



# DPC Inquiry: Appointment of Senior Trade and Investment Commissioner to the Americas

Department of Premier and Cabinet NSW

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# 1 Executive summary

## 1.1 Introduction

This inquiry relates to matters that have been regarded as being at the heart of the Westminster system of government since the Northcote-Trevelyan Report. The Northcote-Trevelyan Report - published in the mid-19<sup>th</sup> century - is generally regarded as having established the basis for the ethical underpinnings of the British Civil Service, notably with respect to merit-based appointment and the ability of public servants to impartially serve the elected government of the day and to transfer that impartial service if and when the government changes.

These principles are reflected in countless statutes that underpin the arrangements for the public service, however named, in Westminster systems. The Ethical Framework at Part 2 of the *Government Sector Employment Act 2013* (GSE Act) is a contemporary expression of these principles; it underpins the relevant arrangements in New South Wales (NSW).

At the heart of this inquiry is the extent to which these principles have in any way been offended. Central to this question is the relative role and responsibilities of ministers and public servants in the recruitment of people into particular roles in the Government Sector.

So, what are the relative roles of ministers and public servants in government sector recruitment? To assist in answering this question it is helpful to do a simple breakdown of the government sector structure in NSW. Figure 1, from the NSW Public Service Commission, provides a schematic of the government sector.

Figure 1: Schematic of the government sector



# Other Crown Services include the TAFE Commission.

\* State Owned Corporations may be part of the Government Sector for specified purposes.

^ Other NSW public sector entities include Public Financial Corporations such as Tcorp, and the Internal Audit Bureau.

## DPC Inquiry: Appointment of Senior Trade and Investment Commissioner to the Americas

For the purposes of this inquiry, I am focussed on the Public Service component of the Government Sector. In respect of the Public Service, the employer functions generally belong to the Secretaries of Departments, the Heads of Executive Agencies, and the Heads of Separate Public Service Agencies, which means that the staff of those entities are public service appointments and, as such, are subject to the merit processes set out in subordinate legislation - the *Government Sector Employment Regulation 2014* (GSE Regulation) and the *Government Sector Employment (General) Rules 2014* (GSE Rules).

With respect to a Secretary, the Premier (or the Premier's delegate) is the employer and the process for appointing a Secretary is set out in the GSE Act.

With respect to the head of an Executive Agency related to a Department, the Secretary of the relevant Department is usually the employer, except where legislation specifically assigns that role to a minister or some other body.

With respect to the head of a Separate Public Service Agency, the minister administering the relevant Act usually exercises certain employer functions, and the Governor appoints on the advice of the Government.

So, within the Public Service, the only positions for which ministers have a formal employer role are in respect of:

- the Secretaries of the 10 Departments - the Premier;
- the Agency Heads of those Executive Agencies that specify a role for a minister in exercising employer functions (e.g., Commissioner of Fire and Rescue NSW) - 11 of the 26 Agency Heads;
- the 19 Heads of Separate Agencies (e.g., the Information Commissioner).

Where the Premier or other ministers are exercising functions in respect of the roles set out in the three points above, those appointments may, as a matter of convention, be considered by Cabinet. For some of the appointments, such as the Ombudsman - which comes under the third dot point - there is also an explicit role for the Parliament.

The remainder of the roughly 66,000<sup>1</sup> roles in the Public Service component of the Government Sector have no role for ministers in respect of employer functions, including appointment. Senior Trade and Investment Commissioners (STICs) are part of this group under the current arrangements.

Generally, there are no exclusions from the merit-based recruitment model set out in the GSE Rules for Public Service appointments. The excision of 'overseas trade employees' from certain GSE Act processes reflects the unique nature of these positions, which include foreign nationals working offshore. However, the way that excision has operated has created an unhelpful ambiguity in respect of what type of modified merit-based process should apply for these roles.

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<sup>1</sup> The most recent data published by the NSW Public Service Commission has the number at 66,631 as at 30 June 2020.

I discuss the specific arrangements that apply to STICs in Section 4 of this report and make recommendations in the report about addressing this anomaly but also about drawing a brighter line between those things where ministers have a formal role and those where they do not.

Public servants and the public alike - including members of our community who wish to put up their hands to work for the NSW Public Service - should be able to have confidence that Public Service appointments are being made in the way they are intended to be. They should be able to expect that such appointments will be merit-based, and that any resulting employment will be into a role that is impartially serving the government of the day, subject to laws and policies directed to that end.

The processes for appointing the Senior Trade and Investment Commissioner to the Americas (STIC Americas) do not meet those expectations. I discuss the two specific recruitment processes in Sections 5 and 7. I also discuss a decision of the Government to change the appointment processes for the STIC Americas and similar roles in Section 6.

Important issues flow from the examination of these processes.

Firstly, the very real impacts of these processes on people who were motivated to make a professional contribution to NSW through working in the NSW Public Service on global trade and investment issues. As will be shown, some have experienced sub-optimal processes and, as a consequence of inquiries established into these processes, have found the fact of their candidacy and other information about them in the public realm.

Secondly, the attention to this issue has likely brought the integrity of Public Service recruitment processes into some disrepute. Confidence in the integrity of Public Service recruitment processes is important. It goes directly to questions of public trust in the Public Service. It goes directly to the ethical culture of the Public Service.

This report seeks to address specific problems arising in the two recruitment processes as well as making recommendations for system-wide change to bolster the arrangements for Public Service appointments and rebuild confidence in these processes. Sections 1.2 and 1.3 in this report summarise the conclusions I reached in this inquiry and the recommendations I make in respect of specific matters and system change.

Key individuals, processes, regulatory instruments and polices are detailed in the appropriate parts of the report. However, for ease of reading this executive summary, I provide below a list of some of these that are referred to in sections 1.2 and 1.3.

- The *Government Sector Employment Act 2013* (GSE Act) is the main piece of legislation relating to Public Service employment.
- The *Government Sector Employment Regulation 2014* (GSE Regulation) is a subordinate instrument that details certain unique arrangements for overseas trade employees. Overseas trade employees are a defined class of employees under the GSE Regulation; STICs are included in this definition.
- The *Government Sector Employment (General) Rules 2014* is a subordinate instrument that, among other things, specifies the usual arrangements for GSE Rules-based selection processes.

- The *Code of Ethics and Conduct* sets out obligations that apply to Government Sector Employees. The Public Service Commissioner has required, via a direction given under the GSE Act, that the Code is implemented across the Government Sector. The Code is typically incorporated into an individual agency's Code where its elements are set out in a way that is most appropriate for that agency.
- The *Ministerial Code of Conduct* is the key instrument governing the conduct of NSW Ministers of the Crown. It is an applicable code under the *Independent Commission Against Corruption Regulation 2017*.
- The 'first recruitment process' refers to the process for STIC Americas that took place between April and October 2021.
- The 'second recruitment process' refers to the process that took place between December 2021 and June 2022 that resulted in the appointment of Mr John Barilaro to the STIC Americas role.
- Ms Amy Brown is the Secretary of the Department of Enterprise, Industry & Trade and is the Chief Executive Officer of Investment NSW. She was the convenor of the selection panel for the first and second recruitment processes.
- Mr John Barilaro is the former NSW Deputy Premier and Minister for Trade who was selected for the STIC Americas role in the second recruitment process; he was also the sponsoring minister for a Cabinet Submission that proposed changing the model of appointment for STICs.
- Hon. Stuart Ayres MP is the former Minister for Trade who was minister at the time of Mr Barilaro's appointment.

## 1.2 Key conclusions

- 1.2.1 In respect of the first recruitment process, the applicable elements of the GSE Act and GSE Regulation, as they relate to process requirements, were generally followed by Investment NSW. This is largely because the GSE Regulation requires a less prescriptive approach for STICs than GSE Rules-based recruitment processes.

However, there are matters of real concern about whether the conduct of the process took proper account of the *Code of Ethics and Conduct*.

- 1.2.2 In respect of the first recruitment process, there were suitable candidates identified and information provided to ministers to the contrary has the effect - through lack of precision and comprehensiveness - of being misleading.

However, for reasons set out in Section 5, I also conclude that there was no belief on the part of Ms Brown that this characterisation was misleading and, therefore, no intent to mislead.

- 1.2.3 In respect of the first recruitment process, certain issues have not been managed fully in keeping with the requirements of the *Code of Ethics and Conduct*. I reach this conclusion in respect of a failure on the part of Ms Brown to consider relevant factors in accepting a late application from a candidate who had had, through the normal course of their duties, access to information about other candidates in the process.

Further, there was no disclosure of this matter to other panel members during the panel's discussion of conflicts of interest. I discuss this in Section 5.

- 1.2.4 The NSW Government, through a Cabinet decision of 27 September 2021, determined a policy to change the method of appointing STICs from the GSE process that was being used; they would become ministerial appointments under statute, in line with the original Cabinet decision of 2019 that had set up the Global NSW Strategy.

That September 2021 decision had the effect of stopping any process to appoint a STIC that was on foot at the time of the decision; the decision explicitly instructed Investment NSW to take reasonably necessary action to 'unwind' contractual arrangements where the STIC was not yet in post.

It is not within my terms of reference, nor within the powers available to me, for this inquiry to examine the motivation and timing for this decision. I discuss this matter further in Section 6.

Investment NSW did not initiate the proposal to change the appointment process. Indeed, Investment NSW had concerns about a number of complex legal issues that it felt might arise in a statutory appointment model. Investment NSW assisted the then Deputy Premier's office in the usual way in the preparation of a Cabinet Submission.

- 1.2.5 In respect of the commencement of a second recruitment process under GSE arrangements, I can see no evidence that the Government has formally overturned the policy referred to in 1.2.4 above.

While it is the case that Strategy Committee of Cabinet received an update on the issue of STIC appointments on 8 November 2021, there is no decision recorded that explicitly overturns the previous policy, neither was there a formal submission seeking to do so.

The former Minister for Trade (Hon. Stuart Ayres MP) indicated to me that he believed that the 8 November meeting had the effect of overturning the policy. However, the record of the meeting provides no definitive position on this.

I am interested in this matter only insofar as it goes to the question of whether Investment NSW should have initiated and concluded the second recruitment process. I have concluded that, while I believe that Ms Brown could have done more to be absolutely certain about the status of the policy, there was genuine confusion on her part as to the policy status. I make no adverse finding in respect of Ms Brown's actions in starting the second recruitment process. I discuss this in Section 6.

- 1.2.6 In respect of the second recruitment process, the applicable elements of the GSE Act and GSE Regulation as they relate to process requirements were generally followed by Investment NSW. Again, and as stated above, this is largely because the GSE Regulation applies requires a less prescriptive approach for STICs than GSE Rules-based recruitment processes.

However, again there are matters of real concern about whether the conduct of the process took proper account of the *Code of Ethics and Conduct*. In respect of the second process, these are more significant issues that go to the fundamental integrity of the process.

1.2.7 In respect of the second recruitment process, certain matters have not been managed fully in keeping with the requirements of the *Code of Ethics and Conduct*. I reach this conclusion in respect of a failure on the part of Ms Brown to fully disclose to all panel members:

- her having involved the then Minister for Trade in discussions about the composition of the shortlist;
- her having arranged for one of the candidates to meet with the then Minister for Trade while the selection process was still under way;
- her having had discussions with the former Minister for Trade as to the suitability of Mr Barilaro for the role while the selection process was under way;
- her having concluded contract negotiations with Mr Barilaro without the selection panel having determined its final assessment of candidates.

1.2.8 In respect of the second recruitment process, there was an apparent lack of due care and diligence in ensuring that the selection panel report properly reflected the considered view of the selection panel. Ultimately, the selection panel report is the responsibility of the assessors on the panel. Again, due to a lack of absolute certainty about elements of the process for settling the final draft, I have not made a specific adverse finding regarding any individual in respect of this part of the process. I discuss this in Section 7.

## 1.3 Recommendations

### Findings related to the conduct of the process

1.3.1 That the DPC Secretary, as the person exercising employer functions (under delegation) for Ms Brown, considers what, if any, action to take in respect of the conclusions referred to at 1.2.3 and 1.2.7 above. In doing so, the Secretary should take account of the contextual factors contained in this report as well as any matters Ms Brown wishes to be factored into his consideration.

### Changes to legislative instruments

More detailed commentary on these recommendations is included at Appendix A. This additional commentary is to put beyond doubt the rationale for each recommendation and, should the recommendations be accepted by the Government, to assist those responsible for drafting legislative instruments, policies, procedures, and training resources.

1.3.2 The *Government Sector Employment Act 2013* should be amended to include a specific reference that a Secretary or Agency Head is not subject to the direction of a Minister in respect of any of their employer functions.

1.3.3 The *Ministerial Code of Conduct* should be amended to ensure that lawful directions to a public servant exclude a minister from seeking to influence a Secretary or Agency Head in respect of their employer functions except through the provision of performance feedback in accordance with the relevant Public Service Commission policy or GSE Rules, or the provision of a formal reference where that is appropriate.



- 1.3.4 The *Government Sector Employment Act 2013* should be amended to include a statement on the role and responsibilities of Secretaries modelled on that contained in the Commonwealth Public Service Act 1999. It should set out that:
- the roles of Secretaries of a Department include, but are not limited to the following:
    - principal official policy adviser to the Minister
    - manager, ensuring delivery of government programs and collaboration to achieve outcomes within the Minister's portfolio and, with other Secretaries, across the whole of Government
    - leader, providing stewardship within the Department and, in partnership with other Secretaries and the Public Service Commissioner, across the government sector.
- 1.3.5 Section 10A of the *Government Sector Employment Regulation 2014* should be amended so that it applies the full GSE Rules-based process to the future selection of overseas trade employees who are STICs. The elements of 10A that allow atypical contract arrangements should not be changed, given that model contracts that apply more generally in the NSW Public Service are unlikely to be fit-for-purpose in overseas jurisdictions.
- 1.3.6 The *Government Sector Employment Act 2013* should be amended to legislate a *Code of Ethics and Conduct* rather than relying on the Public Service Commissioner's direction power to achieve sector-wide application of a Code.
- 1.3.7 The *Government Sector Employment Act 2013* should be amended to establish a Parliamentary Joint Committee to monitor and review the exercise by the Public Service Commissioner of the Commissioner's functions under the Act.
- 1.3.8 The *Government Sector Employment (General) Rules 2014* should be amended to make clear that the suitability of candidates is determined by assessors within the meaning of the GSE Rules.
- 1.3.9 The *Government Sector Employment (General) Rules 2014* should be amended to provide more prescription as to the makeup of selection panels. Specifically, the subordinate of an assessor should only be another assessor in a comparative recruitment process as a last resort and only where there is an additional independent assessor from outside the hiring agency participating in the process.

