



PARLIAMENT OF AUSTRALIA

Report 498: 'Commitment issues' - An inquiry into Commonwealth procurement

Parliamentary Joint Committee

Joint Committee of Public Accounts and Audit

August 2023

CANBERRA

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Chair's Foreword

Procurement is big business and commits the Australian Government and taxpayers to tens of billions of dollars every year. Procurement accounted for more than \$80 billion in committed value in 2021-22, with the Government awarding more than 90,000 contracts to more than 12,000 businesses for a hugely diverse range of goods and services.

The five biggest consulting firms (Accenture, KPMG, Deloitte, PWC and Ernst & Young) secured nearly \$2 billion in government contracts in the 2021-22 financial year, comprising more than \$1.6 billion in new contracts as well as more than \$300 million in contract variations or extensions.

In four of the five reports by the Australian National Audit Office (ANAO) considered in this inquiry, there was noncompliance with the Commonwealth Procurement Rules (CPRs). Especially significant were consistent failures to demonstrate value for money, conduct procurements in line with ethical requirements or keep adequate records, and substandard contract management.

Put plainly, the Commonwealth has serious commitment issues. AusTender is no AusTinder and it needs reform. Public servants need to get far more comfortable and skilled with playing the field and sharpening their pencils on suppliers, even if this leads to difficult conversations and rejection.

This report draws on evidence from the audit reports, and also from procurement practitioners, as well as the context of similar findings over recent years to make 19 recommendations both to the audited entities and to Finance as the 'steward' of the procurement framework.

The rules are not onerous. Simply put, the guiding principle is that agencies should be able to demonstrate that they have achieved value for money for the taxpayer, by following the CPRs which are set by the Department of Finance (Finance). There is a lot of flexibility for agencies to determine how they will conduct their procurements and determine what 'value for money' is in light of their circumstances. But this flexibility brings added complexity and an increased risk of non-compliance.

Systemic problems were identified hence the Committee has recommended major changes are needed to get better value for money for taxpayers.

The Committee recommendations include that:

- ***Panels have become an uncompetitive rort and it needs to stop!*** A growing share of procurement is occurring from suppliers listed on 'Standing Offers' or Panels. Yet too often this is one quote or limiting or stifling competition and value

for money. Limiting competition via panels has been particularly used to advantage the Big 4 consulting firms. The rules should be changed to make clear that: sole-sourcing is not cool and multiple quotes should be obtained; a separate value for money assessment must still be undertaken; and panels should be refreshed more often.

- **Better Match-making by Tarding up AusTender!** It should be clear how many quotes were sought, even when procuring from a Panel, and why a contract was amended or varied. Finance need to exercise greater curatorial oversight on AusTender, making sure data is properly structured and accessible.
- **Take a broader view of what you do!** Procurement is more than a conveyor belt trucking Commonwealth money out, and goods and services in. The current definition should be updated to reflect modern, professionalised practices including more active management of supply chains and markets to maximise value for money.
- **Value for money, always, no exceptions!** Sometimes things are urgent – but value for money still applies. Clause 2.6 is not a magic spell – agencies still need to keep records and ensure value for money.
- **Take a good hard look at yourself!** Internal Audit Committees should increase their scrutiny of procurement controls, and provide more assurance over major, complex or risky procurements.
- **One in, all in!** All Commonwealth Corporate entities should be subject to the CPRs, reversing the current onus where entities like the NDIA are excluded which makes no sense.
- **It's time to re-professionalise!** Finance must address the lack of procurement expertise and capability within the Australian Public Service (APS) by prioritising the development of a procurement professional stream in the APS, and by updating the procurement framework to match the development the procurement profession has undergone outside the public sector in recent years.
- **Finance needs to lead!** Finance is the system steward and regulator – so own it! To be effective, Finance needs to have more clue what's actually happening in the system. That doesn't mean being accountable for every procurement, but it does mean collecting more and better information about agencies' compliance with the CPRs to give it an accurate picture of how the procurement framework is operating. Requirements need to be skilfully crafted so they're not 'red-tape' but force self-reflection and permit external analysis.

Various recommendations are also directed specifically at individual agencies.

This report is the latest in a conga line of reports addressing aspects of procurement but this time recommendations for systemic change are made. In a time of rising prices and tightening budgets, the Australian public deserves no less.

I would like to thank all inquiry participants and witnesses for assisting the work of the Committee and Committee members for their participation in and engagement with this

important inquiry. I would also like to thank the superb Committee secretariat for their diligence and professionalism.

Julian Hill MP
Chair



Terms of reference

The Joint Committee of Public Accounts and Audit will inquire into and report on Commonwealth procurement with a view to improving the culture of how procurement rules and guidelines are implemented across the Australian Public Service.

The inquiry will have particular regard to:

- Any matters contained in or connected with the following Auditor-General's reports:
 - No. 6 (2021-22) Management of the Civil Maritime Surveillance Services Contract
 - No. 15 (2021-22) Department of Defence's Procurement of Six Evolved Cape Class Patrol Boats
 - No. 30 (2021-22) Procurement by the National Capital Authority
 - No. 42 (2021-22) Procurement of Delivery Partners for the Entrepreneurs' Programme
 - No. 5 (2022-23) Digital Transformation Agency's Procurement of ICT Related Services
- The views of the Auditor-General, Department of Finance and other interested parties in relation to Commonwealth procurement and demonstrating value for money through competition, probity, and strong contract management.



Members

Chair

Mr Julian Hill MP

Deputy Chair

Senator the Hon Linda Reynolds CSC

Members

Dr Michelle Ananda-Rajah MP

Senator Catryna Bilyk

Senator the Hon Matthew Canavan

Hon David Coleman MP (*until 22 March 2023*)

Dr Carina Garland MP

Hon Dr David Gillespie MP (*until 15 February 2023*)

Mr Ian Goodenough MP (*from 6 March 2023*)

Senator Karen Grogan

Dr Daniel Mulino MP

Ms Peta Murphy MP (*until 1 August 2023*)

Mr Graham Perrett MP (*from 20 June 2023*)

Mr Henry Pike MP (*from 22 March 2023*)

Senator Barbara Pocock (*from 31 July 2023*)

Mr Sam Rae MP (*until 20 June 2023, from 1 August 2023*)

Senator Tony Sheldon

Mr Aaron Violi MP

This committee is supported by staff of the Department of the House of Representatives.



Abbreviations

ABF	Australian Border Force
ACA	Australian Constructors Association
AIC	Australian Industry Content
AMSA	Australian Maritime Safety Authority
ANAO	Australian National Audit Office
APCC	Australasian Procurement and Construction Council
APS	Australian Public Service
CCEs	Corporate Commonwealth entities
CCP	Contract change proposal
CoPE	Centre of Procurement Excellence
CPRs	Commonwealth Procurement Rules
CWCSS	Coastwatch Command and Support System
Defence	Department of Defence
DPPM	Defence Procurement Policy Manual
DISR	Department of Industry, Science and Resources
DTA	Digital Transformation Agency
ECCPBs	Evolved Cape Class Patrol Boats

Finance	Department of Finance
GROC	Geospatial Data Mart (GDM) Reporting and Operations Command
LOTE	Life-of-type extension
MASSOs	Maritime Aviation Specialist Officers
NCA	National Capital Authority
NCEs	Non-corporate Commonwealth entities
NDIA	National Disability Insurance Agency
OCP	Overall Contract Performance
OMP	Overall Mission Performance
OPV	Offshore Patrol Vessel
PGPA Act	<i>Public Governance, Performance and Accountability Act 2013</i>
PGPA Rule	<i>Public Governance, Performance and Accountability Rule 2014</i>
RFT	Request for tender
SES	Senior Executive Service
SIM	Surveillance Information Management
The 'Watt Review'	<i>Independent Review of Services Australia and NDIA Procurement and Contracting: Independent Reviewer's Report</i>

Recommendations

Recommendation 1

2.143 The Committee recommends that the Department of Finance work to advance public sector procurement capability and professionalisation by:

- prioritising the development and rollout of a procurement professional stream within the Australian Public Service, to facilitate the creation of procurement and contracting specialists, and
- expanding the current definition of procurement in the Commonwealth Procurement Rules, to empower and better reflect modern, professionalised procurement practices, including more active management of supply markets and supply chains to maximise value for money.

Finance should report back to the Committee within 12 months on its progress to develop and deliver these outcomes.

Recommendation 2

2.149 The Committee recommends that the Department of Finance amend the Commonwealth Procurement Rules to reverse the onus such that they apply to corporate Commonwealth entities by default, with any exceptions to be made by the Finance Minister via legislative instrument.

Recommendation 3

2.153 The Committee recommends that the Department of Finance amend paragraph 2.6 of the Commonwealth Procurement Rules to emphasise that the core principles of achieving value for money and conducting procurements in a fair, transparent and accountable manner continue to apply to the procurement even when an exemption to the rules was obtained under the paragraph. Finance should develop and issue guidance on paragraph 2.6 to reflect this amendment.

Recommendation 4

2.160 Noting that reporting on compliance with the Commonwealth Procurement Rules (CPRs) is currently limited to the inclusion of significant non-compliance in annual reports, the Committee recommends that the Department of Finance:

- introduce requirements for entities subject to the CPRs to report, at least annually and certified by the accountable authority, on their compliance with the CPRs
- publish a report annually, commencing in the 2023-24 year, aggregating this information across the sector to help assess the effectiveness of the procurement framework, identify areas of risk, and inform changes to the procurement framework to ensure it remains fit-for-purpose, and
- require Commonwealth entities subject to the CPRs or the Public Governance, Performance and Accountability Act 2013, by 31 December 2023, to provide Finance with a report on their internal procurement and delegation policies that outlines how value for money will be ensured when procuring from panels.

Recommendation 5

2.162 The Committee recommends that the Department of Finance amend its guidance to Commonwealth entities to recommend that, where an entity engages in significant or complex procurement activity:

- the entity's audit committee should increase its scrutiny of procurement risks and internal procurement controls commensurate with the scale and risk of the procurements, and
- the entity's internal audit program should provide assurance over the conduct of those procurements.

Recommendation 6

2.167 The Committee recommends that the Department of Finance write to the accountable authorities of Commonwealth entities with guidance on how to use probity advisers, and reminding them of their obligation to manage probity in a thorough and consistent manner when conducting procurements.

Recommendation 7

2.171 The Committee recommends that the Department of Finance amend its guidance on the use of panels to make it explicit that:

- a separate value for money assessment must still be undertaken when conducting a procurement from a panel, even though value for money has been considered when forming the panel, and
- panel procurement should involve multiple competing tenders from panel members, with sole-sourcing from a panel generally considered inadequate to demonstrate value for money.

Recommendation 8

2.174 The Committee recommends that the Department of Finance require panel procurements to facilitate ongoing competition and foster new entries to markets, by requiring:

- panels to be refreshed at regular intervals, for example, at least once every two years and at least before a panel is extended, and
- an ability for new entrants to seek to be listed on the panel, at any time where possible or at least periodically during the life of the panel.

Recommendation 9

2.177 The Committee recommends that the Department of Finance amend the reporting requirements on AusTender to ensure it is clear for every procurement:

- how many suppliers were invited to submit quotes for a procurement, including when procuring from panels and standing offers as recommended by the Australian National Audit Office in its audit of the Digital Transformation Agency, and
- reasons for any amendments or variations to a contract, by standardising the relevant field to produce more structured data.

Recommendation 10

2.179 To facilitate a greater level of transparency in procurement, the Committee recommends that the Department of Finance exercise greater curatorial oversight over the information on AusTender, by, among other things, ensuring data is consistent, properly structured, and easily accessible, and by making standard format reports available to prospective tenderers.

Recommendation 11

3.99 The Committee recommends that the Digital Technology Agency provide an update to the Committee five months from the tabling of this report on the progress of its improvements to its procurement processes, including:

- its procurement governance and oversight, especially the management of procurement risk
- its management of probity, particularly its fraud and conflict of interest controls
- changes to its approach to market processes to meet its obligations under the Commonwealth Procurement Rules, including its use of procurement plans, risk assessments, and the appropriate use of panels

- improvements to its tender evaluation processes
- improvements to its contract management processes, particularly with respect to contract variations, and
- the keeping of appropriate records of all stages of a procurement, from planning to contract management.

Recommendation 12

3.101 The Committee recommends that the Australian National Audit Office consider conducting a follow up audit within three years of the tabling of this report to determine the success or otherwise of the Digital Technology Agency's procurement reforms.

Recommendation 13

3.103 The Committee recommends that the Digital Transformation Agency's audit committee review the agency's procurement risk and its internal procurement controls, and ensure that procurement is a subject of the agency's internal audit program.

Recommendation 14

4.72 The Committee recommends that the National Capital Authority provide an update on the implementation of the reforms undertaken in response to the audit, including:

- statistics on and analysis of its use of competitive procurement methods, especially when procuring through standing offers and panels
- statistics on and analysis of how its procurement methods have changed to encourage competition, particularly its request documentation and its tender evaluation processes
- changes to its management of probity and promotion of ethical and fair procurement, and
- changes to its record keeping practices and procedures.

Recommendation 15

5.85 The Committee recommends that the Department of Home Affairs report back to the Committee, commencing in September 2023 and then six monthly until the current contract expires, on its progress in tendering and procuring a new surveillance services contract, given that it will have been 21 years since the contract was competitively procured if it runs to its current expiry date.

Recommendation 16

- 5.86** The Committee recommends that the Australian National Audit Office undertake a performance audit of the Department of Home Affairs' transition to the new surveillance services contract when the current contract expires.

Recommendation 17

- 6.45** The Committee recommends that the Department of Finance report back to the Committee within six months of the tabling of this report with the outcomes of its review of its Commonwealth procurement guidance, including a list of changes made to the guidance as a result of the review.

Recommendation 18

- 7.81** The Committee recommends that the Department of Industry Science and Resources report back on:
- the progress and outcomes of its assurance review of its other procurements including advice as to any other breaches of the Commonwealth Procurement Rules identified
 - the outcomes of all claims under the Scheme for Compensation for Detriment caused by Defective Administration, and
 - what additional activities the department's Audit and Risk Committee has undertaken and is undertaking in relation to procurement reforms

Recommendation 19

- 7.82** The Committee recommends that the Australian National Audit Office conduct a follow-up performance audit of the Department of Industry, Science and Resources to assess the effectiveness of its recent procurement reforms.



1. Summary & Background

- 1.1 On 30 September 2022 the Joint Committee on Public Accounts and Audit (JCPAA) adopted an inquiry into Commonwealth procurement. The inquiry had a particular focus on the matters contained in and related to the following five Auditor-General reports:
- No. 6 (2021-22) Management of the Civil Maritime Surveillance Services Contract
 - No. 15 (2021-22) Department of Defence's Procurement of Six Evolved Cape Class Patrol Boats
 - No. 30 (2021-22) Procurement of the National Capital Authority
 - No. 42 (2021-22) Procurement of Delivery Partners for the Entrepreneurs' Programme, and
 - No. 5 (2022-23) Digital Transformation Agency's Procurement of ICT Related Services.
- 1.2 The audit reports identified significant shortcomings in the procurement policies and practices at all of the audited agencies with the exception of the Department of Defence (Defence). In particular, the audits identified problems with:
- procurement planning and approaches to market
 - the use of competition in procurement to deliver value for money outcomes
 - contract management
 - ethical procurement and the management of probity, and
 - record keeping.
- 1.3 During the course of the inquiry, a report into procurement at Services Australia and the National Disability Insurance Agency, the 'Watt report', was published.¹ The Committee subsequently adopted a second procurement inquiry to consider the issues raised by the Watt report separately.

¹ Services Australia, *Independent Review of Services Australia and NDIA Procurement and Contracting*, 6 March 2023.

Background

Previous procurement reviews

- 1.4 Procurement is a topic that has engaged the attention of Parliamentary Committees with unfortunate regularity in recent years. In 2022 the House of Representatives Standing Committee on Infrastructure, Transport and Cities published its report *Government Procurement: A sovereign security imperative*, which looked at the Government's procurement of infrastructure.²
- 1.5 A Joint Select Committee on Government Procurement was established in May 2017 to review the Commonwealth Procurement Framework and in particular the changes to the Commonwealth Procurement Rules that had just come into effect. The report identified problems with procurement capability and culture within the APS, including a focus on lowest cost rather than best value for money, and found that a lack of procurement expertise has led the Commonwealth to become an uninformed purchaser.³
- 1.6 The JCPAA's two most recent reports on procurement were report 472, published in October 2018 and report 465, published in September 2017. Both reports reviewed three procurement focused ANAO performance audits. In addition to recommendations directed at audited entities, the Committee highlighted issues which have arisen again in the course of this inquiry, in particular the management of conflicts of interest and the application of the Commonwealth Procurement Rules (CPRs) to corporate Commonwealth entities.⁴ The JCPAA also conducted an inquiry into government contract reporting which lapsed at the end of the 45th Parliament.
- 1.7 A report in 2014 by the House Standing Committee on Infrastructure and Communications also identified deficiencies in procurement processes, concluding that 'public sector procurement practices are not always serving the taxpayer well and need to be more efficient, cost-effective and flexible'.⁵ This was one of three procurement focused reports published in 2014, the two others being a report from the Senate Standing Committee on Finance and Public Administration, and a Productivity Commission report on public infrastructure.⁶ It is therefore evident that

² House of Representatives Standing Committee on Infrastructure, Transport and Cities. *Government Procurement: A sovereign security imperative*, March 2022.

³ Joint Select Committee on Government Procurement, *Buying into our Future Review of amendments to the Commonwealth Procurement Rules*, June 2017.

⁴ Joint Committee of Public Accounts and Audit, *Report 465: Commonwealth Procurement*, September 2017; Joint Committee of Public Accounts and Audit, *Report 472: Commonwealth Procurement-Second Report*, October 2018.

⁵ House of Representatives Standing Committee on Infrastructure and Communications. *Planning, Procurement and Funding for Australia's Future Infrastructure: Report on the Inquiry into Infrastructure Planning and Procurement*, December 2014, p. 54

⁶ Senate Standing Committees on Finance and Public Administration, *Commonwealth Procurement Procedures*, July 2014; Productivity Commission, *Public Infrastructure*, <https://www.pc.gov.au/inquiries/completed/infrastructure/report>, accessed 15 June 2023.

the issues relating to the design and implementation of Australia's procurement framework are not new.

The Commonwealth procurement framework

- 1.8 The Australian Government's expenditure on procurement is substantial. In the 2021-22 financial year procurement accounted for \$80.8 billion in expenditure, with 92,303 contracts awarded to 12,901 unique businesses.⁷
- 1.9 At the core of the Commonwealth Procurement Framework are the CPRs. The CPRs are issued by the Finance Minister under section 105B of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), and provide the basic compliance framework for the Commonwealth entities subject to them in undertaking procurements.⁸
- 1.10 The Commonwealth Procurement Framework itself sits within the wider Resource Management Framework, the central pillar of which is the PGPA Act. The Resource Management Framework governs how officials in the Commonwealth public sector use and manage public resources, including proposals to spend relevant money.⁹
- 1.11 The CPRs apply to a broad range of Commonwealth entities. According to the Australian National Audit Office (ANAO):
- The CPRs set out requirements for procuring goods and services that must be observed by 'relevant entities'. Appendix B of the CPRs defines 'relevant entities' as all non-corporate Commonwealth entities and corporate Commonwealth entities prescribed by the Finance Minister in section 30 of the Public Governance, Performance and Accountability Rule 2014 (PGPA Rule).¹⁰
- 1.12 The ANAO noted that as of June 2022 there were 187 Australian Government entities governed by the PGPA Act, comprising 98 non-corporate Commonwealth entities, 71 corporate Commonwealth entities and 18 Commonwealth companies. The CPRs applied to 123 of these, including all non-corporate Commonwealth entities, and 24 of the 71 corporate Commonwealth entities.¹¹
- 1.13 AusTender is the government's procurement information system. It is a web-based platform that provides a wide range of information on procurements and contracts awarded. Entities are required to use AusTender to:
- publish annual forward looking procurement plans
 - notify the market of current procurement opportunities, and

⁷ Department of Finance, Submission 11, p. 4.

⁸ Australian National Audit Office, Submission 12, p. 2.

⁹ Department of Finance, Submission 11, p. 4.

¹⁰ ANAO, Submission 12, p. 2.

¹¹ ANAO, Auditor-General Report No. 11 2022–23, *Australian Government Procurement Contract Reporting - 2022 Update*, p. 13.

- report details of all procurement contracts awarded at or above the relevant threshold (\$10,000 for NCEs) within 42 days of entering into the arrangement.¹²
- 1.14 AusTender also provides a central location for the reporting of all procurement panels created by government agencies, enabling purchasers to more easily find and locate goods and services or seek quotes from approved suppliers on panels.¹³
- 1.15 The ANAO reported that in 2021-22 there were 68,158 parent contracts entered into for a committed value of \$47.1 billion, up from \$33.9 billion in 2012-13. The median value of parent contracts has increased over the last 10 years from \$35,568 to \$68,064. The three entities with the largest number of parent contracts over this period were Defence, followed by Services Australia and then Health and Aged Care. The top three entities by value of parent contracts over the period were Defence (\$201.2 billion) followed by Home Affairs (\$16.8 billion) and the National Blood Authority (\$16.0 billion).¹⁴
- 1.16 A significant proportion of annual procurement spending comes via contract amendments. There were more than 200,000 contract amendments between 1 July 2012 and 30 June 2022, with a value of \$182.2 billion. 26,651 variations were recorded in 2021-22, up from 18,747 in 2012-13. 64 per cent of contracts that recorded a variation recorded only one. Only three per cent of contracts were amended more than 5 times. Where an amendment to increase the value of a contract has been reported on AusTender, the increase has often been significant. In 49 per cent of value variations, the increase has been more than 100 per cent.¹⁵
- 1.17 The top category by value of contract was 'Commercial and Military and Private Vehicles and their Accessories and Components' at \$122.8 billion over the last 10 years, followed by 'Management and Business Professionals and Administrative Services' at \$106.7 billion. Following that was Engineering and Research and Technology Based Services' at \$57.4 billion.¹⁶

Conduct of the inquiry

- 1.18 The JCPAA has a statutory responsibility to examine all reports of the Auditor-General presented to the Australian Parliament (as per Section 8(c) of the Public Accounts and Audit Committee Act 1951).
- 1.19 On 30 September 2022 the Committee resolved to inquire into five Auditor-General reports examining aspects of procurement at different Commonwealth agencies.
- 1.20 On 4 October 2022 the Committee issued a media release announcing the inquiry and inviting submissions from interested parties. The Committee also invited

¹² Department of Finance, Submission 11, p. 7.

¹³ Department of Finance, Submission 11, p. 7.

¹⁴ ANAO, Auditor-General Report No. 11 2022-23, pp. 17-19.

¹⁵ ANAO, Auditor-General Report No. 11 2022-23, p. 21.

¹⁶ ANAO, Auditor-General Report No. 11 2022-23, p. 39.

submissions from the agencies included in the Auditor-General reports considered, from the ANAO itself, and from the Department of Finance as policy owner of the procurement framework.

- 1.21 The inquiry received 20 submissions and 19 supplementary submissions, which are listed at Appendix A.
- 1.22 The Committee held seven public hearings. A list of witnesses and organisations that appeared is at Appendix B. Transcripts of the public hearings are available in HTML and PDF formats on the inquiry website.
- 1.23 The inquiry focused primarily on public administration issues arising from the ANAO reports examined. Given the significant volume of issues in these audit reports the Committee elected not to examine broader policy issues such as social procurement as these have been addressed in other inquiries.



2. Common inquiry themes

Introduction

- 2.1 This chapter considers evidence relating to the regulation of the procurement system, as well as a range of common themes that emerged from the five audit reports that are included in the inquiry's terms of reference. In particular, the chapter considers:
- procurement capability within the Australian Public Service (APS)
 - aspects of the Commonwealth Procurement Rules (CPRs)
 - the role of the Department of Finance (Finance) as policy steward of the procurement framework
 - the AusTender electronic procurement reporting platform
 - the principle of value for money in procurement
 - the use of standing offers or panels
 - ethical procurement, and in particular the management of probity
 - contract management practices, and
 - the need for adequate record keeping.

Public sector procurement capability

- 2.2 This section considers the problems of procurement capability and culture identified in the course of this inquiry and considers suggestions for addressing them.
- 2.3 The Australian National Audit Office (ANAO) audit reports considered by the Committee during this inquiry indicate a considerable capability deficit with respect to procurement in the APS. Of the five audit reports, only the audit of the procurement of Evolved Cape Class Patrol Boats by the Department of Defence (Defence) was considered by the Committee to contain positive findings to any significant degree.
- 2.4 The audits of the National Capital Authority (the NCA), the Digital Transformation Agency (the DTA), the Department of Industry Science and Resources (DISR), and the Department of Home Affairs contained significant adverse findings in relation to all stages of procurement from planning through to contract management.
- 2.5 The audit reports highlighted inadequate procurement planning and practices that worked to limit competition at the NCA, weaknesses in approaches to market, tender evaluation and contract management at the DTA, problems with tender evaluation at

DISR, contract management problems at Home Affairs, as well as probity management and record keeping issues at almost all of the audited entities. Later chapters will cover the issues uncovered by the ANAO in more detail.

- 2.6 In response to the ANAO's findings, the NCA engaged a Director of Procurement, implemented a range of new internal controls relating to procurement, provided its staff with improved guidance material, and began an internal audit program to examine its procurements to ensure their compliance with the CPRs.¹
- 2.7 The DTA implemented a centralised process of procurement controls, implemented mandatory employee education and performance management policies relating to procurement, conducted retrospective assessments of selected contracts, and made changes to its record management practices.²
- 2.8 And DISR has put in place stronger probity policies and guidelines including stronger conflict of interest and probity frameworks, it has updated its procurement framework, and it has provided training on procurement and probity for all its Senior Executive Service level staff.³
- 2.9 In light of these audits and their findings, the ANAO argued that 'the regularity with which deficiencies in procurement activities are observed in performance audits suggests a deficit in institutional capability and proficiency'.⁴
- 2.10 The ANAO noted that 'an institutional capability to buy well and manage what is bought is fundamental to the delivery of many government services', and further, that the issues identified by the ANAO in its audit work:

... frequently originate with officials who do not fully understand the procurement framework, including the requirements in the CPRs. This is often the case for officials for whom procurement is an infrequent or secondary responsibility. There is strong evidence that there are shortcomings in the Australian Public Service's institutional capacity and capability for procurement and contract management.⁵

- 2.11 Though procurements can be simple, they may frequently show a high degree of complexity, and when they do there is a significant risk that APS staff may not be negotiating with suppliers from a position of strength:

Many procurement processes involve complex requirements and judgements as well as substantial resources. There is a particular risk that the private sector service provider may have greater information and knowledge about the task than the Australian Government entity. If they are not to be disadvantaged,

¹ National Capital Authority, Submission 7, pp. 2-3.

² Digital Transformation Agency, Submission 1, pp. [3-5].

³ Department of Industry, Science and Resources, Submission 5, p. 3.

⁴ Australian National Audit Office, Submission 12, p. 5.

⁵ Australian National Audit Office, Submission 12, pp. 12-13.

entities need a level of market knowledge and technical skills matching those prevailing amongst private sector service providers.⁶

- 2.12 The ANAO argued that procurement is not given sufficient importance given the scale of Commonwealth expenditure on it:

Public procurement is an underdeveloped professional discipline. Despite the scale of procurement undertaken by many entities, the execution of the procurement process is often viewed as a compliance obligation, rather than as a strategic capability delivering broad benefits.⁷

- 2.13 The Australasian Procurement and Construction Council (APCC) argued that government agencies are expected to do more with their procurement spend than simply acquire goods:

The procurement function has evolved from a primarily transactional role to one which is much more of a strategic enabler for government agencies to deliver value. This shift has required development of complex procurement skills.⁸

- 2.14 As a consequence, according to the APCC, Australia needs to make use of qualified procurement professionals whose expertise is appropriately embedded in the procurement decision making process:

With the changing nature of procurement practices, which often involve multi-billion-dollar expenditures, the range and complexity of what the procurement and contract management professional needs to do must be properly recognised by public sector agencies and developed over a learning continuum that progressively builds the requisite cognitive and creative skills, specialist core procurement skills, and general employability skills that are required in the context of procurement policy, rules and guidelines.⁹

- 2.15 The APCC listed a range of aims for staff development that it considers necessary to build procurement capability in the APS:

...staff development requirements need to draw on this learning/training continuum that needs to encompass on-the-job training, vocational qualifications, higher education in strategic procurement, and professional certifications, including micro-credentials (i.e. small, certification-style courses that focus on a particular area of study to hone proficiency over the shortest possible time).¹⁰

- 2.16 Negotiation Partners, a Sydney-based consultancy, argued that procurement is best seen as 'not an administrative task, but a commercial task' requiring both training and real-world expertise:

⁶ Australian National Audit Office, Submission 12, p. 13.

⁷ Australian National Audit Office, Submission 12, p. 13.

⁸ Australasian Procurement and Construction Council, Submission 9, p. 3.

⁹ Australasian Procurement and Construction Council, Submission 9, p. 3.

¹⁰ Australasian Procurement and Construction Council, Submission 9, pp. 3-4.

Procurement is a specialist profession. It is a subject taught at universities, there is a chartered industry body and a curriculum of continuing professional development. That 'process knowledge' is typically embedded in an organisation's procurement process. In addition to a sound process, effective procurement requires commercial skills, business acumen and professional negotiation skills. None of these are taught at universities and business schools. They require real-world expertise and training.¹¹

- 2.17 Negotiation Partners went on to argue that a process-driven focus is not sufficient to generate positive procurement outcomes, but that procuring officials must have adequate skills:

An open, transparent and ethically competitive process is necessary, but not sufficient, to produce a value-for-money outcome. Poor preparation, inappropriate specification, speculative tendering, inefficient resourcing, ineffective evaluation, political imperatives, unrealistic budgets, wishlist dumping, scope changes, time pressure, poor negotiation and weak contract management can all ensure that a highly competitive procurement that was executed 'perfectly' on paper still delivers a poor value outcome overall.

The skill with which a procurement is undertaken is arguably a much more significant driver of value-for-money than the process itself – and even more so in sole-source negotiations.¹²

- 2.18 Law firm King & Wood Mallesons suggested that there are a range of areas where agencies would benefit from additional detailed training from Finance, including training on the Commonwealth accountability framework, especially the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) framework as it applies to procurement, CPRs best practice, and corporate practices, given that corporate concepts 'are sometimes not well understood' by officials.¹³

- 2.19 In addition, King & Wood Mallesons argued that officials would benefit from access to additional contract templates beyond those currently offered in the Commonwealth Contracting Suite, as well as centralised relationship and information management services for repeat suppliers.¹⁴

- 2.20 The Independent Reviewer's Report of the *Independent Review of Services Australia and NDIA Procurement and Contracting* (the 'Watt Review') identified a need for a whole of government approach to procurement capability uplift:

... procurement outcomes and enhanced value for money will not be achieved by improved processes and capability at the department/agency level alone, no matter how energetically, how vigorously and how expensively they were to be pursued. Instead, it also needs a whole-of-government approach including

¹¹ Negotiation Partners, Submission 4, p. 1.

¹² Negotiation Partners, Submission 4, p. 2.

¹³ King & Wood Mallesons, Submission 15, p. 4.

¹⁴ King & Wood Mallesons, Submission 15, p. 4

professionalisation of the procurement capability, changes to the CPRs, and clearer identification of accountabilities.¹⁵

- 2.21 In his evidence to the Committee, report author Dr Ian Watt AC argued that the APS does not have ‘the capability to do procurements’ as well as it should:

... there's no solution short of doing this systematically, across the board, for agencies as a whole. Unless that happens, I think you will be here for a long while to come, dealing with Auditor-Generals' reports you'd rather not have. Really, it's time for the Australian government and the Australian Public Service to look much more systematically at these issues.¹⁶

- 2.22 Drawing on his long experience in senior public sector roles, Dr Watt noted that issues of public sector procurement capability are of long standing, and that past solutions attempting to deal with procurement problems on an agency-by-agency basis have not worked:

... in reading some of the Auditor-General's remarks, and reflecting on the previous Auditor-General, he said pretty much the same things ... I'm sure, if you go back to his predecessor, they were saying pretty much the same things as well. I think the only way to tackle this is systematically, and I hope you'll come to the same conclusion.¹⁷

- 2.23 Finance advised the Committee that in addition to the training and capacity building activities it undertakes with the aim of improving compliance with the CPRs (see below), it is also exploring the development of a professional stream for procurement, similar to the pathways for Human Resources, Digital, and Data managed by the Australian Public Service Commission:

Finance is also exploring the development and delivery of professionalisation pathways for officials to become procurement and contracting specialists. A spectrum from basic training to specialist qualification and formal accreditation forms part of a professionalised procurement and contract management framework to be examined.¹⁸

The Commonwealth Procurement Rules

- 2.24 The Committee heard evidence from a range of submitters that suggested changes to the CPRs to assist in positive reform of Australia's procurement regime. This section considers aspects of the CPRs that have been drawn to the Committee's attention during this inquiry, in particular:

- the comparatively narrow view of procurement informing the CPRs.
- the use of exceptions in the rules, and

¹⁵ Dr Ian Watt AC, *Independent Review of Services Australia and NDIA Procurement and Contracting: Independent Reviewer's Report*, March 2023, p. 18.

¹⁶ Dr Ian Watt AC, Committee Hansard, 14 April 2023, p. 14.

¹⁷ Dr Ian Watt AC, Committee Hansard, 14 April 2023, p. 15.

¹⁸ Department of Finance, Submission 11, p. 14.

- the application of the CPRs to different types of Commonwealth entity
- 2.25 The CPRs regulate and guide government procurement processes. They aim to ensure that government procurement is conducted in a fair, equitable and transparent manner, and to ensure that procurement delivers value for money. The CPRs establish a framework of principles and processes to achieve open and fair competition and effective management of risks.
- 2.26 Finance’s submission provided the following definition of procurement:
- Procurement is the expenditure of public money to obtain goods or services for Government or third party use. It enables Commonwealth entities to acquire the goods and services needed to deliver the Government’s policies, programs and services.¹⁹
- 2.27 Finance’s definition of procurement mirrors that provided in the CPRs themselves:
- Procurement is the process of acquiring goods and services. It begins when a need has been identified and a decision has been made on the procurement requirement. Procurement continues through the processes of risk assessment, seeking and evaluating alternative solutions, and the awarding and reporting of a contract.²⁰
- 2.28 The CPRs also highlight the importance of contract management as an integral part of procurement:
- Following the awarding of the contract, the delivery of and payment for the goods and services and, where relevant, the ongoing management of the contract and consideration of disposal of goods, are important elements in achieving the objectives of the procurement.²¹
- 2.29 In considering this definition, which the ANAO audited against in the reports before this inquiry, the submission from procurement-focused consultancy Hypereal characterised this definition of procurement as narrow:
- The ANAO, in its two reports covering the activities of the DTA, defines government procurement as “the process of acquiring goods and services”. Outside the sphere of federal government, however, the procurement function has been professionalising since the 1980s and defines itself much more ambitiously.²²
- 2.30 Hypereal said that following this period of professionalisation, the private sector approaches procurement with a much more wide ranging and in-depth focus:

¹⁹ Department of Finance, Submission 11, p. 4.
²⁰ Commonwealth Procurement Rules, paragraph 2.7.
²¹ Commonwealth Procurement Rules, paragraph 2.10.
²² Hypereal, Submission 8, p. [1].

