC have reached a commercial settlement and the development will not proceed.

## **Transparency**

533. The Memorandum of Understanding between the State Government and the City of Port Phillip required 'transparency of process'. Transparency refers to the preparedness of an agency 'to open a project and its processes to scrutiny and possible criticism'. Transparency is also related to the concept of accountability, which requires that agencies are able to justify the use of public resources.
534. Transparency and accountability are integral to maintaining community confidence in a government contract. A lack of transparency can fuel allegations of impropriety, as has occurred with the St Kilda Triangle development. A significant source of concern for witnesses interviewed by my office was the failure of the City of Port Phillip and the State Government to make public the development agreement with BBC, signed on 25 May 2007.
535. On 13 December 2007, Mr Serge Thomann (who was subsequently elected to council in November 2008) applied to the City of Port Phillip for a copy of several documents, including the development agreement, under the Freedom of Information Act. The City of Port Phillip refused access to the development agreement; however, some other documents were provided.



536. On 1 April 2008, Mr Thomann requested an internal review of the City of Port Phillip’s decision. The City of Port Phillip’s internal review officer overturned the original decision and informed Mr Thomann that the City of Port Phillip intended to ‘partially release the development agreement’. In reaching his decision, the internal review officer was required to notify and consult with parties to the agreement, including BBC, about the decision to partially release.
537. BBC subsequently made a Reverse Application to the Victorian Civil and Administrative Tribunal against the release of the agreement. However, BBC later withdrew its objection on the grounds that it was satisfied with the ‘exemptions proposed by the council’. On 7 November 2008, the Victorian Civil and Administrative Tribunal ruled that the City of Port Phillip should release a redacted version of the agreement to Mr Thomann.
538. The City of Port Phillip subsequently published a redacted version of the agreement on its website on 17 November 2008. Since then, further parts of the agreement, which were redacted, have also been disclosed. According to Mr Thomann, unChain St Kilda spent over \$30,000 on legal costs securing a copy of the agreement.
539. In this regard, I note that on 11 October 2000, the then Premier released a policy statement, *Ensuring Openness and Probity in Victorian Government Contracts* (the policy statement). The purpose of this statement was ‘to provide a framework to help achieve the highest standards of probity and transparency in all Government contracts’. The implementation guidelines for the policy statement stated:
- Departmental contracts over \$10 million are to be disclosed in full on the VGPB website, together with Request for Tender documents. If, based on FOI criteria, clauses have been excluded from the contracts, a note explaining the reason for the exclusion will be included.
540. Further to this, the Department of Finance’s *Disclosure of Contracts >\$100000* Policy requires that contracts be listed on the Contracts Publishing System website within 60 days of a contract being awarded. While this policy applies to state government departments, not local government, the Memorandum of Understanding between the State Government and the City of Port Phillip required that the City of Port Phillip comply with ‘all policies of the State of Victoria’.
541. Despite the *Disclosure of Contracts >\$100000* Policy requirement, the development agreement was not made public (with redactions) until 17 November 2008 – some 18 months after the agreement was signed – after the Victorian Civil and Administrative Tribunal ruled that it be released.

542. It is clear from documents obtained by my office that relevant officers of the City of Port Phillip and the Department of Sustainability and Environment were not aware of the policy statement, which required that they publish the agreement.

543. On 3 October 2008, the St Kilda's Edge Project Manager emailed Mr Spokes, Mr Oulton and BBC stating:

DSE informed today that they believe the Triangle Development Agreement may be subject to public release due to a policy named Ensuring Openness and Probity in Victorian Government Contracts. DSE are aware of the current VCAT FOI proceedings and are looking into the implications of this.

544. Mr Spokes responded, 'Is this the first we have heard of this?' Mr Oulton responded to the St Kilda's Edge Project Manager's email stating:

Clause 6 and 8 [of the policy statement] refer to exemptions under FoI

Clause 10 (I think) refers to notifying potential tenderers of disclosure – I don't believe we have complied with this.

We need to meet and discuss this with government before they come to a conclusion, as I think there is what I believe at first glance to be a strong argument against full disclosure.

545. The policy statement said:

In future, agencies will make clear to firms before they enter into contracts with the Victorian Government the strict limitations on contractual confidentiality which will apply. They will point out that the Government cannot override the Freedom of Information Act, the powers of Parliament, the Ombudsman or the Auditor-General. The Government will have a strong presumption in favour of full contractual disclosure, but it will also be fair-minded in applying FOI principles to ensure that genuinely confidential business information is protected. These principles will be spelled out to private firms at the start of each major tendering process.

546. In his response to my draft report, Mr Spokes argues that the policy statement was not unlimited and that there were exceptions. He also argues that the spirit of the policy statement was complied with as:

tenderers were informed at the outset and through the process that: a) a transparent process would be adopted; and b) documents would be available through the FOI process; and c) the Agreement would be published at an appropriate time (and it was).

547. However, Mr Spokes' understanding of the 'spirit' of the policy and of the 'appropriate time' is not consistent with the policy statement and the *Disclosure of Contracts >\$100000* Policy, which required that the development agreement be published within 60 days of awarding the contract.
548. In response to my draft report, the Secretary, Department of Sustainability and Environment stated:

Publication was not within the time limit. However, this was a complex matter. Some time was spent in determining which parts of the overall could be published and which parts could not be. There were also delays in acting on advice received.

### **Conclusions**

549. The Department of Sustainability and Environment, which managed the State Government's interests in the development, did not inform the St Kilda's Edge Committee until late 2008 of the Premier's policy statement and the *Disclosure of Contracts >\$100000* Policy. This suggests that the Department of Sustainability and Environment officer responsible for the project was unaware of the requirement to release the development agreement.
550. As the St Kilda's Edge Committee was clearly unaware of the policy statement, it appears that it did not advise tenderers of the limitations on contractual confidentiality at the start of the tendering process and in the Request for Proposal documentation.
551. I also note that in the policy statement of October 2000, the Premier stated:

The Minister for Local Government will consult with local government on adoption of the Government's probity and disclosure standards as part of the implementation of Best Value Principles in the purchase of goods and services at the local government level.

The Government's objective is that a consistent set of rules on probity should apply across the entire public sector. These commonsense steps will ensure that in future Victorian Government business activities not only accord with the highest standards of probity but are seen to do so by the general public which ultimately funds them.

*I consider that the failure to publish the development agreement until November 2008 had a negative impact on the public's confidence in the transparency of the tender process and fuelled speculation that there was some form of impropriety in the process. It is also concerning that community members had to pay to access a document that should have been freely available, albeit with some exemptions.*

552. Despite this, no steps have been taken to oblige local councils to disclose contracts over \$10 million. I consider that there should be consistency in state and local government policy in relation to the disclosure of contracts. As such, I recommend that the State Government initiate arrangements to ensure the disclosure of contracts for both state and local government in line with the policy statement *Ensuring Openness and Probity in Victorian Government Contracts*. Upon implementation of these arrangements, I consider that training should be provided to state and local government contract officers to ensure compliance with the policy statement.
553. I consider that the failure to publish the development agreement until November 2008 had a negative impact on the public's confidence in the transparency of the tender process and fuelled speculation that there was some form of impropriety in the process. It is also concerning that community members had to pay to access a document that should have been freely available, albeit with some exemptions.

## **Recommendations**

### **Recommendation 17**

I recommend that the State Government initiate arrangements to ensure the disclosure of government contracts for both state and local government in line with the policy statement *Ensuring Openness and Probity in Victorian Government Contracts*.

### **Department of Planning and Community Development response**

Local Government Victoria's 'review of the *Local Government Procurement Best Practice Guideline* ... will address disclosure of Local Government contracts in line with the policy statement *Ensuring Openness and Probity in Victorian Government Contracts*'.

### **Recommendation 18**

I recommend that training be provided to state and local government contract officers to ensure contracts are disclosed in line with the policy statement *Ensuring Openness and Probity in Victorian Government Contracts*.

## **Removal of third party appeal rights**

554. On 29 March 2004, the Regional Manager, Port Phillip Region, Department of Sustainability and Environment recommended the City of Port Phillip 'revisit' the planning controls for the St Kilda Triangle site. He suggested that the City of Port Phillip adopt a 'Development Plan Overlay (including a 28-day exhibition) and then delete the third party rights of appeal currently provided under the Special Use Zone'. He indicated that the department's 'main concern was that the current controls were overlay [*sic*] restrictive [and] not very attractive to developers'.

555. A City of Port Phillip file note stated that this was justifiable as ‘since the original amendment papers were drafted’, the City of Port Phillip, the Department of Sustainability and Environment, and the community had gained ‘a better understanding of community perception, what the proposed development might look like and who would manage the land’.
556. On 24 May 2004, the elected council approved changes to the urban design framework – removing third party appeal rights – and forwarded the document to Ms Delahunty, Minister for Planning for consideration. The Minister approved the urban design framework on 1 July 2004 and it was incorporated into the *Port Phillip Planning Scheme* (Amendment C36).
557. The Minister for Planning’s decision to incorporate Amendment C36 effectively extinguished appeal rights in that it required:

any development plan submitted for approval to be placed on exhibition for public comment, following which Council will consider any submissions received. Council will assess any submitted development plan against the decision guidelines. Any planning permit applications that are generally consistent with the approved development plan are not required to be advertised and do not attract third party appeal rights.

558. I note that on 31 October 2007, the development plan detailing the development and use of the land was put on public display for comment for 28 days ending 29 November 2007. A notice was sent to 2,150 recipients. Over 5,500 submissions were received.
559. In response, the City of Port Phillip engaged Matrix consultants to independently assess the submissions. Matrix found that a number of the submissions held significant merit and some changes were subsequently made to the development plan.

### **Conclusions**

560. I agree with the decision to have the public submissions independently assessed. However, while I note that this and other community meetings led ultimately to changes in the development plan, it did little to allay community concerns about the development.
561. The City of Port Phillip was the proponent of the project, the planning authority and the committee of management for the site. The removal of third party appeal rights, particularly in situations where the one agency fulfils all of the above roles, is not ideal. As discussed earlier in my report, while this is permitted under legislation, such a conflict of duties requires careful and planned management if public confidence in planning matters is to be maintained.
562. I also consider that public confidence in government is strengthened when third parties have the opportunity to engage in debate and have legal avenues of redress.

*The City of Port Phillip was the proponent of the project, the planning authority and the committee of management for the site. The removal of third party appeal rights, particularly in situations where the one agency fulfils all of the above roles, is not ideal. While this is permitted under legislation, such a conflict of duties requires careful and planned management if public confidence in planning matters is to be maintained.*

## CONFLICT OF INTEREST

*While my investigation did not identify evidence that these conflicts of interest led to the unfair treatment of particular tenderers, failure to declare or manage these conflicts could be perceived to have provided opportunities for corrupt conduct. Such failure has the potential to undermine not only the integrity and probity of the tender process, but also public confidence in that process.*

563. Public sector employees are expected to demonstrate high standards of conduct at all times. This is particularly important in procurement. They are obligated to act in the best interests of the State Government and must not act with inappropriate partiality for or against a tenderer. Where this obligation conflicts with the officer's private interests (friendship, family or personal business relationships) or pecuniary interests – or where there is a perception that it conflicts – the officer must declare a conflict of interest and this conflict must be managed.
564. There is a common misconception that a conflict only arises if a person has done something improper. Perception is a critical aspect of the notion of conflict of interest. It is not sufficient for public officials to simply believe or assert that they will not allow themselves to be influenced in any way by their private interest. They must also be seen to avoid situations where they might be perceived as being influenced by a private interest. My reports to Parliament in March 2008 provide further detail on this issue available at <[www.ombudsman.vic.gov.au](http://www.ombudsman.vic.gov.au)>.
565. My investigation identified several conflicts of interest in relation to those involved in the tender and development process. These conflicts were either not declared or not adequately managed.
566. While my investigation did not identify evidence that these conflicts of interest led to the unfair treatment of particular tenderers, failure to declare or manage these conflicts could be perceived to have provided opportunities for corrupt conduct. Such failure has the potential to undermine not only the integrity and probity of the tender process, but also public confidence in that process.
567. I note that in February 2010, the Victorian Auditor-General tabled in Parliament his audit report of *Tendering and contracting in Local Government*. The Victorian Auditor-General identified that most of the councils examined in the audit 'managed conflicts of interest inadequately' resulting in 'a lack of assurance on the fairness and integrity of the process'. He made a number of recommendations to improve local government procurement.
568. I note that in March 2008, I tabled in Parliament my report: *Conflict of interest in local government*. It is disappointing that local councils continue to struggle with this issue.

## Conflict of interest policies and procedures

569. The probity plan provided the following guidelines on declaring and managing conflicts of interest:

A conflict of interest arises where an Authorised Person, whether Council officers, Government employee or adviser, has an affiliation or interest which might be seen to prejudice his or her impartiality. Authorised Persons must advise the Chair of the SKE Committee and the Probity Auditor in writing of any perceived or real conflict of interest, which comes to his or her attention during the course of the Project. The Chair will write to all Authorised Persons and their employer, if it is not the Council, at the commencement of the Project advising them of these requirements and seeking an assurance that no conflict of interest exists. These assurances will need to be updated as required throughout the period of the Project. It will be the Chair's responsibility, on advice from the Probity Auditor, to ensure that any conflicts identified in this way are promptly and satisfactorily resolved.

570. The City of Port Phillip did not have a conflict of interest policy during the tender process. It was not until September 2008 that it added a conflict of interest policy to its People and Culture Policy, Employee Standards. The policy required that all conflicts of interest be recorded for all staff in the Staff Interest Declaration register.
571. My investigation into the St Kilda Triangle development highlighted concerns about the understanding of conflict of interest expressed by City of Port Phillip staff involved in the development, even after the implementation of a conflict of interest policy. Some staff failed to recognise conflicts of interest and attempted to distinguish between 'major', 'minor' and 'small perceived conflicts'.
572. Some individuals also focused on the Local Government Act provisions and pecuniary interests, failing to recognise the broader ethical obligations related to government procurement.