### Changes to recruitment practice and guidance

- 1.3.10 The Public Service Commissioner should review the *Recruitment and Selection Guide* to provide more detailed advice to:
- ensure that reference checks factor into the final ranking of candidates by assessors;
  - clearly delineate the roles of assessors and providers of professional services to assessment panels.
- 1.3.11 If recommendation 1.3.6 is accepted by the Government and, ultimately, the Parliament, to legislate a *Code of Ethics and Conduct*, the Public Service Commission should develop an online training module and assessment tool. Training and

assessment using this tool should be mandated for induction and annually thereafter for all staff in government sector agencies.

- 1.3.12 The Public Service Commissioner should undertake a review of the use of psychometric assessment in the NSW Government Sector to determine: how these assessments are being used; whether current practice is in keeping with the Recruitment and Selection Guide; and recommendations for improving the use of these assessments.

### Guidance on Cabinet decisions

- 1.3.13 The Department of Premier and Cabinet should ensure that all Secretaries, Agency Heads, and Band 3s understand how to clarify the standing of a decision of government where there is doubt. This should be attended to during induction to the public service and on promotion to these levels.

## 2 Background and scope

On 17 June 2022, the appointment of Mr John Barilaro to the role of Senior Trade and Investment Commissioner to the Americas (STIC Americas) was announced by the Hon. Stuart Ayres MP, Minister for Enterprise Investment & Trade, Minister for Tourism & Sport, and Minister for Western Sydney.

Mr Barilaro is a former Deputy Premier and Minister for Trade, portfolios he held at the time he sponsored a Cabinet Submission to change the appointment process for STICs. Mr Barilaro resigned his portfolios in early October 2021, soon after the decision was made to change the appointment process. He later resigned from Parliament and, as a private citizen, applied for the STIC Americas role. He was successful in the selection process and was offered appointment to the role.

The announcement of Mr Barilaro's appointment attracted swift and intense interest in the media. On 23 June 2022, the Parliamentary Accountability Committee of the NSW Legislative Council resolved to establish an inquiry (Public Accountability Committee Inquiry) into the appointment. The terms of reference of that inquiry are as follows:

That the Public Accountability Committee inquire into and report on the appointment of the former Deputy Premier Mr John Barilaro as the Senior Trade and Investment Commissioner to the Americas, including:

- (a) the circumstances of the appointment,
- (b) the process undertaken to make the appointment,
- (c) the probity and integrity measures that were undertaken as part of the appointment, and
- (d) any other related matter.

On 23 June 2022 the Premier of NSW, Hon. Dominic Perrottet, announced that there would also be an inquiry conducted into the appointment by the Secretary of the Department of Premier & Cabinet, Mr Michael Coutts-Trotter.

Section 83 of the *Government Sector Employment Act 2013* sets out the arrangements whereby either the Secretary of the Department of Premier & Cabinet (DPC Secretary) or the Public Service Commissioner can conduct an inquiry into “any matter relating to the administration or management of a government sector agency”.

Section 83 of the GSE Act allows the Secretary or Public Service Commissioner to appoint a person “to act on behalf of the Commissioner or DPC Secretary for the purposes of conducting an inquiry under this section”.

A person appointed under the provision referred to above has the same powers as those available to the DPC Secretary or the Public Service Commissioner, namely to:

- enter and inspect the premises of a government sector agency, and
- require the production of, and take copies of, any documents in the custody of an employee of the government sector agency, and
- for the purposes of further examination, take possession of, and remove, any of those documents, and
- require an employee of the government sector agency to answer questions, and
- require an employee of the government sector agency to provide such assistance and facilities as is or are necessary to enable the Commissioner or DPC Secretary to exercise functions under this section.

Mr Coutts-Trotter determined to appoint me, Graeme Head, through EY Port Jackson Partners, to act on his behalf under the arrangements set out above. His decision was to ensure independence, taking account of the fact that DPC may have had some involvement with some aspects of the processes to be examined in an inquiry. In respect of the recruitment of STIC Americas, the Public Service Commissioner is conflicted out of conducting an inquiry, having been a participant in one of the processes this inquiry must examine.

On 26 June 2022 I was appointed to conduct an inquiry with terms of reference to examine:

- the employment arrangements that apply to the role of Senior Trade and Investment Commissioner to the Americas, and how those employment arrangements were determined;
- details and outcomes of all recruitment and selection processes that were commenced in relation to the role of Senior Trade and Investment Commissioner to the Americas, including arrangements for managing actual and perceived conflicts of interest;
- whether those processes complied with the GSE Act, rules and regulations made under the GSE Act and any other applicable laws and policies.

To be clear, this inquiry relates to the STIC Americas role only and not to the processes relating to other STICs.

Section 83 inquiries focus on the administration and management of government sector agencies. While it may be necessary as part of a section 83 inquiry to examine interactions between a government sector agency and a minister, these inquiries are not the vehicle for specifically examining ministerial conduct. Where something that is examined in this inquiry

touches on matters that may raise questions about the matters covered in the *Ministerial Code of Conduct*, it is for DPC to consider and take appropriate action.

### 3 Process for conducting the Inquiry

Through the powers referred to in Section 2, I have had access to relevant documents from government agencies, principally the Department of Enterprise, Investment and Trade, I have also had access to the transcripts of the Public Accountability Committee Inquiry. I undertook a review of the documents available to me as the basis for identifying individuals to whom I wished to put questions.

I conducted interviews with:

- Hon. Stuart Ayres MP, then Minister for Enterprise, Trade and Investment, Minister for Sport and Tourism and Minister for Western Sydney;
- Ms Amy Brown, Secretary of the Department of Enterprise, Investment and Trade;
- Ms Kathrina Lo, Public Service Commissioner (in her capacity as an independent member of the selection panel for the second recruitment process);
- Mr Jim Betts, former Secretary of the Department of Environment, Planning and Industry (in his capacity as an independent member of the selection panel for the recruitment process);
- Hon. Warwick Smith AO (in his capacity as an independent member of the selection panels for both the first and second recruitment processes);
- Ms Kylie Bell, A/Managing Director Trade and Investment, Department of Enterprise, Investment and Trade (in her capacity as a member of the selection panel for the second recruitment process);
- Mr Chris Carr, General Counsel, Department of Enterprise, Investment and Trade;
- Dr Marianne Broadbent, Managing Partner, NGS Global (in her capacity as the engagement partner for the STICs America recruitment process executive search);
- Mr John Barilaro, former Deputy Premier and Minister for Trade and candidate in the second recruitment process;
- Ms Kimberley Cole, candidate in the second recruitment process;
- Mr Rob Fitzpatrick, candidate in the first and second recruitment processes.

Only Ms Brown, Ms Lo, Ms Bell, and Mr Carr were required to answer my questions. All other interviewees were invited by me to be interviewed and agreed. Their cooperation and candour have been essential and are appreciated. I spoke to several of the people listed above on multiple occasions.

I invited Ms Jenny West (the preferred candidate in the first recruitment process) to engage with me as part of the review. She responded very promptly and asked me to deal with her through her lawyers. As a result of that interaction, and through her lawyers, Ms West chose to

provide me with documents for my consideration rather than to meet with me. Again, I am grateful for her assistance; she was under no obligation to assist me.

After considering the documents and interviewing relevant people, I considered the issues and formed a view as to the matters captured by my terms of reference. Where I was considering making adverse comments or findings, I provided the subject of those comments/findings with an opportunity to see what I was intending to say and to make submissions to me. In finalising my report, I have taken account of submissions made to me; I refer to specific key issues in submissions in the relevant sections of the report.

In respect of comments I make in the report about the interactions between former Minister Ayres and Ms Brown relating to the second recruitment process, I provided an excerpt of my draft report to the Secretary of DPC on the basis that I am not empowered through the arrangements that apply to this inquiry to examine matters that may go to issues covered in the *Ministerial Code of Conduct*.

I understand that Mr Coutts-Trotter used that draft excerpt as the basis for briefing the Premier on these matters. For abundant caution, it is important to point out that I have neither investigated nor made findings in respect of ministerial conduct. Rather, I have described interactions that occurred that may raise questions so that appropriate consideration of those questions can occur through a process properly empowered to do so.

After the provision of the excerpt of the draft report referred to above, the Premier announced the resignation of Minister Ayres on 3 August 2022. I had a conversation with Mr Ayres later that day in which he raised several matters he considered relevant in that section of the report. I considered the former Minister's representations on this matter and made some clarifying comments. These comments are referred to in Section 7.

Again out of abundant caution, I wish to be clear about my prior knowledge of, or dealings with, the people I have interviewed or consulted as part of this inquiry.

Prior to the inquiry, I had not met Ms Amy Brown or any of the staff I interviewed from the Department of Enterprise, Investment & Trade or Investment NSW.

Mr Coutts-Trotter and I were on Secretaries Board together between 2011 and 2018. I had worked with him prior to that, notably when he was Director-General of the then Department of Commerce and I was the Chief Executive of the then Sydney Catchment Authority.

I had a professional relationship with Mr Betts while I was the NSW Public Service Commissioner and he was the Chief Executive of Infrastructure NSW. Our dealings were concerned with public service workforce management and leadership. We had little contact - beyond being connected on social media - after I left the NSW public sector in early 2018 until earlier this year. In late April this year, Mr Betts joined EY Port Jackson Partners where I am a Partner. I was not involved in the decision-making process to bring Mr Betts into the firm. He was a Partner in the firm for approximately eight weeks, five of which I was on annual leave. We did not work on any engagements together.

I had some dealings with Hon. Stuart Ayres when he was the Minister for Police; these dealings related to my responsibilities as Public Service Commissioner.

I have had limited past dealings with Ms Kathrina Lo. I convened a selection panel several years ago that considered her as a candidate (not for her current role). I have had several

discussions with her since she took up the office of Public Service Commissioner; these have related to some of the thinking that underpinned some of the work I led when I was in the role.

I have had prior dealings with NGS Global, including with Dr Broadbent. I last worked with NGS Global on an executive search in 2016.

I have had some incidental contact with Mr Smith in the past.

I have had past dealings on and off with a number of the senior staff in DPC with whom I needed to speak on matters related to the conduct of the inquiry.

The provisions related to section 83 inquiries state that a person appointed to conduct such an inquiry does so under the direction of the Secretary of DPC. I received no direction as to either the process or any of the content of my report. I consulted DPC on the draft policy recommendations and considered submissions made by DPC in respect of them.

Lastly, there has been some public commentary about the time taken to complete this review. This exercise has been undertaken over six weeks. It has involved reviewing a very large number of documents, interviewing and reinterviewing people, considering the issues raised in these discussions, forming views and affording those affected with procedural fairness in respect of any findings or adverse comments I have considered.

DPC has been apprised of my progress regularly and has considered and agreed to the timeframe with adjustments as necessary. Notwithstanding the high level of interest in this report, the timeframe was necessarily dictated by what was required to adequately respond to the terms of reference.

## 4 Employment arrangements for the STIC Americas

### 4.1 Key milestones relating to STICs employment arrangements

STICs in six key locations were announced as a core element of the international network component of Global NSW, the NSW Government's strategy to promote NSW internationally.

STICs are the most senior of the positions captured by the definition "overseas trade employees" as set out in the *Government Sector Employment Regulation 2014*. They are the equivalent of Public Service Senior Executives (PSSEs) and have been determined to be in the Band 3 remuneration range for PSSEs.

The employment arrangements for STICs, including the STIC Americas, are subject to both existing arrangements set out in the *Government Sector Employment Regulation 2014*, and relevant decisions of government. Below, I set out a timeline of how those arrangements have changed over time along with some of the key events being examined in this process. This is a high-level timeline only.

2015

- GSE Regulation is amended to clarify overseas trade employees are GSE appointments, albeit with some GSE arrangements disappplied.

2019

- Overseas trade employees are described in section 4.2 below.
- The Government decides to establish the Global NSW initiative and increase NSW dedicated presence in a number of jurisdictions. These roles are to be known as Senior Trade and investment Commissioners (STICs); STIC Americas is one of these roles.
- The decision taken at this time has these roles being brought to Cabinet for appointment on the joint proposal of the Premier, Deputy Premier and Treasurer. However, the decision does not have the effect of establishing a new employment mechanism to allow for Cabinet appointments; that is, at the time of the decision Clause 10A of the GSE Regulation applied and it continued to apply afterwards.
- At the time of the decision referred to above, the trade function and the Global NSW initiative were both housed within NSW Treasury. NGS Global was engaged by NSW Treasury in November 2019 as the executive search firm to support the selection and appointment of STICs.
- The process was subsequently put on hold as a consequence of the impacts of COVID 19 but recommenced late in 2020.

2021

- In February, NGS Global is engaged by NSW Treasury to support them with the process for the STIC India/Middle East and STIC ASEAN/Singapore.
- In March, through machinery-of-government changes, Investment NSW is created as an agency in the DPC cluster. The trade function and the staff who support it are transferred to Investment NSW from NSW Treasury. Ms Amy Brown becomes the CEO of Investment NSW on its creation.
- Investment NSW engages NGS Global to assist with the recruitment process for the STIC Americas and the STIC Greater China.
- In April, recruitment for the STIC Americas commences, with interviews undertaken in July - this is the first recruitment process.
- In June and July, UK Agent General and STIC North Asia are submitted to Cabinet through the appointment process. This is in line with the initial 2019 Cabinet decision but is at odds with GSE appointments, which are appointments made by Secretaries or Agency Heads or their delegates. Further STIC appointments will not be considered by Cabinet.
- In August, relevant ministers are briefed on the outcome of the STIC Americas process. Ms West is verbally offered the role on 12 August 2021.
- In September, former Deputy Premier Barilaro initiates the development of a Cabinet Submission seeking to put in place a statutory/ministerial process for appointing STICs. Cabinet considers the proposal on 27 September and agrees to the recommendations. This decision has the effect of extinguishing the process on foot for the STIC Americas.
- In October, Mr Barilaro resigns his ministerial offices and the Hon. Stuart Ayres MP becomes the Minister for Trade. The Minister and the CEO of

2022

Investment NSW have initial discussions about the Minister's preference to revert to GSE appointments for STICs.