In its most evolved forms, procurement now represents the commercial function accountable for all aspects of an organisation's third party spend, across all categories from raw materials to contingent labour and from banking relationships to facilities management. The ANAO's definition reflects the process aspect of the function that, in non-government settings, is now largely automated and standardised.²³

- 2.31 Similarly, the APCC highlighted the varied nature of procurement and noted that in addition to the acquisition of goods, procurement spend is expected to advance the Government's social or policy agenda:

The procurement function operates on a continuum from simple to highly complex procurements and subsequent contract management. It is tasked with minimising transaction costs across the supply chain whilst maximising overall value for money in alignment with procurement policy, rules, and guidelines. It is increasingly leveraged to achieve broader strategic policy objectives whilst maintaining and improving service delivery. Public sector procurement is accepted as key enabler to deliver on economic, environmental, governance and social outcomes.²⁴

- 2.32 The Australian Constructors Association (ACA) argued that, at least in relation to construction industry procurements, the simple, transactional model of procurement embodied in the CPRs has given rise to a 'hostile contracting environment' which can be a brake on productivity. The ACA argued that this approach should be replaced with 'more collaborative models focussed on shared accountability and problem solving between all parties':

Streamlined tendering processes based on best value and past performance are far superior to transactional models based on cost alone - indeed, initial 'costs' can be spurious, often being based on partial design and mispriced risk ... It is time to break the tendering mould and rebuild around alternative contracting models focussed on long-term collaborative relationships.²⁵

- 2.33 The ACA went on to argue that, as it exists at present, the procurement regime too often gives rise to misperceptions of value:

A core concern of industry is that procurement assessments often interpret 'value' through the narrow lens of initial cost estimates ... The simple calculus of 'lowest compliant tenderer' has incentivised a 'race to the bottom' mentality in the industry. This mentality is the direct cause of the dysfunctional and risk-laden contracting environment in which we now find ourselves.²⁶

²³ Hypereal, Submission 8, p. [1].

²⁴ Australasian Procurement and Construction Council, Submission 9, p. 2.

²⁵ Australian Constructors Association, Submission 3, p. [3]

²⁶ Australian Constructors Association, Submission 3, p. [3].

2.34 Ms Catherine Thompson, the principal of Hypereal, suggested an alternative concept of procurement:

I propose another definition, which is the active lifecycle management of supply markets in order to achieve transparently reported technology, financial and social outcomes that promote better government and the wellbeing of its people.²⁷

2.35 Ms Thompson argued that her approach would engender a shift from a focus on acquiring goods to one of expense management:

you're shifting from buying a thing towards generalised expense management ... That would typically be how a professional procurement operation would run. You would have your hunters, the people who look at the cost base and structure new deals, and you would have your farmers, the people who make sure that the deals, once contracted, continue to maintain the value that's been identified with them.²⁸

2.36 In further unpacking her alternative definition, Ms Thompson said:

you're looking at everything from the expression of a need or demand. Why is it needed? Could it be satisfied by something we have already? Could it be satisfied in a different way that doesn't require procurement? If so, what's the most effective way to do that? Should it be part of a larger vendor relationship that we already have on foot? That looks at supplier performance management and it looks at supplier relationship management ... It looks at the best way of putting a negotiation together and putting together the needs of various stakeholders in government. Then government has another responsibility, which is ... to look at how you ... use government procurement as an instrument of social and economic policy.²⁹

2.37 The CPRs do not necessarily apply to every procurement. They permit entities to vary their application under certain limited circumstances. For example, paragraph 2.6 of the CPRs states that:

These CPRs do not apply to the extent that an official applies measures determined by their Accountable Authority to be necessary for the maintenance or restoration of international peace and security, to protect human health, for the protection of essential security interests, or to protect national treasures of artistic, historic or archaeological value.³⁰

2.38 Home Affairs used this provision to justify its renewal of the Maritime Surveillance Services Contract considered in Chapter 5 of this report:

²⁷ Catherine Thompson, Principal, Hypereal, Committee Hansard, 16 December 2022, p. 12.

²⁸ Catherine Thompson, Hypereal, Committee Hansard, 16 December 2022, p. 12

²⁹ Catherine Thompson, Hypereal, Committee Hansard, 16 December 2022, p. 12.

³⁰ Commonwealth Procurement Rules, paragraph 2.6.

In March 2021 the Secretary authorised seeking an extension for two years from December 2021 to December 2023 (with a further one year option to December 2024) to avoid a capability gap while the Department evaluated the long term requirement for aerial surveillance capability including the optimal capability mix and associated delivery timeframes. The total value of the contract including the proposed extension required approval by the Secretary. Section 2.6 of the Commonwealth Procurement Rules 2022 was applied 'for the protection of essential security interests'.³¹

- 2.39 Defence also invoked paragraph 2.6 of the CPRs to justify sole-sourcing its purchase of six patrol boats at a cost of approximately \$356 million, a procurement which is considered in Chapter 6 of this report:

In this case the limited tender was confined to a single tenderer. To do so, Defence relied on paragraph 2.6 of the CPRs ... The Defence Procurement Policy Manual (DPPM) outlines that the Secretary of Defence has determined, for paragraph 2.6 of the CPRs, that the procurement of goods under Federal Supply Code 19 Ships, Small Craft, Pontoons and Floating Docks is exempt from the operation of Division 2 of the CPR.³²

- 2.40 Generally, the CPRs require entities to use open approaches to the market when conducting procurements above given thresholds - \$7.5 million for construction procurements or \$80,000 for non-construction procurements. However, paragraph 10.3 of the CPRs permits entities to use limited tender approaches even when the procurement is above that threshold provided certain conditions are met.
- 2.41 Most commonly used is paragraph 10.3.b, which permits entities to use a limited tender approach 'when for reasons of extreme urgency brought about by events unforeseen by the relevant entity, the goods and services could not be obtained in time under open tender'.³³
- 2.42 In its 2022 update on Australian Government Procurement Contract Reporting, the ANAO noted that paragraph 2.6 of the CPRs was applied in some part to a total of 4,135 contracts between 2018-19 (when the requirement to specify a reason came into force) and 2021-22.³⁴ In relation to paragraph 10.3 exemptions, the ANAO noted that:

Seventy-three per cent of limited tender contracts that exceeded the procurement threshold and did not claim exemption reported the condition reason as 10.3.e (unforeseen urgency) and 10.3.d.iii (no reasonable alternative or substitute, and/or exclusive rights or proprietary information) of the CPRs.³⁵

³¹ Department of Home Affairs, Submission 2.2, pp. [3-4]

³² Australian National Audit Office, Auditor-General Report No. 15 2021–22, *Department of Defence's Procurement of Six Evolved Cape Class Patrol Boats*, p. 14.

³³ Commonwealth Procurement Rules, paragraph. 10.3.

³⁴ Australian National Audit Office, Auditor-General Report No.11 2022–23, *Australian Government Procurement Contract Reporting – 2022 Update*, pp. 73-74.

³⁵ Auditor-General Report No.11 2022–23, p. 72.

- 2.43 The DTA used paragraph 10.3.e to justify a limited tender for 'additional deliveries of goods or services ... or continuing services'.³⁶ This procurement is discussed in more detail in Chapter 3. The NCA reported a contract on AusTender which also claimed to use 10.3.e. However:

In fact, the documents seen by the ANAO showed that internally limited tender was justified 'on the basis that the services would be direct sourced from the incumbent supplier 'rather than undertaking a full tender process and incurring administrative expenses including legal costs associated with such a process, and in light of the standard of services which has been provided' - a basis that is non-compliant with the CPRs.³⁷

- 2.44 A final aspect of the CPRs worth noting is that they do not apply to all Commonwealth agencies. All non-corporate Commonwealth entities (e.g. departments of state and parliamentary departments) are covered by the CPRs, but they do not apply to all corporate Commonwealth entities (such as government business enterprises):

The requirements set out in the CPRs must be observed by what the rules term 'relevant entities'. This term is defined as all non-corporate Commonwealth entities and 'corporate Commonwealth entities as prescribed by the Finance Minister in section 30 of the Public Governance, Performance and Accountability Rule 2014 (the PGPA Rule). As at 15 November 2022, 24 out of 72 corporate Commonwealth entities are prescribed as 'relevant entities'.³⁸

- 2.45 The ANAO invited the Committee to consider whether there is merit in the application of the rules to all Commonwealth entities by default. Its submission argued that that 'the key principles in the CPRs, such as obtaining value for public money and acting fairly and ethically when conducting procurements, should not be seen as a barrier to operating commercially or at arms-length from the government of the day'.³⁹
- 2.46 As such, the ANAO argued that there may be merit in applying the CPRs to 'all corporate Commonwealth entities by default and then permitting exemptions and modifications by legislative instrument, rather than only applying the CPRs to those entities prescribed by legislative instrument'.⁴⁰

The Department of Finance's role as policy steward

- 2.47 The Committee heard evidence throughout the inquiry that touched on Finance's role as manager of the Commonwealth Procurement Framework.

³⁶ ANAO, Auditor-General Report No.5 2022–23, p. 43.

³⁷ ANAO, Auditor-General Report No.30 2021–22, p. 23.

³⁸ ANAO, Submission 12, p. 2.

³⁹ ANAO, Submission 12, p. 2.

⁴⁰ ANAO, Submission 12, p. 3.

2.48 Finance's submission noted that it 'is responsible for policy stewardship of the Commonwealth Procurement Framework'. However, the department pointed out that the framework is 'devolved', with the effect that each procuring entity 'is responsible for its own procurement processes and decisions in order to meet its own business needs'.⁴¹

2.49 Finance noted that a devolved framework provides entities with the freedom to decide how to implement their procurement policies, in a manner that best suits their circumstances:

The devolved nature of the framework provides entities the flexibility they need to meet their business needs. As a result, entity procurement governance structures and the operations of their central procurement teams vary widely amongst entities. Procurement governance varies from decentralised models, where individual business areas have more responsibility for procurements and central procurement teams conduct more supporting activities.⁴²

2.50 Despite being responsible for a devolved system, Finance characterised itself as 'an active steward' of the procurement framework, highlighting its work in 'supporting and enhancing the procurement and contract management capability across the APS'. Finance noted that this active stewardship involves:

... initiatives to engage with officials and provide training and guidance on applying the Commonwealth Procurement Framework, promoting examples of excellence in and through procurement, provision of templates and tools, such as the Commonwealth Contracting Suite and BuyRight, and conducting outreach activities to provide tailored support to entities.⁴³

2.51 Finance also noted that it administers the Buy Australian Plan through the Future Made in Australia Office and hosts the Centre of Procurement Excellence, both of which aim to improve procurement capability in the public sector:

The [Future Made in Australia] Office supports the uplift of procurement and contracting capability across the Australian Public Service to provide government buyers with the skills, tools and resources they need, and strengthen relationships with business, industries, and communities by delivering targeted learning events to raise awareness on how to do business with the Australian Government. The Centre of Procurement Excellence (CoPE), which already existed in Finance, has moved into the Office and aligned its work to the Plan. Through CoPE, the Office leads and coordinates initiatives to build public sector procurement capability, strengthens partnerships with the business community and encourages innovation and best practice processes to drive value for money outcomes.⁴⁴

⁴¹ Department of Finance, Submission 11, p. 5.

⁴² Department of Finance, Submission 11, p. 5.

⁴³ Department of Finance, Submission 11, p. 8.

⁴⁴ Department of Finance, Submission 11, pp. 10-11.

- 2.52 Finance emphasised to the Committee that as a policy owner, its focus is squarely on building the capability of procuring entities rather than on monitoring or compliance activity:

We don't run a separate compliance program where we will go and audit, for instance, how a procurement is done and then provide advice back to that entity or publicly do that. Our focus is very much on helping entities try to get it right upfront.⁴⁵

- 2.53 Finance argued that adopting a more compliance-focused regulatory approach would negatively affect its relationship with entities, and thereby result in worse outcomes:

Finance notes that the addition of any further compliance and monitoring activities within the Framework would need to be carefully assessed as this would potentially damage Finance's strong relationships with procuring entities and place additional burden on procuring entities. Without the strong relationships with procuring entities, there is a risk that there will be less transparency and information sharing between entities, including with Finance.⁴⁶

- 2.54 In the absence of compliance activity, Finance noted that it relies on ANAO audit reports as a key indicator of entities' performance in implementing the procurement framework:

We work through the ANAO's reports and audits and look to amend our framework where it's required, where there are shortcomings in the framework and it could be better. We are working to really improve the transparency of data around procurement so that entities can have greater information about their own procurements through AusTender but also so that that is transparent to the public as well.⁴⁷

- 2.55 When asked about Finance's role as steward of the procurement regime, the audited entities provided varied assessments in terms of the usefulness of Finance's guidance. Defence noted that it 'works closely and collaboratively' with Finance on its procurement activities, actively seeking Finance's input in developing its procurement policy.⁴⁸ The DTA, the NCA and DISR likewise indicated that they seek advice from Finance on their procurements, especially complex or bespoke procurement activities.⁴⁹

- 2.56 By contrast, Home Affairs noted that it 'has not specifically sought or received any feedback on its procurement practices' and that 'there is currently no requirement to provide data to Finance about the Department's procurement processes'.⁵⁰ Other entities noted that their provision of procurement information to Finance was limited

⁴⁵ Andrew Jagers, Deputy Secretary, Department of Finance, Committee Hansard, 2 February 2023, p. 3.

⁴⁶ Department of Finance, Submission 11, p. 9.

⁴⁷ Andrew Jagers, Department of Finance, Committee Hansard, 2 February 2023, p. 2.

⁴⁸ Department of Defence, Submission 10.1, p. [6].

⁴⁹ Digital Transformation Agency, Submission 1.1, p. [6]; National Capital Authority, Submission 7.1, p. [4]; Department of Industry, Science and Resources, Submission 5.2, p. [5].

⁵⁰ Department of Home Affairs, Submission 2.1, p. [22].

to the voluntary Commonwealth Procurement Self-Assessment Survey or compulsory reporting of procurements on AusTender.⁵¹

- 2.57 The Auditor-General argued that Finance's position on its responsibilities as a regulator, especially its view that it cannot engage in compliance activity without affecting relationships with procuring entities was 'a strange view to take':

Whether you describe it as a stewardship or a regulatory framework, in most of the frameworks the Commonwealth operates where it's applied to outside of the Commonwealth there would be an expectation that, yes, you would do education but you would have a risk based approach to how you escalate a regulatory route based upon the likelihood of noncompliance. I think most of the community would be surprised if the answer was, 'We only ever do education because we don't want to hurt the relationship'.⁵²

- 2.58 Further, even when evidence from ANAO audits presents Finance with information that could shape a regulatory response, the department does not always act on that information. When asked how it would respond to the negative findings on the management of probity contained in four of the five audit reports that make up this inquiry, Finance said that it could not draw a conclusion as the sample size was too small:

Based on the sample provided in the ANAO audits (representing less than 0.1 per cent of procurements by volume entered into between 2019-20 and 2020-21) Finance has not drawn any conclusions relating to systemic or broader cultural issue across the Australian Public Service.⁵³

- 2.59 The Auditor-General emphasised that the key responsibility of a policy owner is to inform itself in relation to the framework it oversees:

At the end of the day, you are trying to achieve the policy outcome. In the first instance, to know whether you're achieving the policy outcome, you have to collect enough data to know whether there is compliance in the first place and what the level is in order to assess the risk.⁵⁴

- 2.60 The Deputy Auditor-General noted that, following the removal of a requirement that entities report on their procurement performance to Finance, the ANAO has seen even internal reporting on procurement decline at procuring entities:

Each entity was required to provide data to Finance on its compliance with certain elements, including procurement, and there was reporting. That was removed in around 2017. We've observed in audit work that since its removal even the internal reporting on compliance has started to fall away within entities.

⁵¹ National Capital Authority, Submission 7.1, p. [4]; Department of Industry, Science and Resources, Submission 5.2, pp. [5-6].

⁵² Grant Hehir, Auditor-General, Committee Hansard, 2 February 2023, p. 3.

⁵³ Department of Finance, Submission 11.1, p. [13].

⁵⁴ Grant Hehir, Auditor-General, Committee Hansard, 2 February 2023, p. 3.

There's been a bit of a posture of, 'No-one's watching,' so no-one gathers the data anymore.⁵⁵

- 2.61 In the ANAO's view, this dearth of compliance reporting has negatively impacted Finance's ability to understand how procurement is being conducted in the wider APS, or to assess the performance of the framework it administers:

Reporting compliance with procurement requirements is limited to the inclusion of instances of significant non-compliance in entities' annual reports. This impacts Finance's ability, as the policy owner, to measure and assess the effectiveness of the procurement framework, identify areas of risk to the sector and to implement timely intervention strategies. Equally, the disaggregated reporting by entities in annual reports reduces transparency and accountability to the Parliament.⁵⁶

- 2.62 The ANAO argued that a more active regulatory posture could result in significantly better value for money outcomes from Australia's procurement expenditure:

Whether you describe it as a stewardship or a regulatory framework, the policy owner has a responsibility for understanding if Commonwealth procurement policy outcomes are being achieved. Without evidence to the contrary, ANAO audits suggest there is opportunity to improve value for money outcomes and economic and social benefits from Commonwealth procurement activities.⁵⁷

The role of audit committees

- 2.63 Section 45 of the PGPA Act requires Commonwealth entities to set up an audit committee (also sometimes known as an audit and risk committee).⁵⁸ The functions of audit committees are set out in section 17 of the *Public Governance, Performance and Accountability Rule 2014* (the PGPA Rule), which requires that, at minimum, an audit committee must review the appropriateness of the accountable authority's financial reporting, performance reporting, system of risk oversight and management, and systems of internal control.⁵⁹

- 2.64 The ANAO noted that 'an audit committee has no management responsibilities' and that the committees 'are intended to provide independent advice ... supporting the development of key practice and capacity within Commonwealth entities'.⁶⁰

- 2.65 In describing the role of audit committees, Ms Carol Lilley, the Chair of Home Affairs' Audit and Risk Committee, told the Committee that:

We provide independent advice to the accountable authority - for example, the secretary or the CEO - on the appropriateness of four areas: financial reporting;

⁵⁵ Rona Mellor PSM, Deputy Auditor-General, Committee Hansard, 2 February 2023, p. 4.

⁵⁶ Australian National Audit Office, Submission 12, p. 4.

⁵⁷ ANAO, Submission 12.2, p. 4.

⁵⁸ Public Governance, Performance and Accountability Act 2013, section 45.

⁵⁹ Public Governance, Performance and Accountability Rule 2014, section 17.

⁶⁰ ANAO, Submission 12.2, p. 4.

performance reporting; system of risk oversight and management; and system of internal control. 'Appropriateness' is defined as being suitable or fit for purpose for the particular entity. These four areas are required by the PGPA Act and the Department of Finance resource management guide on the role of Commonwealth audit committees.⁶¹

- 2.66 Ms Lilley said that audit committees review 'the appropriateness of the systems the entity has set up' to manage these four areas. In relation to risk management and internal controls, Ms Lilley noted that:

it's the appropriateness of the system of risk oversight and fraud risk and risk management as a whole. The fourth area is the system of internal control, focused on internal audit, so the internal audit program and internal audit reports but also business continuity planning, disaster recovery planning, the protective security policy framework, which includes security and cyber, legislative compliance and that key policies are in place.⁶²

- 2.67 Mr Allan Gaukroger, Independent Chair of the DTA's Audit Committee, told the Committee that an agency's management is responsible for determining its internal audit program. An audit committee reviews the topics and makes recommendations to the accountable authority:

The audit work program is the primary function of management. In the DTA, for example, it gets put together after internal audit liaise with various executives - with the CEO, the executive board - and they have a look at what potential topics there may be against the particular strategic and enterprise risks. It then goes to the audit committee who review the proposed topics. We may make suggestions or changes to that, and after that it's put as a recommendation to the chief executives that the internal work program be approved for that year.⁶³

- 2.68 The Auditor-General highlighted that audit committees do not directly manage risks to an organisation, but rather provide advice on the systems and frameworks the entity has set up:

They are not the chief risk officer; their role is to oversee, to provide advice to the accountable authority on whether those people carrying out those roles, like chief risk officers and chief financial officers, have the frameworks and processes in place to do that appropriately, to carry out that role and give line advice next to it and to give some external oversight about whether things like the risk frameworks have the appropriate coverage of any entity of its ilk.⁶⁴

⁶¹ Carol Lilley, Chair, Audit and Risk Committee, Department of Home Affairs, Committee Hansard, 2 February 2023, p. 1.

⁶² Carol Lilley, Chair, Audit and Risk Committee, Department of Home Affairs, Committee Hansard, 2 February 2023, p. 1.

⁶³ Allan Gaukroger Independent Chair, Audit Committee, Digital Transformation Agency, Committee Hansard, 2 February 2023, p. 5.

⁶⁴ Grant Hehir, Auditor-General, Committee Hansard, 2 February 2023, p. 3.

- 2.69 In relation to procurement, the ANAO noted that audit committees have 'no specific requirement' to advise on procurement, but that they can include procurement processes when reviewing entities' risks and internal controls:

However, in reviewing key risks and the appropriateness of internal controls, including the effectiveness of systems for monitoring the entity's compliance with laws, regulations, and associated government policies with which the entity must comply, it may be appropriate for the audit committee to consider procurement processes, particularly given the scale of procurement in government activity.⁶⁵

- 2.70 The ANAO argued that, given the scale of expenditure on procurement, a greater focus on it in audit committees could be worthwhile:

Procurement is a major spend by entities across the Commonwealth and could warrant monitoring and oversight by audit committees, especially in entities with substantial procurement activities or where ANAO audit reports have identified risks.⁶⁶

AusTender

- 2.71 Finance is responsible for the administration of AusTender, which is the Australian Government's centralised online procurement information system:

AusTender provides a single portal to connect government entities with suppliers through the publication of business opportunities, and provides transparency of contracts awarded following a procurement process. AusTender can also be used for limited tenders, where allowed by the CPRs, enabling entities to invite particular suppliers to participate.⁶⁷

- 2.72 Finance noted that entities are required to publish annual forward looking procurement plans, current procurement opportunities, as well as the details of all procurements entered into above given thresholds. For non-corporate Commonwealth entities, the reporting threshold is \$10,000.⁶⁸

- 2.73 Finance also pointed out that AusTender is the primary method by which entities can set up or make use of standing offers or panels:

Panel arrangements are usually established by approaching the market through an open tender on AusTender. Responses that meet the conditions for participation for a panel are considered for further evaluation and negotiations, and if found fully capable of undertaking the work and demonstrating the best value for money, are appointed to participate in the panel.⁶⁹

⁶⁵ ANAO, Submission 12.2, p. 5.

⁶⁶ ANAO, Submission 12.2, p. 5.

⁶⁷ Department of Finance, Submission 11, p. 7.

⁶⁸ Department of Finance, Submission 11, p. 7.

⁶⁹ Department of Finance, Submission 11, p. 7.

- 2.74 The Committee heard from a range of stakeholders that AusTender has a range of shortcomings for those attempting to access public information stored in it. Ms Catherine Thompson from Hypereal told the Committee that:

AusTender, as mentioned through the ANAO report and by the 2017 task force, is not easy to manipulate and doesn't contain the information you need. It's self-coded by people who enter to it. There are something like 13,000 active codes for UNSPSC [the United Nations Standard Products and Services Code], and there are simpler and easier ways of getting to the information.⁷⁰

- 2.75 Procurement consultancy National Advisory also highlighted flaws in AusTender's usability:

Austender is a great tool for analysis, but it has significant shortcomings. Firstly, it does not capture all of the government spend. There are types of contracts that are exempt ... There is no overall curator of the information that is logged into Austender. This creates difficulty in assessing information without data manipulation first ... The lack of curatorial control means that many fields have variable, and in some cases, incorrect data. This then makes it difficult to identify and amalgamate spends or trends in the data without significant work.⁷¹

- 2.76 King & Wood Mallesons noted that AusTender is not helpful for agencies looking to assess or process tenders:

Currently, AusTender is used solely as a platform communicating Commonwealth opportunities and through which tenders are lodged. We are not aware of the platform having any capability to assist agencies to assess or otherwise process tenders.⁷²

- 2.77 To address this, King & Wood Mallesons suggested that a range of improvements to AusTender would be beneficial, including efforts to 'assist agencies in assessing whether the minimum form and content requirements are satisfied - and communicate outcomes directly to tenderers, saving agencies from expending effort in assessing tenders as compliant or not on that basis' as well as assisting agencies to ensure their tenders are CPR-compliant.⁷³

- 2.78 Finance noted in response that it is exploring the replacement of some free text fields with standardised data, which will in its view increase the transparency of AusTender data.⁷⁴ Finance also noted that it is continuously looking for opportunities to assist entities to improve practices around the use of panels. This is being addressed through 'future updates to AusTender to report how many suppliers were approached when undertaking a panel procurement'.⁷⁵

⁷⁰ Catherine Thompson, Hypereal, Committee Hansard, 16 December 2022, p. 13.

⁷¹ National Advisory, Submission 6.1, p. 1.

⁷² King & Wood Mallesons, Submission 15, p. 2.

⁷³ King & Wood Mallesons, Submission 15, pp. 2-3.

⁷⁴ Department of Finance, Submission 11.1, p. [22].

⁷⁵ Department of Finance, Submission 11.2, p. [8].

- 2.79 National Advisory argued that Finance should do more to improve the information it provides on AusTender, particularly through exercising 'curatorial oversight' over the information there:

[AusTender] is a useful tool to generate historical data, but the data requires too much manipulation to be useful. Austender needs to be actively curated to ensure data input from agencies is accurate, consistent in form and answer, and standards are being met. Austender should also be enhanced to ensure more transparency. For example, at present it is not possible to work out how much the government spends in any category without significant work.⁷⁶

- 2.80 Finance noted, however, that changes to AusTender can be difficult to make due to the significant overhead they carry for users of the platform:

Just very quickly to give you an understanding: making a change to AusTender reporting requirements impacts on a very large number of entities across the Commonwealth and they have to implement system changes in terms of both their personnel and their ICT in order to make that happen.⁷⁷

Value for money in procurement

- 2.81 The audit reports considered by this inquiry highlighted a number of common problems about the operation of the CPRs. Among these is the demonstration of value for money, particularly through the use of competitive procurement approaches.

- 2.82 The ANAO noted in its submission that the Commonwealth Procurement Framework is principles based, and that achieving value for money is its key principle:

The principles are straightforward and readily visible in the table of contents of the Commonwealth Procurement Rules (CPRs). The core principle is achieving value for money, and this is enhanced and complemented by other key principles such as encouraging competition; efficient, effective, economical and ethical procurement; accountability and transparency; and risk management.⁷⁸

- 2.83 The ANAO noted that officials must make a reasonable effort to satisfy themselves that the procurement to be undertaken achieves a value for money outcome:

To achieve this outcome, the CPRs state that relevant entities should:

- encourage competitive and non-discriminatory processes;
- use public resources in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth;

⁷⁶ National Advisory, Submission 61., p. 4.

⁷⁷ Gareth Sebar, Acting First Assistant Secretary, Procurement and Insurance Division, Department of Finance, Committee Hansard, 2 February 2023, p. 15.

⁷⁸ ANAO, Submission 12, p. 4.

- make decisions in an accountable and transparent manner;
- appropriately consider the risks; and
- conduct a process commensurate with the scale, scope and risk of the procurement and business requirement.⁷⁹

2.84 Services Australia, in its submission to the inquiry stated the principle in this form:

All commonwealth procurements are required to consider and achieve value for money, as stated within Section 4 of the Commonwealth Procurement Rules (CPRs). Procurements which are not sufficiently justified based on value for money, pose a potential risk in not clearly demonstrating accountability, probity and transparency of decisions. Undertaking Commonwealth procurements on a value for money basis demonstrates that public resources are used in the most efficient, effective, ethical and economic manner, in accordance with the Public Governance, Performance and Accountability Act 2013.⁸⁰

2.85 The ANAO argued that the use of competitive approaches to procurement is among the easiest ways to demonstrate that value for money has been achieved in a procurement:

Generally, the more competitive the procurement process, the better placed an entity is to demonstrate that it has achieved value for money. Competition encourages respondents to submit more efficient, effective and economical proposals. It also ensures that the purchasing entity has access to comparative services and rates, placing it in an informed position when evaluating the responses.⁸¹

2.86 The most obvious means of promoting competition in procurements is through the use of open tenders which allow any suitably qualified tenderer to bid for the procurement. However, the ANAO noted that:

Despite the CPRs emphasising the benefits of open and effective competition, limited tender is a commonly used procurement approach. ANAO analysis of AusTender data shows that the reported use of open tender procurement methods has increased from approximately 45% of all contracts and amendments in 2017-18 to approximately 54% in 2021-22.⁸²

2.87 Drawing on its extensive performance audit evidence base, the ANAO observed that entities frequently avoid competitive procurement approaches because doing so is less costly for them and an easier process to undertake, and not because their approach provides value for the taxpayer.⁸³

⁷⁹ ANAO, Submission 12, p. 5.

⁸⁰ Services Australia, Submission 17, p. [39].

⁸¹ Auditor-General Report No. 42 2021–22, p. 18.

⁸² ANAO, Submission 12, p. 7.

⁸³ ANAO, Submission 12, p. 7.

- 2.88 The audits reports considered as part of this inquiry provide examples that bear this analysis out. The NCA for example, made insufficient use of open and competitive procurement processes, with limited tender approaches occurring even when the value of the procurement required an open approach to market.⁸⁴
- 2.89 Even when it undertook competitive procurement process, the NCA was often unable to demonstrate value for money. Where open tenders were conducted, conditions for participation were frequently included that limited competition, and incumbent suppliers were often preferred, limiting access to new market entrants. When assessing tenders, the NCA awarded contracts to the candidate that demonstrated value for money in just over half the cases examined by the ANAO.⁸⁵
- 2.90 The audit of the DTA also identified a range of issues relating to achieving value for money. The DTA frequently directly sourced procurements from panels in ways that did not support the intent of the CPRs in achieving value for money. When conducting open approaches to market, the DTA's tender evaluation processes did not stand up to ANAO examination, with the audit finding that "none of the examined procurements fully complied with CPR requirements to consider value for money".⁸⁶
- 2.91 Similarly, the audit of DISR's conduct of the Entrepreneur's Programme 'did not demonstrate achievement of value for money, the core rule of the Commonwealth Procurement Rules'.⁸⁷ Following DISR's open approach to market the ANAO noted that:
- Although the Request for Tender (RFT) resulted in 53 compliant tender responses being received suggesting a competitive selection process, the department's approach was deficient in significant respects such that there was not open and effective competition for the delivery partner roles.⁸⁸
- 2.92 DISR's conduct of procurements associated with the Entrepreneur's Programme was also noncompliant with the CPRs. For example, its engagement of a probity adviser did not demonstrate value for money.⁸⁹ Its engagement of consultants to develop a contract management framework for the program also failed to demonstrate value for money.⁹⁰
- 2.93 However, not all the audit reports had negative findings in relation to value for money. Defence's procurement of the six Evolved Cape Class Patrol Boats was not conducted through an open approach to market, but showed that when properly conducted, such procurements can still demonstrate value for money.

⁸⁴ Auditor-General Report No. 30 2021–22, pp. 17-18.

⁸⁵ Auditor-General Report No. 30 2021–22, p. 8.

⁸⁶ Auditor-General Report No. 5 2022–23, p. 9.

⁸⁷ Auditor-General Report No. 42 2021–22, p. 19.

⁸⁸ Auditor-General Report No. 42 2021–22, p. 19.

⁸⁹ Auditor-General Report No. 42 2021–22, p. 40.

⁹⁰ Auditor-General Report No. 42 2021–22, p. 65.

- 2.94 Defence argued that given the unique environment within which it operates, 'competition in procurement is not always possible or beneficial'.⁹¹ In procuring the patrol boats, Defence undertook a benchmarking process to assess the cost of the proposed procurement and the ANAO found that its value for money assessment was largely appropriate.⁹²

The use of panels for procurement

- 2.95 The inquiry heard a range of evidence relating to the use of standing offers or panel arrangements for procurements. This section considers that evidence – in particular the rationale for panel procurements, their effective use and how competitive they are, reporting of panel procurements on AusTender, market concentration, and barriers to entry on panels.

- 2.96 Finance noted that the Commonwealth procurement framework enables standing offer panel arrangements to be established to streamline the buying and selling process for commonly used goods and services:

Panel arrangements are usually established by approaching the market through an open tender on AusTender. Responses that meet the conditions for participation for a panel are considered for further evaluation and negotiations, and if found fully capable of undertaking the work and demonstrating the best value for money, are appointed to participate in the panel.⁹³

- 2.97 *The Independent Review of Services Australia and NDIA Procurement and Contracting: Taskforce report to the Independent Reviewer* noted that panels can be more efficient and cheaper means of conducting procurement:

Use of a panel (or standing offer) arrangement can be a way to procure goods or services regularly acquired by entities more efficiently, with reduced cost and enhanced service and quality. Panels can be established by open or limited tender, and although the term 'panel' implies multiple suppliers, standing offers with a single supplier can also be referred to as panels.⁹⁴

- 2.98 The ANAO, however, highlighted that panels are designed to improve efficiency and reduce risk, not to reduce competition:

Panel arrangements are designed to improve efficiency and reduce risk, not reduce fair and transparent competition. Establishment of a panel should be viewed as a preliminary process intended to facilitate future procurement

⁹¹ Department of Defence, Submission 10, p. 3.

⁹² Auditor-General Report No. 15 2021–22, p. 35.

⁹³ Department of Finance, Submission 11, p. 7.

⁹⁴ *Independent Review of Services Australia and NDIA Procurement and Contracting: Taskforce Report to the Independent Reviewer*, March 2023, pp. 12-13

processes, which themselves should be conducted in a manner commensurate with the scale, scope and risk of the procurement and business requirement.⁹⁵

2.99 The CPRs note that officials 'should report the original procurement method used to establish the standing offer when they report procurements from standing offers'.⁹⁶ And following their most recent amendment in July 2022, they also state that '[t]o maximise competition, officials should, where possible, approach multiple potential suppliers on a standing offer'.⁹⁷

2.100 The ANAO noted that the requirement to report only the method by which the panel was established is not suitably transparent:

Under the CPRs, procurements involving a panel arrangement, even where only one supplier is approached to tender, are reported on AusTender as an open tender if this was the method used to select the panel. This means that the limited competitive pressure on the tenderer arising from a sole source approach is not transparent to the public. A requirement to more accurately report these procurements would support entities to choose competitive processes more often.⁹⁸

2.101 The ANAO also noted that, increasingly, a small number of suppliers on a panel are capturing a large proportion of the contracts awarded through that panel:

Contracting through procurement panels has been growing significantly both in terms of the number of contract notices and their value. It remains common for a relatively small proportion of suppliers on a panel to be awarded the majority of contract value when the panel is accessed.⁹⁹

2.102 Evidence from Andrew Smith, Special Consultant with National Advisory, concurred with this conclusion:

Market concentration is another concern, with some of the panels we have examined showing one or two suppliers dominating the contracts awarded under the panel - in contrast with similar contracts in the state governments, where there's a greater spread of contracts to suppliers.¹⁰⁰

2.103 The National Advisory submission also noted specific instances of market concentration on a particular panel:

In one ICT panel, with fifteen registered suppliers, and for a commonly used service, agencies have let contracts for over \$700 million in the first 8 years of

⁹⁵ ANAO, Submission 12, p. 7.

⁹⁶ Commonwealth Procurement Rules, paragraph 9.13.

⁹⁷ Commonwealth Procurement Rules, paragraph 9.14.

⁹⁸ ANAO, Submission 12, p. 8.

⁹⁹ ANAO, Submission 12, p. 8.