## Declarations of interest and confidentiality

573. On 4 April 2005, attendees at the probity auditor's briefing were provided with a 'Conflict of interest and confidentiality declaration', consisting of a cover letter; a 'Declaration of private interests'; and a list of principals and consultants for each of the consortia.
574. The cover letter was addressed to the probity auditor and was to be signed by the individual making the declaration. It required individuals to declare that they were aware of their obligations to avoid all conflicts of interest and to declare any potential conflict of interest; and that they were also aware of their obligations in relation to confidential information.

*The City of Port Phillip did not have a conflict of interest policy during the tender process.*

*My investigation into the St Kilda Triangle development highlighted concerns about the understanding of conflict of interest expressed by City of Port Phillip staff involved in the development, even after the implementation of a conflict of interest policy.*

*Some individuals also focused on the Local Government Act provisions and pecuniary interests, failing to recognise the broader ethical obligations related to government procurement.*

575. The 'Declaration of private interests' required individuals to declare shareholdings and other business interests; trusts; trusteeships; agreements; and other interests. This document required that they declare and sign that 'none of these private interests conflict with any of my official duties'.
576. I note that the 'Conflict of interest and confidentiality declaration' used for the development was different to the declaration attached to the probity plan. The probity plan declaration required that individuals declare they did not have:
- any financial interest in the St Kilda Redevelopment Triangle Site ("the Subject")
  - any immediate relatives or close friends with a financial interest in the Subject
  - any personal bias or inclination which would in any way affect my decision in relation to the Subject
  - any personal obligation, allegiance or loyalty which would in any way affect my decisions in relation to the Subject.
577. My investigation obtained copies of the 'Conflict of interest and confidentiality declarations' signed throughout the tender process. These were located in one City of Port Phillip folder. I found 36 declarations, including three declarations for Mr Spokes and two for some other individuals. Most of the declarations were filled out in June 2005, when the Expressions of Interest were received; and September 2006, just after the short-listed bidders submitted their proposals.
578. I identified process issues with over half of the 36 declarations. For example:
- cover letters and declarations were not signed or dated and the relevant period for the declaration was not stated
  - all of the declarations for the Expression of Interest process were signed after informal evaluations of the 15 Expressions of Interest had occurred
  - in his first declaration, Mr Spokes listed the interests of the City of Port Phillip rather than his private interests, as required
  - declarations were not signed by a number of individuals involved in the tender process, including members of the St Kilda's Edge Committee and the Senior Project Officer
  - Mr Dick Gross, former councillor and member of the St Kilda's Edge Committee from August 2004, did not fill out a declaration until 1 July 2006 and it was not signed.



579. In addition to the 'Conflict of interest and confidentiality declaration', 13 councillors, St Kilda's Edge Committee members, evaluation panel members and City of Port Phillip staff signed a separate 'confidentiality declaration' at different times throughout the process. The first 'confidentiality declaration' was signed by Mr Oulton in November 2005 and the last ones were signed by four councillors in March 2007.
580. The 'confidentiality declaration' informed individuals of the 'Commercial in Confidence' nature of the tender documentation and the need for appropriate security. It also required individuals to undertake not to discuss or disclose information from the tender bids and to return documents after the evaluation process. In addition, it stated:

I will immediately report to the Chair of the St Kilda's Edge committee any direct or indirect contact which I have with any bidder, or the employees or advisers of any bidder, which is not officially authorised, including any approach made to me in the way of a direct or implied offer of future employment or other benefit.

### Conclusions

581. In my view, the St Kilda's Edge Committee failed to comply with the probity plan in that it did not:
- ensure that all relevant persons completed declarations
  - ensure that the declarations were completed correctly and signed.
582. I consider that the 'Conflict of interest and confidentiality declaration' should have been signed by all individuals involved in the process. I also note that the separate 'confidentiality declaration' signed by some provided more specific guidance to individuals about confidentiality than the 'Conflict of interest and confidentiality declaration' referred to earlier. It appears the 'confidentiality declaration' was inconsistently provided to individuals at various stages of the tender process. It is unclear why it was signed by some and not others.
583. It is unfortunate that three separate forms existed: the 'Conflict of interest and confidentiality declaration' signed by most individuals involved in the process; the declaration attached to the probity plan; and the 'confidentiality declaration' signed by some individuals. These all served a similar purpose and it is evident from my investigation that they confused, rather than clarified, any understanding of conflict of interest principles and which declarations had been completed.

*The St Kilda's Edge Committee failed to comply with the probity plan in that it did not ensure that all relevant persons completed declarations and that the declarations were completed correctly and signed.*

## Review of conflict of interest declarations

584. While the completion of declarations is important, it is fundamental that the declarations are reviewed and that any conflicts of interest that are identified are appropriately managed. The probity plan stated that it was the responsibility of the Chair of the St Kilda's Edge Committee, 'on advice from the probity auditor, to ensure that any conflicts ... are promptly and satisfactorily resolved'.
585. On 23 June 2005, the probity auditor emailed the Senior Project Officer, suggesting that Mr Spokes, as Chair of the St Kilda's Edge Committee:
- reviews the conflict of interest declarations from [St Kilda's Edge] committee and [evaluation] panel members to ensure he is satisfied that no conflicts of interest arise or require further discussion/action. If any issues arise I would like to be advised.
586. On 30 June 2005, the Senior Project Officer emailed the probity auditor with a 'summary of the private interests declared by the SKE Committee Members and the SKE Evaluation Members'. (This summary did not include a declaration from Mr Geoff Oulton, in which he declared that his relative was an employee of ARM, BBC's architectural firm). The probity auditor responded on that same day that he had 'noted the declarations' and did 'not have any probity issue to raise'. He requested that the Senior Project Officer 'ask David Spokes to review and confirm he has no issue with any of the disclosures [sic]'.
587. There was no evidence on the probity auditor's files that he received any confirmation from Mr Spokes. At interview, Mr Spokes could not recall reviewing the declarations or raising any issues with the probity auditor. However, my investigators did locate an email from Mr Spokes to the Senior Project Officer stating he had reviewed the Senior Project Officer's summary of the declarations and had 'no concerns'. Pitcher Partners has since stated that the probity auditor received 'verbal assurance from [the Senior Project Officer] that there were no issues raised by David Spokes'.
588. I note that Pitcher Partners' submission for the probity auditor contract stated that it would 'review and check "conflict of interest" declarations by all procurement members'. In my view, this requires more than reviewing a summary of the declarations, which may or may not be a full and accurate reflection of the declarations.

589. The probity auditor has since stated that the 'file of declarations were reviewed at the South Melbourne Office' with the Senior Project Officer. The Senior Project Officer did not recall this and my investigation did not locate any evidence to support the probity auditor's statement. The probity auditor's files indicate only that he reviewed a summary of the declarations. Also, if he did review the declarations, his examination was not sufficient to identify a conflict of interest revealed in two declarations signed by Mr Oulton – a conflict that, at interview, the probity auditor said he was not aware of. Mr Oulton's conflict is discussed later in my report.

### *Conclusions*

590. My investigation has identified that Mr Spokes did not review the declarations; although he appears to have reviewed a summary of some declarations. Mr Spokes also failed to raise any issues with the probity auditor.
591. My investigation also found no evidence that the probity auditor reviewed the declarations. While he reviewed a summary of declarations, he did not do so until 30 June 2005 – after evaluations had commenced and one bid had been rejected. If he did review the original declarations, his examination was not sufficient to identify Mr Oulton's conflict of interest which is referred to later in this report.
592. Despite the probity auditor's response to my draft report that 'In all material respects the process was undertaken in accordance with identified probity principles and I reported accordingly', I consider that the probity auditor failed in his duties in relation to conflict of interest declarations. In order to ensure the probity of the process, the probity auditor should have reviewed the declarations and investigated any issues in accordance with Pitcher Partners' submission for the probity auditor contract.
593. In response to this, Pitcher Partners stated:
- Declarations were reviewed by the probity auditor and appropriate actions taken in relation to disclosures at that point in time. David Spokes, the Chief Executive Officer of the City of Port Phillip, reviewed the summary and confirmed that he had no concerns in relation to the declarations at that time. The responsibility for conflict of interest is an ongoing responsibility of individual project team members to update as their circumstances change. The responsibility for change in circumstances rests with the Chief Executive of the City of Port Phillip.

*My investigation did not identify evidence that conflicts of interest led to the unfair treatment of particular tenderers. However, I did identify conflicts of interest that were not declared or managed. These conflicts have the potential to give rise to perceptions of, or to provide opportunities for, corrupt conduct.*

594. I note from my review of the probity auditor's files that on a number of occasions throughout the process, the St Kilda's Edge Committee sought the probity auditor's advice on conflicts of interest that arose. The probity auditor provided the committee with a conflict of interest framework to assist the committee in testing whether a conflict of interest existed and assessing the risk. I was satisfied with the probity auditor's advice in relation to each of these conflicts.

### **Conflicts of interest identified during my investigation**

595. My investigation did not identify evidence that conflicts of interest led to the unfair treatment of particular tenderers. However, I did identify conflicts of interest that were not declared or managed as follows. These conflicts have the potential to give rise to perceptions of, or to provide opportunities for, corrupt conduct.

596. In this regard, I note that the probity plan stated:

Any probity issue whether perceived, potential or actual should be identified, managed and eventually eliminated to ensure that the Project is delivered in a robust manner.

#### **1. Councillor working for BBC's public relations consultants**

597. My investigation identified that Mr Darren Ray, a City of Port Phillip councillor from 1999 until November 2008, was engaged by BBC's public relations consultants, CPR (Communications and Public Relations) as a 'Planning and Development Advisor' from 1 August 2006 to March 2007 – during the tender process. Mr Ray did not declare a conflict of interest throughout the process and did not inform or seek advice from the probity auditor.

#### **Mr Ray's employment with CPR**

598. Mr Ray was engaged by CPR, through his company DCR Consulting, from 1 August 2006. This was just prior to the due date for the three short-listed consortia's final submissions (31 August 2006) and BBC's final presentation to the St Kilda's Edge Committee (12 September 2006). I note that BBC was represented by the National Manager, Public Affairs, CPR (the CPR National Manager), who attended BBC's final presentation.

599. According to Mr Ray, he was engaged until March 2007. During this period, the St Kilda's Edge Committee received and evaluated bids from the short-listed consortia and determined that BBC was the preferred bidder. Subsequently, on 24 May 2007, Mr Ray voted as a councillor to award the tender to BBC.

600. Mr Ray gave evidence to my investigation that he was managed by the CPR National Manager who represented BBC in relation to the development. Mr Ray listed the CPR National Manager on a résumé obtained by my office as his 'most recent employer'. Further evidence obtained demonstrates that the CPR National Manager managed Mr Ray in relation to six of the 12 CPR projects that Mr Ray worked on.
601. Copies of emails obtained from CPR described Mr Ray's role with CPR as follows:
- Mr Ray's engagement was 'not directly related to any individual client', but he was 'working across about a dozen accounts and picking up the overflow work' for senior CPR staff
  - Mr Ray had been assisting senior CPR staff 'with a range of [CPR] infrastructure, development and planning clients. His role [was] to gather intelligence, liaise with state and local government and provide strategic advice'.
602. Mr Ray was paid a weekly retainer of \$1,320 for six months, excluding January 2007 when he was on holidays. In total, he was paid \$23,265 by CPR.
603. I note that Mr Ray nominated his City of Port Phillip mobile phone and fax numbers on his DCR Consulting invoices. I also note Mr Ray did not declare his company on his annual register of interests – a possible breach of section 81(6) of the Local Government Act.
604. According to Mr Ray and the CPR National Manager, they did not speak about the St Kilda Triangle development and Mr Ray did not work on this project on behalf of CPR. The former Special Counsel, CPR, also said he did not speak to Mr Ray about the development.

#### **Mr Ray's knowledge of CPR being engaged by BBC**

605. At interview on 26 June 2009, Mr Ray was asked if he knew of any involvement that CPR had in the St Kilda Triangle project. Mr Ray responded, 'No'. Mr Ray was reminded that he was under oath. He then stated he found out in May 2007 that CPR was engaged by BBC. Mr Ray said Mr Oulton informed the councillors in a briefing that the final presentations to the Design Review Committee had been made and 'mentioned that [the CPR National Manager] was there'. Mr Ray noted that his employment with CPR ceased in March 2007, prior to him learning of CPR's involvement in the St Kilda Triangle project.
606. However, I received evidence from the former Special Counsel, CPR and the CPR National Manager that they told Mr Ray of CPR's involvement in the St Kilda Triangle process before Mr Ray was engaged (the former Special Counsel, CPR) and while Mr Ray was working for CPR (the CPR National Manager).

*My investigation identified that Mr Darren Ray, a City of Port Phillip councillor from 1999 until November 2008, was engaged by BBC's public relations consultants as a 'Planning and Development Advisor' during the tender process. Mr Ray did not declare a conflict of interest throughout the process and did not inform or seek advice from the probity auditor.*

607. Mr Spokes was also aware of both BBC's engagement of CPR and CPR's engagement of Mr Ray. However, Mr Spokes said he did not recall 'linking Mr Ray's employment with CPR specifically to the triangle development' and that Mr Ray did not highlight this connection. As such, he did not raise the conflict with the probity auditor or Mr Ray. In this regard, I note that the probity plan stated it was the responsibility of the Chair, St Kilda's Edge Committee to ensure that any conflicts 'are promptly and satisfactorily resolved'.
608. When interviewed by my office, Mr Spokes said in relation to Mr Ray:
- I think, based on what you've outlined, on face value that would appear to be, you know, a significant conflict of interest.

