

Department of Enterprise,
Investment and Trade

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[Minister]
52 Martin Place
Sydney
NSW 2000

Ref:

30 January 2023

Dear [Minister],

Re: Managing formal and informal approaches by the Australian Turf Club (ATC) regarding its prospective unsolicited proposal to redevelop Rosehill Gardens racecourse

[OCM was engaged by DEIT on XX to]

Background

On 08 November 2023, ATC presented a development concept to the Department of Enterprise, Investment and Trade (DEIT). At its core, the concept involved four significant development components:

1. ATC would retain and redevelop its Rosehill Gardens racecourse site into a mixed-use development that would provide up to 25,000 new homes, green space and a new school.
2. ATC would establish a Centre of Excellence horse training facility at Horsley Park to accommodate the relocation of 300-400 horses from Rosehill with the potential to expand as required.
3. Warwick Farm would be redeveloped as a state-of-the-art racing, training and spectator facility.
4. NSW Government would explore the feasibility of a new Metro station at Rosehill to deliver reliable public transport for the new Rosehill Gardens community.

DEIT and ATC subsequently agreed to engage in a pre-submission concept review to formally explore the proposal's suitability for the Unsolicited Proposals (USP) process, and to guide ATC in its decision to lodge a USP.¹ This agreement was documented in a non-binding Memorandum of Understanding (MOU), executed on 1 December 2023. The MOU acknowledges that ATC is considering submitting a USP that will be based on the concept presented to DEIT on 08 November 2023.

As of [date], ATC has not lodged its USP. OCM has been requested to provide a protocol for future meetings between the Minister or Minister's Office staff and ATC. The objective of this protocol is to canvass the current and future probity requirements that should or must be observed to maintain the integrity of any future assessment and decision-making processes.

Pre-USP submission

USP Guide

As noted above, as of 30 January 2024, ATC has not lodged its USP proposal. However, the MOU stipulates the following at Clause 2(c):

The Parties agree to engage in a pre-submission concept review to formally explore whether any proposal is likely to meet the Stage 1 USP assessment criteria and to guide the Proponent in its decision regarding whether to lodge an unsolicited proposal, as set out in the USP guide.

Commented [KC1]: Suggest remove this section - your following section supersedes this info.

¹ As contemplated by 4.2 of the *Unsolicited Proposals: Guide for Submission and Assessment 2022* (the Guide).

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The 'pre-submission concept review' is recognised under the Guide as the first formal step in assessing the merits of a Proposal.² However, despite being the first formal step in assessing the merits of the Proposal, the Guide does not impose requirements of confidentiality nor prohibitions on lobbying on the proponent for the pre-submission concept review stage. These requirements are only enlivened by the Guide post-submission when the proposal is subject to the formal assessment process that commences in Stage 1, and continue across Stages 2 and 3.³ As such, the Guide alone does not prohibit the Proponent from lobbying the government or media, and leaves ATC free to raise matters relating to its USP proposal until such time that it submits its USP.

Memorandum of Understanding

The MOU contains expressly binding clauses that create legally enforceable rights and obligations between the parties in relation to Confidential Information (Clause 10); Prohibition on Lobbying (Clause 11); Publicity Announcements (Clause 12). These clauses can be summarised as requiring:

- **Confidential Information (Clause 10):** The parties to agree that they are subject to a Confidentiality Agreement that was executed, and that the Confidentiality Agreement survives termination or expiry of the MOU.
- **Prohibition on Lobbying (Clause 11):** The ATC warrants that it will ensure that it will not lobby, or make any representations to any public official, entity, member of parliament or their advisor in regards to the USP.
- **Publicity Announcements (Clause 12):** Neither party must use the logo or make public statements about the MOU, Proposal or activities under it unless first agreed in writing by the other party.

As the terms of the MOU expire the earlier of 31 March 2024 (unless extended in writing) or submission of the USP, these terms bridge a gap between the pre-concept review and Stage 1 of the USP process, and create positive probity obligations for both the NSW Government and the ATC in circumstances where they would not otherwise exist.

Probity Requirements in Practice

In practice, the MOU's Prohibition on Lobbying clause limits what interactions can be had between the Minister or their office and the ATC. Where a formal meeting is requested, consideration may be given to:

1. Setting out at the commencement of the meeting the limitation on how the meeting may progress. This would include communicating the requirements of the Prohibition on Lobbying clause.
2. If receiving presentations from ATC on its proposal for briefing purpose, keeping questions limited to clarifications and not engaging in detailed discussions.
3. Referring ATC back to the Department Representative in the MOU, Ms Katie Knight, Deputy Secretary, Investment NSW.
4. Inviting an independent Probity Advisor or similar to provide an independent observation of the meeting
5. Maintaining a record of the matters discussed.