¹⁰⁰ Andrew Smith, National Advisory, Committee Hansard, 16 December 2022, p. 21.

the panel. One supplier has received over 80 per cent of this market and the top two providers have shared 92 per cent.¹⁰¹

2.104 Mr Smith noted National Advisory's observations that when a panel member has been single-selected for a contract, entities are 'often rewarding that supplier with amendments that take contracts out to 10 years or more', leading National Advisory to conclude that 'incumbency is the greatest determinant of future supply contracts in the public service'.¹⁰²

2.105 Mr Smith argued further that panels as they exist at present often function to exclude new market entrants:

There are barriers to entry that make it difficult for companies to win work from panels; that panels can freeze out new entrants for the life of a panel, which is sometimes nine to 10 years; and that agencies often seek to renew or amend contracts towards the end of a panel's life, further restricting the work available to prospective new suppliers on a replacement panel.¹⁰³

2.106 National Advisory therefore argued for reforms to the CPRs to ensure that panels are refreshed often and that new entrants can apply to join a panel at any time:

That means that the panel remains innovative and competitive because the people who were on the panel before realise there are new entrants coming in, so when they get a chance to bid on a project and there are two or three bids coming in, they know they've got to be competitive.¹⁰⁴

2.107 The ANAO found problems with the way panel procurements were conducted at the DTA and the NCA, which are discussed in more detail in Chapter 3 and 4. The problems involved single-sourcing procurements from panels in a way which did not demonstrate value for money, and using panels in a way that lessened competition and thereby reduced value for money.

2.108 Finance noted that changes to the reporting requirements for procurements conducted by panel are under consideration:

Changes to AusTender reporting requirements are being considered as part of broader policy development which gives due consideration to the ANAO audit findings, including the audit of the National Capital Authority.¹⁰⁵

2.109 The ANAO's review of Procurement Contract Reporting noted that in the last 10 years the value of procurement conducted through standing offers (including panels) has increased from 12 per cent in 2012-13 to 34 per cent in 2021-22.¹⁰⁶ The report

¹⁰¹ National Advisory, Submission 6, p. 4.

¹⁰² Andrew Smith, National Advisory, Committee Hansard, 16 December 2022, p. 21.

¹⁰³ Andrew Smith, National Advisory, Committee Hansard, 16 December 2022, p. 21.

¹⁰⁴ Andrew Smith, National Advisory, Committee Hansard, 16 December 2022, p. 34.

¹⁰⁵ Department of Finance, Submission 11.1, p. [16].

¹⁰⁶ Auditor-General Report No. 11 2022-23, p. 76.

found that the top four suppliers, by number, of standing offers were KPMG, Ernst & Young, PricewaterhouseCoopers, and Deloitte.¹⁰⁷

2.110 The report notes that ‘among the top 10 suppliers by number of consultancy-related contracts, PricewaterhouseCoopers Consulting (Australia) Pty Limited had the largest proportion of its contracts that were consultancy-related with 39 per cent.’ PricewaterhouseCoopers appears twice in the top 10 suppliers by number of consultancy-related contracts, as its legal and consulting arms each appear on the list.¹⁰⁸

Probity and ethics

2.111 The inquiry frequently heard evidence relating to the management of probity during procurement processes. Most of the audited entities were found to have conducted procurements without properly managing probity appropriately.

2.112 The ANAO noted that ethical use of public resources is a key responsibility of officials, particularly via the duties set out in sections 25-29 of the PGPA Act:

In particular, officials must not improperly use their position, or information obtained because they are an official to gain or seek to gain a benefit or advantage for themselves or any other person or seek to cause detriment to the Commonwealth or another person (sections 27 and 28). Moreover, officials must disclose details of any material personal interest that relates to the affairs of the entity.¹⁰⁹

2.113 The ANAO also noted, however, that most of the audit reports identified failings in the ethical conduct of procurements:

Four of the five audits subject to this inquiry contained adverse findings relating to ethical behaviour and probity risks in line with those outlined in paragraph 6.6 [of the CPRs]. Issues identified in the audits included failure to adhere to policy requirements such as mandatory fraud training, flawed processes for appointing a probity adviser, and a failure to take action in response to identified probity risks and proposed treatments.¹¹⁰

2.114 Specific probity management issues were identified in relation to Defence, the DTA, DISR and the NCA.

2.115 Defence’s procurement of six patrol boats resulted from an unsolicited proposal from Australian ship maker Austal. The audit found that Defence did properly manage probity, but that its probity process began only after a delay of five months. Given that Defence shared information with Austal relating to the development of the

¹⁰⁷ Auditor-General Report No. 11 2022–23, p. 79.

¹⁰⁸ Auditor-General Report No. 11 2022–23, p. 55.

¹⁰⁹ ANAO, Submission 12, p. 9.

¹¹⁰ ANAO, Submission 12, p. 9.

proposal during this time, the ANAO found that Defence should have considered probity earlier than it did.¹¹¹ Defence accepted the recommendation while noting that the conduct of its officials was appropriate in spite of the lack of formal probity arrangements during that period.¹¹²

- 2.116 The audit of the DTA uncovered more significant probity issues. Of note, the DTA found but failed to properly investigate a possible case of fraud, in contravention of its own internal probity policies.¹¹³ The DTA also failed to properly identify and manage actual, potential or perceived conflicts of interest, including requirements for activity-specific conflict of interest declarations.¹¹⁴
- 2.117 In its administration of the Entrepreneur's Programme, DISR did not make proper use of the probity advisers it engaged, in one case even putting their probity adviser to work on a project on which they were supposed to be advising on and thereby compromising their independence.¹¹⁵
- 2.118 The ANAO also found that the NCA did not conduct procurements 'to a consistent ethical standard under the CPRs'. NCA staff did not complete conflict of interest declarations in 39 per cent of contracts examined by the ANAO, and where a probity adviser was appointed, the NCA commonly did not have a conflict of interest declaration on record for the adviser.¹¹⁶ Finally, records of the adviser's role and conclusions on the probity of the procurement were often not retained.¹¹⁷

Record keeping

- 2.119 Record keeping is the issue that arises most regularly in JCPAA inquiries. Entities have an obligation to keep adequate records; without adequate records an entity cannot demonstrate that its policies and practices are appropriate, which reduces the transparency and accountability of an entity for its procurement activities. Further, the ANAO's ability to audit the entity's performance can be significantly impeded if they do not keep proper records.
- 2.120 In relation to procurement, record keeping requirements are specified in paragraph 7.2 and 7.3 of CPRs. Officials 'must maintain for each procurement a level of documentation commensurate with the scale, scope and risk of the procurement'. The documentation should accurately and concisely record the requirement for the procurement, the process it followed and how value for money was 'considered and achieved', as well as relevant approvals, decisions and the basis for those decisions.¹¹⁸

¹¹¹ Auditor-General Report No. 15 2021–22, p. 9.

¹¹² Rear Admiral Wendy Malcolm, Department of Defence, Committee Hansard, 14 December 2022, p. 1.

¹¹³ Auditor-General Report No. 5 2022–23, pp. 30-32.

¹¹⁴ Auditor-General Report No. 5 2022–23, p. 33.

¹¹⁵ Auditor-General Report No. 42 2021–22, p. 9.

¹¹⁶ Auditor-General Report No. 30 2021–22, p. 9.

¹¹⁷ Auditor-General Report No. 30 2021–22, p. 9.

¹¹⁸ Commonwealth Procurement Rules, paragraphs 7.2-7.3.

- 2.121 Paragraph 7.4 of the CPRs also notes that entities should retain evidence of agreements with suppliers – that is, contracts, purchase orders, invoices or receipts.¹¹⁹
- 2.122 The ANAO found issues with several aspects of the DTA’s record keeping practices. The audit checked nine DTA procurements. Approach to market documentation was not kept properly for seven of them.¹²⁰ In relation to one procurement which used a limited tender approach, the justification for avoiding an open approach to market was not recorded, meaning value for money could not be demonstrated.¹²¹ The DTA also failed to keep proper records of its tender evaluation processes, including how it established value for money.¹²²
- 2.123 In relation to DISR’s management of the Entrepreneur’s Programme, the ANAO found that 'appropriate procurement records were partly maintained' by DISR, and recommended that the department improve its procurement record keeping so that accurate and concise information on its procurement processes, including value for money assessments, is maintained.¹²³
- 2.124 The NCA’s record keeping was not appropriate, with the ANAO finding that 'poor transparency and record keeping' meant the NCA 'could not demonstrate value for money across its procurement activities'.¹²⁴ The audit also found that:
- The NCA did not maintain records commensurate with the scale, scope and risk of the procurement. While records of approvals and the contracts awarded were largely maintained, it was common for there to be gaps in the records of the planning and conduct of the procurements.¹²⁵
- 2.125 Defence’s record keeping was not identified as an issue in the audit of the patrol boat procurement. Throughout the report the ANAO makes reference to Defence records of its receipt and treatment of the unsolicited proposal, its value for money assessment process, and its management of probity, among other issues.
- 2.126 In relation to Home Affairs, the ANAO reported that its analysis of the departments management of the contract was 'made difficult by the state of the department’s records' and was 'impeded by the department not meeting the requirement for it to maintain adequate records of the original procurement'.¹²⁶ The audit also noted that 'Home Affairs’ invoice records were also incomplete, with a gap totalling \$17 million of expenditure that cannot be supported by invoices'.¹²⁷

¹¹⁹ Commonwealth Procurement Rules, paragraph 7.4.

¹²⁰ Auditor-General Report No. 5 2022–23, p. 43.

¹²¹ Auditor-General Report No. 5 2022–23, p. 44.

¹²² Auditor-General Report No. 5 2022–23, p. 56-59.

¹²³ Auditor-General Report No. 42 2021–22, pp. 46-47.

¹²⁴ Auditor-General Report No. 30 2021–22, p. 7.

¹²⁵ Auditor-General Report No. 30 2021–22, p. 42.

¹²⁶ Auditor-General Report No. 6 2021–22, p. 18.

¹²⁷ Auditor-General Report No. 6 2021–22, p. 24.

Contract management

2.127 Contract management is a key component of the procurement process, and the audits uncovered a range of problems with entities' contract management processes.

2.128 According to the ANAO:

Procurement should be seen in a whole-of-life context, from the initial tender of the goods/service to negotiation and finalisation of a contract and planning for what occurs next. A procurement process that results in a favourable contract does not actually achieve value for money if a contractor fails to perform in accordance with the terms of the contract.¹²⁸

2.129 In its Defence audit report, the ANAO expanded on this principle:

Sound project governance and contract management arrangements support the effective management of procurement risks and the timely delivery of capability on budget and against requirements. The delivery of contracted capability on time and on budget also supports the actual achievement of value for money in procurement.¹²⁹

2.130 A key element of contract management drawn to the Committee's attention by the ANAO is the management of contract variations and extensions:

The value of public funds committed through contract extensions is significant: AusTender reporting for 2021-22 shows roughly \$29.8 billion of contract amendments, compared to roughly \$50.9 billion of parent contracts.⁵¹ Entities should ensure that contract managers, and any individuals advising them, understand that contract extensions and variations that are inconsistent with the key procurement principles can be detrimental to the conduct of a transparent and accountable process and to the achievement of value for money for the taxpayer.¹³⁰

2.131 Chapter 5, which discusses the audit of Home Affairs' Maritime Surveillance contract is primarily concerned with contract management issues. However, contract management issues were identified in other audits before this inquiry.

2.132 For example, the ANAO identified significant deficiencies in the DTA's contract management processes:

The DTA has not established effective contract management arrangements for the procurements examined by the ANAO. None of the nine procurements had a contract management plan. The DTA did not consistently report contract variations to AusTender within 42 days or with the correct value. All nine

¹²⁸ ANAO, Submission 12, p. 11.

¹²⁹ Auditor-General Report No. 15 2021–22, p. 47.

¹³⁰ ANAO, Submission 12, p. 11.

procurements had issues with the timeliness of payments, and there were weaknesses in the DTA's internal payment controls that led to duplicate payments being made.¹³¹

- 2.133 The DTA also made significant use of contract variations in ways contrary to the intent of the CPRs:

The DTA varied seven of the nine procurements examined by the ANAO. In one case, a directly sourced contract was 'leveraged' multiple times, increasing in value by 40 times with substantial changes to scope. Varying a contract in this way is not consistent with ethical requirements.¹³²

- 2.134 In relation to contract management at the NCA, the ANAO noted that 'Contract variations pose particular risk to maximising value for money where they are negotiated in a non-competitive environment with an incumbent supplier':

Of the top four contracts in terms of percentage increase at the NCA the value was subsequently varied by between 165 per cent and 880 per cent of their initial contract value, increasing them in aggregate from \$771,546 to \$2.8 million.¹³³

- 2.135 By contrast, the ANAO found that Defence 'implemented largely appropriate contracting, governance and reporting arrangements to support the acquisition' of the patrol boats. The contract Defence entered into included milestones with clear entry and exit criteria, due dates, and payments tied to achievement of the milestones.¹³⁴ Defence was also found to have managed project milestones appropriately.¹³⁵

Committee comment

- 2.136 These five audit reports, read together with the evidence from other inquiry participants, paint a concerning picture of procurement in the APS. There appears to be a significant capability deficit among procuring officials. As a consequence, there is widespread non-compliance with the procurement rules and frequent failures to demonstrate the achievement of value for money when conducting procurements.

- 2.137 Procurement can be a complex endeavour. While the CPRs themselves are relatively simple, they sit within a financial governance and assurance framework that can be hard to grasp, especially in the case of officials for whom procurement is an infrequent or secondary responsibility.

- 2.138 Given the sums of public money expended on procurement each year, it is clear that improvements in procurement practices and processes must be made, so that money spent generates as much value for the taxpayer as can possibly be expected. And given the scale of the problems evident from these five audit reports, it is equally

¹³¹ Auditor-General Report No. 5 2022–23, p. 10.

¹³² Auditor-General Report No. 5 2022–23, p. 72.

¹³³ Auditor-General Report No. 30 2021–22, p. 28.

¹³⁴ Auditor-General Report No. 15 2021–22, p. 48.

¹³⁵ Auditor-General Report No. 15 2021–22, p. 65.

clear that the improvements must be made systematically, across the APS as a whole rather than on an entity-by-entity basis.

- 2.139 The Committee is encouraged that Finance is exploring the development of professionalisation pathways for APS staff to become procurement and contracting specialists. The Committee agrees with the department that an appreciable career progression incorporating subject matter expertise will assist to ensure that procurement skills and knowledge is built and retained in the APS.
- 2.140 The Committee also acknowledges the evidence from private sector procurement professionals in relation to the development of procurement as a discipline in recent years. While not detracting from the critical importance of improving process, administration and the implementation of the framework, the Committee agrees that the current narrow focus on procurement as “a process” is too limiting and has failed to mirror this development in its conceptual underpinnings
- 2.141 Without pre-empting the outcomes of a considered update of the Commonwealth’s definition of procurement, the Committee considers there is merit in considering procurement as more than just process and instead is attracted to considering procurement as ‘an holistic endeavour to minimise transaction costs across the supply chain whilst maximising overall value for money’ in alignment with the rules. This would require more active lifecycle management of supply markets especially in areas such as technology, health and categories where government is a large and sometimes even monopoly procurer. In many respects Defence already appears to operate in this way.
- 2.142 In light of these factors, the Committee considers that Finance should expedite its work to professionalise procurement in the APS to the maximum extent possible, and ensure that in doing so it embeds a view and broader definition of procurement that reflects current best practice as seen throughout the procurement profession.

Recommendation 1

- 2.143 The Committee recommends that the Department of Finance work to advance public sector procurement capability and professionalisation by:**
- **prioritising the development and rollout of a procurement professional stream within the Australian Public Service, to facilitate the creation of procurement and contracting specialists, and**
 - **expanding the current definition of procurement in the Commonwealth Procurement Rules, to empower and better reflect modern, professionalised procurement practices, including more active management of supply markets and supply chains to maximise value for money.**

Finance should report back to the Committee within 12 months on its progress to develop and deliver these outcomes.

- 2.144 The Committee notes that the CPRs do not apply to corporate Commonwealth entities (CCEs) by default. Only 24 out of 72 CCEs are prescribed as 'relevant entities' in the CPRs and therefore must comply with the rules.
- 2.145 The Committee shares the ANAO's view that obtaining value for money and acting fairly and ethically should not be seen as a barrier to the commercial operation of CCEs. The Committee acknowledges that in some cases an exception could or should apply, but considers that the default approach should be for the CPRs to apply to CCEs with exceptions to be specified by the Finance Minister by way of legislative instrument.
- 2.146 The Committee considers that the onus in relation to CCEs should be reversed so that the CPRs will apply to CCEs by default unless exceptions are made via legislative instrument issued by the Minister for Finance. There is no sensible justification for CCEs such as the NDIA to remain outside the CPRs.
- 2.147 Reversing the onus so that CCEs are included unless exempted is preferable to a 'point-in-time' review of current arrangements. This is because it:
- requires Finance to make a conscious judgment in advising the Minister for Finance in implementing this change to, in effect, re-baseline the current application of the CPRs agency by agency, and then
 - draws a line so that if new CCEs are created in the future the CPRs will automatically apply unless exempted.
- 2.148 This change would mean that the integrity of the regime cannot unconsciously be eroded over time when new CCEs are created as is currently the case.

Recommendation 2

- 2.149 The Committee recommends that the Department of Finance amend the Commonwealth Procurement Rules to reverse the onus such that they apply to corporate Commonwealth entities by default, with any exceptions to be made by the Finance Minister via legislative instrument.**
- 2.150 Paragraph 2.6 of the CPRs gives procuring entities the ability to suspend the operation of the rules in certain circumstances, namely the maintenance or restoration of international peace and security, to protect human health, for the protection of essential security interests, or to protect national treasures of artistic, historic or archaeological value.
- 2.151 The Committee notes that Home Affairs invoked this clause to exempt itself from the requirement for an open approach to market for the Civil Maritime Surveillance contract procurement. While the Committee understands that the department's rationale for invoking this provision was that there was no time left to procure a replacement, it notes two key things. First, that the only reason for urgency was the shared failure of the previous government and the department to initiate a procurement in a timely fashion. Invoking urgency where there has been a failure to

manage procurements in a timely way is frustrating and sub-optimal. Second, that the provision's use does not absolve the department from its obligation to achieve value for money in the expenditure of public money, and to conduct procurement in a fair transparent and ethical manner.

- 2.152 In the Committee's view, Finance should amend the CPRs to make clear that the exemptions from the CPRs under paragraph 2.6 do not excuse entities from their obligations under the Resource Management Framework to act in such a manner.

Recommendation 3

- 2.153 The Committee recommends that the Department of Finance amend paragraph 2.6 of the Commonwealth Procurement Rules to emphasise that the core principles of achieving value for money and conducting procurements in a fair, transparent and accountable manner continue to apply to the procurement even when an exemption to the rules was obtained under the paragraph. Finance should develop and issue guidance on paragraph 2.6 to reflect this amendment.**
- 2.154 The Committee notes Finance's evidence on its role as what it calls the 'steward' of the procurement system. The training and guidance material that Finance makes available is of great use.
- 2.155 The Committee notes evidence from Finance that it looks to the results of ANAO performance audits for information on aspects of the procurement framework that may need attention or reform. While recognising Finance's genuine and constructive actions to support entities to implement the framework, its approach is too passive and not adequate approach for a policy owner to take, not even when in charge of a 'devolved' system.
- 2.156 The Committee notes that while some entities, Defence in particular, engage closely with Finance on procurement matters and share information with it freely, others do not, and provide little information to Finance on the conduct of their procurements beyond compulsory AusTender reporting requirements. The Committee acknowledges and accepts evidence that since the removal in 2017 of requirements for agencies to report to Finance on procurement outcomes, less systemic attention has been paid to procurement within many agencies. While this may have been well intentioned in the name of 'cutting red tape' the practical impact has been that Finance has been 'flying blind' with too little information and assurance on how the CPRs are being implemented by entities to enable it to advise the Minister for Finance on compliance with the framework and any changes that may be needed.
- 2.157 In proposing that Finance can and should take more responsibility for the outcomes being achieved as the policy owner in a devolved implementation framework the Committee is not proposing that Finance police or second guess entities or take responsibility for individual procurements. Nor that Finance should tie the system up in red tape with unduly onerous reporting.

2.158 As a regulator, however, Finance must take better responsibility for the procurement system. This should include the collection of sufficient information to allow it to identify risks to the system and manage them appropriately.

2.159 In making this recommendation the Committee is conscious of the need to ensure any new requirements are as simple and streamlined as possible to minimise any additional internal regulatory burden, and anticipates that implementation of these recommendations would be core ongoing business for agencies and should not require additional appropriation, while recognising that these are matters for Government to consider in the ordinary way.

Recommendation 4

2.160 Noting that reporting on compliance with the Commonwealth Procurement Rules (CPRs) is currently limited to the inclusion of significant non-compliance in annual reports, the Committee recommends that the Department of Finance:

- **introduce requirements for entities subject to the CPRs to report, at least annually and certified by the accountable authority, on their compliance with the CPRs**
- **publish a report annually, commencing in the 2023-24 year, aggregating this information across the sector to help assess the effectiveness of the procurement framework, identify areas of risk, and inform changes to the procurement framework to ensure it remains fit-for-purpose, and**
- **require Commonwealth entities subject to the CPRs or the Public Governance, Performance and Accountability Act 2013, by 31 December 2023, to provide Finance with a report on their internal procurement and delegation policies that outlines how value for money will be ensured when procuring from panels.**

2.161 In relation to the role of audit committees with respect to procurement, the Committee is concerned that oversight of procurement risks and entities internal procurement controls is insufficient. The audits considered in this inquiry, especially those of the DTA and DISR, do not show an obvious appreciation of the entity's substantial lack of compliance with the CPRs by its audit committee. As such, the Committee considers that, especially where entities are engaging in significant or complex procurements, audit committees should provide increased scrutiny of these activities and the consider the prioritisation of procurement in an entity's program of internal audit.

Recommendation 5

2.162 The Committee recommends that the Department of Finance amend its guidance to Commonwealth entities to recommend that, where an entity engages in significant or complex procurement activity:

- **the entity’s audit committee should increase its scrutiny of procurement risks and internal procurement controls commensurate with the scale and risk of the procurements, and**
- **the entity’s internal audit program should provide assurance over the conduct of those procurements.**

2.163 The Committee notes with concern the adverse findings made against audited entities with respect to the management of probity. The obligation to conduct procurements in an ethical manner is a fundamental one, and entities must be capable of demonstrating that they have met that obligation.

2.164 In this inquiry, four out of the five audited entities were found to have flawed processes for managing probity in their procurements in one way or another. Defence has accepted that although its probity process was appropriate, it did not commence early enough in the context of an unsolicited proposal. Probity management at the DTA was much more problematic, and its failure to properly investigate a possible case of fraud is of great concern.

2.165 The management of actual, potential or perceived conflicts of interest is particularly important in procurement. Conflicts of interest will inevitably arise – if they do not, it may be a sign that that officials do not sufficiently understand the market that they are procuring from. What matters is how conflicts are treated, and if these audits are representative, there are deficiencies in probity management across the Commonwealth. The NCA could not demonstrate that it had managed conflicts of interest in nearly 40 per cent of its procurements, and the audits found significant problems with the use of probity advisers at both DISR and the NCA. The Committee considers it worthwhile to remind procuring entities of their probity management obligations and to provide them with guidance on how to properly engage and use probity advisers.

2.166 Having a probity advisor is not a magic spell that cures all problems or ensures integrity and probity. Agencies need to use them properly, actively manage and actually pay attention to advice received and the Committee was bemused and concerned at the evidence revealed through the inquiry. The Committee intends that probity and ethical issues will be a key focus of its future work.

Recommendation 6

2.167 The Committee recommends that the Department of Finance write to the accountable authorities of Commonwealth entities with guidance on how to use probity advisers, and reminding them of their obligation to manage probity in a thorough and consistent manner when conducting procurements.

2.168 The Committee considers that the proper understanding of panels is as a pre-vetted and pre-qualified list of potential suppliers. Panels should not operate to unfairly and unreasonably limit competition through:

- the exclusion of new market entrants from the panel,

- limiting too narrowly the number of participants invited to quote or tender, or
 - seeing prices as a fixed value ceiling, as opposed to a value floor from which to negotiate and sharpening the pencil accordingly.
- 2.169 The inquiry raised a number of concerns about the use of panels for procurement. Both the DTA and the NCA had misused panels in ways that limited competition and did not achieve value for money for the Commonwealth. Single-sourcing from panels, especially when it involves selecting an incumbent supplier, is poor procurement practice and should be avoided if at all possible.
- 2.170 The Committee agrees with the ANAO that entities must still undertake a value for money assessment when procuring from a panel, as should be done with any procurement. And further, that entities should seek multiple offers from panel members whenever possible, so that they can more convincingly demonstrate that they have achieved value for money. Finance should take steps to ensure that procuring entities are reminded of these best practices.

Recommendation 7

- 2.171 The Committee recommends that the Department of Finance amend its guidance on the use of panels to make it explicit that:**
- **a separate value for money assessment must still be undertaken when conducting a procurement from a panel, even though value for money has been considered when forming the panel, and**
 - **panel procurement should involve multiple competing tenders from panel members, with sole-sourcing from a panel generally considered inadequate to demonstrate value for money.**
- 2.172 A further problem with panel procurements is the extent to which a small number of suppliers are dominating the contracts awarded through them. Panel procurements can provide significant benefits in terms of efficiency and risk reduction for entities, but they should not come at the cost of the core principles of competition and value for money. The Committee notes the evidence it heard that panels are often exhibiting and may be facilitating concerning levels of market concentration and anti-competitive behaviour. Instead of assisting small and medium enterprises to compete for government work, panels are too often funnelling work to a small number of large companies. Panels should not continue to be a protection racket to channel work to the Big 4 consulting firms.
- 2.173 Panels should not trade away value for money in exchange for convenience to the procuring entity, and incumbent suppliers should not be unduly favoured by them. Competition on panels and new market entrants should be supported. In the Committee's view, Finance should ensure that the rules around panel procurements facilitate ongoing competition and make room for new entries to markets. Panels should be refreshed regularly enough that they do not become insulated from newcomers, and new market entrants should be able to apply for entry to panels if the situation arises.

Recommendation 8

2.174 The Committee recommends that the Department of Finance require panel procurements to facilitate ongoing competition and foster new entries to markets, by requiring:

- **panels to be refreshed at regular intervals, for example, at least once every two years and at least before a panel is extended, and**
- **an ability for new entrants to seek to be listed on the panel, at any time where possible or at least periodically during the life of the panel.**

2.175 AusTender is a useful tool for information on and reporting of Commonwealth procurement activity. However, the requirements for reporting on certain types of procurements has not always generated the level of transparency which the Committee considers was intended at its establishment. Of most concern are the reporting requirements for panel procurements, where the procurement method reported is the method which established the panel, rather than the method used in the procurement itself. The Committee notes that Finance plans to address this but reiterates that this requirement should be amended.

2.176 Also of concern are the reporting mechanisms for contract amendments. The Committee is particularly concerned that the reasons for contract variations are not being reported in a sufficiently useful and transparent way, in that free text reasons for contract variations do not provide useful data. Consequently, it is recommended that a more standardised approach is adopted.

Recommendation 9

2.177 The Committee recommends that the Department of Finance amend the reporting requirements on AusTender to ensure it is clear for every procurement:

- **how many suppliers were invited to submit quotes for a procurement, including when procuring from panels and standing offers as recommended by the Australian National Audit Office in its audit of the Digital Transformation Agency, and**
- **reasons for any amendments or variations to a contract, by standardising the relevant field to produce more structured data.**

2.178 The Committee also heard evidence that suppliers find that AusTender has significant shortcomings in terms of its usability. One of the biggest problems raised was the difficulty of extracting useful information from AusTender to conduct analysis or identify business opportunities. Inconsistent data is a significant issue, arising in part from entries coded differently or from the use of free text fields where structured data from standard fields would be more useful. The Committee considers that Finance should exercise greater curatorial oversight over this data so that is more consistent, structured and accessible to its users.

Recommendation 10

- 2.179 To facilitate a greater level of transparency in procurement, the Committee recommends that the Department of Finance exercise greater curatorial oversight over the information on AusTender, by, among other things, ensuring data is consistent, properly structured, and easily accessible, and by making standard format reports available to prospective tenderers.**
- 2.180 In considering these changes to AusTender the Committee also sees merit in Finance considering the many positive suggestions made by submitters for improvements to AusTender, including by King & Wood Mallesons, that may assist agencies with procurements and compliance with the rules.

3. The DTA's procurement of digital and ICT-related services

Auditor-General Report No. 5 2022–23

Introduction

Background

- 3.1 The audited entity was the Digital Transformation Agency (DTA). The DTA was established in 2016 to replace its predecessor, the Digital Transformation Office. According to its corporate plan, the DTA aims to be a trusted adviser on digital and ICT investment decisions, as well as to simplify digital procurement and reduce costs for the Commonwealth.¹
- 3.2 Procurement is a core function of the DTA. As such, the audit aimed to assess the effectiveness of the DTA's procurement of ICT-related services through an examination of the DTA's procurement framework, its procurement activity and its contract management.²

Audit findings

- 3.3 Auditor-General Report No. 5 of 2022-23, *Digital Transformation Agency's Procurement of ICT-Related Services* examined a sample of nine procurements undertaken between 1 July 2019 and 30 June 2021. The procurements were selected on the basis of risk, value, and relevance. They included seven of the DTA's nine highest value procurements over this period. Seven of the procurements used the DTA's Digital Marketplaces panel, with one each of the remaining two being limited tender and open tender procurements.³
- 3.4 The audit found that none of the nine procurements were effective. The DTA's implementation and oversight of its procurement framework was found to be weak, the agency did not follow its internal policies and procedures, and there were weaknesses in its governance, oversight and probity arrangements.

¹ Auditor-General Report No. 5 of 2022-23, *Digital Transformation Agency's Procurement of ICT-Related Services*, p. 7.

² Auditor-General Report No. 5 of 2022-23, p. 7.

³ Auditor-General Report No. 5 of 2022-23, p. 8.

- 3.5 None of the 9 procurements complied fully with the Commonwealth Procurement Rules (CPRs). Approach to market and tender evaluation processes were not conducted effectively, and its contract management performance was not effective and fell short of ethical requirements.⁴
- 3.6 The ANAO made nine recommendations, eight of which were addressed to the DTA and one of which was addressed to the Australian Government. The DTA agreed to all eight recommendations.

Chapter overview

- 3.7 This chapter discusses key findings from the audit as well as the actions taken by the DTA's in response. In particular, it considers:
- the DTA's procurement governance and oversight arrangements
 - the DTA's procurement planning and approaches to market
 - the DTA's tender evaluation processes
 - contract management, and
 - procurement culture at the DTA.

Governance, oversight, and probity

Governance and oversight of procurement

- 3.8 The audit report found that the DTA had established appropriate governance and oversight arrangements for procurement, but that their application was not systematic. This section outlines the governance and oversight mechanisms relating to procurement which were in place at the DTA, including its Executive Board and Audit Committee, as well as the frameworks which were intended to manage procurement risk and probity.
- 3.9 The DTA had established procurement governance mechanisms which were compliant with the Commonwealth Procurement Rules (CPRs) and the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act). Section 20A of the PGPA Act permits an entity to give instructions to its officials 'about any matter relating to the finance law'.⁵
- 3.10 The DTA had established Accountable Authority Instructions in line with the PGPA Act and the Department of Finance's further guidance in Resource Management Guide 206. The instructions required officials to comply with the CPRs,

⁴ Auditor-General Report No. 5 of 2022-23, p. 8.

⁵ Public Governance, Performance and Accountability Act 2013, Section 20A, <https://www.legislation.gov.au/Details/C2017C00269>

the PGPA Act and the Public Governance, Performance and Accountability Rule 2014 (the PGPA Rule).⁶

- 3.11 The DTA had also established finance policies on various procurement methods, operational guidelines on the PGPA Act, a Probity Guideline and conflict of interest declaration policy, as well as a Fraud and Corruption Control Plan. The ANAO noted that ‘these policies and guidance were largely appropriate and available to staff on the DTA intranet’.⁷
- 3.12 The DTA had also established appropriate internal governance mechanisms, particularly as they related to risk management. The main governance forum was the Executive Board, which met monthly. The terms of reference for the Executive Board was to ‘determine strategic direction, manage overall performance, and provide advice on the administration and operations of the DTA’ including the ‘development and implementation of systems, processes, and internal controls for the management of the DTA’s risks’.⁸
- 3.13 The DTA had also established an Audit Committee as required under section 17 of the PGPA Rule.⁹ The Audit Committee’s written charter indicated that the committee would ‘review and provide advice on the appropriateness of the DTA’s: risk management framework; articulation of key roles and responsibilities relating to risk management; and approach to managing the entity’s key risks, including those associated with projects and program implementation’.¹⁰
- 3.14 The audit report noted, however, that ‘the DTA has not been following its internal policies and procedures, and there are weaknesses in its governance, oversight and probity arrangements for procurements’.¹¹ One such weakness was that the Executive Board did not actively manage risks arising from the DTA’s procurement activity:
- In 2020–21, the Executive Board did not consider procurements or provide advice on managing procurement risk. The DTA’s 2020–21 Corporate Plan stated that the DTA actively manages risks at its Executive Board meetings. However, risk management was not included as an agenda item for any of the Executive Board meetings in 2020–21.¹²
- 3.15 In relation to the DTA’s Audit Committee, the ANAO noted that the committee had reviewed a one-page report on the DTA’s risk controls and had noted that a Risk Policy and Framework and an Enterprise Risk Management plan were ‘in place but not yet mature’. However, ‘[t]here was no evidence in the Audit Committee papers

⁶ Auditor-General Report No. 5 2022–23, pp. 23–24.

⁷ Auditor-General Report No. 5 2022–23, p. 24.

⁸ Auditor-General Report No. 5 2022–23, p. 25.

⁹ Public Governance, Performance and Accountability Rule 2014, section 17, <https://www.legislation.gov.au/Details/F2023C00333>

¹⁰ Auditor-General Report No. 5 2022–23, p. 26.

¹¹ Auditor-General Report No. 5 2022–23, p. 23.

¹² Auditor-General Report No. 5 2022–23, p. 25.

that the Audit Committee considered or provided advice on risks relating to the procurement of ICT-related services during the period examined by this audit.¹³

- 3.16 The DTA also had a risk management policy for employees, and had made the policy and associated guidance material available on the DTA intranet:

The DTA had the following risk policies and guidance in place and accessible to staff on the DTA intranet:

- ‘Managing risk’ - an intranet page on identifying, reporting and escalating risk;
- ‘Risk management process’ - an intranet page about the process; and
- a template for a risk and control register, with a risk matrix and guidance on ‘how to conduct a risk assessment’ and ‘how to approach the risk register’.¹⁴

- 3.17 In spite of this, however, the audit found that only two of the nine procurements examined by the ANAO had prepared risk assessments, and that ‘neither risk assessment was consistent with DTA guidance on how to assess and rate risk’.¹⁵ As such, the ANAO recommended that the DTA act to ensure procurement risks are being properly monitored, managed and escalated.

- 3.18 The DTA addressed this recommendation by implementing a ‘compensating control’ in an effort to treat procurement risks:

... effective 17 June 2022, the Head of Corporate was authorised as a central point of control for all planned procurements before approaches to market are undertaken by delegates to ensure ... [p]rocurement risks are identified and either mitigated or escalated to the delegate for consideration and action.¹⁶

- 3.19 The DTA also implemented a procurement checklist to assist its staff in ensuring proper process is followed in future procurements:

A Procurement Checklist is required to be completed and accompany each procurement. The completed checklist will be captured with the relevant procurement and kept as an appropriate record.¹⁷

¹³ Auditor-General Report No. 5 2022–23, pp. 26-27.

¹⁴ Auditor-General Report No. 5 2022–23, p. 28.

¹⁵ Auditor-General Report No. 5 2022–23, p. 28.

¹⁶ Digital Technology Agency, *Submission 1*, p. [7].

¹⁷ Digital Technology Agency, *Submission 1*, p. [7].