### Conclusions

609. At interview, Mr Ray acknowledged that he did not declare a conflict of interest, either in the council chamber; on his annual register of interests; or on any declaration of interest or conflict of interest documents specific to the development. However, I consider that Mr Ray had a conflict of interest. His private duty as a consultant for CPR clearly conflicted with his public duty as a councillor. I do not accept Mr Ray's evidence that he did not learn about CPR's role in the development until May 2007. The evidence supports that he knew earlier.
610. I note that Mr Ray was on the St Kilda's Edge Committee in 2004-05. As such, he had access to confidential information about the St Kilda's Edge Committee's evaluation of the Expressions of Interest and the short-listed bids. He also had access to information related to the policies and priorities of the City of Port Phillip and the St Kilda's Edge Committee that bidders did not have access to. Such information would have been invaluable to CPR.
611. Mr Ray also failed to declare his company, DCR Consulting, in his annual register of interests, as required by section 81(6) of the Local Government Act. In this regard, I note that he completed the register just three days after he modified details of DCR Consulting on the Australian Business Register. Mr Ray also failed to declare his interest in his company in July 2007 and June 2008, although his business remains registered.
612. I have not identified any evidence that Mr Ray sought to influence the assessment or bidding process by providing BBC with information not available to other bidders. However, I consider that it is likely that the community perception of Mr Ray's employment with CPR would be that BBC could have received an advantage from Mr Ray's employment with CPR.

## ***2. Relationship between an SKE Committee member and BBC's public relations consultant***

613. My investigation identified that Mr Dick Gross, former councillor and member of the St Kilda's Edge Committee, failed to declare his relationship during the tender process with the National Manager, Public Affairs, CPR (the CPR National Manager) – BBC's public relations consultants. While Mr Gross stated that he did not speak to the CPR National Manager about the St Kilda Triangle development, in my view he should have disclosed the contact.
614. Mr Gross was the only permanent councillor on the St Kilda's Edge Committee. He was a member from its creation in 2004 until November 2008 when he was unsuccessful at the local council elections.
615. Mr Gross said he was introduced to the CPR National Manager on 20 July 2006 (during the tender process) after the resignation of the President of the Municipal Association of Victoria (MAV).
616. Mr Gross met with the CPR National Manager again on 9 August 2006. At interview, Mr Gross said he arranged this meeting to seek advice from the CPR National Manager about how he might 'win' the presidency of MAV – a paid position.
617. In September 2006, the CPR National Manager also prepared a media statement for the Western Regional Waste Management Group (the waste management group). The media statement quoted Mr Gross as Chairperson of the waste management group and listed Mr Gross as the contact. The media statement was prepared in response to media enquiries about one of the organisation's board members.
618. Evidence obtained during my investigation demonstrated that Mr Gross telephoned the CPR National Manager from his council-issued mobile phone 10 times in August and September 2006. Final submissions were due from the short-listed bidders in August 2006 and BBC presented their submission to the St Kilda's Edge Committee and the evaluation panels on 12 September 2006.

### **Mr Gross' knowledge of CPR being engaged by BBC**

619. At interview, Mr Gross was unable to recall when he first found out that CPR was working for BBC, but he said he did not know during the tender process. According to the CPR National Manager, he recalled telling Mr Gross that CPR was working for BBC. The CPR National Manager said:

I do remember quite specifically at one point saying to ... you know, Dick Gross, who I, you know had dealings with ... But quite specifically saying to Dick, "You know you need to know that I work for Citta [BBC]".

620. In relation to when he told Mr Gross, he said he 'would have' told Mr Gross the first time he 'interacted' with him after he was engaged by BBC. Mr Gross said he did not 'recall' this conversation.

621. I note that the CPR National Manager attended BBC's presentation to the St Kilda's Edge Committee on 12 September 2006, which Mr Gross also attended. The presentation was closed to the public. Mr Gross did not 'recall meeting' the CPR National Manager at the presentation.

622. Mr Gross stated he did not declare a conflict of interest or inform Mr Spokes or the probity auditor about his relationship with the CPR National Manager. He said during the planning process (after the tender had been awarded), 'I seem to remember mentioning to [the Senior Project Officer] but I don't know'. The Senior Project Officer did not recall this conversation. I note that the probity plan required that declarations be made to Mr Spokes, Chair of the St Kilda's Edge Committee.

623. Mr Gross said:

My understanding of the conflict of interest provisions is that they're about financial and pecuniary interests. Now I had no pecuniary interest with anyone.

624. However, he also stated:

The point about probity, it's not about what actually happens, it's about appearance. What actually happened was the best bid won. The appearance of CPR does not auger well, but they were irrelevant.

625. Mr Gross also said that he 'knew lots of people' from each of the consortia bidding for the project and that he had 'more connection' with 'the competitors, than [he] had with the winning tender'.

626. I note that Mr Gross signed, but did not date, a pro-forma letter addressed to the probity auditor, titled 'St Kilda Triangle Site Project', which stated:

Conflict of Interest

I am fully aware of my obligations to avoid all conflicts of interest in carrying out my duties, and to disclose any potential conflict of interest if they emerge in the course of my official duties.

627. Mr Gross wrote on the document that his declaration was for the period '1 July 2006 onwards'.

628. According to the probity auditor, members of the St Kilda's Edge Committee should have been aware that their obligations to declare conflicts of interest were broader than pecuniary interests. The probity auditor also said he was visible around the City of Port Phillip and individuals could have sought him out for advice.



### Mr Gross' response to my report

629. Mr Gross provided three responses to my report. The first response was prepared by him. The second and third responses were prepared by a firm of solicitors engaged by Mr Gross. The responses denied that Mr Gross' relationship with the CPR National Manager was an interest that should have been declared.
630. The third response argued that probity standards were not breached by Mr Gross. The response stated that the probity plan's discussion of conflict of interest excluded 'benefits of value of mere trifles, and ad hoc commercial transactions at arms length' – such as the CPR National Manager's advice to Mr Gross regarding the MAV presidency and the media statement prepared by the CPR National Manager for the waste management group. Moreover, according to the response, the probity plan requirements border on 'rendering the functions of Council unworkable'.
631. The response identified four elements of 'affiliation and interests' that must be declared according to the probity plan, but made no attempt to explain Mr Gross' limited understanding of the variety of interests that need to be declared. His understanding was solely in relation to pecuniary interests.
632. According to Mr Gross and his solicitors, Mr Gross' relationship with the CPR National Manager, described by Mr Gross as a 'friendship and a relationship', was not an interest that Mr Gross needed to declare. Mr Gross explained:
- I had no "interest" in [the CPR National Manager's] business or personal affairs. It may have been the reverse. He may have had an interest in cultivating my favour. [The CPR National Manager] was beholden to me as a person who could influence his appointment to act for certain organisations but I was not beholden to him.
633. Mr Gross did not attempt to explain how this accords with the free advice that Mr Gross received from the CPR National Manager or the media statements that the CPR National Manager prepared for the waste management group, of which Mr Gross was Chairperson.
634. According to the solicitors for Mr Gross:
- Mr Gross was unaware that the CPR National Manager had been engaged by BBC until after the selection of the preferred tenderer
  - the CPR National Manager's involvement with BBC was 'invisible and irrelevant during the tender phase' and his involvement was 'predominately in relation to (and therefore activated during) the planning phase'
  - the services provided by the CPR National Manager to the waste management group were 'minuscule' and 'on all accounts a trifle'

- the telephone contacts between Mr Gross and the CPR National Manager were not significant as seven of the calls were between 30 and 60 seconds.
635. The second, third and fourth of those points, even if the descriptions provided are accepted, indicate a lack of appreciation of the nature of the concept of 'perceived' conflict of interest, which is not dependent on the dimension of the interest, but its perception.
636. As to the first point, the response asserts that I should have accepted Mr Gross' evidence that he was not aware that the CPR National Manager was working for BBC, rather than the evidence of the CPR National Manager 'that he "would have" told Mr Gross that CPR was working for BBC'. The response, however, ignores the other evidence from the CPR National Manager that he 'absolutely' recalled telling Mr Gross, 'You know you need to know that I work for Citta'.
637. Therefore, I do not accept the response's selective conclusion. Neither do I accept the response's assertion that Mr Gross should be 'applauded' for mentioning his relationship with the CPR National Manager to the Senior Project Officer during the planning process. I consider that the public expects much more from elected councillors.
638. In my view, the response argument was based on a limited analysis of the standards required of councillors. It fails to appreciate the necessity of avoiding actual and perceived conflicts of interest in the public sector, particularly in the context of high-cost building projects. The probity plan required that Mr Gross declare 'an affiliation or interest which might be seen to prejudice his or her impartiality'. It is hard to avoid a conclusion that Mr Gross' 'relationship and friendship' with the CPR National Manager was not such an interest or affiliation, particularly given that Mr Gross acknowledged at interview, under oath, that he knew the National Manager was a 'lobbyist'.

### **Conclusions**

639. I consider that Mr Gross should have declared his 'friendship and relationship' with the CPR National Manager to the Chair, St Kilda's Edge Committee or the probity auditor so that the conflict of interest could be assessed and managed appropriately. I consider that Mr Gross demonstrated an error of judgement in not declaring this conflict of interest.
640. I note that CPR chose not to respond to my draft report.

### ***3. Relative of SKE Committee member working for BBC's architects***

641. My investigation identified that the City of Port Phillip failed to manage a conflict of interest in relation to Mr Geoff Oulton, who was appointed to the St Kilda's Edge Committee on 20 December 2005. He was also the Executive Director, City Development and was therefore the Executive Director responsible for the St Kilda Triangle project.

642. On 7 November 2005, Mr Geoff Oulton signed a 'Declaration of private interests' stating as follows:

My brother in law, Jesse Judd is employed by ARM Architects.

643. ARM Architects (ARM) had been engaged by BBC to provide architecture services for its bid for the St Kilda Triangle development. Mr Oulton submitted an updated declaration on 8 September 2006, adding:

I have also contracted with him [Mr Jesse Judd through JLM Architects (JLMA)] personally to design a new home for my family.

644. Despite these 'interests', Mr Oulton declared that as far as he was aware, none of these private interests conflicted with any of his official duties. Mr Oulton remained as the Executive Director responsible for the St Kilda Triangle development and, as a member of the St Kilda's Edge Committee, he participated in the vote to recommend that the tender be awarded to BBC.

645. Mr Oulton stated that he formed his view based on consultation with the probity auditor and on the statutory requirements in place at the time. Section 77B(b) of the Local Government Act, at the time, provided that Mr Oulton would have a conflict of interest as a member of a special committee if he was 'of the opinion' that the nature of his interest was such that 'it may conflict with the proper performance of his ... public duties'. Mr Oulton argues:

It is my "opinion" that matters, in terms of section 77B of the *Local Government Act 1989*. It is not to the point that an expectation or appearance of a conflict of interest might be raised.

646. However, Mr Oulton failed to recognise another obligation placed on him as a member of council staff by the Local Government Act. Section 95 establishes conduct principles for council staff and subsection (1)(b) provided, at the time:

(1) Council staff must in the course of their employment ...

(b) act with integrity including avoiding real or apparent conflicts of interest.

647. Accordingly, 'an expectation or appearance of a conflict of interest' is a factor that Mr Oulton should have considered in addition to his obligations under section 77B. As his evidence made clear, he did not do so. Also, it is difficult to avoid the conclusion that an 'apparent' conflict of interest did exist once the full nature of Mr Oulton's relationship, which is outlined as follows, is appreciated.

648. As to his section 77B opinion, Mr Oulton says that he considered his relationship with Mr Judd may be an issue of concern and therefore he consulted with the probity auditor 'probably' around August or September 2006. Mr Oulton said:

I explained to him the circumstances of my relationship with Jesse and the fact that, I think, we were at the point where ARM were one of the three in terms of the – associated with one of the three consortiums, and I sought clarification from him if it was appropriate for me to be part of a process, given that relationship, and his advice was that I should declare that interest, not discuss it [the development] with Jesse [Judd] but it was acceptable for me to continue.

649. According to Mr Oulton, he relied on the probity auditor's advice to form his view that there was no conflict of interest, stating that the probity auditor's advice gave him 'comfort to make the declaration and to continue to participate in the process'. However, the probity auditor has no recollection or written record of the discussion to which Mr Oulton refers.

650. Additionally, while Mr Oulton states that he advised the probity auditor of his family relationship with Mr Judd and that Mr Judd was employed by the relevant firm (ARM), he said he did not advise the probity auditor of his business relationship with Mr Judd – that Mr Judd (through his company JLMA) was designing Mr Oulton's family home. The probity auditor was also not advised of the apparently 'significant' discount that Mr Judd was offering to Mr Oulton.

651. At interview, my investigators asked Mr Oulton why he did not advise the probity auditor of his business relationship with Mr Judd and JLMA. Mr Oulton stated:

The distinction in my mind was about the fact that JLMA didn't have any association, I never connected JLMA as a company, with anything to do with the triangle site ... the triangle site connection was with ARM, and the ARM connection was with Jesse Judd. I didn't then go on to say, "And Jesse Judd's a connection with JLMA."

652. I note that emails between Mr Oulton and Mr Judd's company (JLMA) demonstrate that JLMA agreed to provide Mr Oulton with a 'significant' discount. On 12 February 2007, Mr Judd emailed Mr Oulton invoice number 6043, on JLMA letterhead, and requested payment of \$4,725. The invoice stated that the GST component was '\$0.00'. On 24 July 2007, Mr Judd emailed Mr Oulton invoice number 6045. This version was not on JLMA letterhead and there was no mention of GST. The invoice was for a total of \$13,839. This email stated:

I am trying to finalise accounting for this GST period.