- In November, the Minister updates the Strategy Committee of Cabinet about the STICs process.
- In December, the STIC Americas role is readvertised with a limited time for applications to be lodged - this is the second recruitment process
- In February, candidates are shortlisted and interviewed for the role.
- Between March and May there is a process of reference checking for the top ranked candidates.
- Mr Barilaro is offered and accepts the role in early June, before the selection panel has made its final determination.
- On 17 June, Mr Barilaro is announced by former Minister Stuart Ayres as the STIC Americas.

## 4.2 What are the arrangements set out in the GSE Regulation?

As indicated above, the GSE Regulation (Clause 10A) sets out arrangements for a category of employee known as 'overseas trade employees'. This category includes STICs, which are executive level positions, and other non-executive roles. The regulated arrangements are as follows:

### **Overseas trade employees**

(1) In this clause:

**overseas trade employee** means a person who:

(a) is employed in the Department of Premier and Cabinet<sup>2</sup> (the **Department**) to work in the area of international trade and investment, and

(b) ordinarily resides and works in a country other than Australia while so employed.

(2) The employment under the Act of an overseas trade employee is subject to such arrangements as may be determined by the Secretary of the Department in respect of the employee.

(3) Any arrangements determined by the Secretary under this clause in respect of an overseas trade employee:

(a) may be specified in the employee's contract of employment, and

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<sup>2</sup> Administrative arrangements orders provide that a reference to the Department is construed to be a reference to Investment NSW.



(b) prevail to the extent of any inconsistency with any other provision of this Regulation or the government sector employment rules.

(4) An overseas trade employee who is a Public Service non-executive employee may be employed under a written contract of employment signed by the employee and by the Secretary of the Department.

(5) Persons may be employed as overseas trade employees without compliance with the government sector employment rules on merit-based employment. However, any decision to employ a person as an overseas trade employee must be based on the person's appropriateness for the role concerned having regard to the nature of the role and the person's qualifications, skills and experience.

(6) Any limitation under the government sector employment rules on the power of the Secretary of the Department to delegate his or her functions under the Act does not apply in respect of those functions to the extent that they relate to overseas trade employees.

## 5 The first recruitment process

### 5.1 How the first recruitment process was examined in this inquiry

I have had access to all documentation related to the first recruitment process for the STIC Americas role. This includes all documents relating to the sourcing and selection of candidates and the conduct of the selection process. I have also reviewed the transcripts of the hearings to date of the NSW Legislative Council Inquiry (Public Accountability Committee Inquiry) into the appointment of Mr John Barilaro as the Senior Trade and Investment Commissioner to the Americas.

In addition to reviewing documentation, I have interviewed each member of the selection panel. I made contact with Ms Jenny West who requested that I deal with her through her lawyers; I was provided with material (also provided to the Legislative Council inquiry) by Ms West's lawyers on her instructions. I have examined that material closely.

I also interviewed a second candidate who was in both the first and second round processes: Mr Rob Fitzpatrick.

I examined the process against the relevant provisions of the GSE Act, GSE Regulation and GSE Rules; I also considered relevant directions made by the NSW Public Service Commissioner under the GSE Act, as well as guidance material on recruitment issued by the PSC.

After considering the issues that surfaced through this assessment, I formed preliminary views and draft findings and then exposed these to affected parties. I invited those parties to respond and then considered their responses in finalising this report.

## 5.2 The approach used for the recruitment process

As discussed previously, the operation of clause 10A of the GSE Regulation allows for overseas trade employees to be recruited without the need to comply with the relevant provisions of the GSE Rules. Clause 10A (5) says:

“Persons may be employed as overseas trade employees without compliance with the government sector employment rules on merit-based employment. However, any decision to employ a person as an overseas trade employee must be based on the person’s appropriateness for the role concerned having regard to the nature of the role and the person’s qualifications, skills and experience.”

This gives the Secretary or their delegate significant discretion in determining the approach that will be used. Notwithstanding this level of discretion, the provisions referenced above combined with relevant provisions of the GSE Act (Part 2, *Ethical Framework for the Government Sector*), and the *Code of Ethics and Conduct* issued as a Commissioner’s Direction under the GSE Act (Sections 2.2 - *The Ethical Framework for the Government Sector*, and *Mandatory Conduct*) require that recruitment decisions are made on the basis of merit, albeit in this instance without the obligation of determining merit through the process prescribed in the GSE Rules.

In the case of the first recruitment process for the STIC Americas, Ms Brown chose to put in place arrangements that generally had the features of a compliant process for a ‘comparative assessment’ within the meaning of the GSE Rules:

- an executive search firm (NGS Global) was engaged under the relevant NSW Procurement scheme;
- the role was advertised;
- candidates were identified through executive search and through responding to the advertisement;
- a selection panel was formed;
- candidates were screened by NGS Global and a shortlist recommended;
- the selection panel agreed on the shortlisting;
- the selection panel interviewed shortlisted candidates and ranked them according to the capability requirements of the STIC Americas role;
- referees checks and other assessments were undertaken.

I outline the process in detail below.

The key matters I am considering are framed in the terms of reference:

- details and outcomes of all recruitment and selection processes that were commenced in relation to the role of Senior Trade and Investment Commissioner to the Americas, including arrangements for managing actual and perceived conflicts of interest;

- whether those processes complied with the GSE Act, rules and regulations made under the GSE Act and any other applicable laws and policies.

## 5.3 The requirements that applied to the process

As identified in 5.2 above, the *Government Sector Employment Regulation 2014* - clause 10A - has specific implications for considering what should have happened in the first recruitment process. I set out below both what would typically apply in a GSE Rules-based process and what has been done in this process.

### 5.3.1 How does a fully GSE-compliant process work?

There are several elements of the GSE Framework that have specific application in respect of recruitment. The key elements are:

- GSE Act, Part 2, Ethical Framework for the government sector;
- GSE Act, Section 13, Directions by Commissioner to the heads of government sector agencies;
- GSE Act, Section 36, Government sector employment rules relating to senior executives;
- GSE Regulation, Clause 10A, Overseas trade employees
- GSE Rules, Part 3, Merit-based employment.

In essence, and taken together, these provisions set up a system wherein:

- recruiting and promoting on merit is enshrined in the ethical framework that applies to the government sector;
- the *Code of Ethics and Conduct* gives expression to the ethical framework in the form of a Commissioner's Direction to Secretaries and Agency Heads - the Code sets out mandatory conduct that, relevantly, deals with recruitment and promotion based on merit - there is a detailed explanation of the way the Code is applied in Section 7.5;
- the GSE Rules set out the mandatory processes that are required in order for a process to be considered as merit-based;
- the GSE Regulation switches off the aforementioned rules in respect of overseas trade employees.

If the STIC Americas role had been treated as a Public Service Senior Executive **without** the effect of Clause 10A, the process would have required:

- advertising the role, except in certain circumstances;
- assessing the claims of individuals against pre-established standards for the role;
- assessing the claims of individuals against other claimants for the role.

Importantly, that process must include:

- screening for essential requirements;
- reviewing an application and resume;
- at least three capability-based assessments, one of which is an interview;
- more than one assessor being involved in the assessment.

With the application of Clause 10A of the GSE Regulation, the process for the STIC Americas makes clear that anyone employed as an overseas trade employee can be employed without compliance with the GSE Rules on merit-based employment. However, it does place an obligation on the decision-maker to employ a person based on their appropriateness for the role concerned, having regard to the nature of the role and the person's qualifications, skills and experience.

In simple terms, this does not have the effect of negating the merit-based principles set out in the GSE Act; rather, it allows for a different process to satisfy those principles in respect of a particular class of employees.

The effect of this clause of the GSE Regulation does not relieve people involved in the recruitment process from their obligations under the *Code of Ethics and Conduct*. Relevantly, it is the *Code of Ethics and Conduct* that sets out the obligations of public servants regarding conflicts of interest.

## 5.4 What were the features of the first recruitment process?

The initial work to roll out the Global NSW Strategy was led out of NSW Treasury, including the initial contracting of NGS Global to assist with the recruitment processes for STICs.

Investment NSW was created in March 2021 as an agency within the DPC cluster; the trade function, and associated staff, were transferred from NSW Treasury to Investment NSW in late March 2021. The STIC Americas recruitment commenced shortly thereafter. In effect, the entire recruitment process for this role was conducted by Investment NSW, albeit managed by some of the staff who had had prior responsibility for the program when it had been the responsibility of NSW Treasury.

Firstly, it is important to point out that there is no document that I have seen that sets out explicitly and upfront what arrangements were to apply to the assessment of the STIC Americas. There is no duty on the Secretary of the Department or the Agency Head responsible for overseas trade employees to produce such a document, but - given that the STICs are subject to a modified set of arrangements because of the GSE Regulation - it would have been good practice to clearly document upfront how the process was to run and, to the extent that it differed from a GSE Rules-based process, what those differences were. This point becomes especially important when considering the second recruitment process and the involvement of ministers.

The documents provided to me show that NGS Global was engaged under the Talent Acquisition Scheme administered by NSW Procurement (part of NSW Treasury) to conduct the search for STIC Americas candidates and to support the selection process.



- deliver results highly advanced;
- manage and develop people advanced

Based on the materials I have reviewed, it would appear the shortlist was developed largely by Dr Broadbent and Ms Brown and then provided, along with longlist information, to other panel members. Importantly, all panel members agreed the shortlist. Mr Pratt provided some endorsement for candidates even although he did not end up being on the panel. This appears simply to be a function of his earlier involvement in the STICs process and that the fact that he had originally been going to sit on the panel.

The selection panel interviewed the four shortlisted candidates on 6 July 2021. The interview followed a standard public sector format with pre-prepared questions posed by different members of the panel. The interview guide for the process was aligned to the four focus capabilities referred to above.

At the end of the interview process, two candidates were not considered suitable to progress for this specific role. Two other candidates remained in the process and were taken to reference checks.

Dr Broadbent advised me that NGS Global typically undertakes 360-degree reference checks - a person's supervisor, a peer and a subordinate. They followed that model in this process. Referees' checks appear to have been done asking standard questions of referees rather than probing things that were specific to either candidate.

Referee reports were made available to panel members, but the panel did not reconvene after interviews to discuss referee reports and to consider whether they had any bearing on overall suitability or relative rankings.

At the end of this process two candidates were considered suitable for appointment to the STIC Americas role, ranked first and second respectively:

- Ms Jenny West (preferred candidate);
- Mr Rob Fitzpatrick (assessed as suitable and, according to the selection panel report, placed in a talent pool).

## 5.5 My assessment of the first recruitment process

### 5.5.1 The assessment process

Up to the point of the Government determining to change the method of appointment for STICs (September 2021), the first recruitment process is the most straightforward element of the matters being considered by this inquiry.

Broadly speaking, while it was within the discretion of the Secretary or their delegate to establish an entirely different type of process, Ms Brown opted in respect of the STIC Americas role for an approach that had many of the features of a comparative assessment under the GSE Rules. Notably, candidates were:

- sourced through both targeted executive search and responses to advertising the role;

- pre-screened by NGS Global;
- interviewed by a properly constituted selection panel, exceeding the minimum requirements, and made up of highly qualified people;
- subjected to reference checks;
- ranked in a final selection panel report that represented the considered views of the panel and was able to be relied upon by the decision-maker.

The most notable difference between a GSE Rules-based process and the process used here is that the requisite three capability-based assessments were not undertaken against focus capabilities. They were not required because of the application of the GSE Regulation, but the interview structure was nevertheless broadly aligned to the focus capabilities.

While not a specific difference between a GSE Rules-based process and the processes used here, I have some concerns about the practice of how referee checking is undertaken. This process involved referees being asked standard questions after the interviews and those reports being written up and provided to the panel afterwards. There does not appear to have been targeted probing of referees regarding specific issues relevant to each candidate. Also, there was no panel deliberation after the reports were done. Best practice would see a more candidate-specific approach to reference checking and a genuine consideration of any issues raised in the final ranking of candidates.

Psychometric assessments can count towards the three capability assessments required in a GSE Rules-based comparative assessment. They are not mandatory, but they are used frequently by agencies. The Public Service Commission, in its *Recruitment and Selection Guide*, provides instructions on the administration and scoring of these assessments.

In the STIC Americas process, these tests were administered after the selection panel had completed its work. They were not used to inform rankings. They were not used to identify issues that might usefully be explored with referees. Other than the fact that they were done, it is not clear to me what purpose they served in the process.

Psychometric testing can be a useful tool in recruitment if the right tests are chosen, they are administered correctly, and the results are interpreted and used in the right way. There is no evidence that this is how they were used in this process. Rather, they seem to have been done at the end of the process at the same time as things like police checks. A psychometric test is not a diagnostic tool of some kind to be used at the end of a process; if it is used, it should be used in line with the relevant guidance in the Public Service Commission's *Recruitment and Selection Guide*.

It was brought my attention during the course of this inquiry that there is some concern about the way psychometric assessment is being used more generally in recruitment in the NSW government sector, particularly given its expense. While this was the observation of only a couple of people in the process, it is likely to be useful to understand whether this is a general problem. I make recommendations in this report for the Public Service Commission to conduct a review into how psychometric testing is being used in recruitment in the NSW public sector.

### 5.5.2 The management of conflicts of interest

I have some concerns about the approach to considering conflicts of interest in the first recruitment process, both in terms of decision making and disclosure.

In selection processes what typically matters most is that those involved in the assessment of candidates transparently disclose which candidates they know and the nature of the relationship. For instance, an assessor may be the supervisor of a person but have no relationship with them outside work. On the other hand, one might be both a supervisor or peer and have a social relationship. For the integrity of selection processes, this is one of the most critical disclosures for assessors to make. The *Code of Ethics and Conduct* provides specific guidance on how to manage conflicts of interest, both actual and perceived - one of the examples used to illustrate this issue in the Code pertains to selection panels.

While I have not seen documentation to verify that panel members specifically disclosed their prior knowledge of candidates, I am advised by panel members, including the convenor, that this occurred prior to the interviews commencing.

While the selection panel would have been aware that Ms Brown was professionally close to Ms West, it is not evident to me that what Ms Brown has described under oath as a friendship was known to the rest of the panel. Ms Brown has since clarified for me that she had no social relationship outside of work with Ms West but, rather, her use of that term referred to her positive working relationship with Ms West at the time.