The DTA's management of probity

- 3.20 Department of Finance procurement guidance material notes that probity is 'the evidence of ethical behaviour, and can be defined as complete and confirmed integrity, uprightness and honesty in a particular process'.¹⁸
- 3.21 The audit report highlighted a number of problems in how the DTA managed probity, particularly in the implementation of its fraud management policy and its management of conflicts of interest.
- 3.22 Section 10 of the PGPA Rule requires entities to take all reasonable measures to prevent, detect and deal with fraud, including by fraud risk assessments, fraud control plans, fraud awareness and prevention training, and fraud detection mechanisms.¹⁹ As noted above, the DTA's Accountable Authority Instructions had a section on fraud control and it had established a Fraud and Corruption Control Plan.
- 3.23 However, the DTA did not follow its fraud plan. An instance of potential fraud was examined in 2020-21 after concerns were raised by the DTA's procurement team. The incident involved the engagement of contractors by an official who did not declare an existing relationship with the successful contractors.
- 3.24 According to the DTA's fraud control plan, the incident should have been investigated according to the Australian Government Investigation Standards. Instead, an 'initial assessment' was conducted by the company contracted to manage the DTA's internal audit program. The DTA did not conduct any further investigation following this initial assessment.²⁰
- 3.25 The ANAO concluded that the DTA did not take appropriate action following this initial assessment report. As such it recommended that the DTA require all employees to complete fraud awareness and procurement training and strengthen its processes to ensure that potential fraud and probity breaches are properly investigated.²¹
- 3.26 In response, the DTA submission noted that:
- Commencing from the 2022-2023 performance cycle, mandatory education and training for Fraud Awareness and Commonwealth Resource Management training are now formally linked to satisfactory performance of employees' substantive position. Employees will be deemed as not meeting expectations until such time as they have completed the mandated training.²²

¹⁸ Department of Finance, *Ethics and Probity in Procurement*, <https://www.finance.gov.au/government/procurement/buying-australian-government/ethics-and-probity-procurement>, accessed 30 May 2023.

¹⁹ Auditor-General Report No. 5 2022–23, p. 28.

²⁰ Auditor-General Report No. 5 2022–23, pp. 30-31.

²¹ Auditor-General Report No. 5 2022–23, p. 32.

²² Digital Technology Agency, *Submission 1*, p. [3]

- 3.27 The DTA's management of broader probity concerns was also imperfect. The CPRs state that officials undertaking procurements must act ethically, which includes recognising and dealing with actual, potential and perceived conflicts of interest.²³ The Probity Guideline established by the DTA included principles such as 'fairness and impartiality, consistency and transparency of process; security and confidentiality; and identification and resolution of actual or perceived conflicts of interest' and required that DTA officers undertaking a procurement sign a 'Declaration of Acknowledgement and Agreement to the DTA Probity Guideline'.²⁴
- 3.28 In spite of this, however, the ANAO found that none of the officials involved in the nine procurements examined in the audit report had signed a declaration.²⁵
- 3.29 The ANAO also noted that although the Probity Guideline mentioned the use of procurement and evaluation plans, it did not mention probity plans. None of the nine procurements examined by the ANAO had a probity plan.
- 3.30 The DTA's Probity Guideline also set out conditions for the employment of probity advisers, suggesting that they should be employed for any of the DTA's high risk, high value procurements. However:
- Higher value procurements did not have a probity advisor, and the DTA did not make risk-based decisions on whether to appoint a probity advisor. As the DTA did not assess the risk for seven of the procurements examined, the ANAO could not assess whether these procurements should have had a probity advisor according to DTA policy.²⁶
- 3.31 The most basic element of the management of probity in procurements is the management of actual or perceived conflicts of interest. Poor practice in managing actual, potential or perceived conflicts is corrosive to trust in an entity's procurement processes. The DTA's Accountable Authority Instructions and Probity Guideline laid out policies for the disclosure of conflicts. The Accountable Authority Instructions said that all officials 'must disclose material personal interests in line with Commonwealth and DTA policy and operational guidelines', while the Probity Guideline required officials involved in open tender procurements to complete activity-specific interest declarations:
- The DTA Probity Guideline further states that all DTA officers and contractors ('DTA Affiliates') involved in an open tender procurement must complete and sign a declaration of interests and disclosure statement (the guideline does not discuss limited tender procurements).²⁷

²³ Commonwealth Procurement Rules, Paragraph 6.6.

²⁴ Auditor-General Report No. 5 2022–23, pp. 33-34.

²⁵ Auditor-General Report No. 5 2022–23, p. 34.

²⁶ Auditor-General Report No. 5 2022–23, p. 34.

²⁷ Auditor-General Report No. 5 2022–23, p. 35.

- 3.32 However, for eight of the nine procurements examined in the audit report there was no evidence of activity-specific declarations being completed by officials involved in the procurement.²⁸
- 3.33 The DTA maintained a separate system of conflict of interest declarations for Senior Executive Service (SES) level employees. General interest declarations were maintained for all the SES involved in the nine procurements, but declarations for specific years were not retained on file:
- The DTA Accountable Authority Instructions state that the Human Resources Director ‘must maintain a register of all material personal interests that relates to the affairs of the DTA in accordance with these instructions’. In April 2022, the DTA advised the ANAO that it does not maintain a register of declared personal interests.²⁹
- 3.34 Consequently, the ANAO recommended that the DTA establish an internal control to ensure that procuring officials complete activity specific declarations, and that the DTA maintains a register of declared interests.³⁰
- 3.35 In response, the DTA noted that a central point of control had been established to manage conflict of interest declarations:
- ... the Head of Corporate, as the central point of control, is ensuring activity-specific declarations of interest are made for all procurements after 17 June 2022. It is intended that this control will transition directly to delegates at the point at which improved procurement practices are demonstrated by the business areas and officials involved in procurements.³¹
- 3.36 In addition, the DTA said that a central register of declarations has been created and is held on the DTA's record management platform.³²
- 3.37 Mr George-Philip De Wet, the DTA's Head of Corporate, told the Committee that one of the effects of the procurement checklist introduced at the DTA in response to the audit is to help DTA staff understand their probity requirements:
- ... the procurement checklist, in addition to the procurement and probity policy update, which will be released next week, is helping delegates understand what appropriate behaviour is in the context of tender evaluations. One of those examples is that what the checklist is requiring delegates or responsible contract managers to do is undertake a conflict of interest both prior to a release of a procurement to market and then, depending on who responds from the market,

²⁸ Auditor-General Report No. 5 2022–23, p. 35.

²⁹ Auditor-General Report No. 5 2022–23, p. 36.

³⁰ Auditor-General Report No. 5 2022–23, p. 36.

³¹ Digital Technology Agency, *Submission 1*, p. [9].

³² Digital Technology Agency, *Submission 1*, p. [9].

an updated conflict of interest should they know, be related to or have a financial interest in any of those who respond.³³

Procurement planning and approaches to market

3.38 This section considers the DTA's procurement planning and approaches to market, in particular the DTA's failure to estimate value for money, to conduct risk assessments as required by the CPRs, and the DTA's use of panels.

3.39 The audit found a range of problems with the DTA's procurement planning:

Procurements did not comply with CPR requirements to: estimate the value of the procurement prior to determining the procurement approach; assess risks to the procurement; and maintain appropriate records of the approach to market. Further, the DTA's frequent direct sourcing of suppliers using panel arrangements such as the Digital Marketplace does not support the intent of the CPRs.³⁴

3.40 A core aim of public sector procurement as laid out in the CPRs is achieving value for money.³⁵ However, the DTA frequently did not include value for money considerations in its procurement planning. Out of the nine procurements examined, the ANAO found that 'value for money was mentioned in the procurement planning documentation for only one of the procurements examined'.³⁶

3.41 The CPRs require entities to estimate the maximum value of a procurement in the planning stage, so that an appropriate decision on the procurement method can be made - procurements above a certain threshold (\$80,000 for non-construction procurements) must be conducted by open tender. The audit report noted that:

For five of the nine procurements examined, the DTA did not estimate the maximum value of procurements before a decision was made on the procurement method (of the five, two related to the COVID-19 pandemic response). For the four procurements that included an estimate on the maximum value, only one procurement (Record Management Software) included records to show that this estimation included all of the elements required by the CPRs.³⁷

3.42 The CPRs also require entities to 'establish processes to identify, analyse, allocate and treat risk when conducting a procurement. The effort directed to risk assessment and management should be commensurate with the scale, scope and risk of the procurement'.³⁸

³³ George-Philip de Wet, Head of Corporate, Digital Technology Agency, *Committee Hansard*, 16 December 2022.

³⁴ Auditor-General Report No. 5 2022–23, pp. 39-40.

³⁵ Australian National Audit Office, *Submission 12*, p. 4.

³⁶ Auditor-General Report No. 5 2022–23, p. 41.

³⁷ Auditor-General Report No. 5 2022–23, p. 41.

³⁸ Commonwealth Procurement Rules, paragraph 8.2.

- 3.43 The audit found that '[f]or seven of the nine procurements examined, the DTA had not undertaken a risk assessment ... This included three procurements related to the COVID-19 pandemic response. Neither of the two risk assessments that had been completed was consistent with DTA guidance on how to assess and rate risk'.³⁹
- 3.44 The planning of the limited tender procurement examined by the ANAO also did not comply with the CPRs. The DTA approached a single supplier for this procurement and reported on AusTender that it had conducted this procurement under paragraph 10.3.e of the CPRs, which allows limited tenders for non-construction procurements worth more than \$80,000 for 'continuing services for existing ... software services'.⁴⁰
- 3.45 According to the CPRs, procurements that use the paragraph 10.3.e exemption must be accompanied by a statement specifying 'the circumstances and conditions that justified the use of limited tender, and ... a record demonstrating how the procurement represented value for money'.⁴¹ The DTA did not prepare such a statement:
- For the procurement ... the DTA had not prepared a written report or a statement indicating the circumstances and conditions that justified the use of limited tender or that demonstrated how the procurement represented value for money in the circumstances.⁴²
- 3.46 The audit report also found issues with the DTA's planning for panel procurements. The DTA is a frequent user of the Digital Marketplace panel - an online marketplace for digital and ICT services created under the 2015 National Innovation and Science Agenda. The ANAO examined seven Digital Marketplace panel procurements constituting seven of the DTA's nine highest value procurements for 2019-20 and 2020-21.⁴³
- 3.47 Problems were identified with the conduct of all seven of these procurements:
- in four of the seven procurements, only one supplier was approached. In two cases the approach was made directly (i.e. outside the panel) despite being listed on AusTender as 'open tender' procurements on the basis that they used the panel.
 - Multiple suppliers were approached for the remaining three Digital Marketplace procurements. However, for two of these, the procurement was on the Digital Marketplace for only three days, despite the CPRs specifying a minimum of 25 days,⁴⁴ and one of the successful suppliers knew about the procurement at least one week before the opportunity was published.

³⁹ Auditor-General Report No. 5 2022–23, p. 42.

⁴⁰ Commonwealth Procurement Rules, paragraph 10.3.e.

⁴¹ Commonwealth Procurement Rules, paragraph 10.5.

⁴² Auditor-General Report No. 5 2022–23, p. 44.

⁴³ Auditor-General Report No. 5 2022–23, p. 46.

⁴⁴ Commonwealth Procurement Rules, paragraph 10.22.

- In one procurement, the DTA approached 16 suppliers and received five responses which were evaluated and recommended a supplier identified. After the evaluation panel had made its recommendation, a direct approach was made to one supplier. When it provided a proposal, it was not compared to any of the previously received offers but was accepted anyway. The contract was later varied four times to more than 8.5 times its original value.⁴⁵
- 3.48 In light of these findings the ANAO recommended that the DTA align its approach to market processes with the requirements of the CPRs. It suggested that the DTA should particularly focus on ensuring the expected value of procurements is estimated before a decision on the procurement method is made, that the DTA identify, analyse and treat procurement risks, and that the DTA properly maintain procurement documentation in line with scale, scope and risk.⁴⁶
- 3.49 In response, the DTA pointed to its newly implemented Procurement Checklist, noting that ‘it ensures the proposed procurement has an appropriate procurement plan and evaluation criteria in place’.⁴⁷ The DTA submission also noted that it is developing a ‘more detailed procurement process’ which will capture more relevant information at the planning stage.⁴⁸
- 3.50 In relation to the DTA’s misuse of panel arrangements, the DTA’s Chief Executive Officer, Mr Chris Fechner, told the Committee that panels ‘are a valuable construct, but they need to be used more effectively’:
- The DTA is a very firm believer in the panel construct. When we do our panels we create a baseline value for money by understanding the capabilities, the skills, the experience and the unit rates of the panel providers that go in a particular category. We are absolutely agreeing with the ANAO that we need to demonstrate more broad use of panels rather than a single provider on those panels. They do represent a baseline. I believe they represent a value floor, not a value ceiling. We are looking at making changes to go into those.⁴⁹
- 3.51 The DTA submission noted that some panels, especially those for ICT-related services, have a large number of members, and argued that ‘[a]pproaching a significant number of sellers (when not commensurate with the risk of the procurement) can leave procurement officials inundated with questions, responses and evaluations, leaving them overwhelmed’.⁵⁰
- 3.52 Along similar lines, Mr Fechner told the Committee that:
- Some of those categories have many, many sellers—in some cases, over a thousand. Going to over a thousand for a particular category is not an efficient

⁴⁵ Auditor-General Report No. 5 2022–23, pp. 48-50.

⁴⁶ Auditor-General Report No. 5 2022–23, p. 51.

⁴⁷ Digital Technology Agency, *Submission 1*, p. [3].

⁴⁸ Digital Technology Agency, *Submission 1*, p. [10].

⁴⁹ Chris Fechner, Chief Executive Officer, Digital Technology Agency, *Committee Hansard*, 16 December 2022, p. 10.

⁵⁰ Digital Technology Agency, *Submission 1*, p. 22.

use of time. It's a high expense for vendors to respond to something, where there is a very low likelihood of them actually achieving it.⁵¹

- 3.53 However, Mr Fechner noted that the DTA has nonetheless made changes to how it uses panels in response to the ANAO's findings:

If we are considering using panel arrangements, we've now made changes to ensure that we have a broad selection of panel participants that go into them, as per the recommendations. In selecting those panel participants, we're looking at people who have the skills and experience to help deliver on the outcome and we're assessing them against their value for money as per what has been set up in the panels associated with their ... ratings for value for money. We're looking at it outcome first - competition and use in the marketplace.⁵²

Tender evaluation

- 3.54 In addition to these problems identified with the DTA's approaches to market, the audit report identified problems with the DTA's tender evaluation processes. These included the DTA's failure to develop tender evaluation plans, the absence of fit for purpose tender evaluation criteria, limited consideration of the extent to which tenders represented value for money, and the DTA's failure to keep adequate records of tender evaluations.

- 3.55 The CPRs specify the steps that a tender evaluation process should include:

The CPRs recommend that entities use relevant evaluation criteria to enable the proper identification, assessment and comparison of submissions on a fair, common and appropriately transparent basis. The CPRs state that evaluation criteria should be included in request documentation and that entities must consider relevant financial and non-financial costs and benefits of each submission.⁵³

- 3.56 The DTA's internal procurement policies specify that officials should make tender evaluation plans for panel procurements and for more complicated small to medium procurements. The procurement plan should set out the procurement needs and ensure the compliance with the rules set out in the CRPs. The ANAO found that of the eight relevant procurements examined by the audit, only two had a tender evaluation plan. Further, these evaluation plans were not approved until after the market had been approached.⁵⁴

- 3.57 Under DTA policy, limited tender procurements should have a limited tender procurement plan. However, the audit found that:

⁵¹ Chris Fechner, *Committee Hansard*, 16 December 2022, p. 9.

⁵² Chris Fechner, *Committee Hansard*, 16 December 2022, p. 6.

⁵³ Auditor-General Report No. 5 2022–23, p. 54.

⁵⁴ Auditor-General Report No. 5 2022–23, p. 55.

The one limited tender procurement examined by the ANAO did not have a tender procurement plan. The DTA advised the ANAO it was unable to locate any documentation relating to the initial approach to market for this procurement.⁵⁵

- 3.58 Six of the procurements had evaluation reports that showed evidence of evaluation criteria, but the ANAO found that only three of the criteria were fit for purpose. The other three used 'generic criteria ... without specifying how these criteria would be assessed'.⁵⁶ Two of the three procurements with fit for purpose evaluation criteria did not include them in the request documentation for potential tenderers.
- 3.59 As noted above, achieving value for money is the primary aim of the CPRs. However, the audit found that the DTA did not consistently consider value for money in evaluating tenders. Five of the nine procurements examined considered value for money, one included partial consideration, and three did not have any documentation relating to value for money considerations. Four of the procurements were awarded to contractors who were paid hourly or daily rates in excess of the maximum rate approved for that seller on the Digital Marketplace.⁵⁷
- 3.60 The ANAO also found that the DTA did not retain appropriate records of its tender evaluation processes:
- For six of the examined procurements, the DTA did not maintain appropriate records of the evaluation phase, such as a record of evaluation criteria, how value for money was considered and an evaluation report ... For three of the examined procurements, the DTA had maintained most of the key records, but evaluation criteria and tenderer debriefings were not always documented.⁵⁸
- 3.61 The ANAO therefore recommended that the DTA align its tender evaluation processes with the CPRs and incorporate evaluation criteria to assist it to identify, assess and compare tenders fairly and transparently.
- 3.62 In response, the DTA pointed to its procurement checklist as a control that 'strengthens the DTA's requirements to develop appropriate evaluation plans and criteria prior to seeking delegate approval to approach to market.' It further noted that 'continued guidance is being provided by Corporate Procurement to staff undertaking procurement activities to ensure that evaluations are occurring on a consistent basis'.⁵⁹
- 3.63 Mr de Wet told the Committee that centralised assessment of procurement processes is also helping to address the DTA's shortcomings in tender evaluation:
- ... the evaluation centrally in relation to those tender evaluations is my team offering advice to the business area undertaking those procurements and then

⁵⁵ Auditor-General Report No. 5 2022–23, p. 56.

⁵⁶ Auditor-General Report No. 5 2022–23, p. 56.

⁵⁷ Auditor-General Report No. 5 2022–23, p. 57.

⁵⁸ Auditor-General Report No. 5 2022–23, p. 59.

⁵⁹ Digital Technology Agency, *Submission 1*, p. [11].

being very clear on scale, scope, complexity and value in the contextualisation of risk related to those procurements.⁶⁰

- 3.64 Finally, the DTA noted that it is consulting Department of Finance guidance on tender evaluations to improve its processes:

The DTA will assess its current tender evaluation processes and how these align with the Department of Finance's tender evaluation processes with a view to improving the processes going forward. This work is yet to commence in the context of dealing with more urgent implementation requirements of the report.⁶¹

Contract management

- 3.65 This section considers the DTA's contract management. In particular, the use of contract management plans, contract performance risk management, the DTA's payment controls, and its use of contract variations.

- 3.66 Contract management is a key element of achieving value for money in procurements. According to the ANAO:

Procurement should be seen in a whole-of-life context, from the initial tender of the goods/service to negotiation and finalisation of a contract and planning for what occurs next. A procurement process that results in a favourable contract does not actually achieve value for money if a contractor fails to perform in accordance with the terms of the contract.⁶²

- 3.67 A key element of effective contract management is a contract management plan. According to the ANAO:

A contract management plan should reflect the contract's complexity and risk profile and contain key information about how the contract will be managed over its life to ensure that objectives are met and value for money is achieved. A contract management plan can include a summary of key activities to be completed, roles and responsibilities, identified risks and how these risks will be managed.⁶³

- 3.68 None of the nine procurements examined by the ANAO had a contract management plan. The DTA relied instead on partial plans contained in contracts, requirements documents and seller proposals.⁶⁴

- 3.69 Managing risks to contract delivery is a key element of contract management, since it increases the likelihood that an entity can prevent risks from occurring or minimise their consequences. However, none of the nine contracts had risk management

⁶⁰ George-Philip de Wet, *Committee Hansard*, 16 December 2022, p. 6.

⁶¹ Digital Technology Agency, *Submission 1*, p. [11].

⁶² Australian National Audit Office, *Submission 12*, p. 11.

⁶³ Auditor-General Report No. 5 2022–23, p. 64.

⁶⁴ Auditor-General Report No. 5 2022–23, p. 64.

plans, and the ANAO found that '[t]here was no evidence to indicate that the DTA was actively managing risks related to contract management for the examined procurements'.⁶⁵

3.70 The ANAO also identified issues with the DTA's payment controls:

The ANAO found issues with the timeliness, accuracy or record keeping of payments for eight of the nine procurements examined. For eight of the procurements there were instances of late payments, for one there were inaccurate payments, and for five there were incomplete records.⁶⁶

3.71 Contract performance management was also identified as an issue by the ANAO. While performance expectations were specified in eight of the nine contracts reviewed, performance monitoring was less evident.

For three of the nine procurements examined, performance monitoring was documented through weekly status reports or other forms of milestone tracking prepared by contractors for the DTA. For two procurements, the DTA advised performance was monitored primarily through regular meetings with the contractor. For the two procurements related to the COVIDSafe App, the DTA was unable to produce any documentation to demonstrate that performance had been monitored.⁶⁷

3.72 Five of the nine contracts did not link payment to contract performance (e.g. the achievement of contract milestones):

Invoices for four procurements ... were for time charged by consultants on the project and were not linked to milestones or deliverables. The DTA did not have documentation to demonstrate how timesheets were verified for any of the procurements. For the COVIDSafe App Development procurement, the invoices did not include timesheets for time charged or consistently specify the milestones or deliverables completed under the work order or variation.⁶⁸

3.73 On the basis of these findings, the ANAO recommended that the DTA improve its payment controls and implement an internal compliance review to ensure that the improvements were effective.

3.74 The DTA submission noted that:

Since being implemented in February 2022, the AP Uplift program with the DTA's shared services provider, the Service Delivery Office has significantly reduced the need for manual data entry and increased the accuracy and ability to link invoices to relevant purchase orders ... Month-end reconciliations and checks

⁶⁵ Auditor-General Report No. 5 2022–23, pp. 64-65.

⁶⁶ Auditor-General Report No. 5 2022–23, p. 67.

⁶⁷ Auditor-General Report No. 5 2022–23, p. 71.

⁶⁸ Auditor-General Report No. 5 2022–23, p. 72.

are being performed by the 7th working day after the month end as a checking process.⁶⁹

3.75 That DTA submission also noted that '[t]he DTA's 2022-23 Internal Audit Work Program includes an internal audit focused on DTA payment controls to be conducted by the DTA's internal audit provider by Q4 of the 2022-23 financial year'.⁷⁰

3.76 In relation to payments not being linked to contract performance, Mr Fechner told the Committee that the DTA is moving away from 'time and materials' based contract payments to a more outcomes-focused approach:

When looking at the outcomes, we are really trying to move away from time and materials. Time and materials is not an effective way except in various circumstances, where you are actually directing people specifically on what they're doing hour by hour. We're trying to get much more able to consider what it is we're meant to achieve and what that achievement is valued at.⁷¹

3.77 Throughout the inquiry the ANAO has highlighted the issue of inappropriate contract variations. The ANAO submission noted that:

The value of public funds committed through contract extensions is significant: AusTender reporting for 2021—22 shows roughly \$29.8 billion of contract amendments, compared to roughly \$50.9 billion of parent contracts. Entities should ensure that contract managers, and any individuals advising them, understand that contract extensions and variations that are inconsistent with the key procurement principles can be detrimental to the conduct of a transparent and accountable process and to the achievement of value for money for the taxpayer.⁷²

3.78 The ANAO submission went on to note that:

The reports before the inquiry include examples where decisions to extend or vary contracts might be driven by convenience for entities and officials (sometimes termed 'leveraging' an existing contract) rather than an effort to get the best results for the Australian community. Auditor-General Report No.5 2022-23 Digital Transformation Agency's Procurement of ICT-Related Services contains several examples where contract variations were used unethically and without adequate consideration of value for money.⁷³

3.79 The audit report highlights one procurement, the DTA's myGov Funding Case Support procurement, as an example of unethical contract leveraging. The contract

⁶⁹ Digital Technology Agency, Submission 1, p. [13].

⁷⁰ Digital Technology Agency, Submission 1, p. [13].

⁷¹ Chris Fechner, *Committee Hansard*, 16 December 2022, p. 6.

⁷² Australian National Audit Office, *Submission 12*, p. 11.

⁷³ Australian National Audit Office, *Submission 12*, p. 12.

was varied ten times over two years, increasing the value from approximately \$120,000 to more than \$4.9 million.⁷⁴

3.80 The DTA's Corporate Finance team advised against several of these variations:

On 24 December 2020 ... [a]n official in the corporate finance team raised concerns about this variation, stating:

The proposal is inconsistent with effective and ethical stewardship of public resources. I am also concerned that in mid-January, we will be asked for another increase. And then another. Until mysteriously, the total is equal to the excess amounts we were first offered and rejected as being unacceptable. It is unclear from the proposal what value is being added by the consultant, or what the consultant is doing, combined with a complete lack of tangible deliverables.

In August 2021, the procurement team asked in response to a request for a seventh variation 'Why aren't we conducting an approach to market (rather than leveraging the ... contract)?'⁷⁵

3.81 The audit report notes that in addition to these variations, 'DTA senior officials attempted to vary the contract to include work on another project. The DTA's finance and procurement team strongly advised against this'.⁷⁶ In response, the contractor was engaged under a separate contract following a direct approach.⁷⁷

3.82 In light of these issues, the ANAO recommended that the DTA strengthen internal controls to ensure contract variations are not used to avoid competition or the ethical requirements imposed on its officials by the CPRs.

3.83 The DTA responded by noting that 'The DTA Corporate Procurement team is currently reviewing all significant contracts to ensure these contracts are being managed effectively'.⁷⁸

3.84 Mr Fechner told the Committee that the DTA had begun implementing controls to manage contracts across their whole life-cycle and returning to market rather than extending by default:

In terms of variations, the Audit Office has called out that we had far too many variations, and we agree with that. We are putting in controls that say the contract management functions are also tracked entirely across their life cycle. In the substance of work we're doing now, variations that are brought forward-we have in fact gone back to market instead of using variation. We're demonstrating a change in behaviour where we are going back and reassessing the value for money propositions rather than continuing on with services we already have.⁷⁹

⁷⁴ Auditor-General Report No. 5 2022–23, p. 75.

⁷⁵ Auditor-General Report No. 5 2022–23, p. 79.

⁷⁶ Auditor-General Report No. 5 2022–23, p. 77.

⁷⁷ Auditor-General Report No. 5 2022–23, p. 77.

⁷⁸ Digital Technology Agency, *Submission 1*, p. [13].

⁷⁹ Chris Fechner, *Committee Hansard*, 16 December 2022, p. 6.

- 3.85 Mr de Wet elaborated, noting that the DTA's focus is on ensuring variations are only used where there is a genuine need:

... what we are focusing on with contract managers - a variation is an allowable option within the CPRs, although it shouldn't be exercised lightly. The key focus there for us is: where a variation is a genuine requirement the business area still needs to determine that variation.⁸⁰

Procurement culture

- 3.86 The procurement problems listed above range from the planning phase right through to the contract management phase, a fact which indicates deficiencies in the DTA's procurement culture. In his evidence to the Committee, Mr Fechner acknowledged this issue and attributed it in part to a culture of expediency at the organisation:

I think that there was a high degree of focus on expediency in the activities, rather than a longitudinal understanding of what the effective processes needed to be ... Clearly, in hindsight and through evaluation, the processes that were actually used to manage these things were deficient, and we've spent quite a lot of time from June 2022 implementing new processes for our internal procurement.⁸¹

- 3.87 It is noteworthy that senior officials at the DTA failed to listen when internal advice from procurement experts raised serious questions about the DTA's procurement process:

There was, periodically, evidence called out that other activities needed to be done to ensure that we were following up with the correct processes behind our procurements that we were doing at speed. And unfortunately, that work wasn't heeded as well as it should have been. We have now looked at remediations for that.⁸²

- 3.88 Mr Fechner noted that the DTA is attempting to address this issue in part by the centralisation of responsibility for approving procurements:

The authorisation for the release of the procurement sits with the head of corporate and all controls need to be in place before those procurements are out, before they're awarded and as they are managed throughout the process.⁸³

- 3.89 In terms of addressing the DTA's procurement culture, Mr Fechner also pointed to improvements in its internal review processes and training of staff, as well as ongoing attention to the issue at the highest levels of the organisation:

⁸⁰ George-Philip de Wet, *Committee Hansard*, 16 December 2022, p. 7.

⁸¹ Chris Fechner, *Committee Hansard*, 16 December 2022, pp. 1-2.

⁸² Chris Fechner, *Committee Hansard*, 16 December 2022, p. 2.

⁸³ Chris Fechner, *Committee Hansard*, 16 December 2022, p. 2.

In our internal audit program we've put both the procurement activities and our internal management framework on our order of functions within the annual audit plan. Within all of our performance management plans for staff we have the requirement for them to complete all of their mandatory training across not just the procurement domains but all of the control domains inside the DTA ... We have had deep discussions at our executive board around the controls that we need to have, not just now but ongoing, to ensure this never happens to us again.⁸⁴

- 3.90 Mr de Wet argued that problems with the DTA's procurement culture were not a result of malicious intent, and that senior leadership were helping to drive change at the organisation:

We don't believe that there was any malice in anything contained within the report, but it did also shine a light for us on the need (1) for senior leadership to model the correct behaviour, and (2) to make sure that our staff know what that looks like, and that we help them to do that, not just tell them how to do it.⁸⁵

- 3.91 Mr de Wet went on to say that training has been an important part of cultural change at the DTA:

... we made sure that by the end of October-or it was perhaps the first week of November-all relevant delegates within the DTA who hold a financial delegation had completed the mandatory training. We have a suite of five areas of mandatory training that all staff are now required to complete to be deemed, in addition to performing the roles that they are employed to do, to be meeting the minimum requirements for how they do those things.⁸⁶

- 3.92 He concluded by noting that cultural change will take time to become embedded at the DTA:

The audit report itself identified for us two things. One is the failure of process controls and record keeping, which is an operational thing that you can fix. You would have seen the details in our submission that we're going to deal with those problems, and we're dealing with those already. The cultural change is one that will take a slightly longer period.⁸⁷

Committee Comment

- 3.93 The findings of this audit report give rise to serious concern. The ANAO found problems in nearly every aspect of the DTA's procurement processes, from its governance and oversight to its procurement planning, execution and finally its

⁸⁴ Chris Fechner, *Committee Hansard*, 16 December 2022, p. 2.

⁸⁵ George-Philp de Wet, *Committee Hansard*, 16 December 2022, p. 3.

⁸⁶ George-Philp de Wet, *Committee Hansard*, 16 December 2022, p. 3.

⁸⁷ George-Philp de Wet, *Committee Hansard*, 16 December 2022, p. 5.

contract management. Officials failed to follow the requirements of the CPRs or indeed of the DTA's own internal policies and procedures.

- 3.94 It is concerning a framework was in place that might have given rise to largely appropriate procurement practices, and the audit found that these governance and oversight arrangements were largely appropriate. But their implementation was imperfect, and officials often failed to follow the DTA's policies and procedures. It is important that the DTA's failure to manage procurement risk appropriately is addressed, and the DTA's fraud and conflict of interest controls must also be more effective.
- 3.95 Improvements must also be made in the way the DTA conducts its internal procurement activity. The agency failed to comply with the CPRs in its approaches to market, and its tender evaluation processes were also flawed. It should go without saying that this is unacceptable for an agency which aims to set the direction for Australian Government procurement of digital and ICT products and services.
- 3.96 The Committee also expects to see improvements in the DTA's contract management practices, particularly in the area of contract management plans and the identification of risks to contract performance. Contract variations must also be closely managed in light of their serious misuse. The Committee considers that the audit demonstrates the existence of significant problems in the DTA's procurement culture.
- 3.97 The Committee considers that the description of the culture as one of 'expediency' seriously understates and obfuscates the issues. That line managers were disregarding internal advice that their behaviour was unethical was deeply concerning.
- 3.98 That said, the Committee appreciates and acknowledges the frankness with which the current management of the DTA acknowledged these issues throughout the inquiry which provides strong cultural signals to the organisation about what is expected under the obligations in the PGPA Act and the CPRs to spend public money effectively, efficiently, and ethically. However, the extent of the DTA's deficiencies is significant and culture takes time and consistent effort to change. The Committee considers that the DTA should provide an update on how it is addressing the issues raised throughout this inquiry.

Recommendation 11

- 3.99 The Committee recommends that the Digital Technology Agency provide an update to the Committee five months from the tabling of this report on the progress of its improvements to its procurement processes, including:**
- **its procurement governance and oversight, especially the management of procurement risk**
 - **its management of probity, particularly its fraud and conflict of interest controls**

- **changes to its approach to market processes to meet its obligations under the Commonwealth Procurement Rules, including its use of procurement plans, risk assessments, and the appropriate use of panels**
- **improvements to its tender evaluation processes**
- **improvements to its contract management processes, particularly with respect to contract variations, and**
- **the keeping of appropriate records of all stages of a procurement, from planning to contract management.**

3.100 An ongoing concern arising from this inquiry is that even where the DTA had established proper policies and procedures in relation to its procurements, they were ignored by senior management and procuring officials. This does not give rise to confidence that the DTA is necessarily capable of implementing the reforms it has planned in response to the audit. At the very least it indicates that some verification of its efforts is warranted. The Committee therefore considers that there is merit in a follow up audit of the DTA's ICT-related procurements so that the Parliament can be satisfied that the problems identified by the ANAO have been addressed, and that new problems have not arisen in the interim.

Recommendation 12

3.101 The Committee recommends that the Australian National Audit Office consider conducting a follow up audit within three years of the tabling of this report to determine the success or otherwise of the Digital Technology Agency's procurement reforms.

3.102 Finally, and as noted in Chapter 2, the Committee is concerned at the failure of the DTA's audit committee to identify and address the systemic issues with procurement at the agency. Where an entity engages in complex or significant procurement activity, that entity's audit committee should increase its scrutiny of the entity's procurement risks and its procurement controls, and should oversee a program of internal audit that provides assurance over the procurement activity. Given the DTA's significant noncompliance with the CPRs, in the Committee's view the DTA's audit committee should provide this assurance.

Recommendation 13

3.103 The Committee recommends that the Digital Transformation Agency's audit committee review the agency's procurement risk and its internal procurement controls, and ensure that procurement is a subject of the agency's internal audit program.



4. Procurement by the National Capital Authority

Auditor-General Report No. 30 2021–22

Introduction

Background

- 4.1 The audited entity was the National Capital Authority (NCA). The NCA was created in 1989 after the introduction of self-government to the Australian Capital Territory. It manages some of Canberra's most significant landscapes and attractions:

We operate and maintain national monuments, public artworks, large areas of landscape and infrastructure including paths, lighting, signage, open space areas, trees, carparks, and civil infrastructure such as roads, bridges, lake and waterways, dam, and street lighting.¹

- 4.2 The NCA is a small agency with approximately 60 staff including engineers, architects, planners, designers, horticulturalists, and other specialists.² It is a non-corporate Commonwealth entity and therefore subject to the Commonwealth Procurement Rules (CPRs).

Audit findings

- 4.3 Procurement is a core business of the NCA, accounting for 40 per cent of the agency's total expenses in 2020-21. The objective of the audit was to determine whether the NCA's procurement activities complied with the CPRs and whether it could demonstrate the achievement of value for money.³
- 4.4 Auditor-General Report No. 30, 2021-22, *Procurement by the National Capital Authority* examined the NCA's procurement framework (including its processes and systems) and its procurement activities over the 2019-20 and 2020-21 financial years. A sample of 42 procurement contracts covering different procurement approaches was examined in detail.⁴

¹ National Capital Authority, Submission 7, p. 2.

² National Capital Authority, Submission 7, p. 2.

³ Auditor-General Report No. 30, 2021-22, *Procurement by the National Capital Authority*, p. 14.

⁴ Auditor-General Report No. 30 2021-22, p. 15.