Can you let me know whether you want us to invoice you properly or if you want to pay us in "folding bills"?

653. Mr Oulton responded that he was 'happy to pay without gst' and asked to whom Mr Judd wanted a cheque for \$10,000 made out. On 26 July 2007, Mr Judd replied to Mr Oulton's email stating:

We would prefer not to bank cheque as "cash" payment.  
Can you organise cash, please?

654. On 29 July 2007, JLMA emailed Mr Oulton in relation to 'fees':

We are charging you [X]% of construction cost (excl gst), this is a significant discount from our usual [X]%. [a discount of 3.5 per cent]

In real terms, you are getting an overall \$30,000 (30%) saving with this discount and no gst.

655. In relation to the 'discount', Mr Judd has since stated that 'it is not uncommon to offer reduced fees to family members' and that the fees were well within a 'commercial rate of profit and also above the range of fees described by the Royal Australian Institute of Architects'. He stated that 'JLMA bears no outstanding GST liability to the Australian Taxation Office'. He further stated, 'regardless of method of payment, all payments received for this project were appropriately documented and paid into the JLMA partnership bank account'.

656. In my view, if it was known that Mr Oulton had both a family and business relationship with a senior employee of the architecture firm involved in the BBC bid, then issues should have arisen as to whether it was possible for Mr Oulton to perform his public duties without being affected by those interests, or without there being a perception that he was affected, and whether he should have been in a position to vote or influence the selection of the winning bidder.

657. The two conflict of interest declarations lodged by Mr Oulton were provided to Mr Spokes, Chair of the St Kilda's Edge Committee and Chief Executive Officer of the City of Port Phillip, but it does not appear that he reviewed any of the forms. Nor did the probity auditor.

658. At interview, when asked whether he took any steps to manage Mr Oulton's conflict of interest, Mr Spokes stated, 'other than being aware of it, no I didn't'. He did not investigate whether Mr Judd was working on the St Kilda Triangle development, or whether he stood to benefit financially if BBC was successful in the tender process. In this regard, I note that Mr Judd advised my office that he 'had no direct involvement with any aspect' of the BBC bid and 'stood to gain no financial or other benefit'; although he stated that he did work on the project for 28 hours, providing 'technical architectural advice' to ARM. Mr Judd also stated that he has 'not had any specific discussions with Mr Geoff Oulton relating to the BBC bid'. This is consistent with Mr Oulton's evidence.

*If it was known that Mr Oulton had both a family and business relationship with a senior employee of the architecture firm involved in the BBC bid, then issues should have arisen as to whether it was possible for Mr Oulton to perform his public duties without being affected by those interests, or without there being a perception that he was affected.*

659. In addition, Mr Spokes did not discuss the 'interests' with Mr Oulton or the probity auditor. At interview, Mr Spokes stated:

Notwithstanding that I didn't actively manage the conflict of interest, which I accept, my recollection is that at the point of selection of ARM as one of the winning tenderers, that Geoff was not a part of either of the sub-committees that were involved in that process. So he was not involved in that decision-making.

660. However, Mr Oulton was a member of the St Kilda's Edge Committee from December 2005 to May 2009, when it was disbanded, and he participated in the vote that recommended BBC as the preferred tenderer. Mr Spokes responded:

Look, clearly - if by that - if by that stage he was then formally a member, yes, he would. And that would - that would concern me ...

But you know there's a process that needs to be properly followed, and it would appear that I haven't.

661. Mr Spokes has since provided inconsistent evidence, stating:

[I] did not regard the fact that Mr Oulton's brother in law was an associate of ARM, or that [JLMA] were engaged by him in respect of certain works, to be of sufficient concern to warrant further action, although it is accepted that it was an issue and a matter which should be disclosed and appropriately managed (as it was).

### Conclusions

662. I consider that Mr Oulton should have stood down from his position on the St Kilda's Edge Committee due to the conflict of interest arising from his family and business relations with Mr Judd. His decision not to do so represents a failure to comply with his statutory duty to avoid apparent conflicts, pursuant to section 95 of the Local Government Act.

663. He also formed a view that there was no conflict of interest for the purposes of section 77B of the Local Government Act by relying on advice that he claims he received from the probity auditor (advice that the probity auditor does not recall giving). However, if this discussion did take place, Mr Oulton provided limited and selective information to the probity auditor. Whether he did so carelessly or deliberately, I am unable to determine. In his defence, Mr Oulton said 'there is no evidence that I used my position to extract some benefit from ARM or others'.

664. Given Mr Oulton's conflict of interest, Mr Spokes should have taken action to investigate the conflict and transfer responsibility for the project to another Executive Director at the City of Port Phillip and remove Mr Oulton from the St Kilda's Edge Committee. It is concerning that Mr Spokes took no steps to manage the conflict and did not consult with the probity auditor about the matter. However, the evidence received does not lead me to conclude that the council's ineffectual conflict of interest management process had an impact on the tender process.
665. I note that Mr Oulton left his position at the City of Port Phillip in June 2009.

#### ***4. Minter Ellison Lawyers acted for both the City of Port Phillip and the developer***

666. My investigation identified that the City of Port Phillip permitted its legal representatives, Minter Ellison Lawyers, to act for both the City of Port Phillip and Citta Property Pty Ltd (Citta/BBC).
667. On 2 December 2003, the City of Port Phillip engaged Minter Ellison Lawyers to act on its behalf in relation to the tender process for the St Kilda Triangle development. Minter Ellison Lawyers prepared the development agreement and was also to act for the City of Port Phillip on the resultant lease with BBC. The City of Port Phillip paid Minter Ellison Lawyers in excess of \$1.5 million in relation to the development.
668. On 6 August 2007, Minter Ellison Lawyers wrote to the Senior Project Officer, informing the City of Port Phillip that it had 'been requested to act as legal services provider to the Citta Property Pty Ltd ... (including BBC ...) in respect of the leasing and development of the St Kilda Triangle site'. In the letter, Minter Ellison Lawyers stated it had 'no reason to believe that any Conflict of Interest should arise' as they would maintain 'an effective "Chinese wall" between Council's Team and Citta's Team'.
669. In the letter, Minter Ellison Lawyers listed the proposed 'teams' for each party and further stated that, in the event of a dispute between the City of Port Phillip and Citta/BBC, it would 'cease to act for Citta [BBC] and may, without limiting paragraph (iv) ... continue to act for CoPP'.
670. Paragraph (iv) stated that if Minter Ellison Lawyers determined that it could not continue to act for both parties in relation to an issue, it would cease to act for both parties in relation to that issue 'unless otherwise agreed in writing between both CoPP, Citta [BBC] and us'. Minter Ellison Lawyers stated it would, however, 'be entitled to payment for [its] services delivered to the time [they] cease to act'.

671. While the Senior Project Officer raised concerns with Minter Ellison Lawyers that the City of Port Phillip may be disadvantaged as 'the most experienced of Minter Ellison's leasing specialists would be included in Citta's [BBC's] team', Minter Ellison Lawyers confirmed that the City of Port Phillip would not be disadvantaged and the City of Port Phillip subsequently agreed to the terms of the Minter Ellison Lawyers' 'conflicts letter'.
672. I note that it appears from Minter Ellison Lawyers' tax invoices to the City of Port Phillip for June and August 2007 that Minter Ellison Lawyers charged the City of Port Phillip for drafting and reviewing the 'conflicts letter' and arrangements. It does not appear that these charges were questioned by the City of Port Phillip.
673. My investigators asked the Senior Project Officer whether it was reasonable for the City of Port Phillip to allow Minter Ellison Lawyers to represent both the City of Port Phillip and Citta/BBC on such a large project. The Senior Project Officer stated:
- Yeah, I don't know, other than our legal advisors seem to have taken the view that there was no conflict, or that - that perhaps there was a conflict, but that conflict could be managed.
674. The Senior Project Officer subsequently revealed that the legal advisors she was referring to were Minter Ellison Lawyers. The Senior Project Officer did not recall seeking independent advice on the matter, although she said it would have been 'normal practice for [her] to do that'.
675. In response to this issue at interview, the probity auditor stated:
- It would seem odd to me that someone could act for the City of Port Phillip as well as Citta. It would seem to me that there is an issue that would need to be further explored, as to exactly what they were doing and who was doing it.
676. However, the probity auditor stated that a 'Chinese Wall' is 'a possible means of dealing with conflict of interest'. He said the City of Port Phillip should have sought independent advice about the conflict and that he would have expected the two Minter Ellison Lawyers teams to be geographically separated. This was not the case. He also suggested the City of Port Phillip should have requested that an independent person at Minter Ellison Lawyers sign a statutory declaration to declare that the 'Chinese Wall' had not been breached when their engagement by either party ceased. Despite this, the Special Projects Manager stated that 'no-one in the council' took any steps to ensure that the measures put in place by Minter Ellison Lawyers to address the conflict (for example, the so called 'Chinese Wall') were applied.



677. According to Mr Spokes, he was not aware that Minter Ellison Lawyers had requested permission to act for Citta/BBC, or that the City of Port Phillip had agreed to this request. He said it was something he would have expected to be made aware of.

678. In response to my draft report, Minter Ellison Lawyers stated:

Your staff have evidently read our letter of 6 August 2007 to indicate that we were proposing to act for Citta [BBC] in respect of the lease between Citta and the Council. We accept that this reading of our letter is open, because the letter said that Citta had asked us to act 'in respect of the leasing and development of the St Kilda Triangle site'. This phrasing was inaccurate. We had been approached to act only in respect of the subleasing to retail tenants. The Council was not to be a party to such subleases and, in the event, all we did was prepare a template, not actual subleases.

The only potential for conflict arose from the theoretical possibility that we had some confidential information as a result of acting for the Council which might have assisted us in drawing subleases for Citta [BBC]. In view of that possibility (which did not transpire in practice) we suggested in our letter of 6 August 2007 to the Council that there be separate teams doing the work for the Council and Citta [BBC] ...

We accept your preliminary conclusion that it would not have been appropriate for us to have acted on both sides of one transaction between the Council and Citta, whether that be the development agreement or the resultant lease. But as indicated above, that was not what was proposed and not what occurred.

## Conclusions

679. In my view, the City of Port Phillip failed to adequately consider Minter Ellison Lawyers' conflict and the risks to the City of Port Phillip should it allow Minter Ellison Lawyers to represent Citta/BBC. I am concerned that the City of Port Phillip did not seek independent advice about the appropriateness of Minter Ellison Lawyers representing Citta/BBC and that the City of Port Phillip took no steps to ensure that the measures put in place by Minter Ellison Lawyers to address the conflict were sufficient or applied.

680. The City of Port Phillip's willingness to accept the word of a party with a clear interest – without any analysis or independent advice – demonstrates a naivety on the part of the officers involved.

***5. Holding Redlich Lawyers acted for both the City of Port Phillip and the developer***

681. I also identified issues with the City of Port Phillip's engagement of Holding Redlich Lawyers to brief the newly-elected council on the status of the development in December 2008. I understand the elected council sought advice from Holding Redlich Lawyers on its options under the development agreement, in particular, how it could stop the development from progressing, at least in its current form.
682. My investigation identified that the City of Port Phillip failed to ask the firm whether it had a conflict of interest in the matter until after the legal advice had been provided. At this time, the firm said that Holding Redlich Sydney 'provides legal advice to Citta Property Group (Citta) in relation to development in New South Wales'. I note that Citta is based in New South Wales. Holding Redlich Lawyers further stated that it 'act[s] for one other client in the immediate vicinity of the St Kilda Triangle site'. Despite this, Holding Redlich Lawyers stated that no conflict of interest existed as 'the legal services provided to Citta do not relate to or in any way affect the advice provided to the City of Port Phillip'.
683. Ms Kay Rundle, Chief Executive Officer, City of Port Phillip, sought further advice from Holding Redlich Lawyers on the matter and was advised that Holding Redlich Lawyers had 'no legal or moral conflicts ... as any work for Citta was through the Sydney offices, and were minor in nature'; and that representing the owner of an Acland Street Building provided 'no conflict'.
684. I note that Ms Rundle stated the following in a confidential draft of a report presented to the elected council on 25 May 2009:
- [It is] inappropriate to have a legal firm providing advice regarding a development when the same firm is also providing advice to the developer, albeit through another office in another state.
685. In response to my draft report, Holding Redlich Lawyers stated:
- At no time was the advice given by Holding Redlich to the Council affected in any way by what is, at best, a perceived conflict, rather than an actual or real conflict.
686. While I understand the position of Holding Redlich Lawyers, the onus was on the City of Port Phillip to satisfy itself that there was no conflict of interest.

## Conclusions

687. I consider that the City of Port Phillip should have requested that Holding Redlich Lawyers identify any conflicts of interest prior to engaging the firm. Such conflicts could then have been assessed to determine whether it was appropriate to engage Holding Redlich Lawyers.
688. In addition, I am of the view that once the City of Port Phillip became aware of Holding Redlich Lawyers' relationship with Citta/BBC, the City of Port Phillip should have made further enquiries about the matter to determine whether it was appropriate for Holding Redlich Lawyers to provide advice.