Because Ms West had managed the STICs recruitment process she had had access to progress reports and other communications sent by NGS Global to Investment NSW staff. She was copied in on certain emails that relate to the STIC Americas process.

Ms West submitted an application after the closing date. The advertisement I reviewed requested applications by 26 April 2021. This is consistent with Ms Brown's evidence to the Parliamentary Accountability Committee Inquiry. Ms West formally applied after that date; the material provided to me indicates that she applied on 12 May 2021; this is also consistent with evidence given by Ms Brown in the Parliamentary Accountability Committee Inquiry. The chronology provided to me by Ms West, through her lawyers, also indicates that the application was lodged on 12 May 2021, albeit with a letter dated 4 May 2021.

There is some documentation that supports that Ms West had access to material that included details about candidates for the STIC Americas role. I have not seen evidence that indicates whether Ms West did in fact access the material that was sent to herself and others.

When Ms Brown was considering Ms West's candidacy, whether in respect of a late application or not, it would have been appropriate for her to turn her mind to whether or not Ms West's prior involvement raised flags in terms of any possible advantage. Ms Brown did not do so and has indicated to me that it was Ms West's duty to declare the conflict and that she (Ms Brown) could not be expected to know the full detail of Ms West's involvement.

On the evidence available to me, it also does not appear that a disclosure was made to the rest of the panel by Ms Brown to the effect that:

- she had received and accepted a late application from Ms West;
- that in considering that request, and her candidacy more generally, she had taken account of whether, due to her earlier responsibility for the STICs recruitment processes, Ms West may have had any unfair advantage.

Accepting late applications is at the discretion of the convenor and is usually granted up to the time of shortlisting so, in and of itself, is not a problem. However, in considering whether or not to grant the request I consider that Ms Brown should have:



- sought to understand the precise nature and extent of Ms West's involvement in the process; and,
- whether, as a result of that understanding, there was a conflict that would preclude Ms West either from applying or require her to be managed in some other way.

While Ms West herself had obligations at the time regarding conflicts of interest, she is no longer a public servant, and I am not able to require her to answer questions. Through her lawyers, I made Ms West aware that this is an issue before me and provided an opportunity to raise any matters with me that may be relevant. I have had no further contact since raising this with Ms West's lawyers on 3 August 2022.

In my view, and regardless of the previous point, Ms Brown should have made the assessment referred to above and disclosed the relevant facts and assessment to the remainder of the selection panel.

### 5.5.3 The briefing of ministers and related matters

A great deal of public commentary on the first recruitment process has related to the briefing of ministers after the assessment of candidates had been completed. Ms Brown gave evidence on 29 June 2022 indicating that she had provided written advice for several ministers (then Premier Berejiklian, then Treasurer Perrottet, then Deputy Premier Barilaro and then Minister Ayres) asking them to note that Ms Jenny West had been assessed as the preferred candidate for the STIC Americas posting. I have reviewed those briefing notes.

I do not see a problem with the fact of ministers having been briefed about where this process was up to. If any of these ministers had requested a briefing on the matter, they would have been entitled to the material contained in these noting briefs. Ministers were not being asked to approve anything, they were being asked to note that a preferred candidate had been selected and that the process was under way to complete the appointment.

In respect of the first process, the following comments were attributed to former Secretary Jim Betts in communications between Ms Brown and her office: that he "strongly recommends that the recruitment reports fully signed by each panel member be completed before the brief is sent up to the Minister, in anticipation of them messing with due process".

I discussed these comments with Mr Betts when I interviewed him. He agreed that he had made these remarks. He was very clear with me that his concerns were general in nature rather than being a reference to any specific knowledge he had. He was of the view that there may have been members of the government that favoured a different model for appointing STICs and that, were such a model put in place, it could potentially disrupt completing the first recruitment process and, hence, delay the rollout of the initiative.

### 5.5.4 Were suitable candidates identified at the end of the process?

A considerable level of attention has been paid as to whether, prior to the decision to appoint Mr Barilaro as the STIC Americas, there were 'no suitable candidates' for the role emerging from the first process.

As I conclude in 5.4 above, at the end of the first recruitment process two candidates had been assessed as suitable for appointment: Ms Jenny West was the preferred candidate and Mr Rob

Fitzpatrick was assessed as suitable for appointment and recommended for inclusion in a talent pool.

Ms Brown gave evidence to the Public Accountability Committee Inquiry on 29 June 2022 during which, in response to questions, she discussed the basis upon which she had formed the view that there were no suitable candidates by the date upon which the first recruitment process was completed. I have interviewed Ms Brown on three separate occasions since this evidence was given and have put questions about the suitability of candidates. In summary, Ms Brown considered the following things in respect of this question:

- the impact of the 27 September 2021 decision of government, which she described to me as the main factor;
- things she considered relevant arising from post-assessment issues relating Ms West.

The issues referred to in the last dot point were the subject of evidence given by Ms Brown in camera at the hearing referred to above. These issues were also the subject of evidence given by Ms Jenny West to the Public Accountability Committee Inquiry on 11 July 2022.

Importantly, other than the impact of the decision of government, there was no specific consideration of anything relating to Mr Fitzpatrick's candidacy between the finalisation of the selection panel's assessment and Ms Brown closing off the recruitment process.

I cannot see how it was open to Ms Brown to interpret the decision of government as in any way going to the question of candidate suitability. The Government decided to:

- adopt a model of ministerial appointments for STICs;
- grandfather STIC postings that were already in place;
- terminate any of the STIC appointment processes that were on foot at the time of the decision.

The effect of the decision of government was to quash Ms Brown's discretion to appoint from these processes; it did not - and could not - speak to candidate suitability.

The following are excerpts from Ms Brown's evidence to the Public Accountability Committee Inquiry on 29 June 2022, that relate to questions from Committee members as to whether there were suitable candidates at the end of the first recruitment process:

"...I gave that candidate early visibility that government was considering the policy change in terms of the basis of appointment of STICs. So she had been aware for a couple of weeks before the news was delivered. And then, of course, the news was confirmed, as I just said, on 1 October. She was extremely upset about that, understandably so. And so, to me, the fact that we couldn't appoint anyone for some period of time, and the fact that she was very unhappy with the arrangements and government, the whole situation felt quite irreconcilable."

And later,

"The reason the relationship with the candidate was irreconcilable wasn't just because government was changing its mind. I had some concerns about the candidate and their suitability for the role from mid-September onwards."

And later again,

“I first informed the candidate on 17 September that things were likely to go this way, and it was then that the relationship between the candidate and Investment NSW became troublesome. By 1 October when I, as decision maker, officially closed the recruitment process, I was of the view that there were no suitable candidates.”

Ms Brown’s comments to me during our interviews were consistent with the statements above. The communication of the changed model had provoked a negative reaction by Ms West. In response to this reaction, Ms Brown determined to do further ‘due diligence’ regarding Ms West. In seeking views about Ms West generally, she became aware of matters that were of concern to her in respect of appointing Ms West.

These matters were the subject of the evidence referred to above.

Although Ms Brown did not test any of the issues covered in that evidence with Ms West, she clearly indicated that, in her mind, these issues rendered Ms West unsuitable for appointment. It is also clear that Ms Brown believed that the decision of government had in some way rendered Mr Fitzpatrick unsuitable for appointment.

Under questioning during the Public Accountability Committee Inquiry, Ms Brown was asked whether a direct appointment could have been made under the modified process that applies to overseas trade employees. She replied that “that would not have been best practice”. Indeed.

The reality is that Clause 10A would allow for what is effectively a direct appointment; the normal requirements for multiple assessors do not apply and there is nothing to preclude the decision-maker being the sole assessor. However, Ms Brown did not choose such a process. She put in place an approach where multiple assessors were determining suitability.

My assessment of the material before me suggests that Ms Brown should have more comprehensively and precisely disclosed the situation and characterised it along the lines that: two candidates were determined as suitable by the selection panel, but that in respect of one candidate she was not prepared to exercise her discretion to appoint, and that, in respect of the other, she wanted to retest the market rather than going straight to the talent pool.

My concerns with this aspect of the process are fourfold:

- the assessment of candidates was undertaken through a process where an appropriately qualified group of people were making a judgement using clear criteria - the later decision by Ms Brown was unilateral and made without using clear criteria; and, because of this,
- two people who were assessed as suitable were subsequently described as not being suitable;
- other panel members feel that they are implicated in this assessment, when they were not consulted (one in particular feels that he has been used in the process);
- ministers were given an incomplete and, hence, misleading picture.

These points notwithstanding, Ms Brown clearly believed that by the time she was briefing former Minister Ayres and the Premier, she had determined that there were no suitable

candidates. While the evidence suggests that this may not have been an entirely reasonable belief, it was Ms Brown's belief and, as such, I conclude that there was not an intention to mislead.

## 5.6 Conclusions

### 5.6.1 Did the process comply with the GSE Act and GSE Regulation?

In respect of the first recruitment process, the applicable elements of the GSE Act and GSE Regulation, as they relate to process requirements, were generally followed by Investment NSW. This is largely because the GSE Regulation requires a less prescriptive approach for STICs than GSE Rules-based recruitment processes.

However, there are matters of real concern about whether the conduct of the process took proper account of the *Code of Ethics and Conduct*.

### 5.6.2 Were conflict-of-interest obligations addressed adequately through the process?

No. Conflicts of interest have not been managed fully in keeping with the requirements of the *Code of Ethics and Conduct* (as given effect through the DPC Code). I reach this conclusion in respect of a failure on the part of Ms Brown to consider relevant factors in accepting a late application from a candidate who had had, through the normal course of their duties, access to information about other candidates in the process. Also, there was no disclosure of this matter to other panel members during the panel's discussion of conflicts of interest.

Ms Brown has provided a response to me on this point. She acknowledges that this matter was not well handled and has provided her perspective on things that affected her handling of the matter. I have considered those responses and, while some elements of the response set out circumstances that created complexity for Ms Brown, they do not alter my view as to the lack of responsiveness to the Code. This is particularly the case given that in those submissions, Ms Brown acknowledges that at the time she was more generally considering Ms West's ongoing involvement in STIC recruitment processes. Some of the broader contextual matters raised in Ms Brown's response are addressed in Section 7.

In so concluding, I am making no observations or findings about Ms West. Ms West is no longer a public servant, and I am unable to put to her issues that have been raised about: her early involvement in the STICs recruitment process; the timing of her recusal from the process; her late application; whether she had accessed the material available to her about other candidates.

Finally, while it appears that panel members disclosed their prior knowledge of candidates at the beginning of the interview process, the documentation of the process does not provide definitive proof of this.

### 5.6.3 Were suitable candidates identified at the end of the first recruitment process?

Yes. The selection panel determined that two people were suitable at the end of the first process, a preferred candidate and one that was recommended for inclusion in a talent pool. In

respect of the first recruitment process, there were suitable candidates identified and information provided to ministers to the contrary had the effect - through lack of precision and comprehensiveness - of being misleading.

The selection panel at no time reversed its assessment, nor was it consulted again on either of the candidates in respect of their suitability or otherwise. One of the two candidates was involved in the second recruitment process which shared two panel members in common; I address that assessment separately in section 7 of this report.

For reasons outlined at 5.5.4, Ms Brown is of the view that, after the assessment process, she determined that neither of these candidates were suitable. While she came to this conclusion after assessing matters she deemed relevant in respect of one candidate, the decision in respect of the other candidate appears both arbitrary and not in keeping with the process that Ms Brown herself had put in place to assess suitability. Ms Brown said that she felt the other candidate, on further reflection, lacked the 'boldness and presence' for the STIC Americas role.

That said, and for reasons also outlined in 5.5.4, Ms Brown does not appear to have intentionally misled.

#### 5.6.4 Were other issues identified regarding the process?

Yes, As identified in 5.5.1, psychometric testing may not be being used optimally in NSW public sector recruitment processes.

Also, reference checks should be integral to a panel's deliberations, not something done afterwards and provided for information to panel members.

### 5.7 Recommendations

- 5.7.1 Section 10A of the *Government Sector Employment Regulation 2014* should be amended so that it applies the full GSE Rules-based process to the future selection of overseas trade employees who are STICs. The elements of 10A that allow atypical contract arrangements should not be changed, given that model contracts that apply more generally in the NSW Public Service are unlikely to be fit-for-purpose in overseas jurisdictions.
- 5.7.2 The *Government Sector Employment Act 2013* should be amended to legislate a *Code of Ethics and Conduct* rather than relying on the Public Service Commissioner's direction power to achieve sector-wide application of a Code.
- 5.7.3 That the DPC Secretary, as the person exercising employer functions (under delegation) for Ms Brown, considers what, if any, action to take in respect of the conclusions referred to at 5.6.2 above. In doing so, the Secretary should take account of the contextual factors contained in this report as well as any matters Ms Brown wishes to be factored into his consideration.
- 5.7.4 The Public Service Commissioner should review the *Recruitment and Selection Guide* to provide more detailed advice to:
  - ensure that reference checks factor into the final ranking of candidates by assessors;

- clearly delineate the roles of assessors and providers of professional services to assessment panels.

5.7.5 The Public Service Commissioner should undertake a review of the use of psychometric assessment in the NSW Government Sector to determine: how these assessments are being used; whether current practice is in keeping with the Recruitment and Selection Guide; and recommendations for improving the use of these assessments.

## 6 Between the first and second recruitment processes

### 6.1 What was examined in this part of the inquiry

A number of matters were considered in looking at what happened between the first and the second recruitment processes:

- the decision by the Government to adopt a different model for appointing STICs and its consequences for the process being run by Investment NSW;
- the impact of that decision on the preferred candidate (Ms Jenny West) given its consequences for the first recruitment process;
- the reconsideration of the suitability of candidates by Ms Brown;
- the decision to start a second recruitment process.

### 6.2 How these matters were examined in this part of the inquiry

I have reviewed the Cabinet documents that are relevant to this inquiry. Without explicitly waiving privilege, aspects of the Cabinet process related to the STIC Americas have already been referenced by Minister Ayres in addressing questions from the media. Cabinet decisions have also been referenced by Ms Brown in evidence given by her to the Public Accountability Committee Inquiry.

In addition to reviewing relevant documents, I have interviewed Ms Brown, Mr Carr, Mr Barilaro and Mr Ayres about matters considered in this section of my report.