Where interactions with ATC may occur in other settings, such as during discussions about other government business, incidentally or through telephone calls to the Minister's Office, the Minister and staff should avoid engaging in discussions about the ATC's Rosehill racecourse proposal.

The Minister and staff may adopt the following protocol:

1. If the ATC's proposal is raised in conversation by any of ATC's personnel, immediately acknowledge the MOU's prohibition of lobbying clause and state that they cannot engage in manner regarding ATC's proposal that may be characterised as lobbying.
2. Refer the ATC to the Department Representative in the MOU, Ms Katie Knight, Deputy Secretary, Investment NSW.
3. Create a contemporaneous file note of the incident, including the refusal to engage about the ATC's proposal in a manner that may be characterised as lobbying and the referral to the Department Representative.
4. Ensuring that the Minister's view of the proposal's merits does not fetter the independence of the assessment panel in formalising its assessment recommendation.

Guidance on what constitutes 'lobbying'

² *Unsolicited Proposals: Guide for Submission and Assessment 2022* (the Guide), p 20.

³ *Unsolicited Proposals: Guide for Submission and Assessment 2022* (the Guide), p 4, 11.

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Further guidance on what constitutes lobbying may be drawn from the definition of *lobbying* under the *Lobbying of Government Officials Act 2011* (NSW), which is referenced in the MOU:

(4)(1) For the purpose of this Act, lobbying a Government official means communicating with the official for the purpose of representing the interests of others in relation to any of the following:

- (a) legislation or proposed legislation or a government decision or policy or proposed government decision or policy,*
- (b) a planning application,*
- (c) the exercise by the office of his or her official functions.*

It is arguable that any communication from ATC regarding a positive determination about the USP's progression through the USP process pre-submission may constitute 'lobbying' per the above definition. This is because the decision as to whether the USP satisfies the requirements of each stage is ultimately one for NSW Cabinet, in which the Minister has a decision-making role.

Post-USP submission

Commented [VC2]: Need to include governance section

The terms of the MOU (save for clause 10) expire upon ATC lodging its USP proposal, including the Prohibition on Lobbying clause.⁴ From the point of lodgement, the Guide, *NSW Direct Dealing Guidelines*, *Governance Plan* and any executed Participation Agreements inform and govern probity requirements.

Perhaps one critical difference between pre-submission and post-submission is that post-submission, the Minister undoubtedly has a key decision-making role as a member of NSW Cabinet. As such, the Minister must ensure that any interaction with ATC does not fetter or otherwise impact on the (actual or perceived) integrity of this decision-making process, nor the independence of the assessment process.

Again, this does not explicitly preclude the Minister from meeting with ATC and receiving information and updates on the project; however, the Minister should ensure any meetings do not progress to perceived negotiations or other detailed discussions which may compromise the integrity of any assessment process and/or the ultimate decision-making process.

Probity Requirements in Practice

The advice and protocols detailed in the Pre-USP section above remain equally applicable. However, post-USP submission, ATC should be referred to the Proposal Managers:

- William Murphy, Deputy Secretary, TCO; and
- Rowan Fisher, Director, Commercial Transactions, Investment NSW.

Should you require any further information or clarification, please contact the undersigned on 04xx xxx xxx.

Yours sincerely,

Rory O'Connor

⁴ Memorandum of Understanding, cl 5.

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Project Wattle | Transaction Options Analysis