### *6. Project Manager's uncle employed as independent planner*

689. My investigation identified that the independent planner engaged to consider public submissions about the development plan (October 2007) prepared by BBC was the uncle of the St Kilda's Edge Project Manager (Mr A).
690. In January 2007, Mr A prepared a report on the City of Port Phillip's options for the consideration of submissions about the St Kilda Triangle development plan. He also attended a meeting with the Senior Project Officer, Mr Oulton (Executive Director, City Development) and the Chief Panel Member, Planning Panels Victoria, at which the City of Port Phillip asked the Chief Panel Member to provide names of independent planners who would be suitable to assess the submissions.
691. The Chief Panel Member recommended 11 planners, including Mr A's uncle at Matrix Planning Australia Pty Ltd (the independent planner). According to Mr A, his relationship with the independent planner was declared at this meeting.
692. In an email to the Senior Project Officer, dated 1 February 2007, Mr A provided the list of recommended planners and stated that the Chief Panel Member 'said [the independent planner] was "very good"'. He noted that the independent planner was 'a relative' of his, although he said he could not see 'any real conflict'.
693. On 13 August 2007, Mr A was appointed St Kilda's Edge Project Manager, effective 17 September 2007.
694. On 4 October 2007, the independent planner wrote to the Special Projects Manager to provide a fee proposal. The independent planner estimated his fee at \$11,000. The independent planner further stated:

You should be also aware that the undersigned is an uncle of Mr [A], who has recently been appointed Council's project manager for the development of the St Kilda Triangle Site. We do not think that this constitutes a potential or actual conflict of interest, but nevertheless feel compelled, given the desire for an independent planning assessment of submissions, to bring this to your attention.

695. The Special Projects Manager responded in an undated letter stating:

We [the Special Projects Manager, council officers and the Chief Executive Officer] have discussed the relationship between yourself and [Mr A] and have the view that there is no conflict of interest. Your appointment was recommended by [the Chief Panel Member] and was discussed with you several months ago, prior to Mr. [A]'s appointment. Furthermore, Mr [A] has no role in the planning approval assessment process, as a statutory planner in our City Development Department will conduct this.

### Conclusions

696. The evidence obtained by my office demonstrated that Mr A attended the meeting at which the independent planner was recommended by the Chief Panel Member and that subsequent to the independent planner's appointment, Mr A liaised direct with him on behalf of the City of Port Phillip on at least two occasions.
697. I am concerned that City of Port Phillip officers involved did not recognise that Mr A's relationship with the independent planner, his uncle, presented a conflict of interest. The fact that both Mr A and the independent planner felt the need to declare their relationship, in my view, suggests that there was a conflict of interest that needed to be managed, rather than denied or not acted upon.
698. I did not receive any evidence to suggest that the independent planner's report was influenced by Mr A or City of Port Phillip staff. I also note that the City of Port Phillip considered the report was 'not at all positive' for the City of Port Phillip. However, Mr A's relationship with the independent planner allowed at least the perception that the City of Port Phillip had the opportunity to influence the independent planner's final report. I consider that this may impact upon the community's perception of the independence of the submission process.

## 7. Company engaged by the St Kilda's Edge Committee works with bidder

699. In March 2005, a company that had previously been engaged by the St Kilda's Edge Committee to undertake work on the St Kilda Foreshore, sought approval to assist RV Group with its bid for the St Kilda Triangle development. The probity auditor informed the Senior Project Officer that this raised a 'perceived conflict of interest that must be carefully managed'. The probity auditor suggested that the Senior Project Officer obtain further information from the company, particularly in relation to managing confidentiality within the company between the two projects.
700. Upon provision of further information from the company, the probity auditor stated that he could not 'give unqualified support', but he noted that the City of Port Phillip 'may have other information for you to form a view that the project can be appropriately managed'. It appears that the St Kilda's Edge Committee subsequently permitted the company's participating in the RV Group consortia; however, the City of Port Phillip was unable to provide me with any documentation about this decision.

### Conclusions

701. I do not consider that this conflict of interest had a material effect on the tender process and I note that RV Group was unsuccessful in the tender process. However, it is concerning that the St Kilda's Edge Committee rejected the probity auditor's advice and did not record the reasons for its decision.

### Gifts and hospitality

702. The potential problems that can arise from the acceptance of gifts and hospitality are widely recognised throughout the public sector. Where there could be a reasonable perception that a gift might influence a public sector employee in some way, the reputations of the officer, the employer and the person offering the gift can be damaged.
703. My investigation into the St Kilda Triangle identified instances where council officers accepted hospitality from private companies that were in a contractual relationship with the City of Port Phillip.
704. The first example occurred on 31 August 2005. Mr Graham Cunningham, Paradigm Advisory (project managers for the St Kilda Foreshore Urban Design Framework Project) invited Mr Spokes and City of Port Phillip staff to celebrate 'another milestone on the Triangle Site project' by 'having a few drinks on Paradigm Advisory at ... The Vin 212 High Street Prahran'. Mr Spokes confirmed that he attended and I understand the other invitees also attended.

*The potential problems that can arise from the acceptance of gifts and hospitality are widely recognised throughout the public sector. Where there could be a reasonable perception that a gift might influence a public sector employee in some way, the reputations of the officer, the employer and the person offering the gift can be damaged.*

*My investigation into the St Kilda Triangle identified instances where council officers accepted hospitality from private companies that were in a contractual relationship with the City of Port Phillip.*

705. I note that at this time, Paradigm Advisory was providing services under a contract for stage three of the project. According to Mr Spokes, Paradigm Advisory's appointment for stage four of the project was subject to their performance and whether 'gateway decisions' were met to enable moving to the next stage. However, no contract was entered into for stage four and Paradigm Advisory continued providing services, although the contract had expired, until the City of Port Phillip tendered for project management services in April 2008. My concerns about the City of Port Phillip's engagement of Paradigm Advisory are discussed later in this report.
706. Mr Bruce Phillips, a senior City of Port Phillip officer who attended the drinks, responded to my concerns stating that he 'would not consider something so casual to raise any probity issue where no tender process was on foot at the time'. I consider that Mr Phillips' position represents a fundamental misunderstanding of conflict of interest.
707. Paradigm Advisory and Minter Ellison Lawyers also hosted a dinner to celebrate the conclusion of the St Kilda Triangle tender process in May 2007. The dinner was held in a private room at Donovans restaurant one week after the decision to award the tender to BBC. Twenty-four people were invited. The attendees included Mr Spokes, City of Port Phillip staff and St Kilda's Edge Committee members. Paradigm Advisory advised my office that its share (50 per cent) of the dinner was \$1,679.
708. At the time of this dinner, Minter Ellison Lawyers and Paradigm Advisory were both engaged by the City of Port Phillip. I note that Paradigm Advisory was continuing to provide services, despite its contract having expired at this time. Paradigm Advisory was subsequently awarded a five-year contract in August 2008 after a public tender process.
709. In response to my concerns, Mr Cunningham stated he was 'confident' that Paradigm Advisory's 'continuing role was a result of the significant contribution Paradigm Advisory made to securing a successful outcome to the tendering of this difficult project' and that the celebratory drinks did not influence their continuing role.
710. In its response to my draft report, Paradigm Advisory also stated that its 're-engagement for each consecutive stage of the project was based on merit, rather than arising from the limited hospitality that [it] provided twice over a 5 year period'.

## Conclusions

711. It is inappropriate for a public sector employee to accept gifts or hospitality from individuals, companies or organisations that are in a tender process or a contractual relationship with the public agency. Even gifts of a nominal value, given to express gratitude, may influence the actions of public sector employees by creating a sense of obligation, which may unintentionally or otherwise compromise them. If a third party observer could reasonably believe that a gift was intended to influence an officer in some way, then this perception damages both the reputation of the individual and their employer.
712. Both Minter Ellison Lawyers and Paradigm Advisory could have benefited from the offer and acceptance of hospitality: Minter Ellison Lawyers and Paradigm Advisory were providing ongoing services and to date have been paid over \$1.5 million and \$800,000 respectively. In the case of Paradigm Advisory, a new contract was pending at the time of the dinner in May 2007. It was thus both inappropriate for the companies to offer the hospitality and for the public sector employees to accept.
713. While I consider that it was inappropriate for each of the public sector employees involved to accept the offer of hospitality, I am particularly concerned that Mr Spokes, Chief Executive Officer and Chair of the St Kilda's Edge Committee, who attended both events, did not recognise that it was inappropriate for public sector employees to accept free drinks and dinner from companies engaged by the City of Port Phillip.
714. In this regard, Mr Spokes provided the following response to my draft report:
- It was critical to the project's success that relationships were appropriately managed, including through hospitality. Hospitality is simply a reality of the management of long term relationships, and is an appropriate and legitimate means of building and strengthening stakeholder relationships.
715. In my view, the position of Mr Spokes represents a fundamental misunderstanding of conflict of interest.
716. In order to develop an ethical culture – one that is committed to serving the public interest and recognises that conflicts of interest diminish public confidence in the sector – leadership must come from the top. While policies and procedures assist to ensure public sector employees are aware of their ethical obligations, the best way to develop an ethical culture is for leaders to lead by example. The refusal of an offer of hospitality by a Chief Executive Officer can do more for his or her employees' awareness of what constitutes acceptable conduct than policies and procedures can.
717. I note that Mr Spokes is no longer employed by the City of Port Phillip.

*It is inappropriate for a public sector employee to accept gifts or hospitality from individuals, companies or organisations that are in a tender process or a contractual relationship with the public agency.*

*It was thus both inappropriate for the companies to offer the hospitality and for the public sector employees to accept.*

## EXTERNAL INFLUENCE

### Influence of Ministers

718. During my investigation, Mr David Davis MP suggested that certain Ministers were involved in 'brokering' the deal between the State Government and the City of Port Phillip, which resulted in the City of Port Phillip becoming the Committee of Management for the St Kilda Triangle site. He questioned why the State Government would transfer responsibility for the site to the City of Port Phillip, given that it was Crown land, and suggested that this may have been the result of advocacy from Ministers.
719. At interview, Mr Davis specifically referred to the Hon. John Thwaites, former Deputy Premier and local member for the area. During the Select Committee hearings, Mr Davis stated that there was a suggestion that 'some of the push for this project came from Mr Thwaites'.
720. The St Kilda Triangle lies within the Albert Park electorate, which Mr Thwaites represented from 1992 until his retirement in 2007. Mr Thwaites was the Minister for Environment from 2002 to 2007 and Deputy Premier from 1999 to 2007.
721. My investigation has confirmed that there was some support for the project by Mr Thwaites. However, on the available evidence, Mr Thwaites' support for the project did not go beyond that which may be considered consistent with his ministerial role, as well as his role and interest as a local member.
722. However, it was clear from my investigation that the City of Port Phillip sought the support of Mr Thwaites and that the City of Port Phillip and its agents considered a number of strategies to obtain this support.
723. One of these was the suggestion of providing Mr Thwaites and the State Government with a 'direct (not community) \$ benefit'. On 9 March 2004, Mr David Elsum, independent member of the St Kilda's Edge Committee sent an email to Mr Spokes, Mr Cunningham, the Special Projects Manager, the Senior Project Officer and Mr Phillips regarding a meeting with Mr Thwaites scheduled for 19 March 2004. Mr Elsum stated:

Without success I have been thinking about any direct (not community) \$ benefit (short or long term) we can offer Mr. Thwaites and the Victorian government at the meeting. Obviously such would help any comments he has to make in Cabinet. Any thoughts?



724. My investigation was unable to locate any responses to Mr Elsum's email or evidence that such an offer was made to Mr Thwaites or the State Government. At interview under oath, Mr Thwaites stated that he was not offered a 'dollar benefit', nor did he receive one. I am satisfied that no such offer was made to him.
725. In response to my concerns about this strategy, Mr Elsum has stated:

I was not suggesting any personal or furtive benefit to Mr Thwaites or anyone else; in fact I was addressing my mind, as widely as possible, to all benefits which could be obtained from the Triangle Development ...

In retrospect, such a benefit might be seen as some form of under-hand gift even though nothing improper had occurred.

### *Conclusions*

726. My investigation identified that the City of Port Phillip actively sought support from Ministers, including Mr Thwaites, in relation to the St Kilda Triangle development. In particular, the City of Port Phillip sought the State Government's support for the City of Port Phillip to become the Committee of Management for the St Kilda Triangle site; and for a state government contribution towards the development of the site. While the City of Port Phillip was successful in the former, it did not succeed in the latter.
727. My investigation identified that in March 2005, Mr Thwaites supported the City of Port Phillip's bid to become the Committee of Management for the site and to release Expressions of Interest. The next month, the City of Port Phillip and the State Government executed a Memorandum of Understanding and the City of Port Phillip invited Expressions of Interest for the site.
728. I do not consider it inappropriate for the City of Port Phillip to actively seek the support of Mr Thwaites or that Mr Thwaites provided some support. After all, Mr Thwaites was the local member for the area.
729. However, the suggestion by Mr Elsum of providing Mr Thwaites and the State Government with a 'direct (not community) \$ benefit' was ill-conceived as it lent itself to being misinterpreted.

## Political donations

730. My office received an allegation from Councillor Serge Thomann that BBC 'were always going to get the proposal' for the St Kilda Triangle development as they had made significant donations to the Australian Labor Party. Councillor Thomann stated that Babcock & Brown 'gave \$140,000 three years ago to the Labor Party' and was one of the 'top ten' donors to the Australian Labor Party. At the time the decision to award the contract to BBC was made, the Australian Labor Party was in State Government. I also note that at least four of the seven councillors at the time were Australian Labor Party members.
731. My investigation reviewed the political donations made by parties involved in bidding for the St Kilda Triangle development to determine if the timing of the donations coincided with important dates in the tender process and if the probity of the process was likely to be affected in any way.

### *Donations during the tender process*

732. Key dates of interest for the St Kilda Triangle tender process were as follows:
- 17 June 2005: Expressions of Interest closed
  - 30 August 2005: Short list of three consortia announced:
    - o RV Group, comprising R-Corporation and Mr John van Haandel
    - o Babcock & Brown with Citta Property Group (BBC)
    - o St Kilda Creative Hub, comprising Mirvac and interests associated with the family of Mr Lindsay Fox, David Goldberger and David Wieland
  - 29 November 2006: Revised bids sought from RV Group and BBC
  - 25 May 2007: Contract signed with BBC.