I am not empowered - nor is it in my terms of reference - to examine Cabinet's deliberations, including the motivations for or timing of Mr Barilaro bringing forward a submission to change the process for appointing STICs.

Section 83 inquiries under the GSE are to examine matters related to the administration and management of a government sector agency. The *Ministerial Code of Conduct* is a matter for the Premier and is also an applicable code within the meaning of the *Independent Commission Against Corruption Regulation 2017*. A section 83 inquiry under the GSE Act is not the vehicle for examining any matter that may raise questions about whether there has been a breach of the *Ministerial Code of Conduct*.

### 6.2.1 Decisions of government on appointment processes - relevant history

The manner by which STICs would be appointed has lacked clarity since the decision was taken in 2019 to establish the Global NSW Strategy.

The decision taken at this time had these roles being brought to Cabinet for appointment on the joint proposal of the Premier, Deputy Premier and Treasurer. However, the decision did not have the effect of establishing a new employment mechanism to allow for Cabinet appointments; that is, at the time of the decision, Clause 10A of the GSE Regulation applied to STICs (by virtue of them being captured by the definition 'overseas trade employees' in the GSE Regulation) and it continued to apply afterwards.

It was not until two of the STICs were taken to Cabinet in early 2021 that the incongruence between the original decision and the available mechanism for appointment was properly understood: notwithstanding the original 2019 Cabinet decision, if the appointment of STICs was to move forward, they would need to be GSE appointments and, as such, would not be considered by Cabinet unless and until some alternative set of arrangements was put in place that made the appointments the responsibility of a minister.

The STIC Americas recruitment was commenced by the newly created Investment NSW in April 2021 as a GSE process, which was the same process as Treasury had used for the earlier appointments. It effectively concluded when ministers were briefed on the outcome in mid-August 2021 and Ms West was verbally offered the role on 12 August 2021, but Ms Brown did not formally conclude the process until 1 October 2021.

A decision of government - taken on 27 September 2021 - to change the method of appointment of STICs thus became a critical event in respect of the matters being examined in this inquiry.

A number of crucial things turn on this decision, so for the sake of clarity I have quoted directly from the decision those elements that have had a direct bearing on matters I have considered. My view is that the public reference to elements of the decision has effectively waived privilege; but to be clear, I am citing the decision, not revealing matters relating to the deliberations of Cabinet in reaching the decision. The relevant sections of the decision state that Cabinet approved:

- the drafting and tabling of a Bill in the NSW Parliament to provide for the appointment of an Agent-General for NSW and Commissioners for NSW as statutory officers, and that these appointments be made by the Minister for Trade, subject to prior endorsement by Cabinet;
- that Investment NSW takes reasonably required action on current appointees, including grandfathering existing appointments into statutory officer arrangements and unwinding contractual agreements for those who have not yet commenced.

In relation to this inquiry, the decision above had the effect of not allowing the Chief Executive of Investment NSW to finalise the appointment of the preferred candidate to the STICs America role, notwithstanding that an informal offer had been made in August 2021 and that contractual discussions were on foot.

Importantly, the decision did not - and could not - render the candidates identified as suitable for the STIC Americas role as unsuitable.

This decision became government policy on and from 27 September 2021. I am not aware that any target date was agreed to for the development of the Bill referred to above. However, at the time the decision was taken, there were only eighteen sitting days for the remainder of the 2021 Parliament calendar. It is also the case that Investment NSW had identified a number of complex matters that would need to be addressed in any legislation.

At the time the former Deputy Premier resigned from the Ministry in early October 2021, there was no detailed plan for the development of the legislation, nor had the development of drafting instructions commenced. Given all this, it seems highly unlikely that a Bill could have been developed and taken through all stages of the legislative process before the end of 2021.

This is important because it makes clear that the decision of 27 September would, in all likelihood, create very significant delays in the rollout of the Global NSW Strategy.

Both Ms Brown and the Hon. Stuart Ayres MP (when he was still Minister for Trade) agreed that discussions they had in early October indicated the then Minister's preference to proceed with appointments under the former GSE process.

The then Minister confirmed to me that he had taken the matter of recommencing the old process to the Strategy Committee of Cabinet on 8 November. This too is already on the public record.

Having reviewed the record of the 8 November meeting, it is not at all clear to me that Cabinet has formally reconsidered the policy it made on 27 September. There is no formal submission to reconsider the policy, nor is there a decision that formally overturns it.

Ms Brown has expressed to me her confusion as to the exact standing of the decision when she commenced the second recruitment process. She has not seen an explicit decision to overturn the 27 September decision and, as I state earlier, neither have I. Consequently, I have some sympathy for the view that she has expressed to me and elsewhere that she felt she was in 'a grey zone' on this matter.

Ms Brown has indicated to me that she sought to clarify the standing of the decision with the General Counsel of DPC but remained unclear as to the outcome of the 8 November meeting. In submissions to me, Ms Brown also indicated that she had sought clarity on the matters from the then Minister.

On balance, I believe that Ms Brown ultimately formed the view that she had sufficient authority from the then Minister to proceed, and that the exact terms of the November 8 decision of Strategy Committee of Cabinet were a matter for then Minister Ayres.

The 'no regrets' process here would have been to make clear to the then Minister that the process could proceed only up to the point of selecting a preferred candidate; no conclusion of the process could occur until there was absolute clarity about whether the policy put in place on 27 September 2021 held or not.

I am not making a finding in respect of Ms Brown regarding this matter. I make recommendations regarding as to how Secretaries and Agency Heads should clarify matters regarding Cabinet decisions where there is uncertainty about their status or interpretation.



## 6.2.2 The effect of the decision on the appointment of Ms Jenny West

As has already been established, two candidates were originally assessed as suitable for the role of STIC Americas. Ms Jenny West was identified to the then Premier, Treasurer, Deputy Premier and Minister for Investment as the preferred candidate. These briefings were provided to the relevant Ministers on 11 August 2021; on 12 August 2021, Ms West was told by Ms Brown that she was the preferred candidate.

In the normal course of events, once such an offer is made the process would move fairly quickly to a formal offer in writing. This did not occur in this instance due, initially, to a complicated set of matters that would need to be resolved before a formal offer could be made and an appropriate contract executed. These issues generally related to matters that would have to be considered in developing the contract.

Materials reviewed by me, including Investment NSW records as well as materials provided by Ms West show a very active interaction about moving the appointment forward up until 17 September 2021.

Ms Brown requested a meeting with Ms West on 17 September at which point the likelihood of a change in arrangements was flagged. This was followed up with a communication the day after from Ms Brown advising that the contract could not progress until the outcome of a Cabinet deliberation was known.

Cabinet agreed to Mr Barilaro's proposal on 27 September 2021.

Following this decision, Ms Brown advised Ms West of the outcome. Ms West goes on sick leave from 1 October. Ms Brown has since indicated that on this same date, she determined that there were no suitable candidates from the first recruitment process.

In between Ms West going on leave and returning, the former Deputy Premier, John Barilaro resigns from the Ministry and on 5 October, the Hon. Stuart Ayres MP becomes the Minister for Trade.

On 11 October, Ms West emails the new DPC Secretary advising him of her situation. The correspondence is a short request, to which is appended other material related to Ms West's work and professional experience. It is not, as has been described, a 'dossier'. Mr Coutts-Trotter, new to the role, refers the letter on to Investment NSW.

Ms West returns to work on 13 October and the following day is advised that she will not be getting the STIC Americas role. Ms Brown is aware by this stage, following a meeting with Minister Ayres, that the new Minister's preference is to proceed with GSE recruitment rather than deal with the delays that new legislation would create. Ms Brown has indicated to the new Minister by this stage that it is Ms Brown's view that there are no suitable candidates and she wishes to test the market again. Ms West takes leave again.

During a discussion between Ms West and Ms Brown on 14 October, Ms West alleges that Ms Brown told her that the STIC Americas role would be a 'present' for someone. Ms Brown denies making that comment although she agrees that she made a generally negative comment about the appointment process being taken out of the GSE arrangements and made into ministerial appointments. Mr Ayres also categorically denies ever having said anything of that type.

Ms West and Ms Brown had had prior discussions that she would not be retaining Ms West's substantive role in the new structure for Investment NSW and, in early November, Ms Brown commenced the process to delete Ms West's position.

I have reviewed the material relevant to this. Mr Coutts-Trotter was formally briefed about the deletion of the role and wrote to Ms West on that basis. He first wrote to indicate his intent to remove her from the position that was to be deleted and invited a response within a specified period of time. No response has been provided to me as part of my examination of this element of the process, either by Ms West through her lawyers, or by Investment NSW. Mr Coutts-Trotter wrote a second time later in November to terminate Ms West's employment.

Ms West received compensation for the termination within the terms of the GSE Regulation.

Ms West, in the short space of two months went from being the preferred candidate for a significant role for which she had been assessed as suitable, to being no longer employed in the NSW Government. This is as a direct consequence of the decision to change the appointment process combined with the structural changes that were being made in Investment NSW.

Ms Brown has indicated to me that without the decision taken on 27 September, she believes that in all likelihood Ms West would have been appointed to the role. Ms Brown acknowledges that the events that gave rise to her reconsidering Ms West's suitability would not have arisen except for the change in approach.

I have made comments in Section 5 about my views as to the way in which Ms West came to be considered as unsuitable for the role by Ms Brown. I will not repeat them here.

From the material I have reviewed and the discussions I have had, I concur with Ms Brown's assessment that, absent the decision of the Government, Ms West most probably would have completed the appointment process. But that is speculation and I cannot make a finding in that regard.

In respect of the deletion of Ms West's role, this appears to have been done in line with a prior decision regarding roles and structure, and the process was carried out in the procedurally correct manner.

## 6.3 Conclusions

6.3.1 The NSW Government, through a Cabinet decision of 27 September 2021, determined a policy to change the method of appointing STICs from the GSE process that was being used; they would become ministerial appointments under statute, in line with the original Cabinet decision of 2019 that had set up the Global NSW Strategy.

That September 2021 decision had the effect of stopping any process to appoint a STIC that was on foot at the time of the decision; the decision explicitly instructed Investment NSW to take reasonably necessary action to 'unwind' contractual arrangements where the STIC was not yet in post.

It is not within my terms of reference, nor within the powers available to me, for this inquiry to examine the motivation and timing for this decision. I discuss this matter further in Section 6.2.

Investment NSW did not initiate the proposal to change the appointment process. Indeed, Investment NSW had concerns about a number of complex legal issues that it felt might arise in a statutory appointment model. Investment NSW assisted the then Deputy Premier's office in the usual way in the preparation of a Cabinet Submission.

- 6.3.2 In respect of the commencement of a second recruitment process under GSE arrangements, I can see no evidence that the Government has formally overturned the policy referred to in 6.3.1 above.

While it is the case that Strategy Committee of Cabinet received an update on the issue of STIC appointments on 8 November 2021, there is no decision recorded that explicitly overturns the previous policy, neither was there a formal submission seeking to do so.

The former Minister for Trade (Hon. Stuart Ayres MP) indicated to me that he believed that the 8 November meeting had the effect of overturning the policy. However, the record of the meeting provides no definitive position on this.

I am interested in this matter only insofar as it goes to the question of whether Investment NSW should have initiated and concluded the second recruitment process. I have concluded that, while I believe that Ms Brown could have done more to be absolutely certain about the status of the policy, there was genuine confusion on her part as to the policy status. I make no adverse finding in respect of Ms Brown's actions in starting the second recruitment process. I discuss this in Section 7.

## 6.4 Recommendations

- 6.4.1 The Department of Premier and Cabinet should ensure that all Secretaries, Agency Heads, and Band 3s understand how to clarify the standing of a decision of government where there is doubt. This should be attended to during induction to the public service and on promotion to these levels.

# 7 The second recruitment process

## 7.1 How the second recruitment process was examined in this inquiry

I have had access to all documentation related to the second recruitment process for the STIC Americas role. This includes all documents relating to the sourcing and selection of candidates and the conduct of the selection process. I have also reviewed the transcripts of the hearings to date of the NSW Legislative Council Inquiry (Public Accountability Committee) into the appointment of Mr John Barilaro as the Senior Trade and Investment Commissioner to the Americas.

In addition to reviewing documentation, I have interviewed each member of the selection panel.

I have also interviewed the first, second, and third ranked candidates.

I examined the process against the relevant provisions of the GSE Act, GSE Regulation and GSE Rules; I also considered relevant directions made by the NSW Public Service Commissioner regarding the *Code of Ethics and Conduct* and the related codes that applied during the second recruitment process. I examined the documentation that underpins the Talent Acquisition Scheme, the panel arrangement under which NGS Global were engaged to assist Investment NSW with the second process.

After considering the issues that surfaced through this assessment, I formed preliminary views and draft findings and then exposed these to affected parties. I invited those parties to respond and then considered their responses in finalising this report.

## 7.2 The approach used for the recruitment process

As discussed previously, the operation of clause 10A of the GSE Regulation allows for overseas trade employees to be recruited without the need to comply with the relevant provisions of the GSE Rules. Clause 10A (5) says:

“Persons may be employed as overseas trade employees without compliance with the government sector employment rules on merit-based employment. However, any decision to employ a person as an overseas trade employee must be based on the person’s appropriateness for the role concerned having regard to the nature of the role and the person’s qualifications, skills and experience.”

This gives the Secretary or their delegate significant discretion in determining the approach that will be used. Notwithstanding this level of discretion, the provisions referenced above - combined with relevant provisions of the GSE Act (Part 2, Ethical Framework for the Government Sector), and the *Code of Ethics and Conduct* issued as a Commissioner’s Direction under the GSE Act (Sections 2.2 - The Ethical Framework for the Government Sector, and Mandatory Conduct) require that recruitment decisions are made on the basis of merit, albeit in this instance without the obligation of determining merit through the process prescribed in the GSE Rules.

In the case of the second recruitment process for the STIC Americas, Ms Brown again chose to put in place arrangements that at least superficially had the features of a compliant process for a ‘comparative assessment’ within the meaning of the GSE Rules:

- an executive search firm (NGS Global) was engaged under the relevant NSW Procurement scheme;
- the role was advertised, albeit with a relatively short exposure time and very close to the Christmas/New Year season;
- candidates were identified through executive search and through responding to the advertisement;
- a selection panel was formed;
- candidates were screened by NGS Global and a shortlist recommended - notably with some consultation with then Minister Ayres;
- the selection panel agreed a shortlist;

- the selection panel interviewed all but one of the shortlisted candidates;
- referees checks and other assessments were undertaken.