- 4.5 The audit found NCA procurement processes were insufficiently open and competitive. Where open tenders were conducted, it was common for request documentation to limit the extent of effective competition. Where suppliers were directly approached, the pool of potential tenderers was often limited to those previously engaged by, or known to, the NCA.⁵
- 4.6 The ANAO also found that the NCA could not demonstrate that its procurement decision making was transparent and accountable, primarily as a result of gaps in the records of the planning and conduct of procurements.⁶
- 4.7 The ANAO made eight recommendations, seven of which were directed to the NCA. The NCA agreed to all seven recommendations.

Chapter overview

- 4.8 This chapter considers the audit report's findings and the measures taken by the NCA to address them, in particular:
- value for money and competition in procurement, especially procurement thresholds, the use of panels, incumbency advantage and tender evaluation
 - probity and ethics in procurement, and
 - record keeping.

Value for money and competition

- 4.9 Competition is a key mechanism through which agencies can demonstrate value for money in procurement. As the ANAO notes:

Generally, the more competitive the procurement process, the better placed an entity is to demonstrate that it has achieved value for money. Competition encourages respondents to submit more efficient, effective and economical proposals. It also ensures that the purchasing entity has access to comparative services and rates, placing it in an informed position when evaluating the responses.⁷

The use of procurement thresholds to avoid competition

- 4.10 The CPRs require an entity to estimate the expected value of a procurement prior to the commitment of funds. This estimate determines which rules in the CPRs should be followed.⁸ If the estimated value of a procurement is above a certain threshold, an open approach to market must be made, subject to exemptions which apply in limited

⁵ Auditor-General Report No. 30 2021-22, pp. 7-8.

⁶ Auditor-General Report No. 30 2021-22, p. 8.

⁷ Auditor-General Report No. 30 2021-22, p. 16.

⁸ Commonwealth Procurement Rules, paragraph 9.2.

circumstances.⁹ For procurements of construction services, the threshold is \$7.5 million, while for non-constructions services the threshold is \$80,000.¹⁰

4.11 The audit report found that the NCA had 'adopted an interpretation of "construction services" to encompass goods or services not explicitly covered by the definition as set out in the CPRs and relevant legislation'.¹¹

4.12 Examples of the types of goods and services procured by the NCA which it defined as 'construction services' include:

- provision of sketch plan design, tender and construction documentation, participation on the NCA tender assessment panel and related superintendency services under a consultancy services contract valued at \$152,432
- supply and delivery of compost, drainage sand and mulch, with the NCA initially approaching two suppliers in an unsuccessful approach to market and then running a further limited tender that resulted in a \$150,194 contract, and
- supply and delivery of granite plaques for the Old Parliament House Rose Gardens totalling \$115,500.¹²

4.13 The NCA advised that in the 2021-22 year there were five procurements in addition to those covered in the audit report that were also misclassified as construction:

There were also five (5) procurements for design and supervision services that were classified as construction services. We have made changes to our internal processes and instructions to ensure design services are not classified as construction services going forward.¹³

4.14 The NCA submission noted that one of the internal reforms it has implemented in response to this finding was early engagement with the NCA's new 'procurement expert', the Director of Procurement:

staff are required to engage with the procurement expert and discuss procurement activities in the planning phase, prior to determining approach and presenting approvals to the delegate. This is aimed at early intervention but also ensuring that relevant documentations are in place, including rationale for the procurement approach.¹⁴

⁹ Commonwealth Procurement Rules, paragraph 10.3.

¹⁰ Commonwealth Procurement Rules, paragraph 9.7.

¹¹ Auditor-General Report No. 30 2021-22, p. 17.

¹² Auditor-General Report No. 30 2021-22, pp. 17-18.

¹³ National Capital Authority, *Submission 7.1*, p. [1].

¹⁴ National Capital Authority, *Submission 7*, p. 3.

- 4.15 In relation to the misclassification of procurements as 'construction related', the NCA's Chief Executive Officer Ms Sally Barnes said that 'they were people doing ... projects that, in their minds, were all part of the construction project':

I have no excuse for why it happened, but I haven't sensed mal-intent or trying to get around the rules. It is more that this is part of that construction project, and therefore it falls under those CPRs. That's incorrect, and it's been clarified.¹⁵

The NCA's use of panel arrangements

- 4.16 The NCA's Accountable Authority Instructions require officials conducting procurements to use mandated whole-of-government arrangements where they exist, and to consider whether there is an existing non-mandatory arrangement (such as a panel) that may be used for the procurement.¹⁶
- 4.17 In 2015, the NCA established an Estate Services Panel to provide gardening, landscaping, engineering, and construction advice services, among others. A Deed of Standing Offer was established with qualifying suppliers for a term of four years, with an option to extend for a further two years by issuing notice in writing at least 30 days before the Deed's expiry.
- 4.18 The audit report found that the NCA's use of the Estate Services panel did not always foster competition. The NCA exercised its option to extend the term of the Deed but did so after its expiry date. Six of the 42 contracts analysed by the ANAO were issued under the panel after it had expired. Two further contracts were awarded via direct approach and then retrospectively attributed to a panel in order to avoid having to use an open approach to market.¹⁷
- 4.19 The ANAO also analysed six further procurements by the NCA that made use of panel arrangements set up by other Commonwealth entities:
- In one instance, the relevant panel was established via limited tender and the NCA approached only one supplier.
 - In one instance, the NCA 'piggybacked' off an existing contract originally let by limited tender between the supplier and another non-corporate Commonwealth entity.
 - In one instance, the NCA approached three suppliers on a panel established by open tender.
 - In three instances, the NCA approached only one supplier on a panel established by open tender.¹⁸

¹⁵ Ms Sally Barnes, Chief Executive Officer, National Capital Authority, *Committee Hansard*, 14 December 2022, p. 29.

¹⁶ Auditor-General Report No. 30 2021-22, p. 20.

¹⁷ Auditor-General Report No. 30 2021-22, pp. 21-22.

¹⁸ Auditor-General Report No. 30 2021-22, pp. 21-22.

4.20 On the basis of these findings, the ANAO recommended that the NCA increase the extent to which it uses open competitive procurement processes.

Competitive processes which were not open, fair and non-discriminatory

4.21 The ANAO found that even where the NCA conducted open tender processes, it often did so in a way that functioned to limit competition.

4.22 As the audit report noted, 'a procurement approach that commences with an open approach to the market does not necessarily mean that the procurement process promoted effective competition'.¹⁹

4.23 Even where the NCA conducted open tender procurement processes, the ANAO found that its approach often functioned to limit competition. The report noted that 'Of the 16 contracts examined in detail that were let by open tender, 10 'contained conditions for participation which may have unfairly limited competition despite being open approaches to market'. These conditions included:

- a requirement for suppliers to demonstrate financial stability over three years - an obstacle to new market entrants
- a requirement to hold baseline security clearance - instead of being capable of obtaining clearance
- a requirement to hold membership in a professional organisation - instead of eligibility to be a member.²⁰

4.24 The NCA also gave undue weight to the prior experience of its potential suppliers. According to the CPRs, it is only permissible to require relevant prior experience in a procurement's conditions for participation if that experience is essential to meet requirements. Even then the CPRs do not allow an entity to specify that potential suppliers must have previous experience with the relevant entity or with the Australian Government.²¹

4.25 However, when it examined the 14 contracts where the NCA invited more than one supplier to tender for work, the ANAO found that the NCA commonly limited its approaches to contractors who had previously been engaged by the NCA, finding that 'the NCA commonly treated previous experience as an unspecified requirement for participation'.²² The 12 contracts examined by the ANAO which involved single-supplier approaches 'reinforced' this conclusion.²³

¹⁹ Auditor-General Report No. 30 2021-22, p. 25.

²⁰ Auditor-General Report No. 30 2021-22, p. 26.

²¹ Commonwealth Procurement Rules, paragraph 10.16.

²² Auditor-General Report No. 30 2021-22, p. 26.

²³ Auditor-General Report No. 30 2021-22, p. 26.

- 4.26 In three of the contracts that purported used the NCA's Estate Services Panel, Request for Quote documentation was sent to two suppliers who were not on the panel, for the simple reason that they had previously been engaged by the NCA.²⁴
- 4.27 The ANAO therefore recommended that the NCA 'monitor and provide assurance that the National Capital Authority employs open, fair and non-discriminatory approaches when undertaking procurements'.²⁵
- 4.28 When asked how the NCA had changed its approach to procurement in the wake of the audit, Ms Barnes said 'The one-word answer is: thoroughly'.²⁶ (Sally Barnes, 14 Dec 31).
- 4.29 The NCA's Chief Operating Officer Mr Hamid Heydarian elaborated:
- In short, do we have conditions for participation? So far, no. In fact, there are very few reasons why there should be conditions for participation as such. We're putting greater emphasis on building up the evaluation criteria and fully disclosing it in the tender documentation.²⁷

Requests for and evaluation of tenders

- 4.30 Where entities make an open approach to market for a procurement, the CPRs require them to include evaluation criteria in request documentation, so that tenders are treated in a fair, common and appropriately transparent basis. The request document should include a description of the evaluation criteria to be used and the relative importance of the criteria.²⁸
- 4.31 The audit found that 25 of the 42 contracts examined (approximately 60 per cent) included evaluation criteria with varying levels of detail. The remaining 17 either did not include any criteria or had no records of criteria retained on file. Inconsistent or insufficient records kept on file meant the ANAO was unable to examine whether criteria had been amended during the procurement.²⁹
- 4.32 As such, the ANAO recommended that in future, the NCA should ensure that procurements provide request documentation that includes evaluation criteria.³⁰
- 4.33 The audit also identified problems with the NCA's screening and evaluation of tenders. Just over half the contracts examined by the ANAO were awarded to the tender that offered the best value for money. In the remaining cases, the NCA either failed to analyse bids sufficiently to demonstrate value for money in line with the cost or complexity of the procurement or failed to keep good enough records. In some

²⁴ Auditor-General Report No. 30 2021-22, p. 28.

²⁵ Auditor-General Report No. 30 2021-22, p. 29.

²⁶ Sally Barnes, NCA, *Committee Hansard*, 14 December 2022, p. 31.

²⁷ Hamid Heydarian, Chief Operating Officer, National Capital Authority, *Committee Hansard*, 14 December 2022, p. 31.

²⁸ Commonwealth Procurement Rules, paragraph 7.12.

²⁹ Auditor-General Report No. 30 2021-22, p. 29.

³⁰ Auditor-General Report No. 30 2021-22, p. 30.

cases, the NCA applied evaluation criteria that were not consistent with the approach to market.³¹

- 4.34 In one case, tenders were assessed against two mandatory participation requirements that were not included in request documentation:

Four of the five tenders received were failed against the second requirement. However, all five progressed through to the evaluation stage and were each scored and ranked against the evaluation criteria. In recommending the preferred supplier, the panel then noted that the other four 'failed to meet tender requirements'.³²

- 4.35 The ANAO found that in only five of the 42 contracts the criteria and weightings the NCA applied in the evaluation process were consistent with those advised to potential suppliers in the request documentation. For the remaining 37 contracts, 27 had some inconsistency, mostly because the NCA had not advised potential suppliers of the criteria, and 10 had insufficient information on file to demonstrate consistency.³³

- 4.36 In response to these findings, the NCA pointed to reforms it has undertaken which are intended to change its procurement culture:

We have made significant inroads in addressing the recommendations of the ANAO Report and putting in place additional internal controls to ensure the measures are lasting. In designing the control measures, we have taken a holistic view through the lense of governance, people, process and systems.³⁴

- 4.37 The NCA has developed standardised guidance for its officials when they are undertaking procurements:

At the time of the ANAO audit, we had been working to develop standardised guidance and agency-specific templates for use by staff members when conducting procurement ... Updated information is available on the NCA intranet, incorporating regular updates and ongoing guidance provided to staff when using the resources. The detailed guidance and templates are designed to drive consistency across the agency and improve overall efficiency while ensuring adherence to the Commonwealth Procurement Rules (CPRs) when undertaking procurement.³⁵

- 4.38 The NCA has also engaged a Director of Procurement to provide centralised and consistent compliance advice to procuring staff:

³¹ Auditor-General Report No. 30 2021-22, p. 30.

³² Auditor-General Report No. 30 2021-22, p. 31.

³³ Auditor-General Report No. 30 2021-22, p. 32.

³⁴ National Capital Authority, *Submission 7*, p. 2.

³⁵ National Capital Authority, *Submission 7*, pp. 2-3.

The Director of Procurement engages with staff early to provide advice in the planning stage, and also conducts monitoring and ongoing review of procurement activities to ensure compliance.³⁶

- 4.39 The NCA has also implemented a rolling audit program of its procurements to give greater assurance that they are being carried out in line with the CPRs:

A rolling external audit program of high value and/or risk procurements throughout the life of these projects - this process will bring independent scrutiny and confirmation of our compliance with ANAO's recommendations and assist in further refining our plan to drive best practice and continuous improvement.³⁷

- 4.40 The NCA's Chief Procurement Officer noted that she had experienced very little by way of resistance to the NCA's reform processes:

When I QA things, it's not a matter of 'No, I don't want to do that'; it's a matter of 'Okay; how can we make that work?' Sometimes the response is, 'Yes, we have taken that on board, and now we're going to progress it to the delegate.' ...that's been a very positive experience for me, in particular.³⁸

Probity and ethics

- 4.41 The CPRs require procuring officials to act ethically in conducting the procurement. This includes recognising and treating actual or perceived conflicts of interest, dealing with all potential suppliers or contractors equitably, and complying with requirements governing gifts or hospitality. The CPRs require procuring officials to 'seek appropriate internal or external advice when probity issues arise'.³⁹
- 4.42 As the audit report notes, the APS Code of Conduct also requires officials to take reasonable steps to avoid real or apparent conflicts of interest, and the *Public Service Act 1999*, the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act) and the *Public Governance, Performance and Accountability Rule 2014* all require officials to disclose the details of any material personal interest.⁴⁰
- 4.43 The most basic form of probity management involves the management of conflicts of interest through written declarations made prior to the commencement of the procurement which specify if persons involved have any actual, potential or perceived conflicts of interest.
- 4.44 NCA policy required staff to complete declarations – an 'Acknowledgement of Conflict of Interest Policy' form and a 'Declaration of Material Interests' form – at the start of their employment. Persons involved in procurements from time to time were

³⁶ National Capital Authority, *Submission 7*, p. 3.

³⁷ National Capital Authority, *Submission 7*, p. 3.

³⁸ Ms Angelyn Smith, Chief Procurement Officer, NCA, *Committee Hansard*, 14 December 2022, p. 33.

³⁹ Commonwealth Procurement Rules, paragraph 6.6

⁴⁰ Auditor-General Report No. 30 2021-22, p. 34.

also required to complete activity-specific declarations for each process in which they were involved.⁴¹

4.45 However, the audit found that 'conflict of interest declarations were not completed by all evaluation team members in 39 per cent of the contracts examined in detail by the ANAO where there was sufficient information to enable reliable examination'.⁴²

4.46 The CPRs also provide that an entity may seek appropriate external advice when probity issues arise during a procurement.⁴³ This is typically done through the appointment of a probity adviser.

4.47 An external probity adviser was appointed in 12 of the 42 procurements examined by the ANAO, generally for the more complex procurements or those with higher estimated values. However, the audit found that the NCA could not demonstrate that it had used external probity advice effectively:

of the 12 instances where an external probity adviser was appointed (typically for larger value procurements), only one had sufficient records maintained documenting the probity adviser's role and a report completed by the adviser confirming probity had been maintained during the procurement process.⁴⁴

4.48 Further, the audit went on to note that:

Despite the NCA identifying a need for a probity adviser during planning, it was common for there to be limited information maintained in the relevant procurement files evidencing the probity adviser's involvement. Additionally, the evaluation reports did not contain a clear statement to decision-makers as to the extent of the probity adviser's role.⁴⁵

4.49 The ANAO therefore recommended that the NCA actively engage and manage external probity advisers to ensure that the agreed services are provided, and that probity is maintained.⁴⁶

4.50 In response to this recommendation, Ms Barnes said that NCA officials lacked the capability to manage external probity advisers effectively:

In the model we were using, project officers were using probity advisers but didn't have enough skills to actually know what they needed the probity adviser for or what was expected and asking them to do the role properly.⁴⁷

⁴¹ Auditor-General Report No. 30 2021-22, p. 34.

⁴² Auditor-General Report No. 30 2021-22, p. 33.

⁴³ Commonwealth Procurement Rules, paragraph 6.6.

⁴⁴ Auditor-General Report No. 30 2021-22, p. 33.

⁴⁵ Auditor-General Report No. 30 2021-22, p. 35.

⁴⁶ Auditor-General Report No. 30 2021-22, p. 37.

⁴⁷ Sally Barnes, NCA, Committee Hansard, 16 December 2022, p. 36.

- 4.51 The NCA also responded by drawing the Committee's attention to the 'strong ethical framework' it has in place, including 'a range of preventative controls, procedural arrangements and periodic awareness training'.⁴⁸
- 4.52 Further, in relation to the ANAO's finding that the NCA had not conducted its procurements to a consistent ethical standard, the NCA emphasised that 'discussions with the ANAO confirmed the finding was not a reference to impropriety, but about recognising and dealing with conflicts of interest and maintaining appropriate records regarding conflicts of interest declaration forms'.⁴⁹
- 4.53 Ms Barnes pointed to a range of measures the NCA has taken to address the ANAO's findings on probity:

We're reminding everyone of their APS requirements, generally - their code of conduct requirements. We do an annual check of conflicts through the senior executive team. In the larger procurements, particularly, we've been using external probity providers and lawyers. This hasn't given us the results we needed, so we're doing it internally, and we're checking everything before we sign things off. We've also put in new procedures, in which we're asking probity advisers to give us assurance that there have been the right probity checks and balances and that all conflicts of interest have been addressed, which we didn't do before.⁵⁰

Record keeping

- 4.54 The CPRs require entities to maintain written records of a procurement commensurate with its scale, scope, and risk.⁵¹ This should include records of the requirement for the procurement, the process that was followed, how value for money was considered and established, all relevant approvals, and records of all relevant decisions with the basis of those decisions.⁵² Records should also be kept of evidence of agreements with suppliers.⁵³
- 4.55 NCA staff are required to manage information in line with the NCA's record keeping policies, which are specified in two documents – the NCA National Archives Records Authority, and the NCA Information Management Policy.
- 4.56 The NCA National Archive Records Authority requires several classes of documents to be retained as national archives, including:
- records relating to the management of NCA managed land and assets

⁴⁸ National Capital Authority, *Submission 7*, p. 4.

⁴⁹ National Capital Authority, *Submission 7*, p. 4.

⁵⁰ Sally Barnes, NCA, Committee Hansard, 14 December 2022, p. 36.

⁵¹ Commonwealth Procurement Rules, paragraph 7.2.

⁵² Commonwealth Procurement Rules, paragraph 7.3.

⁵³ Commonwealth Procurement Rules, paragraph 7.4.

- arrangements with external parties to manage or undertake works on NCA managed land or assets, and
 - records relating to major works or development applications.⁵⁴
- 4.57 The NCA Information Management Policy establishes a framework for the creation and management of records within the NCA. The policy sets out information responsibilities for staff at all levels of the organisation.⁵⁵
- 4.58 The audit found that the NCA did not maintain records of procurements as specified by the CPRs. Appropriate written records of the justification for using limited tender processes were kept for just under half of the examined procurements.⁵⁶
- 4.59 When limited tender procurements are used, the CPRs require that each contract should have a written report specifying the value and type of goods, the circumstances that justify the use of a limited tender approach, and how the procurement represents value for money.⁵⁷
- 4.60 Of the sixteen limited tender contracts examined the ANAO:
- nine met the conditions specified in the CPRs
 - two had records justifying the use of limited tender but not demonstrating value for money
 - four had records demonstrating value for money but not justifying the use of limited tender, and
 - one had insufficient records to reach a conclusion.⁵⁸
- 4.61 Of the 42 contracts examined in detail 35 (or 83 per cent) had incomplete documentation, that is, documents that were in draft form or which were missing altogether. Higher value procurements tended to have more complete documentation, in line with their size and scale.⁵⁹
- 4.62 On this basis, the ANAO recommended that the NCA improve its controls over the making of appropriate records.⁶⁰
- 4.63 In response, Ms Barnes told the Committee that the NCA's record keeping issues arose in part because it employed 'doers' whose focus was not on how to keep records:

What tends to happen in a small organisation with lots of doers is that you have this pendulum of expertise in the corporate area. We have had very small corporate areas, because we wanted to put most of the resources into the doing.

⁵⁴ Auditor-General Report No. 30 2021-22, p. 43.

⁵⁵ Auditor-General Report No. 30 2021-22, pp. 43-44.

⁵⁶ Auditor-General Report No. 30 2021-22, p. 22.

⁵⁷ Auditor-General Report No. 30 2021-22, p. 22.

⁵⁸ Auditor-General Report No. 30 2021-22, p. 23.

⁵⁹ Auditor-General Report No. 30 2021-22, p. 44.

⁶⁰ Auditor-General Report No. 30 2021-22, p. 24.

That leaves you exposed, because you need your technical project managers to also be good in the corporate services sphere ... It is the doing and the busyness that has led us to be sloppy and not good at record management and not good at actually making sure we dot i's and cross t's.⁶¹

- 4.64 The NCA submission noted that one of the responsibilities of its newly created Director of Procurement role is to improve record keeping practices:

Part of the responsibilities of the Director of Procurement is to ensure the key relevant documents and records are in place to support each procurement activity from beginning to end, including clear justification for selecting a procurement method.⁶²

- 4.65 The NCA response also drew the Committee's attention to its Monthly Active Contracts Reminders tool, which it characterised as 'a tool to assist staff better monitor and plan for future procurement requirements. In addition, greater visibility promotes maintenance of current records and accurate reporting'.⁶³

Committee comment

- 4.66 The findings of the ANAO's audit report into procurement at the NCA are concerning. An agency with such longstanding procurement and contracting requirements and for whom procurement is a core business requirement, should demonstrate a far better track record than that found by the ANAO.
- 4.67 The NCA did not make sufficient use of open and competitive procurement approaches. Its misclassification of procurements as relating to construction to avoid the necessity for open approaches to market is one of many aspects of its procurement practices that did not comply with the CPRs.
- 4.68 The NCA did not make use of competitive procurement options frequently enough and did not keep sufficient records of its justification for using limited tender approaches. Further, even when using competitive procurement approaches, it did not do so in an open, fair and non-discriminatory manner. In particular, it gave incumbent suppliers too great an advantage and included conditions for participation that limited competition.
- 4.69 The NCA also failed in its duty to conduct procurements to a consistent ethical standard, especially with respect to the management of actual, potential or perceived conflicts interest. The Committee notes the evidence that despite the manifest and repeated breaches of the CPRs including ethical lapses that no evidence was identified that these constitute serious impropriety. The Committee acknowledges that the NCA's primary deficiency is a failure to adequately document its

⁶¹ Sally Barnes, NCA, Committee Hansard, 14 December 2022, p. 29.

⁶² National Capital Authority, *Submission 7*, p. 3.

⁶³ National Capital Authority, *Submission 7*, p. 3.

management of probity rather than persistent or seriously egregious breaches of the ethical requirements laid down by the CPRs and the PGPA Act.

4.70 The Committee is also concerned at the inadequate record keeping practices at the NCA. Good record keeping practices are critical to the administration of public funding as without a documentary record an entity is unable to demonstrate that it has conducted itself in line with its obligations.

4.71 That said, the Committee was pleased that the NCA acknowledged that its procurement practices were not in line with the expected standards. The Committee is encouraged to receive information from the NCA indicating that it has undertaken to make changes to its procurement practices and procedures, and that it intends its procurement culture to be one of compliance with the CPRs going forward.

Recommendation 14

4.72 The Committee recommends that the National Capital Authority provide an update on the implementation of the reforms undertaken in response to the audit, including:

- **statistics on and analysis of its use of competitive procurement methods, especially when procuring through standing offers and panels**
- **statistics on and analysis of how its procurement methods have changed to encourage competition, particularly its request documentation and its tender evaluation processes**
- **changes to its management of probity and promotion of ethical and fair procurement, and**
- **changes to its record keeping practices and procedures.**

5. The management of the maritime surveillance contract by Home Affairs

Auditor-General Report No. 6 2021–22

Introduction

Background

- 5.1 On 3 March 2006, the Australian Government¹ entered into a contract with Surveillance Australia Pty Ltd (Surveillance Australia) for the provision of civil maritime surveillance services.² Civil maritime surveillance involves surveillance activities in Australia's maritime zone for the purpose of deterring, preventing, detecting and responding to civil (non-military) maritime threats, including illegal maritime arrivals as part of Operation Sovereign Borders.³
- 5.2 At the time of contract, it had a reported value of \$1.187 billion, and was due to expire on 31 December 2019 with an option to extend by up to two years. This option was exercised by the Department of Home Affairs (Home Affairs) in October 2012, more than six years before any notice needed to be given to the contractor, 'in an attempt to reduce the annual cost of the contract'.⁴ The extension took the contract expiry date out to 31 December 2021 with a total value of \$1.647 billion.
- 5.3 In September 2021, the department extended the contract with Surveillance Australia for further six years to 31 December 2027.⁵ This extension increased the value of the contract by \$991.3 million, bringing the total contract value to \$2.6 billion.⁶

¹ The Australian Government was represented at the time by the Australian Customs Service, now the Department of Home Affairs (Home Affairs). For convenience, this report refers to all predecessor entities as Home Affairs.

² AusTender, *Contract Notice View – CN23257*, <https://www.tenders.gov.au/Cn/Show/bd02aa0b-ca22-c96b-29dc-b1debd443e94>, viewed 18 April 2023.

³ Auditor-General Report No. 6 of 2021–22 *Management of the Civil Maritime Surveillance Services Contract*, paragraph 1.1, p. 14.

⁴ Auditor-General Report No. 6 of 2021–22, paragraph 1.4, p. 15.

⁵ Home Affairs, Submission 2, p. 3.

⁶ Ms Emma Johnson, Assistant Commissioner, West and Close Support Command, Australian Border Force, *Committee Hansard*, Canberra, 14 December 2022, p. 12.

Audit findings

- 5.4 Auditor-General Report No. 6 of 2021–22 *Management of the Civil Maritime Surveillance Services Contract* assessed whether Home Affairs was effectively managing the civil maritime surveillance services contract. To form a conclusion against the objective, the Australian National Audit Office (ANAO) adopted the following high-level criteria:
- Has the contract delivered against the planned cost, scope and delivery timeframe?
 - Have the specified surveillance assets been provided?
 - Have the specified surveillance services been provided?⁷
- 5.5 The audit was undertaken in a similar timeframe as a separate audit of the Australian Maritime Safety Authority's (AMSA) management of its search and rescue contract (the AMSA audit). The two contracts were awarded to subsidiaries of the same parent company, Cobham Ltd. This provided an opportunity for the ANAO to compare and contrast the two aircraft service contracts and their management by AMSA and Home Affairs.⁸
- 5.6 The AMSA audit was tabled on 18 January 2021 and concluded that AMSA's management of the search and rescue contract has been fully effective.⁹ In contrast, the Home Affairs audit found that:
- The department's management of the Civil Maritime Surveillance Services contract has not been effective and, as a result, while surveillance services have been provided, the quantum and range of those services has fallen short of the contractual requirements.¹⁰
- 5.7 The ANAO made four recommendations to Home Affairs, all of which were agreed to by the department.

Chapter overview

- 5.8 This chapter discusses key findings from the audit and Home Affairs' actions to address these findings since the tabling of the audit. The chapter focuses particularly on findings relating to:
- contract extensions and variations
 - contractor performance management
 - AusTender reporting and record keeping, and
 - leadership and culture.

⁷ Auditor-General Report No. 6 of 2021–22, paragraphs 1.9–1.10, p. 16.

⁸ Auditor-General Report No. 6 of 2021–22, paragraph 1.8, p. 16.

⁹ Auditor-General Report No. 27 of 2020–21 *Management of the Search and Rescue Aircraft Contract*.

¹⁰ Auditor-General Report No. 6 of 2021–22, paragraph 10, p. 8.

Contract extensions and variations

Changes to contract cost, scope and timeframe

- 5.9 According to the audit report, the original contract signed in March 2006 had an authorised total cost of \$1.1873 billion over 14 years, including a two-year transitional period. This amounted to a contract cost of \$98.9 million per annum over the expected 12 years of operations.¹¹
- 5.10 Under the terms of the original contract, Surveillance Australia was responsible for the provision of:
- ten fixed wing aircraft (six Dash–8 202s and four Dash–8 315s) that operate day and night, in all but the most extreme weather, 365 days a year
 - on-board sensor and communication systems, including the development, delivery and integration of a surveillance information management (SIM) system
 - annual rate of effort of 13,613 hours with 26 qualified aircrews, and
 - bases in Darwin, Cairns, Broome and Horn Island.¹²
- 5.11 Services were to commence on the ‘handover date’ of 1 January 2008, on which the specified surveillance assets necessary to perform the contract were to be made available.¹³ Full service delivery was scheduled for 1 July 2008.
- 5.12 The contract has since undergone significant changes. The audit report noted that as at March 2021, the contract had been subject to 40 variations, ‘with the effect of significantly changing the scope of the services to be delivered and increasing the term and value of the contract’.¹⁴ Examples of key contract variations include:
- a variation executed in December 2006 for a new delivery schedule, including amendment of the full service delivery date from 1 July 2008 to 7 June 2010, 23 months later than originally planned. This delay was due to ongoing contract negotiations between Home Affairs and Surveillance Australia relating to the delivery of a suitable SIM solution
 - a variation executed in September 2008 for an increase in the contracted annual rate of effort from 13,613 hours to 15,000 hours, from 1 October 2008 to 30 June 2010, at an estimated cost of \$6 million. This included provision of additional two crew members (for 28 crew members in total) and an increase in fixed monthly service charges to Home Affairs. The audit report found that ministerial authorisation was not sought prior to entering into this contract variation, which increased the value of the contract beyond the approved limit, and Home Affairs did not conduct a value for money assessment to inform the decision

¹¹ Auditor-General Report No. 6 of 2021–22, paragraph 2.6, pages 19–20.

¹² Auditor-General Report No. 6 of 2021–22, paragraph 2.3, p. 19.

¹³ Auditor-General Report No. 6 of 2021–22, paragraph 3.1, p. 29.

¹⁴ Auditor-General Report No. 6 of 2021–22, paragraph 11, p. 8.

- a variation executed in July 2009 for additional surveillance services using two Reims F406 aircrafts until 30 June 2011, at an estimated cost of \$16.5 million. This included two additional crew (for a total of 30 crew members) to provide an extra 2,000 surveillance hours per annum. As above, ministerial authorisation was not sought prior to entering into the contract variation despite it increasing the value of the contract beyond the approved limit. This arrangement was extended via another variation to June 2013, and then to June 2015
 - numerous variations relating to provision of satellite communication services, including one executed in October 2014 for satellite engineering support and data provision services that was scheduled to be reviewed or ceased in June 2016 but was continued without review until November 2018, when Home Affairs formally acknowledged continuing requirement for the services. Expenditure for this variation exceeded the approved amount by \$1.1 million.¹⁵
- 5.13 The audit report found that variations to the contract to March 2021 had increased its cost by \$354.1 million, 'more than 29 per cent higher than the amount authorised by the Finance Minister when the contract was originally entered into'.¹⁶ The latest variation of \$991.3 million in September 2021 brings the total cost increase by variation to \$1.3454 billion—more than double the original authorised contract value.
- 5.14 At the public hearing on 14 December 2022, the Committee inquired about the decision to extend the contract for another six years to 2027, despite the myriad of issues outlined in the audit report. Home Affairs informed the Committee that this was because the department's market sweeps indicated that there was no other provider capable of providing the services within the timeframes required:
- The ability of the market to respond with what we need in the time frames, in terms of a new capability for aerial surveillance, is where you get that out to 2027. We have plans to go out to market, but the market sweeps that have been done have sort of confirmed the market is not ready to respond quickly and needs time to build up that capability in order to get it to a deliverable state, hence the length of the extension that's been done.¹⁷
- 5.15 In a supplementary submission to the inquiry, Home Affairs further explained that it had commenced planning for future aerial surveillance capability in 2016 in advance of expiry of the previous contractual arrangements on 31 December 2021.¹⁸ The department conducted three formal industry engagements (market sweeps) in October 2018, late 2020 and August 2021, before concluding that 'full delivery of a like-for-like replacement capability could not be achieved by other service providers (other than the incumbent) before at least 2025'.¹⁹

¹⁵ Auditor-General Report No. 6 of 2021–22, Appendix 3, pages 77–81.

¹⁶ Auditor-General Report No. 6 of 2021–22, paragraph 2.19, p. 25.

¹⁷ Ms Lee-anne Monterosso, First Assistant Secretary, Procurement, Property and Contracts, Department of Home Affairs, *Committee Hansard*, Canberra, 14 December 2022, p. 12.

¹⁸ Home Affairs, Submission 2:1, Answer to Question on Notice 15, p. [27].

¹⁹ Home Affairs, Submission 2:2, Answer to Question on Notice 24, p. [3].

- 5.16 In response to the Committee's question of whether contract terms had been amended with the extension, for instance to address the areas identified as deficient in the audit report, Home Affairs advised the Committee that there were 'minor variations to the terms to accommodate the extension' of September 2021, but that the contract had been extended 'largely on the same terms and conditions'.²⁰ The minor changes included an 'aircraft modification program to address obsolete mission systems and equipment' and amendment of administrative processes in line with updated departmental policies.²¹
- 5.17 The department noted that the extension contained options to terminate early, with 12 months' notice, at the end of 2025 and 2026.²² If the contract runs to its full term to 2027, it would not have been competitively tendered for 21 years. At the public hearing on 10 February 2023, the Secretary of the department acknowledged that this was not acceptable, but argued that the department's options had been limited because it did not have an integrated investment plan with an ongoing capital budget like the Department of Defence to 'recapitalise the fleet' as needed.²³
- 5.18 In a supplementary submission to the inquiry, the ANAO questioned the relevance of an integrated investment plan to the department's ability to retender the contract, noting that the contract is for the provision of surveillance services with the aircraft and equipment owned and operated by the contractor.²⁴
- The civil maritime services contract is for surveillance services and so incorporates a service level agreement. The key contractual obligation is the delivery of a specified quantum of surveillance flying hours, being the annual Rate of Effort ... As this is a services contract, the surveillance aircraft are owned and operated by the contractor. Consequently, the relevance of a[n] integrated investment plan is not evident.²⁵
- 5.19 Home Affairs informed the Committee that the department has since made changes to its contract management practices to provide better guidance to staff when considering contract variations and amendments. These include updating and publishing internal guidance material for staff, updating its Accountable Authority Instructions to include the requirement for the Chief Procurement Officer to approve all proposals to extend a contract by variation where there are no further extension options, and releasing a non-mandatory eLearning course titled 'Your responsibilities as a Contract Manager', which outlines the requirements of contract managers to meet high standards of governance, performance and accountability.²⁶

²⁰ Ms Fatime Shyqyr, Commander, Air and Marine Capability, Australian Border Force, *Committee Hansard*, Canberra, 14 December 2022, p. 13.

²¹ Home Affairs, Submission 2:1, Answer to Question on Notice 1, p. [1].

²² Home Affairs, Submission 2:1, Answer to Question on Notice 1, p. [1].

²³ Mr Michael Pezzullo AO, Secretary, Department of Home Affairs, *Committee Hansard*, Canberra, 10 February 2023, pages 2, 4.

²⁴ ANAO, Submission 12:2, paragraph 28, p. 6.

²⁵ ANAO, Submission 12:2, paragraph 28, p. 6.

²⁶ Home Affairs, Submission 2:1, Answer to Question on Notice 13, pages 23–24.