**Table 3: Donations from bidders to the Australian Labor Party (ALP) during the tender process**

	Babcock & Brown	Citta Property Group	Linfox Australia	Mirvac	Mr John van Haandel	R Corporation	St Kilda Creative Hub
ALP	Nil	Nil	Nil	Nil	Nil	Nil	Nil
ALP (Victorian Branch)	Nil	Nil	Nil	31/10/2006 \$50,000	Nil	Nil	Nil
Progressive Business Association <sup>4</sup>	Nil	Nil	1/07/2005 - 7/12/2005 \$15,000	Nil	Nil	Nil	Nil
<b>Total</b>	<b>Nil</b>	<b>Nil</b>	<b>\$15,000</b>	<b>\$50,000</b>	<b>Nil</b>	<b>Nil</b>	<b>Nil</b>

(Source: Australian Electoral Commission)

733. The above table indicates that Babcock & Brown and Citta Property Group made no donations to the Australian Labor Party during the tender process. While Mirvac and Linfox Australia did make donations, they were both unsuccessful in the tender process.

#### *Donations during the development plan approval phase*

734. Key dates of interest for the St Kilda Triangle development plan approval phase were as follows:

- 7 February 2008: Statutory Planning Committee of Council approved the development plan subject to conditions
- 8 August 2008: Development plan was endorsed by the Manager, City Strategy.

**Table 4: Donations from BBC to the Australian Labor Party (ALP) during the development plan approval phase**

	Babcock & Brown	Citta Property Group
ALP	15/11/2007 \$25,000	Nil
ALP (Victorian Branch)	25/07/2007 \$1,000 4/10/2007 \$4,800 9/10/2007 \$5,000	Nil
Progressive Business Association	Nil	Nil
<b>Total</b>	<b>\$35,800</b>	<b>Nil</b>

(Source: Australian Electoral Commission)

736. The above table demonstrates that Babcock & Brown donated \$35,800 from July to November 2007 – after BBC had been selected as the preferred tenderer and months prior to the approval of the development plan.

<sup>4</sup> A fundraising arm of the Australian Labor Party.

## POOR PROCUREMENT AND CONTRACT MANAGEMENT PRACTICES

*During my investigation into the St Kilda Triangle development, I came across further examples of poor procurement and contract management practices in relation to the City of Port Phillip's engagement of consultants for the project. I also identified ... that the City of Port Phillip 'cut' contracts in order to get 'out of the Local Govt Act provisions'.*

737. In August 2009, I tabled in Parliament, *A report of investigations into the City of Port Phillip*. My report identified a significant number of tenders and contracts where non-compliance with legislation and City of Port Phillip policies had occurred.
738. Section 186 of the Local Government Act requires that local councils give public notice of the purpose of a contract and invite tenders or expressions of interest for purchases above a prescribed amount. Up until August 2008, this amount was \$100,000. For purchases below this amount, the City of Port Phillip's procurement policies apply.
739. During my investigation into the St Kilda Triangle development, I came across further examples of poor procurement and contract management practices in relation to the City of Port Phillip's engagement of consultants for the project. I also identified from an email written by Mr Bruce Phillips, City of Port Phillip Contract Manager that the City of Port Phillip 'cut' contracts in order to get 'out of the Local Govt [sic] Act provisions'.

### Paradigm Advisory

740. Paradigm Advisory was engaged by the City of Port Phillip as project managers for the St Kilda Foreshore Urban Design Framework Project from 29 September 2003. To date, the City of Port Phillip has paid Paradigm Advisory over \$800,000, at least \$700,000 of which was paid to Paradigm Advisory prior to a public tender and over three separate contracts.
741. According to Mr Spokes, Paradigm Advisory's engagement was divided into five stages. He said their continued involvement was subject to their performance and whether 'gateway decisions' were met to enable moving to the next stage of the development process. According to City of Port Phillip documents, the stages involved receiving approval from the elected council to approach the market to develop the site; inviting Expressions of Interest and finalising a short list of proponents; selecting a preferred tenderer; achieving contractual close; and implementing the project.

### *Appointment of Paradigm Advisory - Stage one*

742. My investigation identified that Mr Spokes met Mr Tony Jolly, Director, Paradigm Advisory after Mr Jolly was personally recommended to him. Mr Jolly subsequently emailed Mr Spokes a proposal to assist with the delivery of the St Kilda Foreshore development on 1 August 2003.

743. On 18 August 2003, Mr Spokes emailed the elected councillors stating that he was engaging Mr Jolly as 'UDF Project Manager'. Mr Spokes stated that he had been 'seeking to engage the services of an experienced Project manager' for 12 months and that he had 'considered' five other individuals before selecting Mr Jolly.
744. I note that Mr Jolly did not provide a 'formal submission' to Mr Spokes until 22 September 2003 – over one month after Mr Spokes' email to the elected councillors. This submission outlined what the role and responsibilities of Paradigm Advisory would be. It also stated, 'the capped fee for the first phase of the project will be \$80,000'.
745. At interview, Mr Spokes said the City of Port Phillip publicly tendered for the project management contract. However, there was no evidence on the City of Port Phillip files of a public tender process or of Mr Spokes seeking quotes from any other individual or organisation, in accordance with its *Purchasing Guidelines* (<\$100,000).
746. According to former councillor, Mr Dick Gross, Paradigm Advisory was described to the elected council 'as leading consultants who were assisting the state on the Spencer Street development'. He said, 'part of the issue was that they [Paradigm Advisory] had credibility with the State and our problem at the time was that we were just a local council and we had insufficient credibility and access to the State'.
747. On 29 September 2003, Mr Phillips emailed Paradigm Advisory a draft letter 'confirming [their] involvement on the project' until contractual documents were ready for Mr Spokes to sign when he returned from leave.
748. On 7 November 2003, Paradigm Advisory submitted its first invoice to the City of Port Phillip for \$30,916.
749. On 25 November 2003, Mr Spokes wrote to Mr Jolly to 'formally appoint' Paradigm Advisory for stage one of the project. The letter enclosed a contract 'for the scope of works covered by stage 1 only' and stated that 'subsequent contracts will be entered into for Stages 2 to 5'. The contract referred to Mr Jolly's letter, dated 22 September 2003, as defining the services to be performed under the contract.
750. On 3 February 2004, Mr Cunningham provided the City of Port Phillip with a document titled, 'St Kilda's Edge fee proposal'. My investigators noted Mr Cunningham's document was the last document on the City of Port Phillip contract file for stage one. Neither the City of Port Phillip nor Paradigm Advisory was able to provide me with a copy of an executed contract, signed by both parties.

751. Paradigm Advisory was paid \$105,100 for services from October 2003 to the end of January 2004. This included \$85,000 for services related to the St Kilda Triangle, although the fee cap for the contract was \$80,000 (excluding GST). It also included \$20,100 for services in relation to the West Beach Bathing Pavilion project, part of the St Kilda Foreshore development. Paradigm Advisory worked 'under the assumption that West Beach [would] be covered by the SKE contract', but noted that their fee caps did not include services for this project. According to an email from Mr Phillips to Mr Cunningham, dated 29 September 2004, 'for internal budget reasons [the City of Port Phillip were] keeping West beach separate'. No contract was ever entered into for this project.
752. The stage one contract listed Mr Phillips as the City of Port Phillip's Contract Manager. According to Mr Phillips, the City of Port Phillip did not foresee that Paradigm Advisory's costs would exceed the prescribed amount of \$100,000. When asked if the City of Port Phillip had split Paradigm Advisory's contracts in order to avoid the requirements of the Local Government Act, he stated, 'I don't believe that was the intent'.
753. When asked whose responsibility it was to ensure that the City of Port Phillip complied with its procurement guidelines and the Local Government Act, Mr Phillips stated:

I don't know. I mean as the contract manager I take responsibility for having a lot of responsibility. But in terms of, you know, every part of that contract, you know it's a team effort, and governance are there to provide some expertise.

754. During my investigation, my investigators obtained a series of emails that demonstrate Mr Phillips had a clear intent to avoid the effect of section 186 of the Local Government Act and that Mr Spokes, then Chief Executive Officer was aware of this.
755. For example, on 17 March 2004, Mr Phillips emailed Mr Cunningham. It appears Mr Phillips was trying to finalise and execute a contract for stage one of the project (which had finished) so that the City of Port Phillip could execute a contract for stage two. The email stated:

For Local Govt [sic] Act reasons we cannot let a contract over \$ 100 K without a tender - so we need to 'cut' this work that Paradigm are doing another way - internally (not the sub committee) we have resolved to call the Business case was [sic] Project No 1 and that is now done and the next Project is to get the EoI [Expression of Interest], evaluation, selection, Council decision and then a design preference resolved to report to Council

This gets us out of the Local Govt [sic] Act provisions

In this context I need to get a letter of appointment for Project No 1 resolved and signed and sitting on the file

We will then do a separate set of letter exchange and contract for Project No 2

I have done a cut of the letter and the contract for your consideration again

This email is confidential

Please get back to [the Senior Project Officer] direct

756. Mr Phillips forwarded the above email to Mr Spokes on the same day, requesting that he 'read for info' and noting that Mr Phillips had 'recut the terms of the tasks' for stage one.

757. I note that according to an email sent to Mr Spokes and the St Kilda's Edge Committee members on 16 March 2004, 'Project No 2' was to conclude with the 'selection of the preferred consortia and the development of the preferred design for consideration by Council'. However, Paradigm Advisory's involvement was divided into four to five stages, not two. In my view, this was to get 'out of the Local Govt [sic] Act provisions'.

758. In response to my concerns, Mr Phillips stated:

I do not accept that my performance could be described by a reasonable person as amounting to "poor procurement and contract management practices". You infer that it is wrong, and a poor procurement and contract management practice, to separate work into separate contracts. It is not. There are various situations in which it is to the procurer's distinct advantage to separate work between contracts ...

The report seems to infer that I was trying corruptly to bring the contract under the legislated limits so as to ensure the appointment of Paradigm. I refute that suggestion absolutely.

759. In its response to my draft report, Paradigm Advisory stated:

At al [sic] times during our engagement by the City of Port Phillip we had no reason to believe that Section 186 of the Local Government Act was being breached. There were no guarantees that Paradigm Advisory would be retained for the consecutive stages of the project, or in fact that the project would continue beyond each stage, and we believe that our role continued based on merit.

## Conclusions

760. Paradigm Advisory provided services for stage one of the project from October 2003 to the end of January 2004 without any other individuals or organisations having the opportunity to tender or quote for the project and without an executed contract between the City of Port Phillip and Paradigm Advisory.
761. I consider that the letter dated 25 November 2003 between Mr Spokes and Mr Jolly, and the email dated 17 March 2004, indicate that an understanding had been reached between the City of Port Phillip and Paradigm Advisory that Paradigm Advisory was to be engaged for each stage of the project, but that different contracts were to be used for each stage as a device to avoid section 186 of the Local Government Act.
762. Mr Spokes disagrees and considers that the email, despite its reference to 'cutting' the work to 'get us out of the Local Govt Act provisions', was evidence of 'the Council taking steps to ensure that, from a legal perspective, it complied with the Act'.
763. Mr Spokes also argued:
- Section 186 requires more than a mere possibility that the works may exceed the specified value [\$100,000 at the time] – there has to be a legal obligation at the relevant time that the contracted party will (or at least a strong possibility that it will) do works at an amount higher than the specified value – anything short of that does not breach the Act ... it is not possible to state that because there was a relationship over a period of time involving a number of activities that there was a legal obligation within the meaning of the Act overall or in respect of any particular activity.
764. Despite Mr Spokes' comments, it is clear from Mr Phillips' email that the City of Port Phillip considered the contract would exceed the \$100,000 threshold and that, for this reason, Paradigm Advisory's contract was 'cut' into stages. As the City of Port Phillip had identified that the contract would exceed the \$100,000 threshold, it was obligated to publicly tender for the project.
765. I consider that the position taken by Mr Spokes in relation to his former responsibilities demonstrates an inadequate appreciation of the fulfilment of public obligations. I am also concerned with the conduct of Mr Phillips as he showed disregard for the requirements of the Local Government Act. I note that he left the City of Port Phillip in September 2006 and is now employed at the City of Yarra as the Director, City Development.



*Stages two to four*

766. The City of Port Phillip also entered into contracts with Paradigm Advisory for stages two and three without inviting public tenders or Expressions of Interest, or obtaining quotes from any other organisations.
767. Between 29 February 2004 and 30 June 2004, the City of Port Phillip paid Paradigm Advisory \$106,713, when the contract for stage two set a fee of \$32,320 (excluding GST). This included services related to the West Beach Bathing Pavilion project.
768. The City of Port Phillip did not enter into a contract for stage four. According to the Special Projects Manager, the stage three contract was 'rolled over' into stage four because Paradigm Advisory was involved in the negotiations with the preferred proponent and it 'didn't make sense to get someone else' for stage four ('achieving contractual close'). This decision was not documented.
769. A contract for stage five did not commence until 1 August 2008. Therefore, Paradigm Advisory appears to have provided services under the stage three contract from 30 June 2004 to 1 August 2008. While the contract for stage three stated the fee was not to exceed \$65,000 (excluding GST), between 30 June 2004 and 1 August 2008, the City of Port Phillip paid Paradigm Advisory \$618,805, including fees for services related to the West Beach Bathing Pavilion project.