However, there were aspects of the second recruitment process where individual elements had important irregularities. I outline the process in detail below.

The key matters I am considering are framed in the terms of reference:

- details and outcomes of all recruitment and selection processes that were commenced in relation to the role of Senior Trade and Investment Commissioner to the Americas, including arrangements for managing actual and perceived conflicts of interest;
- whether those processes complied with the GSE Act, rules and regulations made under the GSE Act and any other applicable laws and policies.

### 7.3 The requirements that applied to the process

As identified in 7.2 above, the *Government Sector Employment Regulation 2014* - clause 10A - has specific implications for considering what should have happened in the second recruitment process. I set out below both what would typically apply in a GSE Rules-based process and what has been done in this process.

Section 7.3.1 immediately below repeats material presented at 5.3.1 in the discussion of the first recruitment process. It is repeated here to assist readers to understand the process requirements without needing to flip back through the report.

#### 7.3.1 How does a fully GSE-compliant process work?

This section repeats the material in 5.3.1.

There are several elements of the GSE Framework that have specific application in respect of recruitment. The key elements are:

- GSE Act, Part 2, Ethical Framework for the government sector;
- GSE Act, Section 13, Directions by Commissioner to the heads of government sector agencies;
- GSE Act, Section 36, Government sector employment rules relating to senior executives;
- GSE Regulation, Clause 10A, Overseas trade employees
- GSE Rules, Part 3, Merit-based employment.

In essence, and taken together, these provisions set up a system wherein:

- recruiting and promoting on merit is enshrined in the ethical framework that applies to the government sector;

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- the Code of Ethics and Conduct gives expression to the ethical framework in the form of a Commissioner's Direction to Secretaries and Agency Heads - the Code sets out mandatory conduct that, relevantly, deals with recruitment and promotion based on merit;
- the GSE Rules set out the mandatory processes that are required in order for a process to be considered as merit-based;
- the GSE Regulation switches off the aforementioned rules in respect of overseas trade employees.

If the STIC Americas role had been treated as a Public Service Senior Executive **without** the effect of Clause 10A, the process would have required:

- advertising the role, except in certain circumstances;
- assessing the claims of individuals against pre-established standards for the role;
- assessing the claims of individuals against other claimants for the role.

Importantly, that process must include:

- screening for essential requirements;
- reviewing an application and resume;
- at least three capability-based assessments, one of which is an interview;
- more than one assessor being involved in the assessment.

With the application of Clause 10A of the GSE Regulation, the process for the STIC Americas makes clear that anyone employed as an overseas trade employee can be employed without compliance with the GSE Rules on merit-based employment. However, it does place an obligation on the decision-maker to employ a person based on their appropriateness for the role concerned, having regard to the nature of the role and the person's qualifications, skills and experience.

In simple terms, this does not have the effect of negating the merit-based principles set out in the GSE Act; rather, it allows for a different process to satisfy those principles in respect of a particular class of employees.

The effect of this clause of the GSE Regulation does not relieve people involved in the recruitment process from their obligations under the *Code of Ethics and Conduct*. Relevantly, it is the *Code of Ethics and Conduct* that sets out the obligations of public servants regarding conflicts of interest.

## 7.4 What were the features of the second recruitment process?

### 7.4.1 Advertising

The second recruitment process started with an atypical advertising process. In my discussion with panel members from the first recruitment process and Dr Broadbent, it was apparent that people were of the view that the field for the first process was not as deep as they had hoped. Given that, and also that the first recruitment process had not resulted in an appointment, both the timing and duration of the advertised period for the second STIC Americas recruitment process seem odd if the goal is to produce a deeper pool of candidates.

Advertising immediately before Christmas for a key role would generally be regarded as sub-optimal. In 2021, after a year dominated by disruption and disconnection, the placement of an advertisement in a single newspaper, accompanied by the mandatory online exposure through the *I Work for NSW* website - both for short durations - was unlikely to produce high visibility of the roles.

That said, where executive search is being used, advertising typically yields fewer of the ultimately shortlisted candidates than are identified through the targeted search process.

At the end of the advertised process, applications were received from both people who were responding to the ad and people who had been identified by NGS Global.

### 7.4.2 The selection panel

To assess candidates, Ms Brown established a new selection panel, comprising: herself as convenor; Ms Kylie Bell (A/Managing Director Trade & Investment at Investment NSW and a subordinate of Ms Brown's) as a member; Ms Kathrina Lo (NSW Public Service Commissioner) as an independent member; and the Hon. Warwick Smith AO (businessperson and former parliamentarian) as an independent member. Ms Brown and Mr Smith had also been members of the selection panel for the first recruitment process.

An independent member of a selection panel is a member who does not work in the hiring agency. He/she/they are usually a person from another NSW Government Sector agency or an external person with relevant expertise in the field related to the role. In this case, with Ms Lo and Mr Smith, the panel had both.

A note on terminology: the term 'hiring agency' refers to the government department or agency that is hiring a person; 'recruitment agency' refers to the professional services firm used to support a recruitment process, in this case NGS Global. These terms are not interchangeable.

### 7.4.3 Shortlisting

Shortlisting for the roles took place in February 2022. There are two notable features of the shortlisting process here.

Firstly, a candidate who had been assessed as suitable for appointment in the first recruitment process, Mr Rob Fitzpatrick, applied in the second round. While shortlisted for interview, he was not interviewed. The selection panel members agree that he was not interviewed on the basis of advice from Ms Brown that he had recently been interviewed in the first recruitment

process (which had occurred 9 months prior) and there was no need to interview him a second time. NGS Global's shortlisting report notes that he was regarded by the selection panel members in the first recruitment process as appointable to the role.

Secondly, Ms Brown discussed the shortlist with then Minister Ayres, including seeking his views as to whether to include a candidate about whom she had some concerns relating to that candidate's prior role. The fact of this discussion with the Minister was not known to the independent panel members. It was known to Ms Bell, through email communication to her from Ms Brown on 8 February 2022.

While ultimately this candidate (not Mr Barilaro) withdrew from the process prior to interview, it is highly irregular for a party outside the selection panel - in this case a minister - to be consulted on the makeup of a shortlist. It is even more problematic that the fact of it having occurred was not disclosed to the independent members of the panel by Ms Brown.

#### 7.4.4 Interviewing and ranking of candidates at the end of the interview process

Three candidates were interviewed on 15 March, two in person and one virtually, the latter due to the candidate being overseas and the difficulties of international travel at the time.

The interview guide for the second recruitment process followed the format of earlier processes and was broadly organised against the focus capabilities of the role. A standard interview format was followed.

The only remarkable aspect of the interview process is that the panel did not interview one of the shortlisted candidates.

There are quite different views among the panel members about when and how Mr Fitzpatrick was to be considered with respect to final rankings. Mr Smith in particular was of the view that the panel would loop back to Mr Fitzpatrick after the reference checks on the other two candidates.

At the end of the interview process the panel concluded that both Mr Barilaro and Ms Kimberley Cole had both interviewed well and were equally ranked. All panel members agree that at no stage in the process was Ms Cole the top ranked candidate, notwithstanding the fact that the first draft of the selection panel report suggested that that was the case. Three of the panel members had the two candidates equally ranked, Ms Lo had thought that Mr Barilaro was slightly ahead. The panel members have confirmed that they agreed that reference checks would be instrumental in determining who was to be the preferred candidate.

There is no formal record of where the selection panel, as a group, sat on the issue of rankings at this point in the process. However, each individual member has confirmed that there was no consensus as to the preferred candidate at the end of the interviews. The absence of a clear record becomes important in relation to the iterative development of the final selection panel report which I discuss later.

#### 7.4.5 Post-interview assessment and reference checking

Formal reference checking was undertaken on behalf of the panel by NGS Global. As discussed in Section 5, NGS Global use a 360-degree model for reference checking - a supervisor (past or present), a peer (past or present), a subordinate or direct report (past or present). It is the candidate who nominates who their referees will be. Sometimes, if there is concern about the



currency of the referee's assessment, the candidate may be asked to nominate an additional referee.

Referees were asked to answer a standard set of questions. Individual issues or concerns about the two candidates were not directly explored. This is unusual given that the selection panel was seeking to differentiate between two equally ranked candidates with totally different backgrounds and equally different strengths and weaknesses for the role.

Reference checking for this role took quite some time to complete due to the lack of availability of one of Ms Cole's referees. This is relevant to the time taken between the first and second drafts of the selection report.

There is a highly irregular feature of the reference checking process for the second recruitment process in that Ms Brown sought an 'informal' reference from then Minister Ayres. She also arranged for Ms Cole to meet with the Minister. She did not disclose either of these things to the independent members of the selection panel.

#### 7.4.6 Determining final rankings

Despite the fact that the panel had not concluded final rankings at the end of the interview process and had determined that reference checks would be central to settling a preferred candidate, the selection panel did not convene again as a group.

Ms Brown and Ms Bell agree that they discussed certain matters, including Ms Bell's informal reference checks related to Ms Cole. Ms Brown and Ms Lo agree that they had a phone conversation about reference checks; Ms Brown has indicated to me that both Ms Cole and Mr Barilaro were discussed in this call; Ms Lo recalls a discussion only about Mr Barilaro's references 'checking out'.

There are no contemporaneous file notes of this discussion.

Mr Smith has indicated that he had no discussions about the STIC Americas role with panel members after the interviews. He did not re-engage with the process until he was provided with the final selection panel report to sign, two days prior to the announcement of Mr Barilaro's appointment.

#### 7.4.7 The selection panel report

NGS Global prepared the first draft of the selection panel report after the interview process had concluded in March. This draft represented NGS Global's take on where the discussion had landed at the end of the interviews. It does not accord with the views of panel members.

The first draft includes candidate assessment commentary and rankings about Mr Fitzpatrick that differ from those in his assessment in the first recruitment process. Ms Brown maintains that she was unaware of these differences; NGS Global (Dr Broadbent) maintains that these modifications were made at the request of Ms Brown. There are not contemporaneous file notes of discussions that go directly to this point.

The second draft of the selection report was not provided by NGS Global to Investment NSW until late May. It incorporates adjustments to both Ms Cole's assessment and Mr Barilaro's, the former being less positive, the latter being more positive.

Neither the first nor the second drafts of the selection panel report were provided to the independent members of the selection panel. This is confirmed by Ms Brown as well as the two independent members and accords with my assessment of the documentation.

The final draft of the selection panel report includes edits made by Investment NSW. It was provided to NGS Global to issue to selection panel members for signature. Ms Brown has indicated that only formal references influenced the final form of the selection panel report and that 'informal' references were not factored in. I have no way of verifying this.

When the final selection panel report was provided to panel members to sign on 15 June 2022, there had been no additional panel deliberation on how the references had shifted rankings.

## 7.5 My assessment of the second recruitment process

### 7.5.1 Assessments against the elements outlined in 7.3

With respect to advertising, it does not appear to me that this was undertaken as a serious exercise in attracting candidates. While not mandatory for this process, it appears to have essentially been undertaken to fulfil what would usually be a requirement for GSE Rules-based recruitment.

Nobody has suggested to me a specific rational underpinning for having a role open for a short period of time in the Christmas/New Year period at the end of a very unusual and demanding year. However, I make no specific finding or recommendation in respect of advertising.

The selection panel for the process had both a breadth and depth of expertise and independence. I have no concerns about the composition of the panel, although I do think it is generally best to avoid having the direct report of a convenor on a panel; I make a recommendation about this matter.

I have significant concerns about the shortlisting of candidates, most notably the sharing of the shortlist with the then Minister and the seeking of the Minister's views about a specific candidate. These concerns are compounded by the fact that Ms Brown did not disclose to the independent members of the selection panel that this consultation had occurred. I discuss this matter in more detail in the next section.

With respect to interviewing and ranking candidates, there are a number of issues deserving attention.

The decision not to interview Mr Fitzpatrick does not seem fair to him. Either he was shortlisted - as the panel seems to agree he was - or he was not. To effectively outsource his assessment to a prior process does not put him on the same footing as other candidates. In one of her interviews with me Ms Brown indicated that his candidacy 'had faded' from consideration by the end of the process. Two of the four selection panel members had never interviewed him before and I have concerns about how his assessment is represented or, more accurately, misrepresented in the final selection panel report. Both Mr Smith and Dr Broadbent have indicated that they wanted more active consideration of Mr Fitzpatrick. Indeed, Mr Smith's notes, in his clearance of the final selection panel report, indicate that he supports the ranking in respect of the candidates that were interviewed. He told me that this was in reference to Mr Fitzpatrick's exclusion.

The interview format does not concern me. It followed a standard approach as described in Section 5.5 of this report.

The ranking of candidates should have been more explicitly discussed at the end of the interviews. It speaks to this point that the Public Service Commissioner and an experienced executive search consultant had a different view about the standing of candidates at the end of interviews than the other members of the panel: one evidenced by Ms Lo's interview with me; the other by the way the first draft of the selection panel report was presented. I discuss the issues arising from this in more detail in the next section.

In relation to post-interview assessment and reference checking, I also have significant concerns.

Firstly, when two such different candidates are so closely ranked, references should have been structured to respond to both the standard questions and to candidate-specific differentiators. Having read the references for both candidates, I cannot see how they were able to be relied upon to shift rankings to the extent that they did.

I acknowledge that the formal references do go to a point that Ms Bell discussed with me: that ideally, they were looking for a candidate with relevant trade/investment-related expertise, and with knowledge of both NSW and the relevant market (in this case the Americas). One can reasonably infer from the references that there is a point of difference between the candidates in respect of this criterion.

More problematic is the use of informal referencing as part of the process, particularly where Ms Brown has indicated that she sought the former Minister's views informally. This raises questions about the fairness of the process to candidates and the appropriateness or otherwise of involving a minister in what is effectively part of the assessment process.

In addition to informal reference checking of both Mr Barilaro and Ms Cole, Ms Brown arranged for one of these candidates only - Ms Cole - to meet with the then Minister.

Neither the informal reference checking nor the meeting referred to above were disclosed to the independent panel members. Based on my discussions with Ms Lo and Mr Smith, I am of the view that had such a disclosure occurred they would have challenged the integrity of the process and put on record their concerns. Ms Lo has reinforced that point repeatedly with me.