Concessions and reductions in contractual penalties through variations

- 5.20 As outlined above, the contract requires Surveillance Australia to provide a specified number of surveillance assets, including aircraft, the SIM system, and a contingent of qualified aircrew to operate the aircraft and equipment.²⁷ The contract also required four aerial surveillance bases to be established and maintained in Cairns, Darwin, Broome and Horn Island.
- 5.21 The audit report found that not all required assets were provided at commencement of services on 1 January 2008. Shortfalls in the provision of surveillance assets included:
- an eight-month delay in establishing the fourth base, with negotiations not resolved until August 2008²⁸
 - one of the Dash–8 315 aircrafts not being provided until 23 March 2008
 - the remaining three Dash–8 315 aircrafts not having long-range fuel tanks installed as required by the contract to perform longer-endurance surveillance missions²⁹
 - the SIM system not being fully installed in all aircrafts until June 2010, resulting in a 23-month delay in full service delivery³⁰
 - the full contingent of qualified aircrew not being provided, with only 17 of 26 available at commencement of services—a shortfall of 35 per cent.³¹
- 5.22 The audit report observed that the shortfalls in aircraft and qualified aircrew at commencement of services ‘triggered the contract liquidated damages regime, which covered the first six months of service delivery before the performance measurement system came into effect from 1 July 2008’. There were two liquidated damages provisions in the original contract:
- from 1 January 2008 to 31 March 2008, liquidated damages applied at the percentage of actual rate of effort compared to planned rate of effort, multiplied by \$100,000 per day (first damages provision)
 - from 1 April 2008 to 30 June 2008, liquidated damages applied at a flat rate of \$100,000 per day (second damages provision).³²
- 5.23 The audit report outlined how Home Affairs progressively varied the contract to reduce the applicability of the liquidated damages scheme, with negotiations with the contractor on how the scheme will be applied continuing into 2008:
- In December 2007, Home Affairs agreed to implement a contract variation to amend the second damages provision to reflect the arrangement in the first

²⁷ Auditor-General Report No. 6 of 2021–22, paragraph 3.1, p. 29.

²⁸ Auditor-General Report No. 6 of 2021–22, paragraph 3.4, p. 30.

²⁹ Auditor-General Report No. 6 of 2021–22, paragraph 3.11, p. 31.

³⁰ Auditor-General Report No. 6 of 2021–22, paragraph 3.13, p. 32.

³¹ Auditor-General Report No. 6 of 2021–22, paragraph 3.19, p. 33.

³² Auditor-General Report No. 6 of 2021–22, paragraphs 3.27–3.28, p. 35.

damages provision, ‘thereby removing Surveillance Australia’s exposure to the flat \$100,000 per day’ that would have resulted in \$9 million in liquidated damages for failure to provide the contracted number of qualified aircrew.³³

- In February 2008, Home Affairs agreed that liquidated damages would only apply if the achieved rate of effort fell below a threshold of 95 per cent of the planned rate of effort, measured retrospectively for each month.³⁴
- In April 2008, Home Affairs agreed to use the average monthly contracted rate of effort to establish the monthly liquidated damages threshold, rather than the actual planned rate of effort.³⁵

- 5.24 Home Affairs made numerous other concessions and accommodations to ‘mitigate’ Surveillance Australia’s exposure to liquidated damages and assist it in meeting the planned rate of effort during the liquidated damages period. This included planning missions based on Surveillance Australia’s ability to perform the missions rather than the department’s actual operational imperatives,³⁶ and enabling Surveillance Australia to fill the shortfall of aircrew by using pilots not trained for the purposes of the contract. Home Affairs further agreed to credit all completed missions with at least six hours of flight time, unless the planned or actual flight time was greater than six hours. This meant, for example, ‘if the actual flight time for a completed mission was 5.8 hours and the planned mission time was 6.2 hours, the mission would be credited with an “adjusted” time of 6.2 hours’.³⁷
- 5.25 Home Affairs also assisted the contractor with meeting its contractual obligations in relation to establishing the contracted number of bases and resource distribution, such as by leasing three of the department’s residential properties in Broome to Surveillance Australia to assist in attracting aircrew to Broome, for rent payment of \$34–\$35 per week.³⁸
- 5.26 The contract had also included a penalty framework to deal with unavailability of the SIM Ground (SIM-G) component, with Surveillance Australia liable to pay \$1,000 per hour of unavailability of the system. In July 2012, Home Affairs amended the penalty clause in the contract so that the penalty was only applied if Surveillance Australia failed to rectify the problem within 12 hours, rather than immediately upon notification of the unavailability.³⁹
- 5.27 In addition to reducing the contractor’s liquidated damages and penalties payable under the contract, the audit report found that Home Affairs commenced payment for surveillance assets that were not being provided. This included payment of the full fixed component of the monthly service charge of \$4.5 million per month from 1 January 2008, for:

³³ Auditor-General Report No. 6 of 2021–22, paragraph 3.29, pages 35–36.

³⁴ Auditor-General Report No. 6 of 2021–22, paragraph 3.30, p. 36.

³⁵ Auditor-General Report No. 6 of 2021–22, paragraph 3.34, p. 37.

³⁶ Auditor-General Report No. 6 of 2021–22, paragraph 3.31, footnote 64, p. 36.

³⁷ Auditor-General Report No. 6 of 2021–22, paragraph 3.31, footnote 65, p. 36.

³⁸ Auditor-General Report No. 6 of 2021–22, paragraph 3.38, p. 38.

³⁹ Auditor-General Report No. 6 of 2021–22, paragraphs 3.43, 3.46, pages 39, 40.

- the Dash–8 315 aircraft that was not available for almost all of the first three months of service delivery, which amounted to \$1.4 million
- the three non-compliant Dash–8 315, which had a reduction in capability due to lack of long-range fuel tanks, and
- the provision of the contracted number of qualified aircrew, which comprised around 37 per cent of the fixed monthly service charge, that was not provided at any time throughout the life of the contract.⁴⁰

5.28 The audit report further noted that:

Home Affairs was not liable to pay Surveillance Australia for the SIM until acceptance of the first SIM modified aircraft. Nevertheless, Home Affairs agreed to amend the contract to commence payments for the SIM prior to the acceptance of the first aircraft.⁴¹

5.29 From available records, the ANAO estimated that around \$4.2 million was paid for the SIM prior to the acceptance of the first SIM-modified aircraft in July 2009.⁴² In relation to the provision of aircrews, the ANAO estimated that ‘Home Affairs may have paid in excess of \$87 million ... over the life of the contract in monthly service charges for crew numbers that it did not receive’.⁴³

5.30 At the public hearing held on 14 December 2022, Home Affairs informed the Committee that the contractor still had not been able to provide the full complement of qualified aircrews as contracted. Home Affairs also confirmed that it continues to pay the full monthly service charges, ‘because the contract’s performance framework is centred around the 90 per cent [mission performance] threshold ... not the number of crew.’⁴⁴ Deficiencies in the contract’s performance framework are examined later in the chapter.

5.31 The audit report drew a contrast between the numerous concessions made by Home Affairs for Surveillance Australia, and the approach taken by AMSA for its search and rescue contract. The audit report noted that AMSA effectively managed delays in provision of required assets through the contractual framework:

Specifically, AMSA did not pay the standing charge for the bases and aircraft until they had been accepted into service and, once it started paying the charge, paid at a reduced rate until the remaining deficiencies had been addressed.⁴⁵

5.32 At the public hearing of 14 December 2022, the Auditor-General elaborated on this comparison:

⁴⁰ Auditor-General Report No. 6 of 2021–22, paragraphs 3.25–3.26, 4.33, pages 34–35, 54.

⁴¹ Auditor-General Report No. 6 of 2021–22, paragraph 3.41, p. 39.

⁴² Auditor-General Report No. 6 of 2021–22, paragraph 3.42, p. 39.

⁴³ Auditor-General Report No. 6 of 2021–22, paragraph 4.36, p. 55.

⁴⁴ Ms Shyqyr, Home Affairs, *Committee Hansard*, Canberra, 14 December 2022, p. 23.

⁴⁵ Auditor-General Report No. 6 of 2021–22, paragraph 3.22, p. 34.

... in AMSA the contract was managed quite hard to the contract terms. The contract set up the incentives, and it was very strongly implemented. We thought it was one of the best contract management audits that we'd done as an office ... Whereas, at Home Affairs we didn't see the same rigorous process in adhering to the terms of the contract.⁴⁶

- 5.33 In its response to the audit, Home Affairs disagreed with the comparison between its contract and AMSA's due to 'significant differences between the two Services' such as length of time, different service requirements, and different fleet and base locations.⁴⁷ In a supplementary submission, the ANAO explained that the two audits had the same three audit criteria relating to effectiveness of contract management that yielded different conclusions, based on evidence of each entity's performance:

For AMSA, the evidence was that 'following initial delays, search and rescue assets have been provided and accepted into service' with AMSA addressing the initial delays through the contractual framework so they did not persist. For Home Affairs, the evidence was that 'there were shortfalls and delays in the provision of the contracted surveillance assets' and that 'the department did not effectively apply the contractual framework to manage the shortfalls and delays'.⁴⁸

- 5.34 The ANAO recommended that Home Affairs, in developing and managing the next surveillance services contract:

... adopt an approach that involves not paying charges for the bases and aircraft until they have been accepted into service and, once it has started paying charges, paying at a reduced rate until any remaining deficiencies are addressed.⁴⁹

- 5.35 The department agreed to the recommendation. In its submission, Home Affairs stated that '[t]he Department will ensure that the conditions of contract and associated payment schedules contain sufficient provision of information to enable informed decisions on payments, with remuneration reflective of services rendered'.⁵⁰

Contractor performance management

Deficiencies in contract performance framework

- 5.36 The contract contains a Performance Measurement System under which Surveillance Australia's performance is measured and assessed. There are two key performance measures under the contract:

⁴⁶ Mr Grant Hehir, Auditor-General, *Committee Hansard*, Canberra, 14 December 2022, p. 20.

⁴⁷ Auditor-General Report No. 6 of 2021–22, paragraph 3.23, p. 34.

⁴⁸ ANAO, Submission 12.2, paragraph 26c, p. 7.

⁴⁹ Auditor-General Report No. 6 of 2021–22, Recommendation no. 1, paragraph 3.48, p. 40.

⁵⁰ Home Affairs, Submission 2, p. 4.

- Dispatch Reliability, which assesses whether the response mission was on time or delayed
 - Mission Completion, which assesses whether the mission brief was completed.⁵¹
- 5.37 These performance measures are allocated a score between 0 per cent and 100 per cent. The two scores are then used to calculate the Overall Mission Performance (OMP) score for each mission. At the end of each month, the OMP scores are averaged to calculate the Overall Contract Performance (OCP) score. The contract requires a minimum OCP score of 90 per cent to be achieved in order to be paid the full monthly service charge. A lower minimum threshold of 80 per cent was specified for the Reims F406 aircrafts, which were in service from July 2011 to June 2015. If the OCP score falls below the minimum threshold, a performance deduction will apply.⁵²
- 5.38 The audit report noted that ‘over the life of the contract to 31 December 2020, overall performance has been calculated to meet the contracted 90 per cent OCP metric for the significant majority of months (92 per cent)’, with the Dash–8 service OCP score falling below the threshold for only 13 months (8 per cent) over the period analysed. For the Reims F406 service, OCP fell below the 80 per cent minimum threshold for 7 months (15 per cent) over the period they were in service.⁵³
- 5.39 However, the audit report found that there were a number of ways that the OCP score could be adjusted and increased. For instance, the Dispatch Reliability and Mission Completion scores were ‘up scored’ when the mission was not completed as briefed, if the reason was considered to be out of the service provider’s control. Examples of reasons for ‘up scoring’ included:
- coverage >95 per cent — surveillance mission completion of 95 per cent or greater equals up score to 100 per cent (4,426 missions)
 - prudent Limit of Endurance — the time during which an aircraft can remain airborne and still retain a given safety margin of fuel (2,133 missions)
 - adverse weather conditions (520 missions)
 - not enough fuel available for the mission duration (381 missions).⁵⁴
- 5.40 The ANAO found that 10,512 (47 per cent) of total 22,203 missions planned for the Dash–8s that were subject to the performance system had their Mission Completion scores increased.⁵⁵
- 5.41 There was also a mechanism to exclude missions with the lowest OMP scores from the OCP calculation, using a cap that limited the number of missions that the Performance Measurement System could be applied to. This cap was introduced via

⁵¹ Auditor-General Report No. 6 of 2021–22, paragraphs 4.44–4.45, pages 59–60.

⁵² Auditor-General Report No. 6 of 2021–22, paragraphs 4.45–4.46, pages 59–60.

⁵³ Auditor-General Report No. 6 of 2021–22, paragraph 4.47, p. 60.

⁵⁴ Auditor-General Report No. 6 of 2021–22, paragraph 4.49, p. 62.

⁵⁵ Auditor-General Report No. 6 of 2021–22, paragraph 4.49, p. 62.

a contract variation in March 2008 and subsequently amended in line with increases in annual rate of effort.⁵⁶

- 5.42 Other adjustments and alleviations could be made to the performance scores. For example, the audit report noted that the process used for calculating the OCP scores was conducted in a 'local spreadsheet', outside of the department's system used to monitor and manage surveillance mission data. The audit observed that '[t]his means that there is a lack of version control and transparency regarding the calculation of the OCP scores, with limited supporting evidence to explain changes and omissions when calculating the OCP score.'⁵⁷
- 5.43 Further, Surveillance Australia uses a different system to Home Affairs to collect and calculate missions scores. The audit report found that this 'has provided additional avenues for negotiations when there are instances where data does not align', with the audit identifying 'occasions where mission scores have been negotiated due to a difference between the two systems'.⁵⁸ Record keeping and data quality issues are discussed further below.
- 5.44 As the ANAO summarised at the hearing on 30 March 2023:
- Whilst at the higher level, the department is able to say that most of the time the department is meeting the target under the contract for performance. What we point out in the audit report is that happens through a number of things, where the department is able to upscore whether missions have actually been completed or not. The department is able to adjust what it tasks to what is able to be delivered rather than what it wants delivered.⁵⁹
- 5.45 The audit report also outlined another significant shortcoming in the contract's performance framework. Key deliverables specified in the contract are not linked to the Performance Measurement System, meaning that even if the full suite of contracted assets and services are not provided, Home Affairs is not able to apply a performance deduction. This includes the provision of surveillance assets such as the number of qualified aircrew, examined earlier in the chapter, as well as surveillance services such as night missions, long-range missions and reserve missions.⁶⁰
- 5.46 Importantly, the audit report noted that costs were incurred for all of these assets and services that were not provided or utilised. For example, three Dash-8 315 aircraft were required to be fitted with a long-range fuel tank for longer endurance flights of up to 13 hours duration, incurring a cost that was approximately 27 per cent higher than the other Dash-8 aircraft (amounting to \$16 million per aircraft over the life of the contract). However, the audit report noted that although the fuel tanks were

⁵⁶ Auditor-General Report No. 6 of 2021–22, paragraph 4.50, pages 62–63.

⁵⁷ Auditor-General Report No. 6 of 2021–22, paragraph 4.51, p. 63.

⁵⁸ Auditor-General Report No. 6 of 2021–22, paragraph 4.52, p. 63.

⁵⁹ Mr Brian Boyd, Executive Director, Performance Audit Services Group, Australian National Audit Office, *Committee Hansard*, Canberra, 30 March 2023, p. 4.

⁶⁰ Auditor-General Report No. 6 of 2021–22, paragraph 4.39, p. 58.

retrofitted into the Dash–8 315 aircrafts, the capability to undertake a 13-hour flight was never provided. This was due to aircraft weight limitations, with ‘many of the runways to be used at the bases and for deployments preclud[ing] take-off at current maximum take-off weights’, meaning the planes are unable to carry additional fuel.⁶¹ As the ANAO explained in the 30 March 2023 hearing:

... they've negotiated the contract to have something provided which, physically, is unable to be provided. They're still paying that additional fee for an aircraft that can't perform the very function it's there for, if that makes sense.⁶²

5.47 Home Affairs admitted in 2014 that both the Dash–8 202 and Dash–8 315 were only able to provide an endurance of 6.5 to 7 hours. The ANAO found that over the life of the contract, the longest recorded mission duration was 10 hours and 43 minutes, completed using a Dash–8 202 aircraft rather than the modified Dash–8 315.⁶³

5.48 The audit report further noted that ‘[i]n 2006, Home Affairs obtained additional Budget funding to increase the range and amount of night time surveillance under the contract, and this led to two contract variations ... at a combined cost of \$63.2 million’.⁶⁴ However, ‘[s]ince 2018–19, planning for night missions has reduced significantly. Since September 2018, only two “late night” missions have been flown.’⁶⁵

5.49 At the 14 December 2022 hearing, the Auditor-General further commented on this audit finding:

The contract allowed for certain capability to be done. Part of the contract was having aircraft with larger fuel tanks so they could go further. That hasn't been utilised. The ability to do reserve missions when there's capability—that hasn't been utilised. More night flights—that hasn't been utilised to the extent expected. So, while you're getting a performance of the contract within the contract terms, because those things aren't specified in contractual terms, you're not getting part of that additional capability that was envisaged when the contract was entered into.⁶⁶

5.50 At the same hearing, Home Affairs told the Committee that:

The contract provides that [the services] are ready and available for when we need them. From our perspective, they are being delivered when we need them. The Auditor-General's comment is about the way the contract is written and about the fact that we're paying for these even though we're not using them up to

⁶¹ Auditor-General Report No. 6 of 2021–22, paragraph 4.20, p. 51.

⁶² Mr Boyd, ANAO, *Committee Hansard*, Canberra, 30 March 2023, p. 4.

⁶³ Auditor-General Report No. 6 of 2021–22, paragraphs 4.18–4.20, p. 51.

⁶⁴ Auditor-General Report No. 6 of 2021–22, paragraph 4.16, p. 51.

⁶⁵ Auditor-General Report No. 6 of 2021–22, paragraph 4.15, p. 49.

⁶⁶ Mr Hehir, Auditor-General, *Committee Hansard*, Canberra, 14 December 2022, p. 25.

the amount that's in there. But, from our perspective, from an operational perspective and a delivery perspective, the tasking level has been met.⁶⁷

- 5.51 In response to a question from the Committee about whether the operational response was being driven by the limits of contracted services available, Home Affairs advised that '[t]he requirement is driven by intelligence and risk assessments done by a maritime border command area within ABF', and that the reason certain services had not been utilised was due to lack of operational needs.⁶⁸ However, contrary to this evidence, the audit had found that 'Home Affairs has been planning missions to fit Surveillance Australia's capability, rather than planning to meet the desired operational outcomes':

... instead of tasking missions to meet operational requirements, mission tasking factors in Surveillance Australia's reduced capacity... As recently as March 2021, in accepting requested changes to the [Monthly Deployment Plan], the department stated it was 'another example of the compromises we make continually in planning to accommodate shortages of crew duty'.⁶⁹

- 5.52 At the public hearing held on 10 February 2023, the ABF Commissioner acknowledged the issues in the contract's performance framework:

The overall contract performance, whether we like it or not ... doesn't hold the contractor to account in the performance framework for how many crew or how many hours. It's based on dispatch reliability... [a]nd mission completion...
... we have what we have here, and in terms of aircrews there are a whole lot of issues there. I would agree that there's been less than we would like. We're unable to take action against the contractor in terms of abatements, because it's not part of the overall contract performance framework.⁷⁰

- 5.53 Despite these issues, in a supplementary submission to the inquiry, Home Affairs confirmed that it 'has not sought to change the outcomes-based nature of the performance management framework since the Contract commenced in 2008'.⁷¹ Home Affairs also 'reject[ed] the assertion that the performance framework allows taxpayer funds to be paid for work that is not done', stating that the contract is 'an outcomes-based Contract' that 'has met the operational objectives it was put in place to achieve'.⁷² Home Affairs further asserted that '[t]he majority of concerns raised by ANAO in the report are historical in nature, and have largely been addressed since 2017 through significant improvements in contract management'.⁷³

- 5.54 In a supplementary submission, the ANAO disputed this advice, stating that:

⁶⁷ Ms Johnson, Home Affairs *Committee Hansard*, Canberra, 14 December 2022, p. 26.

⁶⁸ Mr Hehir, Auditor-General, *Committee Hansard*, Canberra, 14 December 2022, pages 25–26.

⁶⁹ Auditor-General Report No. 6 of 2021–22, paragraphs 4.36, 4.65, pages 55, 66.

⁷⁰ Mr Michael Outram APM, Commissioner, Australian Border Force, *Committee Hansard*, Canberra, 10 February 2023, p. 16.

⁷¹ Home Affairs, Submission 2:3, Answer to Question on Notice 32, p. [257].

⁷² Home Affairs, Submission 2:1, Answer to Question on Notice 10, pages [18]–[19].

⁷³ Home Affairs, Submission 2:1, Answer to Question on Notice 9, p. [17].

The contract is not an ‘outcomes’ based contract. The contract specifies a certain number of aircraft and equipment, and number of aircrew to be provided to meet a specific annual planned rate effort. The contract includes a service level agreement with a requirement that the ‘service provider shall deliver the Annual Planned Rate of Effort’ (paragraph 4.6 [of the audit report]). As described above, the contracted annual [rate of effort] was not achieved in any year of the contract examined by the ANAO.⁷⁴

- 5.55 The ANAO made two recommendations relevant to the contract performance framework in developing and managing the next surveillance services contract:
- where it sets requirements for the provision of aircrew, for Home Affairs to adopt an approach which links the contractual requirements to the performance measurement system.⁷⁵
 - leveraging off the approach taken by AMSA for its search and rescue contract, for Home Affairs to develop and use appropriate systems and processes that links data on operational activities with contractual performance requirements, including opportunities to apply technology solutions to increase automation thereby increasing transparency and reducing reliance on external processes.⁷⁶
- 5.56 Home Affairs agreed to both recommendations, and confirmed that it was engaging with ‘partner civil maritime security agencies including the Department of Defence and AMSA, as well as Central Agencies’ in its procurement planning for the next contract.⁷⁷

Assurance over contractor performance

- 5.57 Under the terms of the contract, Home Affairs employs Maritime Aviation Specialist Officers (MASSOs) ‘to provide a level of assurance over the operational competency of Surveillance Australia’. According to the audit report, the MASSOs have three key roles:
- monitor and report on Surveillance Australia’s operational performance and compliance with the contractual service delivery requirements of all activities associated with missions, including pre-mission, in-mission and post-mission activities
 - contribute to, and report on the development, delivery and assessment of operational surveillance training by Surveillance Australia, and
 - work with Surveillance Australia to improve the overall operational effectiveness and efficiency of surveillance operations.⁷⁸

⁷⁴ ANAO, Submission 12:2, paragraph 31, p. 8.

⁷⁵ Auditor-General Report No. 6 of 2021–22, Recommendation no. 2, paragraph 4.43, p. 59.

⁷⁶ Auditor-General Report No. 6 of 2021–22, Recommendation no. 3, paragraph 4.54, p. 63.

⁷⁷ Home Affairs, Submission 2:1, Answer to Question on Notice 14, p. [26].

⁷⁸ Auditor-General Report No. 6 of 2021–22, Appendix 7, paragraph 2, p. 87.

- 5.58 The audit report noted that MASSOs have an internal target to undertake monitoring activities of at least 15 per cent of all missions flown across the four bases. According to ANAO's analysis of Home Affairs' records, only an average of 10.6 per cent of missions were monitored by MASSOs in 2014–15. This decreased over the years to 2.3 per cent in 2020–21, 1.9 per cent of which were from missions based in Darwin, 0.3 per cent from Cairns and 0.1 per cent from Broome. There was also a corresponding decrease in the total number of MASSOs employed by Home Affairs, from six in 2014–15 to just one in 2020–21.⁷⁹
- 5.59 The audit report observed that an internal consultants' report from January 2018 had commented that the degree of assurance provided by the one MASSO in employment 'must surely be considered unacceptable' to the Australian Government.⁸⁰ The audit report concluded that '[a]ppropriate arrangements are not in place to provide assurance over contractor performance in undertaking missions'⁸¹ and recommended that the department implement stronger assurance arrangements for monitoring of mission performance.⁸²
- 5.60 Home Affairs agreed to the recommendation. In its submission to the inquiry, Home Affairs stated that an additional MASSO was engaged in late August 2021 'to monitor and report on the service provider's mission performance, and to conduct operational assessments on-board aircraft.'⁸³ In a supplementary submission, the department elaborated that the engagement of the additional MASSO has 'increased mission monitoring onboard the aircraft from an average of 2.14% in FY2020/2021 to 3.64% in FY2021/2022', noting that the monitoring levels were impacted by COVID-19 travel restrictions.⁸⁴ The department denied that it had 'an agreed internal target of 15% for MASSO mission monitoring under this Contract'.⁸⁵
- 5.61 Home Affairs further noted that:
- The service provider's operational performance is monitored through a range of measures including monthly performance reporting, strong governance arrangements, and 24/7 engagement and monitoring of all missions undertaken by the ABF.⁸⁶

⁷⁹ Auditor-General Report No. 6 of 2021–22, Appendix 7, paragraphs 3–4, p. 87.

⁸⁰ Auditor-General Report No. 6 of 2021–22, Appendix 7, paragraph 5, pages 87–88.

⁸¹ Auditor-General Report No. 6 of 2021–22, paragraph 22, p. 10.

⁸² Auditor-General Report No. 6 of 2021–22, Recommendation no. 4, paragraph 4.71, p. 67.

⁸³ Home Affairs, Submission 2, p. 4.

⁸⁴ Home Affairs, Submission 2:1, Answer to Question on Notice 17, p. [30].

⁸⁵ Home Affairs, Submission 2:1, Answer to Question on Notice 17, p. [30].

⁸⁶ Home Affairs, Submission 2:1, Answer to Question on Notice 18, p. [32].

Record keeping

Record keeping and data quality issues

- 5.62 The audit report commented that analysis of Home Affairs' performance against the audit criteria was 'made difficult by the state of the department's records of its management of the contract'.⁸⁷ Key shortfalls in Home Affairs' record keeping practices observed by the ANAO include:
- lack of adequate records of the original procurement, including the approval of the decision to enter into the contract
 - inability to locate spending proposals and approvals for all variations that increased the cost of the contract⁸⁸
 - no evidence of the original breakdown of the budgeted expenses for each category of the service charge at the time the spending proposal for the contract was approved⁸⁹
 - incomplete invoice records, with \$17 million of expenditure that could not be supported by invoices, 43 per cent of invoices analysed by the ANAO totalling \$452 million not having evidence of delegate approval, and \$121 million of expenditure misattributed to the current Surveillance Australia contract when it actually related to the previous contract during the transition-in period from March 2006 to December 2007⁹⁰, and
 - insufficient records regarding the provision of surveillance assets, including not retaining acceptance certificates for all aircrafts⁹¹ and significant gaps in data on aircrew numbers.⁹²
- 5.63 The ANAO also made a number of findings in relation to the quality of mission data collected by the department. From January 2008 to June 2011, Home Affairs used the Coastwatch Command and Support System (CWCSS) to record mission data. In July 2011, Geospatial Data Mart (GDM) Reporting and Operations Command (GROC) was implemented. GROC remains the primary system used by Maritime Border Command to monitor and manage surveillance mission data passed through from the surveillance assets. Accuracy of mission data recorded in GROC is important, as the system is used to generate a report with performance scores for each mission, which are then used to calculate the OCP score every month.⁹³
- 5.64 The ANAO identified the following concerns with the base data recorded in GROC:

⁸⁷ Auditor-General Report No. 6 of 2021–22, paragraphs 2.2, 4.2, pages 18, 42.

⁸⁸ Auditor-General Report No. 6 of 2021–22, paragraph 2.2, p. 18.

⁸⁹ Auditor-General Report No. 6 of 2021–22, paragraph 2.10, p. 23.

⁹⁰ Auditor-General Report No. 6 of 2021–22, paragraphs 2.9, 2.15, pages 20–21, 24.

⁹¹ Auditor-General Report No. 6 of 2021–22, paragraph 3.12, p. 31.

⁹² Auditor-General Report No. 6 of 2021–22, paragraph 4.2, p. 42.

⁹³ Auditor-General Report No. 6 of 2021–22, paragraph 4.51, p. 63.

- instances of mismatches between flying hours invoiced and flying hours recorded in base data
- instances of mismatches of the quantum of missions and missions scores between the OCP calculation and base data
- mission records that are incorrect, haven't been updated, or are incomplete, and
- inconsistent processes in place through the use of free text to input important context for mission data.⁹⁴

5.65 The ANAO noted that Home Affairs has not performed quality assurance checks over the base data contained in GROC since it was implemented in July 2011. Home Affairs corrected the base data records throughout the audit as issues were raised by the ANAO.⁹⁵

5.66 In its submission and supplementary submission, Home Affairs informed the Committee that it has since implemented quality assurance of mission and performance data in GROC,⁹⁶ and that manual changes to performance scores 'are now clearly documented in GROC, and reviewed against Contract requirements as part of the monthly performance reporting assurance processes'.⁹⁷

Leadership and culture

5.67 An organisation's leadership has a significant role in shaping its culture, including procurement culture. In his mid-term report published in October 2020, the Auditor-General commented that '[a] culture of integrity in an organisation flows from the standards set by its leaders'⁹⁸ and noted that:

... culture is a driver of the proper use of public resources. Compliance with minimum standards is essential, but internal culture drives entity behaviours and affects whether their approach to compliance results in actions consistent with the intended outcomes of a framework.⁹⁹

5.68 Poor procurement culture can also result in issues such as high turnover, affecting continuity of contract management, and lack of appropriate training and support provided for staff. In the audit report, the ANAO observed that the surveillance services contract had been managed by 19 different staff up until August 2020. Of these:

⁹⁴ Auditor-General Report No. 6 of 2021–22, paragraph 4.2, p. 42.

⁹⁵ Auditor-General Report No. 6 of 2021–22, paragraph 4.3, p. 42.

⁹⁶ Home Affairs, Submission, p. 4.

⁹⁷ Home Affairs, Submission 2:1, Answer to Question on Notice 17, p. [31].

⁹⁸ ANAO, *Auditor-General's mid-term report*, 7 October 2020, <https://www.anao.gov.au/work/speeches-and-papers/auditor-generals-mid-term-report>, paragraph 5.45, viewed 18 April 2023.

⁹⁹ ANAO, *Auditor-General's mid-term report*, 7 October 2020, <https://www.anao.gov.au/work/speeches-and-papers/auditor-generals-mid-term-report>, Foreword, viewed 18 April 2023.

- six had experience managing large-scale contracts and/or have held formal contract management training and/or qualifications
- none were involved in the development of the original request for tender or contract negotiation process.¹⁰⁰

5.69 The audit report noted that there has been improvement in staffing arrangements since 2021, with the branch responsible for the management of the contract now comprising a team of five staff, all of whom hold formal qualifications in government procurement and contracting.¹⁰¹ This team is supported by those responsible for managing the operational aspects of the contract, including service provider and asset performance.¹⁰²

5.70 At the 14 December 2022 hearing, Home Affairs stated that the current contract manager had been in the role for three years, and ‘had over 20 years’ experience in [High Risk High Value] contract management’.¹⁰³ The department further elaborated on the work it had been doing to develop its capability in procurement and contract management:

We’ve been rolling out courses for people to do, communities of practice and clinics that people can attend. We’re trying lots of different avenues to identify the people in the organisation who have those responsibilities, sometimes as part of their main job, and there’s mandatory training for people who are identified within those roles. We also look back on some of the processes and do some assurance to see what we can learn internally. There is a lot of work happening internally within the department to actually improve the way that we do not only procurement but also contract management.¹⁰⁴

5.71 The department recognised that cultural change will be a long process and acknowledged the challenge ahead.¹⁰⁵ In a supplementary submission, Home Affairs also commented more broadly on the department’s broader initiatives to improve its annual staff census results, address behavioural issues, and embed an inclusive culture.¹⁰⁶

Committee comment

5.72 Home Affairs is an important portfolio with significant responsibilities relating to immigration and citizenship, border protection, and national security. The department is also one of the largest procurers in the Australian Government, ranking fifth by

¹⁰⁰ Auditor-General Report No. 6 of 2021–22, paragraph 2.22, pages 26–27.

¹⁰¹ Auditor-General Report No. 6 of 2021–22, paragraph 2.26, p. 28.

¹⁰² Auditor-General Report No. 6 of 2021–22, paragraph 2.27, p. 28.

¹⁰³ Ms Shyqyr, Home Affairs, *Committee Hansard*, Canberra, 14 December 2022, p. 17.

¹⁰⁴ Ms Monterosso, Home Affairs, *Committee Hansard*, Canberra, 14 December 2022, p. 24.

¹⁰⁵ Ms Monterosso, Home Affairs, *Committee Hansard*, Canberra, 14 December 2022, p. 24.

¹⁰⁶ Home Affairs, Submission 3:3, Answer to Question on Notice 27, pages [5]–[7].

number and second by value of all parent contracts reported on AusTender from 2012–13 to 2021–22.¹⁰⁷

- 5.73 It is unacceptable to the Committee that the audit found deficiencies in almost every aspect of the department’s management of a contract intended to protect Australia’s maritime zone from illicit activities. This is on the back of similarly critical audit reports on other significant procurements, such as contracts for the delivery of garrison support and welfare services in offshore processing centres at Nauru and Papua New Guinea.¹⁰⁸
- 5.74 Yet, despite the serious deficiencies in the contract identified by the ANAO, the department decided to further extend the surveillance services contract out to December 2027 at an additional cost of \$991.3 million. This brings the total contract value to \$2.6 billion, and it will have been 21 years since the contract was competitively tendered by the time it expires.
- 5.75 The Committee does not find persuasive the Home Affairs Secretary’s explanation that the lack of an integrated investment plan for the department was one of the key reasons that the contract was extended and not re-tendered. As explored in subsequent public hearings, the contract is for the provision of surveillance services. The contractor owns the surveillance assets, and there is no capital investment required by the Commonwealth that would have necessitated an ongoing capital funding to re-tender. Following his offer to do so, the Committee invited the department to make a supplementary submission explaining its views on the department’s funding model and its relevance to the surveillance services contract in more detail. However, this has not been provided. Committee members were genuinely interested to understand the issue and open to making recommendations that an integrated investment capital budget should be provided however were unable to consider this without further evidence.
- 5.76 The Committee also notes that the delay in retendering this contract is not simply a matter of value for money or probity or compliance with the CPRs. As a result of the decade long delay Australia is lumbered with sub-optimal out of date technology, rather than having the world’s best surveillance working in crewed, uncrewed systems and satellite technology that other nations already have.
- 5.77 Further, the Committee is unable to understand why the department has not sought amendments to the terms and conditions of the contract to remediate the issues identified in the audit before approving the latest six-year extension. In particular, the Committee believes that the flawed performance framework that allows full payment to be made regardless of whether all assets and services were provided if the contractor meets a certain threshold of mission performance should have been

¹⁰⁷ Auditor-General Report No. 11 of 2022–23 *Australian Government Procurement Contract Reporting — 2022 Update*, paragraphs 3.6–3.7.

¹⁰⁸ Auditor-General Report No. 16 of 2016–17 *Offshore Processing Centres in Nauru and Papua New Guinea: Procurement of Garrison Support and Welfare Services*; Auditor-General Report No. 32 of 2016–17 *Offshore Processing Centres in Nauru and Papua New Guinea: Contract Management of Garrison Support and Welfare Services*.

amended. The audit finding that mission performance scores could be adjusted and 'up scored' on various pretexts is very concerning, and the fact that the ANAO found 47 per cent of Dash-8 missions were adjusted in such a way weakens the department's assurance that the contractor had met the minimum performance threshold for the majority of months over the term of the contract.