*Stage five*

770. In October 2007, internal City of Port Phillip reports identified that its contract with Paradigm Advisory had 'recently expired' and noted that stage five of the contract would be tendered 'in the next month'. Three subsequent reports, the latest dated March 2008, repeated this advice. Paradigm Advisory continued to provide a service to the City of Port Phillip during this period.
771. It was not until 12 April 2008 that the City of Port Phillip gave public notice in *The Age* that it was seeking tenders for 'Commercial Project Management Services in relation to the St Kilda Foreshore Urban Design Framework Project'. The contract related to the implementation of the project. The City of Port Phillip received five responses to the tender, including a response from Paradigm Advisory.
772. The City of Port Phillip reviewed the tender responses and short-listed three bidders for interview. An evaluation panel interviewed the three bidders and recommended that Paradigm Advisory be awarded the contract. Mr Spokes subsequently executed a contract with Paradigm Advisory.

773. I note that while the contract term was for five years from 1 August 2008, the contract was dated 19 August 2008. In addition, the contract refers to the tender response and specifications as forming part of the contract; however, these documents were not on the file. Paradigm Advisory estimated its fees would be \$75,000 per annum; however, no fee cap was set. I note that the City of Port Phillip's tender specifications required a fee cap.
774. I also note the Special Projects Manager's advice that the stage three contract was 'rolled over' into stage four because Paradigm Advisory was involved in the negotiations and it 'didn't make sense to get someone else' for stage four. It would appear from this argument that it would also not 'make sense to get someone else' for stage five, given Paradigm Advisory's extensive involvement in the project. In response to this, the Special Projects Manager stated:
- Stage 5 was considered to be a new stage of the project following the awarding of the contract and it was determined that it would make sense to test the market for commercial project management consultancy services.
775. Despite this, I consider that other bidders for the stage five contract were disadvantaged by the City of Port Phillip's failure to tender for project management services at stage one, as they were bidding against a company (Paradigm Advisory) that had been involved in the St Kilda Triangle project for five years and whose employees had established relationships with both City of Port Phillip and BBC staff.

### **SKE Committee and evaluation panel members**

776. On 2 February 2004, Mr Phillips wrote to Mr Elsum inviting him to be an independent member of the St Kilda's Edge Committee effective 9 February 2004 and agreeing to pay him \$30,000 per annum for his involvement. Mr Elsum was also subsequently appointed Chair, Commercial and Finance Panel. The City of Port Phillip paid Mr Elsum over \$175,000 from August 2004 to October 2009.
777. According to Mr Elsum, he entered into a 'handshake agreement' with Mr Spokes, which 'would roll on from one year to the next'. Mr Elsum said he thought it was a 'bit casual', but he rendered quarterly accounts that referred to the agreed fee. Mr Elsum has since stated that he accepted Mr Phillips' written offer, 'Thus a contract was created'. He said the "'handshake agreement'" referred to the precise services' that he would provide.
778. While a 'handshake agreement' may be sufficient to establish an enforceable contract, it was not sufficient to identify the terms of Mr Elsum's engagement and it did not meet the requirements of the City of Port Phillip's *Purchasing Guidelines* (<\$100,000), which required a written contract for procurement over \$10,000.

779. Mr Jim Holdsworth was the Chair, Design and Functionality Committee. Mr Holdsworth was a City of Port Phillip employee until 30 June 2005. On 29 June 2005, Mr Geoff Oulton, Executive Director, City of Port Phillip, wrote to Mr Holdsworth to secure his 'consultancy services' for projects including 'St Kilda's Edge and Port Melbourne Waterfront revitalisation'. Mr Oulton stated that the City of Port Phillip would pay Mr Holdsworth '\$100 per hour plus GST, averaging around 2 days per week or around 60 or so hours per month'.
780. Mr Holdsworth signed a statement at the end of Mr Oulton's letter:
- I, Jim Holdsworth of Planning Collaborative, agree to the above conditions of contracted service provision.
781. Mr Holdsworth has been paid \$20,170 since 1 July 2005. His company, Planning Collaborative, has been paid \$97,279.

## Conclusions

782. My investigation in relation to the City of Port Phillip's engagement of Paradigm Advisory identified that:
- the City of Port Phillip split contracts to avoid the Local Government Act's requirement that contracts over \$100,000 go to public tender
  - there was non-compliance with procurement guidelines
  - there was no executed contract in place when Paradigm Advisory commenced work for the City of Port Phillip
  - there was a contract that had expired; however, services were continuing to be provided
  - there were documents that formed part of the contracts missing from the relevant City of Port Phillip files, including tender specifications and insurance certificates
  - poor governance of the engagement of Paradigm Advisory allowed expenditure of significant amounts of public funds to occur with little, if any, oversight.
783. I also identified concerns with the City of Port Phillip's engagement of Mr Elsum and Mr Holdsworth. There was no evidence on City of Port Phillip files that it sought quotes from other individuals prior to engaging Mr Elsum and Mr Holdsworth. In this regard, the City of Port Phillip failed to comply with its *Purchasing Guidelines* (<\$100,000), which required that three written quotations be obtained. Had the City of Port Phillip anticipated that Mr Elsum and Mr Holdsworth were likely to be paid in excess of \$100,000, it should have publicly tendered for the contracts in accordance with section 186 of the Local Government Act.

784. I note that since my report tabled in Parliament in August 2009, *A report of investigations into the City of Port Phillip*, the City of Port Phillip has committed to a centralised procurement process and has established a new contracts and tendering unit with additional resources to manage the process. The City of Port Phillip advised that the new unit will manage all aspects of procurement, including tender specifications, contract documentation and probity.
785. I also note that in his report titled, *Tendering and contracting in Local Government*, February 2010 the Victorian Auditor-General made a number of recommendations to improve local government procurement.

## OTHER ISSUES

### Breach of privacy

786. During my investigation into the St Kilda Triangle development, I identified that a number of councillors and senior City of Port Phillip staff were given copies of electronic data and emails, including private and confidential information, when they left the council. This appears to breach the Information Privacy Principles.
787. I understand that the City of Port Phillip has since reconsidered its position on the release of information to outgoing councillors and staff. I am advised that it has taken action to recover the data provided to councillors and staff and has implemented policies and procedures to prevent this occurring in the future.

### Secondary employment

788. During my investigation, I also identified that a senior City of Port Phillip officer conducted private business during his normal work hours at the City of Port Phillip, possibly in breach of his employment contract and the City of Port Phillip's *People and Culture, Employee Standards Policy*. The policy stated that 'employees must not engage in private business, work for other organisations during their normal working hours'.
789. The senior officer also nominated his City of Port Phillip mobile phone number and email address on his private business letterhead and invoices. The senior officer no longer works at the City of Port Phillip so no further action is contemplated.

## SUMMARY OF RECOMMENDATIONS

I recommend that:

### Recommendation 1

The City of Port Phillip, the Department of Human Services and Major Projects Victoria review their file management practices in relation to procurement processes to ensure the standards meet the requirements of the *Public Records Act 1973*.

#### *City of Port Phillip response*

‘This recommendation is accepted in full and I will take immediate steps to review our file management practices’.

#### *Department of Human Services response*

‘Noted and agreed’.

#### *Department of Innovation, Industry and Regional Development response*

‘The Department of Innovation Industry and Regional Development accepts the recommendations pertaining to it (and Major Projects Victoria) and provides the following comments ... Over the last two years, considerable changes have occurred to document management processes within Major Projects Victoria. In particular, Major Projects Victoria, as part of a program being rolled out across the Department, has introduced a new electronic document management system – TRIM. In addition, project communications have been streamlined with the usage of *Aconex*’ (an online project management system).

### Recommendation 2

The Department of Treasury and Finance review the *Good Practice Guidelines – Conduct of Commercial Engagements* and the *Probity Risk Assessment Tool* to specify that:

- major projects require both a probity advisor and probity auditor and that these functions are provided by different parties
- medium-risk projects require that, at a minimum, a probity auditor be appointed
- in medium and high-risk projects, agencies consider extending the role of the probity advisor and/or auditor past the announcement of the successful tenderer.

#### *Department of Treasury and Finance response*

‘The issues you raise will be taken into account at the time the new probity auditor panel is finalised [by the Department of Treasury and Finance in November 2010]. Further, the Government is currently undertaking a major review of the *Financial Management Act 1973* [sic – 1994] with the intent of establishing the Public Finance and Accountability Bill (PFAB) currently before Parliament. A new procurement environment is to be established under the Bill, and probity issues, including matters raised by your draft report, will be addressed by the new governance arrangements and, the complexity/capability framework that departments will be required to apply in conducting open tenders. I also note that “probity” is defined in the PFAB as a fundamental principle to apply to Government procurement and DTF will review and issue further guidelines on this topic following passage of the Bill’.

### Recommendation 3

The Department of Planning and Community Development update its *Local Government Procurement Best Practice Guideline* to ensure that local government and state government policies are consistent in relation to the appointment of probity advisors and auditors for major projects.

#### *Department of Planning and Community Development response*

'Local Government Victoria has scheduled a review of the *Local Government Procurement Best Practice Guideline* to commence in June this year. The broad principle of consistency between Local Government and State Government requirements will inform that review. It needs to be borne in mind however that there will remain some necessary points of divergence. For example, in the role played by the Victorian Government Purchasing Board which does not extend to local government procurement'.

### Recommendation 4

The Department of Treasury and Finance conduct regular reviews of the probity practitioner panel to ensure probity auditors and advisors appointed to medium and high-risk projects are upholding its probity principles.

#### *Department of Treasury and Finance response*

The Department of Treasury and Finance 'regularly reviews the quarterly activity reports from departments using the panel, which includes customer feedback of the performance of those appointed in the reporting period. The probity practitioner panel is currently under review, with a new panel arrangement to be implemented in November 2010. The approach to market will include provisions on how probity practitioner services shall be defined and the appropriate method for allocating probity practitioners having regard to the complexity of the project'.

### Recommendation 5

The Department of Treasury and Finance review the *Good Practice Guidelines – Conduct of Commercial Engagements* to include the following as functions of a probity auditor:

- the probity auditor is to endorse a procurement conduct plan (probity plan) at the beginning and conclusion of the auditor's involvement, which sets out the probity principles and the tasks required to ensure probity is achieved
- the probity auditor is to endorse a conflict of interest register, to be completed by the agency, at the conclusion of the auditor's involvement to confirm that any conflict of interest issue has been appropriately managed by the agency
- the probity auditor's interim and final probity reports are to be accompanied by a signed document detailing the work completed by the probity auditor.

#### *Department of Treasury and Finance response*

'The issues you raise will be taken into account at the time the new probity auditor panel is finalised'.

### **Recommendation 6**

Major Projects Victoria improve its financial accounting processes to include disclosure of project management fees prior to and on completion of each project.

#### ***Department of Innovation, Industry and Regional Development response***

‘The Department of Innovation Industry and Regional Development accepts the recommendations pertaining to it (and Major Projects Victoria)’.

### **Recommendation 7**

The State Services Authority examine and report to the Premier on the circumstances in which it is necessary for individuals to perform public servant duties when not engaged as a public servant.

### **Recommendation 8**

The State Services Authority examine and report to the Premier on the circumstances in which it is necessary for public servants to be paid gratuity payments.

### **Recommendation 9**

The Department of Innovation, Industry and Regional Development implement annual training programs for Major Projects Victoria’s contractors and public servants on conflict of interest principles and requirements, and the acceptance of gifts and hospitality, to ensure adherence to the *Public Administration Act 2004* and the State Services Authority’s *Code of Conduct for Victorian Public Sector Employees*.

#### ***Department of Innovation, Industry and Regional Development response***

‘The Department of Innovation Industry and Regional Development accepts the recommendations pertaining to it (and Major Projects Victoria) and provides the following comments ... Understanding and managing potential and actual conflicts of interest is treated as an important part of the operations of Major Projects Victoria. This matter is raised on a regular basis at staff meetings and in staff training. We will review these arrangements to ensure all staff and ongoing contractors have a clear understanding of these matters’.



## **Recommendation 10**

The Department of Human Services report on the financial return to the State Government from the Kew Residential Services project in its Annual Report.

### *Department of Human Services response*

'Agree in Principle – The Department of Human Services will discuss options for the annual public release of revenue details of the Kew Residential Services Redevelopment with Major Projects Victoria'.

## **Recommendation 11**

The Secretary of the Department of Innovation, Industry and Regional Development conduct a review of Major Projects Victoria's current projects to ensure that the State Government's obligation to disclose contracts on the Contracts Publishing System website is met.

### *Department of Innovation, Industry and Regional Development response*

'The Department of Innovation Industry and Regional Development accepts the recommendations pertaining to it (and Major Projects Victoria) and provides the following comments ... A review will be conducted of Major Projects Victoria's current projects to ensure that the Government's commitment to disclose contracts on the Contracts Publishing System website is met'.

## **Recommendation 12**

The Minister for Finance consider options to strengthen probity in the procurement process in instances where an entity expressing an interest in a project changes during the tender process.

## **Recommendation 13**

The Secretary of the Department of Planning and Community Development review the policies of Heritage Victoria to ensure that officers do not express opinions on the heritage significance of a place.

### *Department of Planning and Community Development response*

'The current practice of Heritage Victoria is that officers do not offer opinions or advice as to the Heritage significance of a place. The Executive Director of Heritage Victoria is preparing a directive to his staff to formalise this requirement'.

## Recommendation 14

The Government Land Monitor review his *Policy and instructions for the purchase, compulsory acquisition and sale of land* to specify the treatment of land in respect to matters including:

- heritage issues
- environmental aspects
- legal and contractual arrangements
- Valuer-General requirements

to ensure that all these factors are managed by the agency prior to the Expression of Interest phase.