With respect to establishing the final rankings for candidates, again there are issues with the process. Most notable among these is the lack of a formal deliberation by the whole selection panel to conclude a position considering matters raised in the reference-checking process. Given the lack of a clear resolution at the end of the interviews and, as a consequence, the significance of references it beggars belief that it was not thought to be necessary for a formal deliberation to determine what the final rankings were and the basis for these.

I also think it is likely that, had there been such a deliberation, Mr Fitzpatrick's orphaned candidacy may have been more properly considered by the group as a whole. As it stands, he was never again considered in the process despite the fact that he was a shortlisted candidate and also despite the fact that the selection panel report presents as though he had been.

The development of the final selection panel report is also highly problematic. There is a strong difference of recollection and opinion between Dr Broadbent and Ms Brown about the first draft of the selection panel report. Ms Brown contends that it was not asked for and was inaccurate; Dr Broadbent contends, and her correspondence seems to support, that the

preparation of a first cut was consistent with the approach in other STIC processes and that the draft represented her view of where she thought the panel had landed. A simple polling or summing up at the end of the interview process would have put beyond doubt where the panel stood and what issues it was looking to explore in reference processes.

Dr Broadbent further contends that no issues of performance of service had been raised with her about the STIC Americas recruitment until she saw media reporting of evidence given by Ms Brown in the Public Accountability Committee Inquiry. Dr Broadbent describes a face-to-face meeting with Ms Brown in late May as cordial and raising none of the matters that have since surfaced. I have checked the relevant records and note that Investment NSW has both paid for the services, which requires an acceptance that the services have been performed, and has not lodged any dispute under the rules that apply to the Talent Acquisition Scheme (through which NGS Global was procured).

The final selection panel report was developed without an appreciable input from the independent members of the panel, to whom it was presented around three months after the interviews had taken place with the pressure of a tight turnaround due to the proximity of an impending announcement as to the outcome of the process.

By the time the independent members of the panel signed the report, Ms Brown has acknowledged, and the relevant documents confirm, that Mr Barilaro had been offered the job, and signed a contract. This was not disclosed to either of the independent panel members.

### 7.5.2 Major issues arising from the assessment of the elements of the process

There has been significant commentary on whether the second recruitment process was 'arm's-length' from the Government. In fact, the recruitment process that I am inquiring into has been defended by former Minister Ayres as having been at arm's length from government. I believe, therefore, that I must address this question.

I want to stress upfront that in respect of the employment of overseas trades employees, there is enormous discretion under the GSE Regulation as to what process is used to make an appointment. The process for the STIC Americas role could have built in a specific and transparent mechanism for consulting the responsible minister at the appropriate point in the process - after the selection panel had completed its assessment and determined its rankings. However, it did not.

Importantly, independent members of the selection panel (Ms Lo and Mr Smith) were unaware that any candidate was put before Minister Ayres and the bearing that may have had on ranking of candidates. So, while it was open to Ms Brown to put in place a process that was less arm's-length - in the sense that it included a formal role for the minister as described above - it would not be appropriate to defend the current process on the basis that it was.

The term 'arms-length' is generally understood to mean avoiding close contact. It would be hard to conclude that close contact between the decision-maker and the relevant minister - Minister Ayres at the time - had been avoided in this process.

There were at least three touchpoints:

- Investment NSW consulted with the Minister on the approach to advertising the role;
- there was a discussion between the Minister and Ms Brown relating to the shortlist;

- Ms Brown determined that the Minister should meet with one of the candidates, and that meeting took place.

Since providing this section of the report in draft form to the DPC Secretary, it has come to light that there were additional interactions beyond those listed above, including the 'informal' reference checking referred to in the previous section.

On the first of the three points above, internal Investment NSW communications record views attributed to Minister Ayres regarding job advertisement placement for the STIC Americas role. In the second of my discussions with Minister Ayres, he agreed that there had been a general discussion with him about the coverage of the advertising strategy.

An interaction of this type would not be typical in a selection process being run under the requirements of the GSE Act/Rules but is not material to the outcome of this process.

In respect of the second point above, an internal Investment NSW email indicates that Minister Ayres was consulted about the shortlist. That email, which is from Ms Brown to Ms Kylie Bell reads as follows:

"Hi Kylie, Min Ayres and I have run through the 'long'shortlist' and our recommended 'short' shortlist for NYC. He'd like to add [name redacted] to the short shortlist please. Looking forward to the interviews!"

There are differing accounts from the Investment NSW officers I interviewed as to why the Minister was consulted about a specific candidate, but the accounts agree that the consultation occurred. I can confirm that the candidate in question was not Mr Barilaro. I can also confirm that the candidate in question later withdrew from the process and was not interviewed.

Minister Ayres concurred in his second meeting with me that there had been a discussion about the shortlist with Ms Brown. He characterised this as a general discussion in which he did not request additions to or removals from the shortlist. Minister Ayres indicated that, at the time, he was concerned to ensure that the process would afford ample opportunity for women to be considered for the role.

Notwithstanding the content of the email quoted above, it does not appear that the addition of the candidate was at Minister Ayres request. He indicated to me that he did not know the candidate. I explained that the advice I had from Investment NSW was that there had been some media controversy surrounding the candidate in question and that he was being consulted to determine whether, if this candidate were to be successful, that controversy would present a problem. Minister Ayres was fairly emphatic that this specific issue was not ultimately canvassed in the discussion between himself and Ms Brown.

Two things are noteworthy about the discussion of the shortlist. Firstly, it is not typical practice to consult ministers on the makeup of a shortlist when recruiting people under the GSE Act framework. The shortlisting of candidates is a responsibility of the selection panel, having looked at the focus capabilities of the role and the claims of candidates against those capabilities.

Secondly, the fact that Investment NSW was seeking to test the suitability of individual candidates with the Minister suggests that the Minister's views were being taken into consideration in the process. I emphasise here that I am not suggesting that the then Minister was actively seeking to influence the outcome, but rather that Investment NSW saw the Minister's views as being relevant to the decision about who to interview.

This would appear to be at odds with a process being conducted at arm's length. In support of this view, Ms Brown told me that she acknowledged that this does not align with the general view of an arm's-length process, but thought it was prudent to involve the Minister, given that the decision of government might ultimately see this appointment proceeding as a ministerial appointment.

Finally, and most importantly, is the meeting between Minister Ayres, Ms Cole and Ms Brown.

It was the general view of the selection panel that at the end of the interview process that Mr Barilaro and Ms Cole were equally ranked. Ms Brown told me that she put Ms Cole in front of the Minister because of a number of things she was considering: whether Ms Cole's business experience was matched by her experience in government; whether those strengths in business would outweigh her lack of recent connection with NSW and the relative lack of government experience.

By her own account, Ms Brown's assessment of Ms Cole's meeting with the Minister was material in her own view as to the relative ranking of candidates. She was of the view that Ms Cole did not perform as well as expected in the discussion and that this had factored heavily into her assessment. I say 'her assessment' since, with the exception of Ms Bell, other members of the selection panel were not made aware that Ms Cole had met with the Minister; indeed, they were not aware until media coverage of Ms Brown's evidence to the Public Accountability Inquiry on 29 June 2022.

Minister Ayres is very clear in his recollection that he did not have substantive discussions with Ms Brown about his views regarding Ms Cole's performance in the interview. Ms Brown's recollection is that Minister Ayres expressed a view that Ms Cole did not have the gravitas to represent NSW in the Americas; Minister Ayres has no recollection of making such a remark. There is no contemporaneous record of the discussion that took place between Minister Ayres and Ms Brown on this matter.

Ms Brown is very clear that at no point did the Minister seek to direct her as to the outcome of the process. In fact, she stresses that the Minister was clear that it was her decision. However, she also indicated that her strong impression was that Mr Barilaro was preferred over Ms Cole.

My terms of reference relate to the conduct of a government sector agency; I am not empowered to inquire into the conduct of ministers. But in examining the conduct of the agency, its interactions with ministers during the process is important. Investment NSW actively sought the involvement of the Minister at several points in the process; the Minister did not reject those requests.

Following the provision of this excerpt to the DPC Secretary and subsequent discussions between the Premier and then Minister Ayres, the Minister resigned from his ministerial offices. He spoke with me that day and indicated that, since he had met with all of the other STICs before they were formally appointed, he had not regarded meeting with Ms Cole as unusual. He indicated that he was not aware at the time that the assessment process was still live in the case of STIC Americas (the respective processes had concluded when he had previously met candidates for other STIC roles). He also indicated that he was not aware that his meeting with Ms Cole had not been disclosed to other selection panel members.

My overall conclusion is that, for the reasons outlined above, this process did not occur at arm's length from the then Minister. Specifically, the material before me strongly suggests that Ms Brown factored into her consideration of candidates her views as to the preference of the Minister, even if the Minister did not expressly convey a preferred outcome. For abundant

caution, I am not suggesting any impropriety on the part of the then Minister, merely that any characterisation of the process as arm's-length is not supported by the available material.

I make recommendations later in the report on changes to the GSE Act, GSE Rules, codes of conduct, and guidance materials that I believe are essential to clarify the processes that should apply to ensure that public service appointments are made at arm's length from government.

There is also an overall issue in the second recruitment process as to the basic integrity with which some aspects have been carried out.

Ms Lo and Mr Smith, as the two independent members of the panel, had very little involvement in the process after the initial interviews. While ultimately the final selection panel report was signed off by all members, it was provided at very short notice to Ms Lo and Mr Smith and they were unaware of a number of things that should have been fully disclosed to them:

- first and foremost, that the selection panel was being approached to sign the report after the job had been offered and contract negotiations concluded with Mr Barilaro;
- the nature and extent of discussions between Ms Brown and then Minister Ayres regarding the process, including what views the then Minister had expressed about any candidate/s;
- the nature and extent of any informal reference checking that had been done, and with whom;
- how those checks had factored into Ms Brown's thinking about relative rankings;
- the fact that there had been earlier drafts of the selection panel report that, in Ms Brown's view, did not reflect the panel's deliberations and how the final report differed from these earlier drafts;
- that Ms Cole had met with Minister Ayres and that, as a result of Ms Brown's assessment of the meeting, the selection panel report gave a relatively less positive view of the candidate than may have existed at the end of the panel's deliberations;
- that after further consideration of his referee reports, the final selection panel report gave a relatively more positive view of Mr Barilaro than may have been the case at the end the panel's deliberations.

## 7.6 Conclusions

### 7.6.1 How the *Code of Ethics and Conduct* applies in this process

As has been discussed elsewhere in this report, the *Code of Ethics and Conduct* underpins the consideration of a number of significant issues concerning the integrity of the process.

It is important to understand how the Code applies. A 2015 Public Service Commissioner's Direction made in 2015 required Departmental Secretaries, Heads of Executive Agencies, and Heads of Separate Agencies to put in place a Code for their organisation and to require employees to comply with the Code. Implementation of the Code could be by way of

incorporating the *Code of Ethics and Conduct* into an existing agency code of conduct or by adoption separately. Many Departments and Agencies chose the former.

Until such time as it published its own Code, Investment NSW staff were subject to the DPC Code. Since July 2021, and so for the entirety of the second recruitment process, Investment NSW staff - including the CEO - have been subject to the *Investment NSW Code of Conduct*.

The Code states that staff of Investment NSW must comply with the *Code of Ethics and Conduct for NSW government sector employees*.

The Code states that staff must meeting the following standards in the course of discharging their duties:

- Behave honestly and with integrity.
- Act with care and diligence.
- Treat all people with respect and courtesy.
- Comply with any authorised and reasonable direction received in the course of employment.
- Take reasonable steps to avoid, and in all cases disclose, any actual or potential conflicts of interests (real or apparent), noting that staff are required to provide a statement of private interests and update accordingly.
- Be aware of the Ethical Framework for the Government Sector (contained in Part 2 of the Government Sector Employment Act 2013) and relevant codes of conduct which bind government sector employees.
- Not make improper use of their position or access to information to gain or seek to gain a benefit or advantage for themselves or any other person.
- Not access information unless it is immediately relevant to the work being performed and ensure that information is not accessed by or disclosed to unauthorised persons, including complying with the Privacy and Personal Information Protection Act 1998 (NSW) and the Health Records and Information Privacy Act 2002 (NSW).
- Use State resources for the effective conduct of public business in a proper manner. State resources are not to be subject to wasteful or extravagant use, and due economy is to be observed at all times. Staff must be scrupulous in ensuring the legitimacy and accuracy of any claim for entitlements.
- Have no involvement in outside employment or in the management or work of any business, and not hold a position as a director or member of the governing body of any company or other entity, without the agreement of Investment NSW.
- Notify Investment NSW immediately if you are charged, convicted or found guilty of a serious offence (punishable by imprisonment for 12 months or more) or any offence which may impact on your ability to undertake part or all of the inherent requirements of your role.



- Report suspected wrongdoing including but not limited to corrupt conduct (as defined in the Independent Commission Against Corruption Act 1988 (NSW)), maladministration, waste of public money and government information contravention (a failure to exercise functions in accordance with the Government Information (Public Access) Act 2009 (NSW)).
- Comply with the Gifts, Hospitality and Benefits Policy.
- Comply with the NSW Government Lobbyist Code of Conduct.
- Comply with all applicable laws, applicable codes of conduct and Premier's Memoranda (including, without limitation, the NSW Lobbyists Code of Conduct, record keeping requirements under the State Records Act 1998 and responsibilities under work health and safety legislation).
- Maintain appropriate confidentiality about their dealings with their Minister, other Ministers, other Ministers' staff, public servants, and Parliamentary employees (including after the cessation of employment).
- Other than in the course of their professional duties, not post personal online commentary or other material or publish books or articles expressing personal views which relate to general work of the NSW Government, unless otherwise approved by Investment NSW.
- Familiarise themselves with this Code of Conduct upon commencement of their duties with Investment NSW.

#### 7.6.2 Was the conduct of the second recruitment process in keeping with the Code?

In respect of the second recruitment process, the applicable elements of the GSE Act and GSE Regulation as they relate to process requirements were generally followed by Investment NSW. Again, and as stated above, this is largely because the GSE Regulation requires a less prescriptive approach for STICs than GSE Rules-based recruitment processes.