Option	Description	Key Steps	Risks	Benefits	Policy and Legislation
<p>Option 1 Direct Deal (Joint Venture)</p>	<p>NSW Government enters in Joint Venture agreement with the landowner. This could be structured in several ways, for example the Government could develop and own the metro station and over station development, while both parties could enter into a profit-sharing arrangement for housing.</p>	<ol style="list-style-type: none"> 1. Justification to direct deal approved by NSW Cabinet or relevant Minister 2. Participation agreement or MOU entered into by both parties 3. Multi-stage negotiation and assessment process 4. Cross-agency governance oversight and relevant Cabinet approvals to progress to further stages of negotiation 5. Joint venture agreement finalised (including condition precedent regarding rezoning of site) 6. Site rezoned to allow residential development 	<ul style="list-style-type: none"> • Development risk - including potential site contamination • Transaction risk - joint venture arrangements can be legally complex, particularly regarding the interface between government assets such as a metro station, and adjoining property • Due diligence risk - further consultation with Metro, TfNSW and Planning is required to determine the suitability of the site for a metro station and residential uses • Reputational risk - the NSW Government may be criticised for reducing recreational greenspace and overpaying the landowner • Reputational risk - perception Government acting as a property developer 	<ul style="list-style-type: none"> • Significantly increase housing supply along the Metro West corridor • Potential to secure high return on investment 	<p>NSW Government <i>Direct Dealing Guidelines</i> June 2021</p> <p>ICAC <i>Guidelines for Managing Risks in Direct Negotiations</i> August 2018</p>
<p>Option 2 Direct Deal (either Proponent or Government led)</p>	<p>A direct deal refers to any circumstance where Government enters into direct negotiations / sole source arrangements over a commercial proposition.</p>	<ul style="list-style-type: none"> • Justification to direct deal approved by NSW Cabinet or relevant Minister • Participation agreement or MOU entered into by both parties • Multi-stage negotiation and assessment process • Cross-agency governance oversight and relevant Cabinet approvals to progress to further stages of negotiation • Agreement finalised (including condition precedent regarding rezoning of site) • Site rezoned to allow residential development 	<ul style="list-style-type: none"> • Development risk - including potential site contamination • Due diligence risk - further consultation with Metro, TfNSW and Planning is required to determine the suitability of the site for a metro station and residential uses • Reputational risk - the NSW Government may be criticised for reducing recreational greenspace and overpaying the landowner • Reputational risk - perception Government acting as a property developer 	<ul style="list-style-type: none"> • Significantly increase housing supply along the Metro West corridor • A robust, multi-staged assessment process to ensure the NSW Government is achieving value for NSW • Slightly more process flexibility than the USP pathway • Greater negotiation control than USP pathway • Greater potential to prove that the Government is securing value for money by increasing contestability - i.e. under a JV, the landowner may operate as master-developer, whereas in a direct deal, the NSW Government may run a competitive process. 	<p>NSW Government <i>Direct Dealing Guidelines</i> June 2021</p> <p>ICAC <i>Guidelines for Managing Risks in Direct Negotiations</i> August 2018</p>

Option	Description	Key Steps	Risks	Benefits	Policy and Legislation
Option 3 Unsolicited Proposal	A specific process / pathway under the broader umbrella of 'direct dealing'. This is the pathway through which the private sector can approach Government to propose a commercial transaction on a direct basis.	<ol style="list-style-type: none"> 1. Landowner lodges unsolicited proposal 2. Proposal assessed by DEIT and considered by cross-agency USP Steering Committee 3. Multi-stage negotiation and assessment process 4. Cross-agency governance oversight and relevant Cabinet approvals to progress to further stages of negotiation 5. Agreement finalised (including condition precedent regarding rezoning of site) 6. Site rezoned to allow residential development 	<ul style="list-style-type: none"> • Transaction risk – landowner potentially given first opportunity to develop negotiation parameters • Probity risk – perception that NSW Government is engineering an unsolicited proposal for a Government-driven transaction • Reputational risk – the USP pathway has been previously been perceived by the media as 'controversial' and associated with the Crown at Barangaroo. However, the USP process is robust, reviewed by the Audit Office of NSW, and considered fit-for-purpose • Reputational risk - the NSW Government may be criticised for reducing recreational greenspace and overpaying the landowner • Due diligence risk – further consultation with Metro, TfNSW and Planning is required to determine the suitability of the site for a metro station and residential uses 	<ul style="list-style-type: none"> • Significantly increase housing supply along the Metro West corridor • A robust, multi-staged assessment process to ensure the NSW Government is achieving value for NSW 	NSW Government <i>Unsolicited Proposals – Guide for Submission and Assessment</i> May 2022
Option 4 Compulsory Acquisition	NSW Government acting through TfNSW compulsorily acquires part of the site required for transport purposes (e.g. the metro station site) per the <i>Land Acquisition (Just Terms Compensation) Act 1991</i> (NSW)	<ol style="list-style-type: none"> 1. Attempt to reach negotiated agreement (statutory period 6 months but can be shortened if agreed by both parties) 2. NSW Valuer-General undertakes valuation of site and provides determination to both parties - valuation considers market value on the date of acquisition, loss attributable to severance or disturbance, disadvantage resulting from relocation, and any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land (556). 3. Both parties agree to terms of agreement 4. Negotiations commence for broader site to facilitate residential development (see Options 2-4) 7. Site rezoned to allow residential development 	<ul style="list-style-type: none"> • Transaction risk – acquisition may be required to be undertaken in two tranches - i.e. TfNSW could only acquire land required for the metro station, not broader housing supply. Further investigation required into body / legislative power to acquire land for housing purposes • Reputational risk – the NSW Government may be criticised for limiting the commercial viability of the racing industry and reducing recreational greenspace for the community • Due diligence risk – further consultation with Metro, TfNSW and Planning is required to determine the suitability of the site for a metro station and residential uses • Financial risk – valuation will not only include the value of the land but will also consider value from racing operations 	<ul style="list-style-type: none"> • Independent valuation process undertaken • Could form part of an important part of a broader direct negotiation regarding the greater site 	<i>Includes: Land Acquisition (Just Terms Compensation) Act 1991</i> (NSW)