- 5.78 It is not clear to the Committee what the department meant by the contract being an 'outcomes-based contract'. The contract includes a clear service-level agreement with the requirement that the service provider shall deliver the annual planned rate of effort, which the audit found were not met in any year. Moreover, the findings of the audit report, as well as evidence received during the inquiry, indicated that Home Affairs was tailoring its mission tasking according to the limits of the contractor's capability, rather than operational needs or outcomes it was seeking to achieve. The Committee again notes that it invited the department to elaborate on what it meant by an 'outcomes-based contract', and this has not been provided.
- 5.79 The Committee agrees with the ANAO's conclusion that poor contract management has led to the department not receiving the quantum of surveillance assets and services that it was paying for. This relates not only to the full complement of qualified aircrews, which the audit report found has never been provided, but also the fact that the department had agreed to pay additional costs for long-range fuel tank capability that was never realised, and had obtained additional budget funding for increased night time surveillance that is underutilised.
- 5.80 Although the department had indicated that certain services, such as longer range flights and late night flights, were not being requested because of lack of operational needs, the Committee finds that it is not acceptable for the department to have been paying additional sums of money for capabilities it is not utilising. This once again emphasises the flaws that had been inherent in the initial contract design, which were further exacerbated via numerous variations that provided additional concessions and reduced the service provider's liability to liquidated damages and penalties under the contractual framework.
- 5.81 The department's response to the findings of the audit and the Committee's concerns were disappointing. While the Committee appreciates the department's commitment to improving its organisational and procurement culture, its rejection of key findings from the audit, such as those in relation to the contract's performance framework and additional payments made for services not provided, suggests that it has not fully acknowledged its shortcomings in contract management or accepted this experience as a valuable learning opportunity to improve its future performance.
- 5.82 Home Affairs has assured the Committee that its future contract will be incorporating the recommendations and lessons learned from the audit, including any learnings shared by AMSA, with procurement planning and industry engagement already underway. In light of the above, however, the Committee believes that there would be benefit in greater oversight of the department's procurement and contract management processes until the new contract is in place.

- 5.83 The Committee notes the evidence including from Audit and Risk Committee Chairs that the primary determinant of organisational culture is the behaviour of and tone set by leaders including officials and ministers. The Committee is concerned that the Department of Home Affairs has consistently been found in annual APSC surveys to have the worst culture of any large Commonwealth Department. This cannot be brushed aside by grandiose critiques of the survey methodology or by claims that it is because staff want to be paid more (which no doubt they do). While the Committee acknowledges the impact that concerns about wages no doubt have on morale alongside the impact of serial under-resourcing and structural underfunding of Home Affairs since its creation, the leadership of Home Affairs needs to accept its share of responsibility.
- 5.84 The Committee also notes that how senior officials present to Parliamentary Committees and respond (or fail to respond) to legitimate questions on notice is not just a matter of courtesy or even the accountability of officials to the Parliament – it goes directly to integrity in the public sector and, along with the tone set by ministers in administering their agencies, sends cultural signals to a department’s officers. This is especially the case with the JCPAA given the Committee’s significant statutory responsibilities and powers in relation to audit, public finances and public administration, exercised on behalf of the Parliament.

Recommendation 15

- 5.85 The Committee recommends that the Department of Home Affairs report back to the Committee, commencing in September 2023 and then six monthly until the current contract expires, on its progress in tendering and procuring a new surveillance services contract, given that it will have been 21 years since the contract was competitively procured if it runs to its current expiry date.**

Recommendation 16

- 5.86 The Committee recommends that the Australian National Audit Office undertake a performance audit of the Department of Home Affairs’ transition to the new surveillance services contract when the current contract expires.**



6. Defence's procurement of six Evolved Cape Class Patrol Boats

Auditor-General Report No. 15 2021–22

Introduction

Background

- 6.1 In April 2020, the Department of Defence (Defence) contracted with Austal Ships Pty Ltd (Austal), an Australian shipbuilding company, for the construction of six new Evolved Cape Class Patrol Boats (ECCPBs). The decision to purchase the vessels followed the receipt of an unsolicited proposal from Austal to build new ships rather than extend the service lifetime of Defence's existing Armidale class ships.
- 6.2 The objective of the audit by the Australian National Audit Office (ANAO) was to assess the effectiveness of Defence's procurement of the six evolved Cape class patrol boats.

Audit findings

- 6.3 *Auditor-General Report No. 15 2021–22 Department of Defence's Procurement of Six Evolved Cape Class Patrol Boats* found that the procurement of the Cape class patrol boats was largely effective. Its decision making and advice to government were effective, and it implemented largely appropriate contracting, governance and reporting arrangements.¹
- 6.4 The report made one recommendation to Defence which related to its management of probity. Defence agreed to the recommendation.

Chapter overview

- 6.5 This chapter considers the ANAO's findings with respect to the acquisition of the ECCPBs and Defence's actions taken in response to the audit. In particular, it considers:
- Defence's receipt and consideration of Austal's unsolicited proposal

¹ Auditor-General Report No. 15 2021–22 *Department of Defence's Procurement of Six Evolved Cape Class Patrol Boats*, p. 8.

- the probity arrangements Defence put in place for the project, and
- Defence's contract management and delivery arrangements.

Procurement decision making

Receipt and consideration of the proposal

6.6 The framework under which Defence conducts its procurements differs slightly from that at other Commonwealth entities. Procurement at Defence is undertaken in line with the Defence Procurement Policy Manual (the DPPM):

The DPPM incorporates both the Commonwealth Procurement Rules (CPRs) and additional Defence Procurement Policy Directives that must be complied with by Defence officials in relation to procurement. Defence Procurement Policy Directives supplement specific the CPRs in the context of Defence's particular circumstances and needs.²

6.7 On 5 September 2019, Austal provided Defence with an unsolicited proposal for the lease of six Cape Class Patrol Boats.

6.8 Prior to the receipt of the proposal, Defence had planned to develop a life-of-type extension (LOTE) for its current fleet of Armidale Class Patrol Boats by way of transitioning to the planned Arafura Class Offshore Patrol Vessels (OPVs). Under the original plan Defence also intended to extend the existing lease of two Cape Class Patrol Boats to support the transition to the OPVs.³

6.9 Austal's proposal presented Defence with an alternative transition arrangement. In April 2020, Defence sought government approval to acquire six ECCPBs and discontinue the Armidale class LOTE. Government approved the request, and soon after a contract worth \$356 million was signed for the construction of the six ECCPBs.⁴

6.10 After receiving the offer, and being aware of Austal's advice to the government that unless it received more work from Defence it would be forced to make part of its Australian workforce redundant, Defence considered the proposal to be 'live'. It was presented to the Chief of Navy Senior Advisory Committee on 4 October 2019.⁵

6.11 Defence wrote to Austal in on 21 October 2019 to advise that the proposal was 'of genuine interest' to Defence. Austal was then sole sourced to undertake a Risk Reduction Design Study, which was intended to:

identify all deviations from the extant Cape class patrol boat design, provide impact assessments of those deviations, develop ship design documents

² Auditor-General Report No. 15 2021–22, p. 23.

³ Auditor-General Report No. 15 2021–22, pp. 14–15.

⁴ Auditor-General Report No. 15 2021–22, p. 15.

⁵ Auditor-General Report No. 15 2021–22, p. 27.

including system specifications, and develop lifecycle upkeep and sustainment intelligence system specifications. These deviations included modifications to the extant design to address known deficiencies in the extant Cape class design which had previously resulted in sustainment issues.⁶

- 6.12 Following this and based on the results of the Risk Reduction Design Study, Defence began a Collaborative Design Process with Austal to develop to project, and on 9 April 2020 a request for tender was issued solely to Austal for the procurement of six ECCPBs and associated supplies.⁷

Defence's assessment of the proposal

- 6.13 The audit found that 'Defence's assessment of value for money of Austal's sole source tender was largely appropriate'.⁸ The DPPM sets out conditions Defence officials should consider when determining value for money in a procurement:

Division 1 provides a framework for determining 'value for money'. Under this framework, procurements should: encourage competition and be non-discriminatory; use public resources in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth; facilitate accountable and transparent decision making; encourage appropriate engagement with risk; and be commensurate with the scale and scope of the business requirement.⁹

- 6.14 Defence conducted its initial value for money assessment in January and February 2020. The assessment was limited to an initial assessment of financial costs and benefits. In April 2020 the Tender Evaluation Board conducted a deeper value for money assessment that considered a range of non-financial factors. The assessment relied on benchmarking rather than market testing and compared Austal's proposal with the existing Armidale Class LOTE project, reaching a final conclusion that the Austal proposal would save approximately \$50 million.¹⁰

- 6.15 The Defence submission emphasises the expertise that it brought to these assessments:

In the case of the ECCPB procurement, Defence applied extensive knowledge, rigour and experience in assessing the unsolicited proposal, and determining the capability benefits that could cost effectively be derived from expanding Navy's existing fleet of Cape class patrol boats (CCPB) rather than extending the life of aging Armidale class patrol boats (Navy operated two leased CCPB at the time).¹¹

⁶ Auditor-General Report No. 15 2021-22, p.30.

⁷ Auditor-General Report No. 15 2021-22, p. 32.

⁸ Auditor-General Report No. 15 2021-22, p. 35.

⁹ Auditor-General Report No. 15 2021-22, p. 35.

¹⁰ Auditor-General Report No. 15 2021-22, pp. 37-39.

¹¹ Department of Defence, *Submission 10*, p. 3.

- 6.16 The ANAO noted that the Commonwealth procurement framework has made provisions for unsolicited proposals for quite some time, especially in the context of Defence procurements:

the unsolicited proposals concept has been in the Commonwealth procurement framework and the Commonwealth procurement rules for some time. We were looking specifically at the 2020 CPRs, which were the ones applying at the time. It is a longstanding feature of the framework ... Finance does, as a policy owner, have a responsibility for providing whole-of-government guidance in this space, and it has done so, because the whole notion of unsolicited proposals is something that the sector as a whole has to grapple with, and certainly defence has to grapple with it because there are some very active players.¹²

- 6.17 In relation to the treatment of unsolicited proposals, the audit report noted that the guidance material provided by the Department of Finance to assist agencies in appropriately treating such a proposal was inaccurate. The audit report noted that with regard to unsolicited proposals, the guidance stated that:

The Department of Defence receives many 'unsolicited proposals' from industry due to its unique business requirements. These proposals may range from small, off-the-shelf supply items to more complex capability solutions. Defence has therefore established an Unsolicited Proposals Gateway to provide a single entry point for businesses and individuals to submit their proposals to Defence.¹³

- 6.18 However, at the time of the audit, the Unsolicited Proposals Gateway referred to in the Finance guidance was no longer available.¹⁴

- 6.19 Dr Tom Ioannou, Group Executive Director, Performance Audit Services Group at the ANAO told the Committee that:

What we observed ... was in fact some of the guidance that Finance had put out at a whole-of-government level and some specific defence guidance was more or less out of date. So there is a question to be asked of Finance about its ability to keep important guidance up to date.¹⁵

- 6.20 When asked about the guidance it provides to procuring entities, the Department of Finance told the Committee that the review of its guidance is 'an ongoing process that is generally triggered by changes in the legislative and policy environment in which Commonwealth entities and officials operate':

The last comprehensive review of the procurement guidance was undertaken in 2020. Another full review of the guidance material is currently underway. Entities have been contributing to that review since June 2022. This review is in addition

¹² Dr Tom Ioannou, Group Executive Director, Performance Audit Services Group, Australian National Audit Office, *Committee Hansard*, 14 December 2022, p. 4.

¹³ Auditor-General Report No. 15 2021-22, p. 25.

¹⁴ Auditor-General Report No. 15 2021-22, p. 25.

¹⁵ Dr Tom Ioannou, ANAO, *Committee Hansard*, 14 December 2022, p. 5.

to updates made to specific guidance as required, in view of such triggers as those identified above.¹⁶

Defence's management of probity

- 6.21 Defence did not consider probity risks upon receipt of the initial proposal in September 2019, but did so when it commenced negotiations with Austal in February 2020, a delay of five months.
- 6.22 The Auditor-General told the Committee that probity should be a key consideration in the context of unsolicited proposals:
- The nature of unsolicited proposals probably heightens some of the issues around how you manage probity, which is why we raised the issues, particularly early on in the process of developing up a proposal. That's because the nature of an unsolicited proposal is that it hasn't been developed by the entity and there's not a competitive process within it. So getting to a probity early in those types of projects is quite core, we would say, in making sure you retain confidence.¹⁷
- 6.23 The audit report noted that Defence engages with Austal on a routine basis and on a wide range of matters. It went on to argue that:
- While the ANAO did not identify direct evidence of joint development of the unsolicited proposal before it was formally received by Defence in September 2019, and Defence has advised that joint development did not occur, in such circumstances care needs to be taken to avoid the perception of joint development of a proposal which may result in procurement action, so as to avoid any perception that potential suppliers enjoy an unfair advantage.¹⁸
- 6.24 In this context the ANAO found that it would have been 'prudent' for Defence to consider probity issues earlier, so that any perception that it had developed the unsolicited proposal jointly with Austal could be avoided.¹⁹
- 6.25 As such the report recommended that Defence 'develop and implement specific requirements for the management of probity when engaging with industry on unsolicited proposals including by identifying, assessing and managing probity risk at an early stage, when considering and assessing the feasibility of unsolicited proposals.'²⁰
- 6.26 In response, the Defence submission stated that, while agreeing with the recommendation, its view is that its officials acted with probity throughout the procurement:

¹⁶ Department of Finance, *Submission 11.1*, p. [6].

¹⁷ Grant Hehir, Auditor-General, Australian National Audit Office, *Committee Hansard*, 14 December 2022, p. 3.

¹⁸ Auditor-General Report No. 15 2021-22, p. 41.

¹⁹ Auditor-General Report No. 15 2021-22, p. 40.

²⁰ Auditor-General Report No. 15 2021-22, p. 43.

While Defence maintains that probity was managed effectively in this case, Defence has agreed to this ANAO recommendation and has responsibly implemented change through development and implementation of specific requirements for the management of probity in regard to unsolicited proposals. This has been reflected in strengthened arrangements within the Defence Commercial Framework and Defence Procurement Manual.²¹

- 6.27 Further, Rear Admiral Wendy Malcolm told the Committee that Defence had existing arrangements with Austal as a known supplier, and that these arrangements were satisfactory from a probity standpoint:

From our perspective, we felt that the arrangements that we had in the workplace that surrounded the current sustainment business with this particular company were well understood, and we certainly dealt with the unsolicited proposal seriously in considering probity, but we hadn't actually put a formal probity plan around this particular unsolicited proposal in place, as was certainly pointed out by the audit. So, from my perspective, I felt that the arrangements that were in place and the conduct of the officials were appropriate and complied with our defence procurement rules.²²

- 6.28 Rear Admiral Malcom emphasised that Defence nevertheless agreed to the ANAO's recommendation:

We understand the importance of what the audit report showed to us and so we recognise that we could have improved the way that we did those things and have acted accordingly. I don't want to suggest that I don't feel that way. It certainly was an appropriate recommendation. We believe that we have made the necessary policy changes and done the administration to reflect that.²³

- 6.29 In relation to the specific measures Defence has taken to implement the ANAO's recommendation, Rear Admiral Malcom said:

What has been put in place is that the procurement manual has been updated. In particular, we've developed and strengthened arrangements within the Defence commercial framework through the Defence procurement manual. We've updated policies specifically around unsolicited proposals and how they're dealt with, and we've provided stronger guidance on how those probity arrangements should be put in place pretty much as soon as there's an unsolicited proposal.²⁴

²¹ Department of Defence, Submission 10, p. 3.

²² Rear Admiral Wendy Malcolm, Head, Patrol Boats and Specialist Ships, Department of Defence, *Committee Hansard*, 14 December 2022, p. 1.

²³ Rear Admiral Malcolm, Department of Defence, *Committee Hansard*, 14 December 2022, p. 2.

²⁴ Rear Admiral Malcolm, Department of Defence, *Committee Hansard*, 14 December 2022, p. 2.

Contract management and delivery

Contracting arrangements

- 6.30 The audit found that the contracting arrangements for the acquisition of the vessels implemented by Defence was fit for purpose:

Defence's contract with Austal includes 20 milestones, with clear entry and exit criteria and due dates. Contract payments are tied to the achievement of milestones. Payment amounts are appropriately distributed to incentivise satisfactory contractor performance, with amounts held over until achievement of acceptance milestones. Performance expectations are clearly set out in the contracted statement of work, with additional detail about consequences for poor performance included in the conditions of contract. Provisions for corrective action are included in the contract, as are provisions for the payment of liquidated damages.²⁵

- 6.31 In its submission, Defence pointed to its contracting arrangements, noting their contribution to the procurement achieving good value for money outcomes:

Defence established fit-for-purpose contracting arrangements for the ECCPB. This included contract payments being tied to the achievement of milestones and milestones being appropriately distributed with clear entry and exit requirements. The enforcement of these contract provisions by Defence, through strong contract management, has contributed to the achievement of outcomes and value for money for Defence.²⁶

- 6.32 Defence also noted that it has a range of tools available for its officials to assist them in their contract management:

Defence's contract management is underpinned by the Defence Contract Management Framework, developed to provide best practice guidance for the management of procurement contracts and to improve contract management outcomes for Defence. This incorporates a variety of contract management templates and checklists assisting contract managers when undertaking key contract activities.²⁷

- 6.33 The audit report noted that as at December 2021, the contract with Austal had been subject to six variations by way of contract change proposals (CCPs). None of the CCPs had impacted the cost of the contract. The variations approved by Defence concerned matters including the reallocation of the Australian Industry Content (AIC)

²⁵ Auditor-General Report No. 15 2021-22, p. 48.

²⁶ Department of Defence, *Submission 10*, p. 4.

²⁷ Department of Defence, *Submission 10*, p. 4.

plan approval to a later milestone, and the incorporation of the AIC plan into the contract.²⁸

- 6.34 AusTender records showed one variation in cost of just under \$750,000 which corrected a financial reporting error in the purchase order but which did not substantively change the value of the contract.²⁹
- 6.35 Defence argued that its focus on sound contract management frameworks and practices had paved the way for good outcomes in relation to the acquisition of the ECCPBs:

Since the ANAO report was published, Defence has accepted the three ECCPB and Austal and Defence have worked collaboratively to ensure delays due to Covid-related border closures and issues with aluminium quality have been minimised.³⁰

Governance arrangements

- 6.36 The audit reported positive findings in relation to Defence's governance and assurance arrangements relating to the ECCPB project:

The governance, oversight and coordination arrangements for the project include a combination of project-specific governance and oversight groups, as well as higher-level oversight and coordination arrangements for Defence's naval shipbuilding activity as a whole ... Defence has recognised the risk and complexity of these non-standard administrative arrangements, with the anticipated benefits expected to outweigh the risk.³¹

- 6.37 However, the audit also noted that the full suite of assurance activities ordinarily undertaken by Defence had not yet been recorded at the time of the audit:

Two mandated governance documents - the Product Delivery Agreement (Materiel Acquisition Agreement) and Integrated Project Management Plan - had not been approved as at 1 December 2021, and no independent assurance reviews have been conducted to date. As a consequence, Defence and its senior leaders have not had the benefit of the full suite of inputs which contribute to providing assurance that capability requirements are being successfully delivered by an acquisition project.³²

- 6.38 A risk management plan for the project was approved in April 2021. According to Defence, three internal risk meetings had been held since the contract was signed in April 2020 two of which predated the risk plan. In addition:

²⁸ Auditor-General Report No. 15 2021-22, p. 51.

²⁹ Auditor-General Report No. 15 2021-22, p. 52.

³⁰ Department of Defence, *Submission 10*, p. 4.

³¹ Auditor-General Report No. 15 2021-22, p. 52.

³² Auditor-General Report No. 15 2021-22, p. 52.

As part of the acquisition contract, Austal has produced and delivered a description of its risk management processes and procedures within its Project Management Plan, and has maintained a risk register for the duration of the contract. Records indicate that risks and issues were regularly discussed at Progress Review Meetings between Defence and Austal.³³

- 6.39 The contract is monitored through regular Contract Status Reports from Austal to Defence which provide information on progress, planned activities, and risks. A Contract Master Schedule was approved in July 2020. Updates submitted by Austal must be approved by Defence. Austal also provides reporting on progress against Defence's Australian Industry Content plan.³⁴
- 6.40 The audit found that Defence's activities to manage project milestones have been appropriate, although delays of 26 to 35 weeks were reported to allow rectification work following the use of defective aluminium and production workforce inefficiencies.³⁵
- 6.41 Of the 12 milestones which were at the time of the audit, Austal had claimed eight. Four of the eight were claimed on schedule, with two further being claimed within two weeks of the scheduled date. Delays in the construction of the first boats is expected to flow through to the later vessels.³⁶
- 6.42 The ANAO found evidence that Defence had raised the issue with Austal, and that Defence had appropriately revised its Patrol Force Capability Transition plan in July 2021 to delay the retirement of the Armidale class boats which remained in service.³⁷ Audit.

Committee comment

- 6.43 The Committee is pleased to note the generally favourable findings of this audit report, which stand in quite stark contrast to the other audit reports that make up this inquiry. In particular, it is commendable that Defence conducted a rigorous and well-documented value for money assessment in response to an unsolicited proposal from Austal. Sole sourced procurements require value for money to be established without the benefit of competition, requiring entities to make informed judgements as to cost and capability, benchmark them appropriately and retain proper documentation of its processes in line with the procurement's scope, cost and risk.
- 6.44 The Committee notes the ANAO's finding that elements of Finance's guidance to procuring entities relating to unsolicited proposals contained references to a resource that no longer existed at the time of the audit. Notwithstanding the otherwise positive findings of the audit, the Committee considers that Finance should verify that this and

³³ Auditor-General Report No. 15 2021-22, p. 59.

³⁴ Auditor-General Report No. 15 2021-22, pp. 63-64.

³⁵ Auditor-General Report No. 15 2021-22, p. 66.

³⁶ Auditor-General Report No. 15 2021-22, p. 67.

³⁷ Auditor-General Report No. 15 2021-22, pp. 70-72.

the remainder of its procurement guidance materials have been made current as part of the review of its guidance material that it is currently undertaking.

Recommendation 17

- 6.45 The Committee recommends that the Department of Finance report back to the Committee within six months of the tabling of this report with the outcomes of its review of its Commonwealth procurement guidance, including a list of changes made to the guidance as a result of the review.**
- 6.46 The Committee does not have any recommendations relating to Defence's acquisition of the ECCPBs and extends its thanks to and commends Defence for its cooperation with this inquiry.

7. DISR's procurement of delivery partners for the Entrepreneur's Programme

Auditor-General Report No. 42 2021–22

Introduction

Background

- 7.1 The Entrepreneurs' Programme was announced as part of the 2014–15 Budget with funding of \$484.2 million. It was launched on 1 July 2014, and aims to support high-potential business ideas by providing businesses with access to expert advice and grant funding.¹ The Department of Industry, Science, Energy and Resources (DISER), now the Department of Industry, Science and Resources (DISR), is responsible for administering the program.²
- 7.2 A procurement process conducted in 2014–15 appointed 10 providers to deliver the program, with most of the contracts expiring on 30 June 2020. In September 2019, following a 'redesign project' that refocused the program delivery model to three outcomes of growth, innovation and commercialisation, DISR issued a Request for Tender (RFT) for the engagement of new delivery partners. The delivery partners' role is to deliver expert business advisory and facilitation services for the Entrepreneurs' Programme. The RFT sought:
- a single delivery partner to provide commercialisation services to customers nationally
 - a single delivery partner to provide innovation and incubator support services nationally, and
 - one or more delivery partners to provide expert business advisory and facilitation services in nominated geographic areas on a state and/or regional basis.³

¹ Auditor-General Report No. 42 of 2021–22 *Procurement of Delivery Partners for the Entrepreneurs' Programme*, paragraph 1.1, p. 16.

² For convenience, this report refers to the department as DISR.

³ Auditor-General Report No. 42 of 2021–22, paragraphs 1.2, 1.4, pages 16–17.

- 7.3 The procurement had an estimated value of \$182 million for the maximum contract term of five years. The tender received 55 responses, two of which did not satisfy the minimum requirements and were excluded from consideration. The remaining 53 progressed to evaluation. Seven tenderers were awarded contracts for a term of three years from 1 July 2020 to 30 June 2023, with two one-year extension options.⁴

Audit findings

- 7.4 Auditor-General Report No. 42 of 2021–22 *Procurement of Delivery Partners for the Entrepreneurs' Programme* examined whether the design and conduct of the procurement process for delivery partners for the Entrepreneurs' Programme complied with the Commonwealth Procurement Rules (CPRs), and whether the signed contracts are being appropriately managed.
- 7.5 The audit focused on the conduct of the 2019–20 procurement process and DISR's management of the resulting contracts. The audit scope did not include the procurement process of 2014–15 or the administration of grant funding under the Entrepreneurs' Programme.
- 7.6 The audit report concluded that:
- The design and conduct of the procurement did not comply with the Commonwealth Procurement Rules (CPRs), and the signed contracts are not being appropriately managed.⁵
- 7.7 In relation to the department's procurement process, the audit found that the department did not demonstrate the achievement of value for money, its approach was deficient in significant respects, and its conduct also fell short of the ethical requirements set out in the CPRs. In management of the delivery partner contracts, the audit noted that the contract management framework is inadequate, and the contracts do not include an effective performance management framework.⁶
- 7.8 The Auditor-General made 10 recommendations to DISR. The department agreed to all recommendations.

Chapter overview

- 7.9 This chapter discusses key findings from the audit and DISR's actions to address these findings since the tabling of the audit. The chapter focuses in particular on findings relating to:
- tender design, evaluation and assessment
 - probity and ethics
 - record keeping

⁴ Auditor-General Report No. 42 of 2021–22, paragraphs 1.5–1.6, p. 17.

⁵ Auditor-General Report No. 42 of 2021–22, paragraph 8, p. 8.

⁶ Auditor-General Report No. 42 of 2021–22, paragraphs 9–10, p. 8.

- contract management
- procurement culture.

Tender design, evaluation and assessment

Evaluation criteria

7.10 As required under the CPRs, the RFT issued by DISR in September 2019 outlined six criteria that would be used to evaluate the tender responses. Two of the criteria were weighted and the remaining four were not weighted. The RFT stated that the six evaluation criteria were not listed in order of importance. The criteria comprised:

- organisational capability (70 per cent weighting)
- promotion and marketing and industry knowledge (30 per cent weighting)
- price (not weighted)
- risk (not weighted)
- corporate and financial viability (not weighted), and
- Commonwealth policies (not weighted).⁷

7.11 The audit report noted that a tender evaluation plan, which would outline how the tender responses would be evaluated in accordance with the RFT, was not established before market responses were sought. Only a draft evaluation plan was in circulation at the time the RFT was published, which:

- was based on the plan used for the 2014–15 tender, and contained various comments from the probity adviser and departmental officers
- did not correctly identify who would conduct the evaluation, despite the fact that a three-person Tender Assessment Panel had already been established by the department
- did not reflect that four ‘internal experts’ would play a role in the conduct of the evaluations, and
- did not reflect the evaluation criteria set out in the RFT, with the draft plan indicating that there would be five weighted evaluation criteria that differed from the six listed in the RFT, only two of which were weighted.⁸

7.12 The draft evaluation plan was not signed off and approved before the RFT was issued on 27 September 2019 or before tender submissions were opened on 28 November 2019. It was not also signed off and agreed by all Tender Assessment Panel members, the probity adviser, or the delegate for the procurement.⁹

⁷ Auditor-General Report No. 42 of 2021–22, paragraph 2.3, p. 20.

⁸ Auditor-General Report No. 42 of 2021–22, paragraph 2.6, p. 21.

⁹ Auditor-General Report No. 42 of 2021–22, paragraph 2.7, pages 21–22.

7.13 Importantly, the audit report noted that the department's evaluation plan outlined a two-stage approach to the tender process, but that this information was not provided to the potential tenderers in the RFT. According to the evaluation plan, tender submissions would be required to meet the first two weighted criteria to be shortlisted for further evaluation against the remaining criteria. The department also did not inform the potential tenderers that it only envisaged a shortlist of around 15 tender submissions to proceed to the pricing evaluation stage. This information was important for tenderers to determine whether to participate in the tender process, which can be a time-consuming and costly exercise, especially for small businesses.¹⁰

Evaluation process

7.14 A total of 55 tender responses were received by the department. The tender evaluation plan set out five stages in the evaluation process:

- stage 1: registration and screening
- stage 2: technical evaluation (assessment against the two weighted criteria)
- stage 3: pricing evaluation (assessment against the rest of the criteria)
- stage 4: contract compliance evaluation
- stage 5: value for money including overall risk evaluation.¹¹

7.15 The audit report found significant issues at almost every stage of the evaluation process. At the registration and screening stage, the department determined that two tender responses did not satisfy the conditions for participation and/or the minimum content and format requirements, and these were excluded from further consideration.¹²

7.16 There were 13 other responses that required additional information to satisfy the conditions for participation and minimum content and format requirements. Of these, 11 were progressed to the next stage before the additional information was received, contrary to paragraph 10.34 of the CPRs.¹³

7.17 Another submission was recommended to be excluded by the probity adviser on the basis of it being non-competitive and non-compliant with the minimum content and format requirements, but the Tender Assessment Panel decided to shortlist the project. The ANAO found that the Tender Assessment Panel's records 'were inadequate to explain the decision that was taken'.¹⁴

¹⁰ Auditor-General Report No. 42 of 2021–22, paragraphs 2.10–2.11, p. 22.

¹¹ Auditor-General Report No. 42 of 2021–22, paragraph 2.7, footnote 15, p. 21.

¹² Auditor-General Report No. 42 of 2021–22, paragraph 2.22, p. 25.

¹³ Auditor-General Report No. 42 of 2021–22, paragraph 2.22, p. 25. Paragraph 10.34 of the CPRs states: 'Further consideration must be given only to submissions that meet minimum content and format requirements': Department of Finance, *Commonwealth Procurement Rules*, 1 July 2022, p. 28.

¹⁴ Auditor-General Report No. 42 of 2021–22, paragraphs 2.23–2.24, pages 25–26.

7.18 Fifty-three submissions progressed to stage 2, which involved assessments against the two weighted criteria: organisational capability (70 per cent weighting), and promotion and marketing and industry knowledge (30 per cent weighting). The audit report noted that '[t]he [Tender Assessment Panel] did not employ a consistent and transparent process in evaluating each of the tender submissions'.¹⁵ Issues identified by the audit include:

- while all 53 tenders were evaluated against the first weighted criterion, six tender submissions did not receive an evaluation against the second weighted criterion¹⁶
- only four tender responses (eight per cent) received an evaluation from all three Tender Assessment Panel members, while 26 (49 per cent) received an evaluation from two members, and 23 (42 per cent) received an evaluation from only one member
- how overall scores were determined was not transparent, with one assessor giving an overall score for the submissions they assessed while other two did not; the overall scores recorded in a 'tracking document' were also different to those recorded in the tender evaluation report
- there was no evidence of weightings having been applied
- a significant proportion of assessments were undertaken late in the two-week evaluation period and there was an uneven distribution of assessments conducted by individual members, with the assessor independent to the program undertaking the fewest assessments
- 30 tenders were rated as 'acceptable' or better against the two criteria, however only 14 of these 30 tenders were shortlisted.¹⁷

7.19 The 14 shortlisted tender responses were provided to the panel of internal experts for further evaluation. As noted above, this process was different to one outlined in the RFT, which did not indicate that a staged approach would be adopted. The ANAO observed that '[s]hortlisting did not provide for open and effective competition to be maintained', and that 'the shortlisting process had a significant bearing on the likelihood of tenderers being successful such that the department should have communicated in the RFT the extent to which shortlisting would be applied'.¹⁸

7.20 A consultancy firm was engaged by the department to conduct the stage 3 price evaluation for the shortlisted projects. Based on the results of the internal experts' evaluation, the initial stage 3 pricing, and interviews with the 14 shortlisted tenderers, DISR reduced the shortlist to 10 tender submissions,¹⁹ which were provided to the Tender Assessment Panel for the overall value for money assessment.²⁰

¹⁵ Auditor-General Report No. 42 of 2021–22, paragraph 2.43, p. 30.

¹⁶ Auditor-General Report No. 42 of 2021–22, paragraph 2.27, p. 27.

¹⁷ Auditor-General Report No. 42 of 2021–22, paragraph 2.43, p. 30.

¹⁸ Auditor-General Report No. 42 of 2021–22, paragraph 2.107, p. 48.

¹⁹ Auditor-General Report No. 42 of 2021–22, paragraph 2.35, p. 28.

²⁰ Auditor-General Report No. 42 of 2021–22, paragraph 2.54, p. 34.

- 7.21 The audit report found that instead of ranking the tender submissions based on the technical merit, associated risks and the cost of each response, as required under the tender evaluation plan, the Tender Assessment Panel instead grouped the 10 submissions into 'bands' comprising: 'competitive and recommended', 'competitive and not recommended' or 'uncompetitive' against each of the three program outcomes (commercialisation, innovation, and growth). The audit report noted that:
- This meant that DISER was not able to transparently demonstrate that the successful candidates were recommended based on their merits as determined by the evaluation against each of the six specified criteria.²¹
- 7.22 The audit found the process for identifying the preferred tenderers for the 'commercialisation' and 'growth' outcomes problematic. Of the two tender responses offering commercialisation services that were shortlisted for comparative assessment, the Tender Assessment Panel identified i4 Connect as the recommended tenderer despite the other tenderer ranking first.²² The audit report stated that 'there was bias evident in the [Tender Assessment Panel's] analysis to support the decision to recommend i4 Connect over Respondent 53'.²³
- 7.23 For the 'growth' outcome, the ANAO noted the following inconsistencies:
- Additional opportunities were provided to three tenderers to revise or improve their tender submissions 'with alternative delivery models to what they had initially proposed, along with additional pricing information in support of those alternative delivery models'.
 - DISR tailored arrangements to select Deloitte, an incumbent provider that was not identified as the best candidate in any particular region, to provide growth services in Queensland on the basis that it was able to provide additional 'national specialist roles'.
 - A series of 'errors' in pricing assessments resulted in one submission, originally deemed non-competitive and non-compliant before being shortlisted by the Tender Assessment Panel, being ranked higher than it was warranted, and the tenderer was successful in being selected as the growth services provider for the Northern Territory.²⁴
- 7.24 At the conclusion of the tender process, seven tenderers were awarded contracts: one to deliver commercialisation services nationally; one to deliver incubation support and innovation connection services nationally; and five to deliver advisory and facilitation services in nominated geographic areas. Five of the seven successful tenderers were incumbent providers. DISR's management of incumbency advantage is examined further below.

²¹ Auditor-General Report No. 42 of 2021–22, paragraph 2.55, p. 34.

²² Auditor-General Report No. 42 of 2021–22, paragraph 2.57, p. 35.

²³ Auditor-General Report No. 42 of 2021–22, paragraph 2.58, p. 35.

²⁴ Auditor-General Report No. 42 of 2021–22, paragraph 2.67, p. 37.

ANAO recommendations and department's response

7.25 The ANAO made recommendations for DISR:

- when planning to employ a staged process to evaluating tenders, 'clearly identify this in its approach to market along with the criteria that will be used to shortlist potential suppliers, and if applicable, any expected limits on the number of potential suppliers that will be shortlisted at each stage'²⁵
- when evaluating tender responses, 'fully evaluate responses received consistent with the approach set out in the approach to the market, with the results of this work relied upon to select the successful candidate(s)'²⁶
- to not exercise the extension options in the awarded contracts, commence a new procurement process before the existing contracts expire in June 2023, and conduct the next procurement process in a manner that fully complies with the CPRs.²⁷

7.26 DISR agreed to all recommendations, the last one 'in principle' noting that the continuation of the program will be subject to government consideration.

7.27 At the public hearing held on 14 December 2022, DISR acknowledged the significance of the audit findings, and assured the Committee that it was taking them seriously:

We acknowledge there were significant deficiencies in the procurement process for the delivery partners, which fell short of the appropriate transparency, consistency and fairness as required under the Commonwealth Procurement Rules. I can assure you that, since the audit, the department's taken strong action to ensure current and future procurements do not have the same deficiencies.²⁸

7.28 Importantly, the department recognised the possibility of the issues being systemic, and informed the Committee that it had 'commenced immediate assurance processes to make sure no other procurement breaches the CPRs'²⁹:

... we have started reviewing a sample of all of our existing procurements to make sure that we aren't seeing the same things happening in other places, and I'm happy to let the committee know that we haven't identified any of those failures in those others. We are continuing to do that work. ... that work is being oversighted by our audit and risk committee, as well as the executive board in the department.³⁰

²⁵ Auditor-General Report No. 42 of 2021–22, Recommendation no. 1, paragraph 2.13, p. 23.