### *Department of Planning and Community Development response*

‘The Government Land Monitor has advised that Section 2.4 of the *Policy and Instructions* ... captures the matters to which you refer and that in practice Section 2.4 operates so that matters such as heritage overlays, soil contamination, planning requirements, terms and conditions of the sale and development agreements, leases and other encumbrances are considered during the valuation process. I have requested, however, the Government Land Monitor examine making the treatment of these issues more explicit in the *Policy and Instructions*’. The Secretary, Department of Planning and Community Development stated that the Government Land Monitor is reviewing his *Policy and instructions for the purchase, compulsory acquisition and sale of land*. The Secretary also noted that this policy provides the Government Land Monitor with ‘a right of access and inspection of all files, notes and documents which relate to the land transaction’.

## Recommendation 15

The Department of Treasury and Finance review the *Good Practice Guidelines – Conduct of Commercial Engagements* to require that the probity auditor be engaged by the portfolio department and report to that department.

### *Department of Treasury and Finance response*

‘DTF [Department of Treasury and Finance] does not accept this recommendation, as the proposal that the probity auditor be engaged by the portfolio department, rather than the entity conducting the tender, has the potential to blur the legal lines of accountability and responsibility between the contracting entity and the portfolio department’.

## Recommendation 16

Prior to commencement of any Expression of Interest or Request for Proposal phase of a major development project of this nature, departments ensure that there is a degree of certainty about the site, its condition and availability.

### **Recommendation 17**

The State Government initiate arrangements to ensure the disclosure of government contracts for both state and local government in line with the policy statement *Ensuring Openness and Probity in Victorian Government Contracts*.

#### ***Department of Planning and Community Development response:***

Local Government Victoria's 'review of the *Local Government Procurement Best Practice Guideline* ... will address disclosure of Local Government contracts in line with the policy statement *Ensuring Openness and Probity in Victorian Government Contracts*'.

### **Recommendation 18**

Training be provided to state and local government contract officers to ensure contracts are disclosed in line with the policy statement *Ensuring Openness and Probity in Victorian Government Contracts*.

# ATTACHMENT 1 – Kew final probity report



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S SCHONBERG  
M D NORTHEAST  
P A JOSE  
M HARRISON  
T A JONAS  
S P CATLIN  
G E BLASHKI  
A R FITZPATRICK  
I D STEWART  
R RIGONI  
R CUMMINGS  
D A THOMSON  
M J LANGHAMMER  
J BRAZZALE  
V A ARNETT  
S DAHN  
A R YEO  
P TONER

GEW:rs

13 April 2005

Mr Ian Leong  
Project Director – KRS Redevelopment  
Capital Management Branch  
Department of Human Services  
7/589 Collins Street  
MELBOURNE VIC 3000

Dear Mr Leong

## FINAL PROBITY AUDIT REPORT

We provide our final probity audit report in respect of the Kew Residential Services (“KRS”) project. This final probity report is a continuation of our reports dated 15 October 2004 and 15 November 2004.

Subsequent to our report of 15 November 2004, the lead assessment team has recommended that Walker Corporation be selected as preferred developer, such recommendation having been adopted by the Project Control Group. The Valuer-General has advised that the Walker bid is considered reasonable and the Land Monitor has granted approval for a development agreement to be entered into with Walker Corporation. A letter of intent was signed by the parties on 4 March 2005.

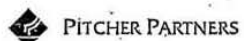
My role as Probity Auditor has been to assess that the following principles to promote probity have been applied by the evaluation and selection teams:

- Fairness and impartiality;
- Use of a competitive process;
- Consistency and transparency of process;
- Security and confidentiality;
- Identification and resolution of conflicts of interest; and
- Compliance with government policies as they apply to tendering.

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In my view the work of the evaluation teams was properly focused in accord with the RFP and probity plan. In all material respects and based on the probity framework, the process has been in accordance with identified probity principles covered in the probity plan.

Yours sincerely

A handwritten signature in black ink, appearing to read 'G E Walsh'.

G E WALSH  
Partner

# ATTACHMENT 2 – St Kilda Triangle expression of interest probity report



**PITCHER PARTNERS**  
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M W FRINGE	B RIGONI
C M RAMBALDI	R CLIMMINGS
D A THOMSON	D A KNOWLES
M J LANGHAMASSEE	F J ZAHRA
M C HAY	I BRAZTALE
S SCHONBERG	V A ARNETTI
M D NORRHEAST	S DARR
P A JOSE	A R YEO
M J HARRISON	P W TONGE
T SARELL	D B VASILEVICH

Ref.: GEW:tg

22 July 2005

Mr D Spokes  
Chair  
St Kilda's Edge Committee  
City of Port Phillip  
Private Bag 3  
ST KILDA VIC 3182

Dear Sir

## PROBITY AUDIT REPORT FOR TRIANGLE SITE REDEVELOPMENT – EXPRESSION OF INTEREST

The probity audit for the St Kilda Triangle Site Project has been completed up to the Expression of Interest ("EOI") stage.

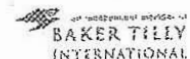
EOI has been sought for the redevelopment of the St Kilda Triangle Site. This will require a private party to design, construct, finance, lease, maintain and operate the Project. Submissions were received from fourteen respondents.

Respondents to the EOI were assessed by two Evaluation Panels (Financial & Commercial Panel and Design & Functionality Panel). Each Evaluation Panel prepared an assessment report to the SKE Committee. All members of the SKE Committee and Evaluation Panels were aware of the Probity and Evaluation Plans which included responsibility descriptions, VGPB guidelines, risk management strategy, confidentiality and evaluation procedures.

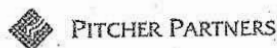
My role as Probity Auditor has been to assess that the following principles to promote probity have been applied by the SKE Committee and Evaluation Panels:

- Fairness and impartiality;
- Use of a competitive process;
- Consistency and transparency of process;
- Security and confidentiality;
- Identification and resolution of conflicts of interest; and
- Compliance with government policies as they apply to tendering.

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I have attended various meetings of the SKE Committee and Evaluation Panels, reviewed minutes and other documents which record the process undertaken and evaluation of respondents.

Based on a review of the Evaluation Panel's reports the SKE Committee has nominated the following consortia to proceed to the Request for Proposal stage:

- Babcock & Brown, Citta Property Group
- St Kilda Creative Hub, Mirvac
- R Corporation & John Van Haandel

Failing to reach a satisfactory conclusion, in relation to a commitment deed and bid bond, with any of the above consortia the following parties will be considered for shortlisting:

- MAB St Kilda Red Rocks Consortium
- Sunland Group

In my view the work of the SKE Committee and Evaluation Panels were properly focused on the EOI objective to select a shortlist of respondents capable of delivering infrastructure works to be detailed in a subsequent Request for Proposal. In all material respects and based on the probity framework, the process has been undertaken in accordance with identified probity principles covered in the Probity Plan and meets the probity requirements and expectations set out in the VGPB Probity Policy.

Yours faithfully  
PITCHER PARTNERS

A handwritten signature in black ink, appearing to read "G E Walsh".

G E WALSH  
Partner

## ATTACHMENT 3 – St Kilda Triangle final probity report



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Ref: GEW:tg

22 May 2007

Mr D Spokes  
Chair  
St Kilda's Edge Committee  
City of Port Phillip  
Private Bag 3  
ST KILDA VIC 3182

Dear Sir

### **PROBITY AUDIT REPORT FOR TRIANGLE SITE REDEVELOPMENT – REQUEST FOR PROPOSAL**

The probity audit for the St Kilda Triangle Site Project has been completed for the Request for Proposal ("RFP") stage.

RFP has been sought for the redevelopment of the St Kilda Triangle Site. This will require a private party to design, construct, finance, lease, maintain and operate the Project. Submissions were received from the three respondents shortlisted from the Expression of Interest stage.

Respondents to the RFP were assessed by two Evaluation Panels (Financial & Commercial Panel and Design & Functionality Panel). Each Evaluation Panel prepared an assessment report to the SKE Committee. All members of the SKE Committee and Evaluation Panels were aware of the Probity and Evaluation Plans which included responsibility descriptions, VGPB guidelines, risk management strategy, confidentiality and evaluation procedures.

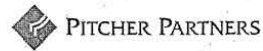
My role as Probity Auditor has been to assess that the following principles to promote probity have been applied by the SKE Committee and Evaluation Panels:

- Fairness and impartiality;
- Use of a competitive process;
- Consistency and transparency of process;
- Security and confidentiality;
- Identification and resolution of conflicts of interest; and
- Compliance with government policies as they apply to tendering.

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I have attended various meetings of the SKE Committee and Evaluation Panels, reviewed minutes and other documents which record the process undertaken and evaluation of respondents.

Based on a review of the Evaluation Panel's reports the SKE Committee has nominated Consortia A as preferred tender.

In my view the work of the SKE Committee and Evaluation Panels were properly focused on the RFP objective to select a respondent capable of redevelopment of the St Kilda Triangle Site as detailed in the RFP. In all material respects and based on the probity framework, the process has been undertaken in accordance with identified probity principles covered in the Probity Plan and meets the probity requirements and expectations set out in the VGPB Probity Policy.

Yours faithfully  
PITCHER PARTNERS CONSULTING PTY LTD

A handwritten signature in black ink, appearing to read "G E Walsh".

G E WALSH  
Executive Director

## ATTACHMENT 4 – St Kilda’s Edge Committee’s conflict of interest framework

Might the advisors [*sic*] other duties result in the advisor compromising their obligation to SKE (i.e. conflict of duty)?

Does the advisor have the ability to compromise their obligation to SKE by accessing information that may benefit the advisor or other parties?

Does the advisor have the ability to compromise the interests of and their obligation to SKE by potentially influencing or altering the outcomes to SKE in a material way that will benefit the advisor or other parties?

In the event that the answer to any of the above questions is YES a COI event exists and there is potential for the interests of SKE to be compromised. A risk assessment should be undertaken to determine whether the risk is manageable:

What degree of incentive does the advisor have in compromising the interests of SKE?

What event or ability does the advisor have to compromise or harm SKE’s interests?

Are current internal management arrangements sufficient to manage the COI event or would they be put in place?

The COI would be considered as manageable if you are able to satisfy yourself that the advisor:

Is not able to compromise or harm the Government’s interests and the advisor has limited incentive to do so; or

Management plans can be put in place to monitor the COI event.

If you are not satisfied in relation to the above, approval should not be provided.



# OMBUDSMAN'S REPORTS 2004-10

## 2010

Own motion investigation into Child Protection – out of home care  
*May 2010*

Report of an investigation into Local Government Victoria's response to the Inspectors of Municipal Administration's report on the City of Ballarat  
*April 2010*

*Whistleblowers Protection Act 2001* Investigation into the disclosure of information by a councillor of the City of Casey  
*March 2010*

Ombudsman's recommendations – Report on their implementation  
*February 2010*

## 2009

Investigation into the handling of drug exhibits at the Victoria Police Forensic Services Centre  
*December 2009*

Own motion investigation into the Department of Human Services – Child Protection Program  
*November 2009*

Own motion investigation into the tendering and contracting of information and technology services within Victoria Police  
*November 2009*

Brookland Greens Estate – Investigation into methane gas leaks  
*October 2009*

A report of investigations into the City of Port Phillip  
*August 2009*

An investigation into the Transport Accident Commission's and the Victorian WorkCover Authority's administrative processes for medical practitioner billing  
*July 2009*

*Whistleblowers Protection Act 2001* Conflict of interest and abuse of power by a building inspector at Brimbank City Council  
*June 2009*

*Whistleblowers Protection Act 2001* Investigation into the alleged improper conduct of councillors at Brimbank City Council  
*May 2009*

Investigation into corporate governance at Moorabool Shire Council  
*April 2009*

Crime statistics and police numbers  
*March 2009*

## 2008

*Whistleblowers Protection Act 2001* Report of an investigation into issues at Bayside Health  
*October 2008*

Probity controls in public hospitals for the procurement of non-clinical goods and services  
*August 2008*

Investigation into contraband entering a prison and related issues  
*June 2008*

Conflict of interest in local government  
*March 2008*

Conflict of interest in the public sector  
*March 2008*

## 2007

Investigation into VicRoads' driver licensing arrangements  
*December 2007*

Investigation into the disclosure of electronic communications addressed to the Member for Evelyn and related matters  
*November 2007*

Investigation into the use of excessive force at the Melbourne Custody Centre  
*November 2007*

Investigation into the Office of Housing's tender process for the cleaning and gardening maintenance contract – CNG 2007  
*October 2007*

Investigation into a disclosure about WorkSafe's and Victoria Police's handling of a bullying and harassment complaint  
*April 2007*

Own motion investigation into the policies and procedures of the planning department at the City of Greater Geelong  
*February 2007*

## 2006

Conditions for persons in custody  
*July 2006*

Review of the Freedom of Information Act 1982  
*June 2006*

Investigation into parking infringement notices issued by Melbourne City Council  
*April 2006*

Improving responses to allegations involving sexual assault  
*March 2006*

## **2005**

Investigation into the handling, storage and transfer of prisoner property in Victorian prisons

*December 2005*

*Whistleblowers Protection Act 2001* Ombudsman's guidelines

*October 2005*

Own motion investigation into VicRoads registration practices

*June 2005*

Complaint handling guide for the Victorian Public Sector 2005

*May 2005*

Review of the *Freedom of Information Act 1982*

Discussion paper

*May 2005*

Review of complaint handling in Victorian universities

*May 2005*

Investigation into the conduct of council officers in the administration of the Shire of Melton

*March 2005*

Discussion paper on improving responses to sexual abuse allegations

*February 2005*

## **2004**

Essendon Rental Housing Co-operative (ERHC)

*December 2004*

Complaint about the Medical Practitioners Board of Victoria

*December 2004*

Ceja task force drug related corruption – second interim report of Ombudsman Victoria

*June 2004*