However, again there are matters of real concern about whether the conduct of the process took proper account of the *Code of Ethics and Conduct*. In respect of the second process, these are more significant issues that go to the fundamental integrity of the process.

In respect of the second recruitment process, certain matters have not been managed fully in keeping with the requirements of the *Code of Ethics and Conduct* (as given effect through the Investment NSW Code). I reach this conclusion in respect of a failure on the part of Ms Brown to fully disclose to all panel members:

- her having involved the then Minister for Trade in discussions about the composition of the shortlist;
- her having arranged for one of the candidates to meet with the then Minister for Trade while the selection process was still under way;
- her having had discussions with the former Minister for Trade as to the suitability of Mr Barilaro for the role while the selection process was under way;

- her having concluded contract negotiations with Mr Barilaro without the selection panel having determined its final assessment of candidates.

These steps call into question the integrity of the process. Further, the fact that these things had occurred was not disclosed to the independent members of the selection panel. In becoming aware of these matters, independent members of the panel have indicated that, had they been aware, they would have called into question the integrity of the process. Ms Lo in particular has indicated that she would not have completed the process by signing off the selection report had these things been disclosed to her.

Ms Brown has raised with me through this process the fact that she sought the counsel of the DPC Secretary before the process was completed and when Mr Barilaro was firming up as the likely preferred candidate. It does not seem to me that the DPC Secretary could intervene in any way in a selection process that was on foot and of which he was not a part. Given the non-disclosure issues above and noting the obvious anxiety that it caused Ms Brown to raise this with the DPC Secretary, it is even more surprising that Ms Brown did not seek to deliberate with her fellow assessors about the process. The people on the panel were the right people to be considering these issues, not people outside the process for whom it would have been improper to intervene.

In respect of the second recruitment process, there was an apparent lack of due care and diligence on the part of the panel in ensuring that the selection panel report properly reflected the considered view of the selection panel. Ultimately, the selection panel report is the responsibility of the assessors on the panel and, as Ms Brown was the convenor of the panel and the head of the hiring agency, she had overall responsibility for the process.

It is regrettable that the Public Service Commissioner was involved in this process given the flaws that have been identified. Ms Lo is already on the record about a number of important matters related to her concerns. She has rightly pointed out that when she is on a selection panel, she is there as a participant in the process and not as a person with a specific probity responsibility that differs from the responsibilities of other selection panel members. However, it is also the case that one would naturally expect a process in which the Commissioner was involved to be of a high standard. Had certain things been disclosed to Ms Lo and Mr Smith, it is highly unlikely that this process would have unfolded as it did.

That said, I consider it to be the case that greater attention should have been paid by the Commissioner. In particular, I believe the Commissioner should have requested a copy of the selection panel report from the first process. This may have prevented what I believe to have been very disrespectful treatment of Mr Fitzpatrick.

I have reached these conclusions having consulted with Ms Brown, Dr Broadbent and Ms Lo on relevant matters, including my preliminary view as to findings and the reasons for those findings, as well as any adverse observations. I have considered the issues raised with me in this process.

In putting matters regarding the Code to Ms Brown, Ms Brown has indicated a significant level of regret about a process she agrees was 'flawed'. She has indicated that she understands the Code and has, to the best of her ability, done everything she can in respect of core elements of the Code.

She has also indicated that any failure to comply with the Code was unintentional and a function of what she describes as quite unusual circumstances. In summary, those circumstances include:

- inheriting a program to which high expectations attached from another part of government while trying to stand up a new agency;
- dealing with the impact of a decision of government to change the appointment model for STICs and the associated uncertainty about process;
- being unclear about how she should involve, or not involve, the then Minister, in the recruitment process given that she was the decision-maker under GSE but she was uncertain as to whether the appointments would proceed under GSE;
- dealing with a perceived high level of interest on the then Minister's part.

Ms Brown makes a number of points about what she regards as other relevant considerations:

- that her 'swift promotion' means that she has less practical experience in considering the Code and the GSE Act day-to-day;
- she feels she has not had adequate access to either formal mentoring or informal advice and support, including from the DPC Secretary;
- she has had to contend with complex machinery-of-government issues (involving simultaneously setting up a new agency and integrating programs inherited from other agencies);
- she has indicated that she has had no formal induction for any of her Public Sector Senior Executive roles, including on governance matters generally and on the Code specifically.

These may indeed be relevant considerations in respect of any action in respect of the Code, but they do not really go to whether or not the second recruitment process is one in which the obligations under the Code have been fully met.

## 7.7 Recommendations

- 7.7.1 That the DPC Secretary, as the person exercising employer functions (under delegation) for Ms Brown, considers what, if any, action to take in respect of the conclusions referred to at 1.2.3 and 1.2.7 above. In doing so, the Secretary should take account of the contextual factors contained in this report as well as any matters Ms Brown wishes to be factored into his consideration.
- 7.7.2 The *Government Sector Employment Act 2013* should be amended to include a specific reference that a Secretary or Agency Head is not subject to the direction of a Minister in respect of any of their employer functions.
- 7.7.3 The *Ministerial Code of Conduct* should be amended to ensure that lawful directions to a public servant exclude a minister from seeking to influence a Secretary or Agency Head in respect of their employer functions except through the provision of performance feedback in accordance with the relevant Public Service Commission policy or GSE Rules, or the provision of a formal reference where that is appropriate.
- 7.7.4 The *Government Sector Employment Act 2013* should be amended to include a statement on the role and responsibilities of Secretaries modelled on that contained in the Commonwealth Public Service Act 1999. It should set out that:

- the roles of Secretaries of a Department include, but are not limited to the following:
  - principal official policy adviser to the Minister
  - manager, ensuring delivery of government programs and collaboration to achieve outcomes within the Minister's portfolio and, with other Secretaries, across the whole of Government
  - leader, providing stewardship within the Department and, in partnership with other Secretaries and the Public Service Commissioner, across the government sector.

7.7.5 The *Government Sector Employment Act 2013* should be amended to legislate a *Code of Ethics and Conduct* rather than relying on the Public Service Commissioner's direction power to achieve sector-wide application of a Code.

7.7.6 The *Government Sector Employment Act 2013* should be amended to establish a Parliamentary Joint Committee to monitor and review the exercise by the Public Service Commissioner of the Commissioner's functions under the Act.

7.7.7 The *Government Sector Employment (General) Rules 2014* should be amended to make clear that the suitability of candidates is determined by assessors withing the meaning of the GSE Rules.

7.7.8 The *Government Sector Employment (General) Rules 2014* should be amended to provide more prescription as to the makeup of selection panels. Specifically, the subordinate of an assessor should only be another assessor in a comparative recruitment process as a last resort and only where there is an additional independent assessor from outside the hiring agency participating in the process.

## Appendix A: Detailed rationale for policy/system recommendations

- 1.3.2 The *Government Sector Employment Act 2013* should be amended to include a specific reference that a Secretary or Agency Head is not subject to the direction of a Minister in respect of any of their employer functions.

### Rationale

This is to put beyond doubt that the employer functions of a Secretary or Agency Head are outside the purview of a Minister.

Care will need to be taken in the drafting of this recommendation to ensure that it does not disrupt those limited Public Service appointments where either the Premier or a minister has a statutory role in a Public Service Appointment. Care will also need to be taken in respect of the Secretary of Department of Premier & Cabinet acting as the employer of Secretaries under delegation from the Premier; the intent is not to capture this circumstance but to preserve the Premier's employer function in respect of Secretaries.

- 1.3.3 The *Ministerial Code of Conduct* should be amended to ensure that lawful directions to a public servant exclude a minister from seeking to influence a Secretary or Agency Head in respect of their employer functions except through the provision of performance feedback in accordance with the relevant Public Service Commission policy or GSE Rules, or the provision of a formal reference where that is appropriate.

### Rationale

This is to formally limit the interaction of ministers with Secretaries in relation to the latter's employer functions.

The perspectives of ministers are important in assessing the performance of certain Public Sector Senior Executives and in developing those staff. However, the appropriate vehicle for this should be through routine performance assessment processes and only for Secretaries, Band 3s and those Band 2s who have regular dealings with ministers.

There will be times when it is entirely appropriate for a minister to provide a reference (for instance where a member or former members of a minister's staff is seeking a role in the public service). Any amendment to the Code should allow for this to happen, as a formal reference sourced from the minister as part of the usual reference checking process and included in the selection process documentation.

- 1.3.4 The *Government Sector Employment Act 2013* should be amended to include a statement on the role and responsibilities of Secretaries modelled on that contained in the Commonwealth Public Service Act 1999. It should set out that:
- the roles of Secretaries of a Department include, but are not limited to the following:
  - principal official policy adviser to the Minister

- manager, ensuring delivery of government programs and collaboration to achieve outcomes within the Minister's portfolio and, with other Secretaries, across the whole of Government
- leader, providing stewardship within the Department and, in partnership with other Secretaries and the Public Service Commissioner, across the government sector.

### Rationale

It serves as a useful foundation for the culture of the Public Service for the role and responsibilities of the Secretaries of Departments to be stated clearly in the Act, particularly since the role includes things that are essential to the character of the Public Service in a Westminster system.

The intention here is to mirror the equivalent provisions in the Commonwealth Public Service Act 1999, the 'role' being described identically as it is in that Act, and responsibilities being reflective of the focus of Public Service agencies in NSW.

The principal policy adviser element of the role is a critical underpinning of the notion that part of the job of the Secretary and her/his/their Department is the provision of frank and fearless advice.

- 1.3.5 Section 10A of the *Government Sector Employment Regulation 2014* should be amended so that it applies the full GSE Rules-based process to the future selection of overseas trade employees who are STICs. The elements of 10A that allow atypical contract arrangements should not be changed, given that model contracts that apply more generally in the NSW Public Service are unlikely to be fit-for-purpose in overseas jurisdictions.

### Rationale

The changes to Clause 10A of the GSE Regulation were made, as I understand it, to regularise a number of ad hoc arrangements that applied to 'overseas trade employees' prior to 2015.

Given that many of these employees are foreign nationals working offshore on behalf of NSW, I understand that it may be impracticable to apply the full GSE Rules-based model across the board without a more detailed consideration of all of the implications that would flow from that.

As an initial step, and prior to that more detailed assessment, and in the light of the issues identified in this inquiry, STICs should not be covered by the exemption and should revert to being full Public Service appointments.

- 1.3.6 The *Government Sector Employment Act 2013* should be amended to legislate a *Code of Ethics and Conduct* rather than relying on the Public Service Commissioner's direction power to achieve sector-wide application of a Code.

### Rationale

The current method of applying a sector-wide code is clunky and makes it difficult to educate public servants in a comprehensive and consistent manner.

At present, the Commissioner issues a direction to Secretaries and Agency Heads to require them to put in place a Code for their Agency. This invariably produces inconsistency and creates complexity in monitoring those processes that support public servants understanding their obligations.

The Public Service Commission is already well advanced in updating the 2015 Commissioner's Direction. In my view, this work should proceed and be promulgated even if it is to be replaced by the legislated Code.

- 1.3.7 The *Government Sector Employment Act 2013* should be amended to establish a Parliamentary Joint Committee to monitor and review the exercise by the Public Service Commissioner of the Commissioner's functions under the Act.

#### Rationale

This would add an important layer of oversight to the statutory office of Public Service Commissioner. The Commissioner performs a critical role integrity role. The Commissioner is not subject to either direction by the Premier or to the scrutiny of an oversight committee. Given the importance of the role, it would be appropriate to treat this office in the same way that many other independent statutory offices are treated (e.g., Ombudsman, Electoral Commissioner, Auditor-General, Health Care Complaints Commissioner).

- 1.3.8 The *Government Sector Employment (General) Rules 2014* should be amended to make clear that the suitability of candidates is determined by assessors within the meaning of the GSE Rules.

#### Rationale

This is intended to put beyond doubt that selection panels (assessors) determine suitability against the capabilities of a role and that decision-makers exercise discretion as to appoint, but not discretion to re-visit the suitability assessment in making such a decision.

- 1.3.9 The *Government Sector Employment (General) Rules 2014* should be amended to provide more prescription as to the makeup of selection panels. Specifically, the subordinate of an assessor should only be another assessor in a comparative recruitment process as a last resort and only where there is an additional independent assessor from outside the hiring agency participating in the process.

#### Rationale

This is to ensure that selection panels bring a diversity of perspective and, equally, minimise the opportunity for poor process arising from a person being unsure whether their loyalty is to the process or their supervisor. In my original framing of this recommendation I considered recommending a prohibition on a subordinate officer being on the same panel as their supervisor. I have considered a submission from DPC on this matter and accept that the practical implications need to be tested thoroughly before such an approach is taken. In the interim, the amendment I am recommending should offer considerable mitigation of risk.

## Changes to recruitment practice and guidance

1.3.10 The Public Service Commissioner should review the *Recruitment and Selection Guide* to provide more detailed advice to:

- ensure that reference checks factor into the final ranking of candidates by assessors;
- clearly delineate the roles of assessors and providers of professional services to assessment panels.

### Rationale

This is to ensure that assessors consider references as part of determining final rankings and not after the fact.

1.3.11 If recommendation 1.3.7 is accepted by the Government and, ultimately, the Parliament, to legislate a *Code of Ethics and Conduct*, the Public Service Commission should develop an online training module and assessment tool. Training and assessment using this tool should be mandated for induction and annually thereafter for all staff in government sector agencies.

### Rationale

This is to ensure that there is a system in place across the sector that ensures public servants are properly trained in the code and that there is a record of that training having been provided.

1.3.12 The Public Service Commissioner should undertake a review of the use of psychometric assessment in the NSW Government Sector to determine: how these assessments are being used; whether current practice is in keeping with the *Recruitment and Selection Guide*; and

### Rationale

Psychometric testing is a valuable tool only when used correctly in any recruitment process. It is also an expensive part of any exercise where it is used. This review is to ensure both proper and efficient use of this tool.

## Guidance on Cabinet decisions

1.3.13 The Department of Premier and Cabinet should ensure that all Secretaries, Agency Heads, and Band 3s understand how to clarify the standing of a decision of government where there is doubt. This should be attended to during induction to the public service and on promotion to these levels.

### Rationale

This is to ensure that when there is any doubt whatsoever about the status or interpretation of a decision of government, that key senior people in the sector understand when and how to seek authoritative advice on the matter.



## DPC Inquiry: Appointment of Senior Trade and Investment Commissioner to the Americas

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