²⁶ Auditor-General Report No. 42 of 2021–22, Recommendation no. 2, paragraph 2.68, p. 38.

²⁷ Auditor-General Report No. 42 of 2021–22, Recommendation no. 6, paragraph 2.118, p. 52.

²⁸ Neal Mason, Deputy Secretary, Department of Industry, Science and Resources, *Committee Hansard*, Canberra, 14 December 2022, p. 41.

²⁹ Neal Mason, DISR, *Committee Hansard*, Canberra, 14 December 2022, p. 41.

³⁰ Neal Mason, DISR, *Committee Hansard*, Canberra, 14 December 2022, p. 42.

- 7.29 The department also assured the Committee that in line with the ANAO's recommendation it would not be exercising the options to extend the contract and that, if the government decided to continue the program, the contracts would be re-tendered and not rolled over.³¹
- 7.30 DISR acknowledged that 'deficiencies right at the beginning around planning and design did not set this procurement up for success at all'.³² The issues in planning and design went onto impact the procurement's value for money,³³ as well as affect how small-and-medium businesses and incumbents engaged with the process.³⁴
- 7.31 In a supplementary submission to the inquiry, DISR stated that its procurement policy has been updated to strengthen the relevant requirements, and that it now:
- outlines the need to identify evaluation criteria in the procurement planning stage, which must also be included in the 'approach to market' documentation. This evaluation criteria must be used to select the successful candidate(s).³⁵
- 7.32 The department also outlined a new 'risk-tiering' model for procurement that would differentiate the controls required for high value, high-risk procurement activities and simpler and smaller purchases.³⁶
- 7.33 At the same hearing, the Auditor-General noted that it was positive to see DISR taking department-wide action in response to the audit findings:
- I think one of the positive things is that, from what they've said, they've looked at the audit findings and not said, 'Well, this is a one-off instance and we'll just ignore it,' but appear to be looking at it systematically and saying, 'Is this the canary in the mine or whatever for what's happening in the organisation as a whole?'
- ...
- I just wanted to say that I think coming to the committee and talking about a departmental-wide response, rather than treating it as a narrow incidence, is a positive.³⁷
- 7.34 DISR also informed the Committee that, in line with its model litigant responsibilities, it had provided all unsuccessful tenderers information on how to make a claim for compensation under the *Government Procurement (Judicial Review) Act 2018*.³⁸ The

³¹ Kylie Bryant, Head of Division, AusIndustry, Department of Industry, Science and Resources, *Committee Hansard*, Canberra, 14 December 2022, p. 47.

³² Ms Bryant, DISR, *Committee Hansard*, Canberra, 14 December 2022, p. 48.

³³ Ms Bryant, DISR, *Committee Hansard*, Canberra, 14 December 2022, p. 48.

³⁴ Ms Bryant, DISR, *Committee Hansard*, Canberra, 14 December 2022, p. 50.

³⁵ Department of Industry, Science and Resources (DISR), Submission 5.1, p. [3].

³⁶ Mr Mason, DISR, *Committee Hansard*, Canberra, 14 December 2022, p. 42.

³⁷ Mr Grant Hehir, Auditor-General, *Committee Hansard*, Canberra, 14 December 2022, p. 51.

³⁸ DISR, Submission 5, p. 3; Mr Mason, DISR, *Committee Hansard*, Canberra, 14 December 2022, pages 41, 45.

Act provides a mechanism for seeking compensation for the cost of providing a tender when the CPRs are breached during the procurement process.

- 7.35 DISR confirmed at the hearing that it had received eight applications under the Act, with two further applications being made through the Scheme for Compensation for Detriment caused by Defective Administration.³⁹

Probity and ethics

Probity adviser

- 7.36 In August 2019, DISR appointed Mills Oakley as the probity adviser for the procurement process, 'to advise on key documentation for the procurement process, conduct probity briefings for procurement personnel and advise on ad hoc probity and process issues'.⁴⁰

- 7.37 The audit report noted that the engagement process 'did not transparently demonstrate value for money and lacked probity' itself. In particular, the audit noted that the process unfairly advantaged Mills Oakley by making its previous experience with the Entrepreneurs' Programme a deciding factor in its decision:

Mills Oakley was the probity adviser on the previous procurement of industry partners for the Entrepreneurs' Programme and was directly approached in June 2019 to provide probity advice on the redesign of the program. ... while another candidate offered a lower estimated price, [the department noted that] 'the Mills Oakley quote showed their greater relevant experience which indicated that they had a better grasp of what work was required of them.'⁴¹

- 7.38 The audit observed that:

Engaging the same probity adviser on an ongoing or serial basis over several related or unrelated issues increases self-interest and familiarity risks that may threaten the actual or perceived independence of the practitioner. DISR's focus on the benefits of Mills Oakley's previous experience in its evaluation also failed to consider whether this experience could adversely affect the independence of its probity advice.⁴²

- 7.39 The risk to independence of probity advice was exacerbated when the scope of probity services requested by the department included the adviser's involvement in procurement work, including drafting planning documents, RFT documentation, and draft contract forms and evaluation templates. This represented a significant conflict,

³⁹ Ms Bryant, DISR, *Committee Hansard*, Canberra, 14 December 2022, p. 45.

⁴⁰ Auditor-General Report No. 42 of 2021–22, paragraph 2.71, p. 39.

⁴¹ Auditor-General Report No. 42 of 2021–22, paragraph 2.72, p. 40.

⁴² Auditor-General Report No. 42 of 2021–22, paragraph 2.73, p. 40.

as the probity adviser then provided assurance to the delegate that the documents that they were involved in drafting met the probity and procurement requirements.⁴³

7.40 At the public hearing on 14 December 2022, the Auditor-General elaborated on this issue:

I think that the role of the probity adviser should be clearly set out and it should include what it can do and what it can't do, and the probity adviser should be aware of what they can't do. You can't do things which would create conflicts, which is the concern that we had here.⁴⁴

7.41 The ANAO recommended that DISR:

improve its procurement framework to specifically address the engagement of probity advisers, including ensuring that advisers are independent and objective by not engaging the same probity advisers on an ongoing or serial basis.⁴⁵

7.42 DISR agreed to the recommendation. In its supplementary submissions, DISR stated that it was developing a new probity framework to address this recommendation,⁴⁶ which will include:

... guidance on how to engage with probity advisers, the type of work they should undertake, what to do in response to their advice and how to support delegates and decision makers. This will strengthen current guidance on the key principle that the use of probity advisers does not remove the department's accountability and obligations for a procurement process.⁴⁷

Conflict of interest

7.43 In the audit, the ANAO examined DISR's management of conflict of interest in relation to the procurement process, as well as its monitoring of the delivery partners' conflicts of interest as part of the department's contract management activities.

7.44 The audit report found that DISR had not managed conflicts of interest relating to the procurement process as required by its probity plan and probity protocols. Key deficiencies included:

- not retaining on file all conflict of interest declarations, including that of the external financial analyst responsible for preparing pricing evaluations and corporate and financial viability checks of shortlisted tenderers
- not all members of the procurement team having signed conflict of interest declarations, including the procurement delegate and internal legal and procurement advisers who formed part of the specialist advice and support team

⁴³ Auditor-General Report No. 42 of 2021–22, paragraph 2.76, p. 41.

⁴⁴ Mr Hehir, Auditor-General, *Committee Hansard*, Canberra, 14 December 2022, p. 49.

⁴⁵ Auditor-General Report No. 42 of 2021–22, Recommendation no. 3, paragraph 2.77, p. 41.

⁴⁶ DISR, Submission 5.1, p. [3].

⁴⁷ DISR, Submission 5.2, Answer to Question on Notice 5, p. [4].

- not all conflicts of interest being identified, with one internal expert not declaring his known employment relationship of nine years with one of the tenderers
- no management actions being put in place to avoid or mitigate identified conflicts of interest.⁴⁸

7.45 In relation to the monitoring of delivery partners' conflicts of interest, the audit found that:

delivery partners have not consistently complied with their contractual obligation to 'immediately' notify DISER of conflicts of interest, and that DISER has failed to take appropriate action when delivery partners do not meet their contractual obligations, including when actual conflicts occur.⁴⁹

7.46 Examples of potential and actual conflicts that arose included:

- a facilitator employed by one of the delivery partners submitting an expression of interest for a grant under one of the program initiatives. This was brought to DISR's attention by another facilitator of the program, and DISR took action to ensure that the application for the grant was withdrawn⁵⁰
- a member of a delivery partner firm offering to invest in a company that was receiving facilitations services from the delivery partner and applying for a grant under the Entrepreneurs' Programme. Despite receiving legal advice that identified this as an actual conflict of interest, the program delegate endorsed the declaration of interest without requiring any management actions to mitigate the conflict.⁵¹

7.47 The ANAO made a recommendation for DISR to 'adopt a proactive approach to managing delivery partner conflicts of interest', to which the department agreed.⁵² In a supplementary submission to the inquiry, DISR informed the Committee that, in response to the recommendation, it had undertaken the following actions:

- Probity & Conflict of Interest Training has been completed by all [Entrepreneurs' Programme] branch staff.
- Delivery partner conflict of interest management has commenced and is required prior to the payment of all remaining invoices in the contracts.
- Management of actual or perceived conflicts of interest within [Entrepreneurs' Programme] and across delivery partners has been reviewed.⁵³

7.48 In relation to the last point, DISR elaborated on the review work undertaken in the 14 December 2022 public hearing.

⁴⁸ Auditor-General Report No. 42 of 2021–22, paragraph 2.83–2.86, pages 42–43.

⁴⁹ Auditor-General Report No. 42 of 2021–22, paragraph 3.13, p. 58.

⁵⁰ Auditor-General Report No. 42 of 2021–22, paragraph 3.13, p. 58.

⁵¹ Auditor-General Report No. 42 of 2021–22, paragraph 3.14, p. 58.

⁵² Auditor-General Report No. 42 of 2021–22, Recommendation no. 8, paragraph 3.17, p. 59.

⁵³ DISR, Submission 5.1, p. [5].

We conducted a review on current state—that was what is currently happening. ... We took the seven delivery partner findings and then we identified areas for improvement and recommendations. And, more importantly, we designed a future state, and that was the place that we wanted to get to, and we provided recommendations that were then tied into the annual work plans. ... Some of the findings that we found in there were: the timeliness of reporting of conflicts of interest—that was something we really focused on; and how the department is alerted to those but also how the delivery partner intervenes early, whether that be reassignment of duties, notification to the business or removal from that process altogether.⁵⁴

Incumbency advantage

- 7.49 As mentioned in the beginning of the chapter, the 2019–20 procurement process was preceded by a ‘redesign project’ that sought to ‘improve the operation of the program, including the delivery mechanism and the structure of the program’. The audit report noted that DISR engaged five of the 10 existing providers to assist with the redesign to draw on their ‘deep knowledge of customer needs/program experience.’ This engagement was not conducted via a new contract, but through the existing arrangements with the suppliers.⁵⁵ Further, although probity advice was received regarding the engagement of incumbents for the redesign work, the audit found that ‘some key probity controls ... were not implemented or eroded during the redesign process’.⁵⁶
- 7.50 The audit found that there was an actual breach of probity during this process. Around four weeks before the RFT was released, the department effectively advised the incumbent providers involved in the redesign project that the delivery model had been decided based on the work they had performed, rather than their work being the basis of concept development that presented options for the department to consider and make a decision on. The audit noted that ‘[t]his breach provided those incumbent providers with information about the tender process before the RFT was released’.⁵⁷
- 7.51 Along with their involvement in the redesign process, the audit report noted that ‘the department’s approach to the procurement resulted in incumbent providers receiving greater consideration’, especially during the shortlisting process. Tender submissions from incumbents represented 73 per cent of shortlisted submissions for the growth and innovation outcomes despite only comprising 20 per cent of the tenders submitted.⁵⁸ After shortlisting, there was no competition from non-incumbents in New South Wales/Australian Capital Territory, South Australia, Tasmania, Queensland,

⁵⁴ Ms Siobhan Campbell, Acting General Manager, Science Policy & Governance, Department of Industry, Science and Resources, *Committee Hansard*, Canberra, 14 December 2022, p. 47.

⁵⁵ Auditor-General Report No. 42 of 2021–22, paragraph 2.91, pages 43–44.

⁵⁶ Auditor-General Report No. 42 of 2021–22, paragraph 2.93, p. 45.

⁵⁷ Auditor-General Report No. 42 of 2021–22, paragraph 2.95, p. 45.

⁵⁸ Auditor-General Report No. 42 of 2021–22, paragraph 2.108, p. 49.

and Victoria. As noted earlier in the chapter, five of the seven successful tenderers were incumbent providers.

7.52 Other shortcomings in management of incumbency advantage identified by the audit report include:

- no records being made of the probity issue that arose from the probity breach outlined above, and how it was handled⁵⁹
- recommencing the redesign project that had been paused during the tender evaluation process, based on 'probity advice' that was received via a phone call and not recorded⁶⁰
- consultation being held with one of the incumbent providers (Deloitte) three months before the delivery partners were selected, as part of the recommenced redesign project; this engagement was not recorded in the probity register. Deloitte was chosen as one of the delivery partners for 'growth' services.⁶¹

7.53 The ANAO made a recommendation for DISR to 'improve its procurement framework to specifically address how it will manage the risk of any incumbency advantages when conducting procurement processes'.⁶² DISR agreed to the recommendation and noted that its updated procurement policy will 'include additional advice on managing incumbency'. It also received probity training delivered by Maddocks that specifically covered risks of incumbency bias.⁶³

Record keeping

7.54 The audit report raised a number of findings in relation to the department's record keeping practices for the procurement. Some of these findings are outlined earlier in the chapter, including key documentation relating to the procurement not being signed or approved by the Tender Assessment Panel or the delegate, and insufficient records being retained regarding the probity of the procurement process. Other key deficiencies included:

- incorrect or misleading statements being included in the tender evaluation report to the delegate, such as that each response was reviewed by two of three assessors when 23 of 53 responses only had one assessment⁶⁴
- no records being made of Tender Assessment Panel meetings to evidence their deliberations⁶⁵
- key procurement records not being stored in the secure procurement library, with the audit report noting that around 200 records were added to the procurement

⁵⁹ Auditor-General Report No. 42 of 2021–22, paragraph 2.96, p. 45.

⁶⁰ Auditor-General Report No. 42 of 2021–22, paragraph 2.97, pages 45–46.

⁶¹ Auditor-General Report No. 42 of 2021–22, paragraph 2.97, pages 45–46.

⁶² Auditor-General Report No. 42 of 2021–22, Recommendation no. 4, paragraph 2.98, p. 46.

⁶³ DISR, Submission 5, p. [4].

⁶⁴ Auditor-General Report No. 42 of 2021–22, paragraph 2.102, Appendix 4, pages 46–47, 85.

⁶⁵ Auditor-General Report No. 42 of 2021–22, paragraph 2.102, pages 46–47.

library by the department during the course of the audit. These records included conflict of interest declarations, with six of 14 declarations added to the department's records management system during the audit⁶⁶

- not retaining a copy of the necessary approvals for 10 of the 19 contract variations signed to date.⁶⁷

7.55 The ANAO made a recommendation to the department to:

improve its procurement record keeping so that accurate and concise information exists on:

- the process that was followed
- how value for money was considered and achieved
- relevant approvals, and
- relevant decisions and basis of those decisions.⁶⁸

7.56 DISR agreed to the recommendation. In its supplementary submission, the department stated that its updated procurement policy 'now better highlights record keeping requirements', and that delegates have access to a 'checklist to assist with document identification and required justifications'.⁶⁹

7.57 At the 14 December 2022 public hearing, DISR elaborated on the work it was doing to improve record keeping:

In my view, the work we really need to focus on when it comes to record keeping is that capability and training uplift, particularly around the importance of record keeping because without the record keeping you cannot prove the value-for-money decision was made. ... The delegate checklist we have put together for all our delegates specifically goes to the types of records that must be kept and the level at which they need to be kept. That's been a key focus. The longer term focus for us is that capability uplift and better training.⁷⁰

Contract management

7.58 According to the audit report, the delivery partner contracts are 'fee for services' arrangements, with six of the seven delivery partners paid quarterly for services delivered, and the remaining delivery partner paid monthly. As at 31 October 2021, the ANAO calculated the total cumulative expenditure for the seven contracts to total \$70.8 million, with \$62.5 million comprising regular service charge payments.⁷¹

⁶⁶ Auditor-General Report No. 42 of 2021–22, paragraph 2.102, Appendix 8, pages 46–47, 101.

⁶⁷ Auditor-General Report No. 42 of 2021–22, paragraph 3.43, p. 64.

⁶⁸ Auditor-General Report No. 42 of 2021–22, Recommendation no. 5, paragraph 2.103, p. 47.

⁶⁹ DISR, Submission 5.1, p. [4].

⁷⁰ Ms Bryant, DISR, *Committee Hansard*, Canberra, 14 December 2022, p. 48.

⁷¹ Auditor-General Report No. 42 of 2021–22, paragraph 3.19, p. 59.

- 7.59 The audit report found that ‘DISER’s contract management framework for the program is inadequate’.⁷² It noted that despite the fact the delivery partner contracts were DISR’s largest value procurement in 2019–20, representing 37 per cent of the total value of contracts entered into by the department in that financial year, DISR did not develop contract management plans for the delivery partner contracts.
- 7.60 The audit report further found that the department’s approach to managing the contracts did not enable it to secure provision of contract deliverables on time, or verify that services had been provided to an appropriate standard before payments are made.
- 7.61 The contract specified the following deliverables and milestone dates by which they must be delivered:
- engagement of all required specified personnel to deliver program services — by 1 July 2020
 - draft work and communications plans, which detail how the delivery partner will deliver the services, including activities, targets and qualitative measures — within four weeks from the services commencement date of 1 July 2020 for the 2020–21 financial year, and then at least six weeks prior to the start of the new financial year
 - quarterly management report, which contains updates on the delivery partner’s year-to-date performance against the work and communications plan — 30 days after the conclusion of each quarter.⁷³
- 7.62 The audit report outlined shortfalls in the provision of each contract deliverable:
- five of seven delivery partners did not engage the required number of specified personnel by the milestone date. There were no deductions made from the first quarterly payments, with DISR citing ‘discretion’ and lack of options to vary payments under the contract without suspending payment due to contractual non-compliance.⁷⁴
 - no delivery partner has complied with the contractual deadline for the draft work and communication plans, with the average delay for submission across all delivery partners being 94 days in 2020–21, deteriorating to 163 days in 2021–22. The longest time taken to submit the plans was 247 days late. As the work plans outline the services that will be delivered in the relevant financial year, ‘[t]he delay means that the services for the financial year have not been agreed at the beginning of the financial year’.⁷⁵
 - 51 per cent of the quarterly reports submitted were outside of the contractually required deadline with an average delay of 15 days. While two delivery partners submitted all reports within the deadline, one provider has never met the deadline for the submission of the quarterly reports. The audit noted that although the

⁷² Auditor-General Report No. 42 of 2021–22, paragraph 8, p. 10.

⁷³ Auditor-General Report No. 42 of 2021–22, paragraph 3.21, p. 60.

⁷⁴ Auditor-General Report No. 42 of 2021–22, paragraph 3.22, p. 60.

⁷⁵ Auditor-General Report No. 42 of 2021–22, paragraph 3.25, p. 61.

contract stated that payment of invoices is subject to DISR's acceptance of the quarterly reports, '60 per cent of invoices [were] recorded as having been verified and processed for payment without submission of the quarterly reports by the delivery partners'.⁷⁶

- 7.63 The department's contract management activities were further weakened by the lack of an effective performance management framework in the contract. The audit report noted that the draft contract released as part of the RFT documentation did not include a performance management regime to assess the deliver partners' performance, with the document stating that a performance framework 'will be developed by the department in consultation with prospective delivery partners during the contract negotiation stage'.⁷⁷
- 7.64 The performance framework was delivered in December 2019 by a consultant engaged by DISR. The audit report noted that the engagement of the consulting service did not comply with the CPRs and did not transparently demonstrate value for money. Notably, DISR conducted a limited tender and only approached a single firm for a quote using 'short timeframe' as its justification, despite the fact that 'the short timeframes were not brought about by unforeseeable events given the RFT had foreshadowed that the performance framework would need to be developed'.⁷⁸
- 7.65 The audit report noted that the contracts outlined three types of services to be provided: business facilitation and advisory services; promotion and marketing for the Entrepreneurs' Programme; and provision of market and business intelligence to the department. However, the contract did not contain:
- specific service levels that each delivery partner must achieve or exceed
 - any performance measures to assess delivery partner performance, or
 - a provision by which DISR could reduce quarterly payments for failure to meet contracted service levels. This provision was included in the draft contract, but was removed by DISR in the final contract on its own initiative.⁷⁹
- 7.66 The audit report noted that the contracts referred to a 'performance and capability policy' to provide details on the process for performance management. However, while the policy contains 'a mix of qualitative and quantitative measures and "expected behaviours" the delivery partners will be assessed against', the audit found that '[n]o targets are set in the policy against the performance measures and no process is set out to assess performance'.⁸⁰
- 7.67 Further, the audit noted that the 'targets and qualitative measures' included in the deliver partners' work and communication plans had 'a clear disconnect' with the performance and capability policy, with '[n]one of the delivery partner work and

⁷⁶ Auditor-General Report No. 42 of 2021–22, paragraph 3.28, p. 62.

⁷⁷ Auditor-General Report No. 42 of 2021–22, paragraph 3.47, p. 65.

⁷⁸ Auditor-General Report No. 42 of 2021–22, paragraph 3.48, p. 65.

⁷⁹ Auditor-General Report No. 42 of 2021–22, paragraph 3.60, p. 67.

⁸⁰ Auditor-General Report No. 42 of 2021–22, paragraph 3.56, pages 66–67.

communications plans includ[ing] targets for all measures contained in the performance and capability policy'.⁸¹

7.68 The audit report concluded:

Without targets or any basis for comparison, the department is unable to assess whether delivery partner performance is satisfactory and is also unable to demonstrate that the contracts are delivering against the expectations that informed the decision to select the successful tenderers.⁸²

7.69 The ANAO made three recommendations relating to DISR's contract and performance management framework, for DISR to:

- develop contract management plans for each of the delivery partner contracts⁸³
- strengthen its management of the Entrepreneurs' Programme delivery contracts, including by taking prompt action in circumstances where delivery deadlines are not met and verifying that services have been provided before payments are made⁸⁴, and
- apply competitive pressure when establishing performance expectations, and how these will relate to contractual payments.⁸⁵

7.70 The department agreed to all three recommendations. It informed the Committee in a supplementary submission that:

- contract management plans have been developed for each of the seven contracts, and implemented in March 2022
- a delivery partner Contract Compliance Schedule has been implemented to support contract management
- a Service Verification process has been implemented for the payment of all remaining invoices in the contracts, and
- a delivery partner Performance Capability Framework was developed and implemented in June 2022, which includes annual and quarterly performance discussions, the deployment of client satisfaction surveys, delivery partner and section manager performance assessment reviews and feedback.⁸⁶

Procurement culture

7.71 The importance of culture and leadership in shaping an organisation's behaviour has been outlined in previous chapters. Recognising the seriousness of the audit findings, DISR advised the Committee in its submission to the inquiry that it is

⁸¹ Auditor-General Report No. 42 of 2021–22, paragraph 3.57, p. 67.

⁸² Auditor-General Report No. 42 of 2021–22, paragraph 3.62, pages 67–68.

⁸³ Auditor-General Report No. 42 of 2021–22, Recommendation no. 7, paragraph 3.7, p. 57.

⁸⁴ Auditor-General Report No. 42 of 2021–22, Recommendation no. 9, paragraph 3.44, p. 64.

⁸⁵ Auditor-General Report No. 42 of 2021–22, Recommendation no. 10, paragraph 3.63, p. 68.

⁸⁶ DISR, Submission 5.1, p. [5].

expediting 'a program of work to focus on improving procurement culture and capability'.⁸⁷

- 7.72 The department elaborated on its initiatives to improve its procurement culture and capability in a supplementary submission. Along with changes to its procurement and probity frameworks, DISR acknowledged the importance of senior leadership in driving cultural improvements:

All Senior Executive Service (SES) staff are expected to lead by example in modelling appropriate ways of working. They do this by leading the changes within their groups and being held accountable for decisions being taken. To support accountability new reporting is being developed to provide whole of portfolio visibility of procurement activity being undertaken and its adherence to policy. A number of SES staff are also involved in overseeing the program of work to bring about cultural change, including development of the probity framework.⁸⁸

- 7.73 In relation to capability, DISR stated at the 14 December 2022 public hearing that:

What the audit has highlighted to us is that strengthened processes need to be backed by improved staff capability, and we're working to improve staff capability, particularly in the procurement practice. The department has ensured all its senior executives have undertaken additional probity training, and we have now a particular focus on supporting our delegates involved in complex procurements. In addition, we've been working with other agencies on best practice reforms in procurement and program management. Further, the ANAO has presented lessons learned from procurement audits to all of our senior executives and a range of our executive level staff.⁸⁹

- 7.74 DISR acknowledged that 'driving and embedding cultural and capability uplift is a longer term commitment', and stated that it will continue to monitor its progress via indicators such as the APS staff census.⁹⁰

Committee comment

- 7.75 The audit report on the Entrepreneur's Programme presented very serious findings in relation to DISR's procurement and contract management processes. As the department acknowledged, the procurement process was flawed from the beginning, with the risks arising from the incumbents' involvement in the program's redesign project not properly managed. More issues occurred throughout the rest of the planning and design phase, with the RFT document containing incorrect statements

⁸⁷ DISR, Submission 5, p. 2.

⁸⁸ DISR, Submission 5.2, Response to Question on Notice 8, pages [9]–[10].

⁸⁹ Mr Mason, DISR, *Committee Hansard*, Canberra, 14 December 2022, p. 41.

⁹⁰ DISR, Submission 5.2, Response to Question on Notice 8, p. [10].

about the evaluation criteria and process, and the tender evaluation plan not being finalised, signed off or approved by key procurement personnel.

- 7.76 The Committee finds it particularly concerning that the shortlisting process was not communicated to potential tenderers, hindering their ability to make an informed decision on whether to participate in the tender. The Committee notes the department's advice regarding the compensation claims it had received from unsuccessful tenderers, and hopes that such steps will not be required for future procurements it undertakes.
- 7.77 The probity issues raised by the audit are alarming. It is a requirement of the CPRs that procuring entities act ethically throughout the procurement, including by recognising and dealing with actual, potential and perceived conflicts of interest and by dealing equitably with potential suppliers, tenderers and suppliers. The department met neither of these requirements.
- 7.78 The extent of the issues raised by the audit report indicated to the Committee that there are systemic failures in the department. Not only was the procurement of delivery partners deficient in almost every respect, but the ANAO also found that supporting procurements such as the engagement of the probity adviser and other consultants during the process were also found to be non-compliant with the CPRs and did not demonstrate value for money.
- 7.79 In light of these findings, the Committee welcomes the department's advice that it had commenced an immediate assurance review of its other procurements to ensure that there are no further breaches of CPRs and thanks the witnesses who appeared for their frank and open approach which is likely to have a positive impact on cultural change. The Auditor-General's comment that the department's response to the audit findings has been positive further reassures the Committee that appropriate actions are being taken in response to the audit recommendations.
- 7.80 Although the Committee acknowledges that DISR accepted all of the report's recommendations and have already made progress in addressing the findings, this inquiry's evidence highlighted the scope and scale of the work the department must undertake to improve its procurement culture and capability to ensure that these failures are not repeated.

Recommendation 18

- 7.81 **The Committee recommends that the Department of Industry Science and Resources report back on:**
- **the progress and outcomes of its assurance review of its other procurements including advice as to any other breaches of the Commonwealth Procurement Rules identified**
 - **the outcomes of all claims under the Scheme for Compensation for Detriment caused by Defective Administration, and**

- **what additional activities the department's Audit and Risk Committee has undertaken and is undertaking in relation to procurement reforms**

Recommendation 19

7.82 The Committee recommends that the Australian National Audit Office conduct a follow-up performance audit of the Department of Industry, Science and Resources to assess the effectiveness of its recent procurement reforms.

Mr Julian Hill MP
Chair



A. Submissions

- 1** Digital Transformation Agency
 - 1.1 Supplementary to submission 1
- 2** Department of Home Affairs
 - 2.1 Supplementary to submission 2
 - 2.2 Supplementary to submission 2
 - 2.3 Supplementary to submission 2
- 3** Australian Constructors Association
- 4** Negotiation Partners
- 5** Department of Industry, Science and Resources
 - 5.1 Supplementary to submission 5
 - 5.2 Supplementary to submission 5
- 6** National Advisory
 - 6.1 Supplementary to submission 6
- 7** National Capital Authority
 - 7.1 Supplementary to submission 7
- 8** Hypereal
 - 8.1 Supplementary to submission 8
 - 8.2 Supplementary to submission 8
- 9** Australasian Procurement and Construction Council (APCC)
- 10** Department of Defence
 - 10.1 Supplementary to submission 10
- 11** Department of Finance
 - 11.1 Supplementary to submission 11
 - 11.2 Supplementary to submission 11
 - 11.3 Supplementary to submission 11

- 12** Australian National Audit Office
- 12.1 Supplementary to submission 12
 - 12.2 Supplementary to submission 12
 - 12.3 Supplementary to submission 12
 - 12.4 Supplementary to submission 12
- 13** Australian Maritime Safety Authority
- 13.1 Supplementary to submission 13
- 14** Malkara Consulting Pty Ltd
- 15** King & Wood Mallesons
- 16** Community and Public Sector Union
- 17** Services Australia
- 18** National Disability Insurance Agency
- 19** Australian Securities and Investments Commission
- 20** David Milo



B. Public hearings

Wednesday, 14 December 2022

Committee Room 1R3, Parliament House

Canberra

Department of Defence

- Mr Tony Dalton, Deputy Secretary, Naval Shipbuilding and Sustainment
- Rear Admiral Wendy Malcolm AM CSM, Head Patrol Boats and Specialist Ships

Australian National Audit Office

- Mr Grant Hehir, Auditor-General
- Dr Tom Ioannou, Group Executive Director – Performance Audit Services Group
- Ms Sally Ramsey, Executive Director, Performance Audit Services Group
- Ms Carla Jago, Group Executive Director – Performance Audit Services Group
- Ms Amy Willmott, A/G Executive Director – Performance Audit Services Group

Department of Home Affairs

- Ms Fatime Shyqyr, Commander, Air and Marine Capability, Australian Border Force
- Ms Emma Johnson, Assistant Commissioner, West and Close Support Command, Australian Border Force
- Ms Lee-anne Monterosso, First Assistant Secretary, Procurement, Property and Contracts

Australian Maritime Safety Authority

- Mr Mark Morrow, Executive Director, Response
- Mr Michael Wytcherley, Principal Advisor, Aviation Assets, Response

National Capital Authority

- Ms Sally Barnes, Chief Executive
- Mr Hamid Heydarian, Chief Operating Officer
- Mr Andrew Smith, Chief Planner
- Ms Angelyn Smith, Director, Procurement and Commercial Operations

Department of Industry, Science and Resources

- Mr Neal Mason, Deputy Secretary
- Ms Kylie Bryant, Head of Division, AusIndustry
- Ms Rebecca Lannen, General Manager
- Mrs Erin Cockram, General Manager, Financial and Shared Services
- Ms Siobhan Campbell, Acting General Manager, Science Policy & Governance
- Ms Kelley Wiggins, Principal Advisor – Program and Probity Review Task Force

Friday, 16 December 2022

Committee Room 1R3, Parliament House

Canberra

Digital Transformation Agency

- Mr Chris Fechner, Chief Executive Officer
- Mr George-Philip de Wet, Head of Corporate

Australian National Audit Office

- Mr Grant Hehir, Auditor-General
- Ms Carla Jago, Group Executive Director – Performance Audit Services Group
- Ms Christine Chalmers, Executive Director – Performance Audit Services Group

Hypereal

- Catherine Thompson, Principal

National Advisory

- Mr Andrew Smith, Special Consultant

Thursday, 2 February 2023

Committee Room 2R1, Parliament House

Canberra

Department of Finance

- Mr Andrew Jagers, Deputy Secretary
- Mr Gareth Sebar, Acting First Assistant Secretary, Procurement and Insurance Division
- Ms Sabrena King, Acting Assistant Secretary, Future Made in Australia Office

Australian National Audit Office

- Mr Grant Hehir, Auditor-General
- Ms Rona Mellor PSM, Deputy Auditor-General
- Ms Carla Jago, Group Executive Director – Performance Audit Services Group

Thursday, 2 February 2023

Committee Room 2R1, Parliament House

Canberra

Ms Carol Lilley, Private capacity

Mr Ian McPhee AO PSM, Private capacity

Mr Allan Gaukroger, Private capacity

Australian National Audit Office

- Mr Grant Hehir, Auditor-General
- Ms Rona Mellor PSM, Deputy Auditor-General
- Ms Carla Jago, Group Executive Director – Performance Audit Services Group

Friday, 10 February 2023

Committee Room 2R1, Parliament House

Canberra

Department of Home Affairs

- Mr Michael Pezzullo AO, Secretary
- Mr Michael Outram APM, Commissioner, Australian Border Force
- Mr Tim Fitzgerald, Deputy Commissioner, North, West and Detention Group, Australian Border Force
- Ms Lee-anne Monterosso, First Assistant Secretary, Procurement, Property and Contracts
- Ms Justine Saunders APM, Deputy Secretary, Chief Operating Officer Group

Australian National Audit Office

- Ms Rona Mellor PSM, Acting Auditor-General
- Ms Carla Jago, Group Executive Director – Performance Audit Services Group

Friday, 3 March 2023

Committee Room 2R1, Parliament House

Canberra

Australian National Audit Office

- Mr Grant Hehir, Auditor-General
- Ms Carla Jago, Group Executive Director, Performance Audit Services Group
- Ms Lesa Craswell, Senior Executive Director, System Assurance and Data Analytics
- Ms Xiaoyan Lu, Executive Director, System Assurance and Data Analytics

Thursday, 30 March 2023

Committee Room 2R1, Parliament House

Canberra

Australian National Audit Office

- Mr Grant Hehir, Auditor-General
- Ms Rona Mellor PSM, Deputy Auditor-General
- Ms Carla Jago, Group Executive Director, Performance Audit Services Group
- Mr Brian Boyd, Executive Director, Performance Audit Services Group
- Mr George Sotiropoulos, Group Executive Director, Performance Statements Audit Services Group

Community and Public Sector Union

- Mr Michael Tull, Assistant National Secretary

Friday, 14 April 2023

Committee Room 2R1, Parliament House

Canberra

Dr Ian Watt AC, Private capacity

- Mr Chris Flinders, Taskforce Representative from Services Australia
- Ms Lisa Carmody, Taskforce Representative from Services Australia

Services Australia

- Ms Rebecca Skinner PSM, Chief Executive Officer
- Ms Susie Smith, Acting Deputy Chief Executive Officer
- Ms Lisa Carmody, General Manager
- Ms Angela Diamond, Chief Financial Officer

National Disability Insurance Agency

- Ms Rebecca Falkingham, Chief Executive Officer
- Ms Debbie Mitchell PSM, Deputy Chief Executive Officer, Governance, Risk & Integrity
- Mr Sam Porter, Chief Operating Officer

Ms Khamphone Xaysavanh, Private capacity

Mr John Margerison, Private capacity

Mr David Milo, Private capacity

Infosys Portland

- Mr Andrew Jarvis, Chief Executive Officer