



PARLIAMENT OF AUSTRALIA

Report 502: The never-ending quest for the golden thread

Probity and ethics in the Australian public sector

Joint Committee of Public Accounts and Audit

June 2024

CANBERRA

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Foreword

The law requires the Australian public service to be efficient and effective in serving the Government, the Parliament and the Australian public.¹ In delivering outcomes, however, it is not a case of *anything goes*.

The public sector is obligated to operate with probity and ethically. Narrow compliance—that is, complying with the letter of the law or rule while ignoring its intent in order to deliver outcomes—does not cut it.

Yet too often the public sector is falling short of the high standards of professionalism required of it, failing to comply with both the intent and the requirements of its legal and regulatory frameworks. Risk tolerance for non-compliance is unacceptably high; ‘getting things done’, even if it involves cutting corners, has become, in some instances, more important than complying with the law.

The Committee has observed over many years, including through this inquiry, a pattern of persistent resistance to accountability across the public sector. Accountable authorities do not consistently have frameworks in place to be reasonably confident their officers are acting according to the letter and the intent of the law, and thus demonstrating probity.

To foster an Australian Public Sector that acts with probity and integrity, the Committee has concluded that a focus on three critical and interdependent aspects of the system is necessary:

- **Frameworks**—legislation, regulations, rules, policies, codes and guidelines which set the requirements of entities and officers, including but not limited to, finance law.
- **Culture**—‘the way we do things around here’ will rightly vary across entities depending on their missions, but within the limits set by cross-government frameworks; the tone is set by governments and the Parliament, while entity culture is overwhelmingly set by senior leaders.
- **Accountability**—of individual officers for their actions; of senior leaders and accountable authorities for their entities; and of policy owners for outcomes of and compliance with their policies.

The key, however, to ensuring the public sector acts with probity and integrity is overwhelmingly not the rules *per se*—it is **ethical leadership: the ‘golden thread’ that binds and animates the system in a positive direction**. Ethical leadership must be demonstrated at all levels, especially by accountable authorities and senior officers.

¹ *Public Service Act 1999*, section 3.

The Committee acknowledges that while senior officers must be accountable for culture, the ‘tone’ is set by government and ministers. Reforms such as the National Anti-Corruption Commission, and ongoing efforts to rebuild the capability of the public service and learn the lessons of the Robodebt Royal Commission, in addition to dealing with the myriad of rorts and maladministration under the previous government are welcome but ethical public sector leadership remains key.

Shortcomings in integrity frameworks

Numerous frameworks for integrity exist across the public sector and, during the inquiry, the five entities examined in this report told the committee they measured probity largely through a range of integrity metrics.

Yet integrity frameworks focus predominantly on administrative and process-oriented metrics which are necessary but not sufficient to give accountable authorities confidence their officers are acting with probity and ethically. Integrity metrics are simply the minimum requirements of the law under which the public sector operates.

It may seem intuitive to subsume probity within the concept of integrity, and it is not necessarily problematic to do so. However, when probity is narrowly equated with integrity metrics, officers can make a flawed judgement that if there are no conflicts of interest, if they are not benefitting personally from a decision, if they have a positive performance review, if they have completed mandatory training, then they are acting with probity.

It was concerning to hear during the inquiry that even when officials were found acting contrary to finance law, multiple witnesses and entities referred to a ‘lack of malintent’, to having ‘acted in good faith’, and ‘delivering on decisions of government’.

The Committee’s firm conclusion is that any claim or view that it is somehow acceptable for an officer to breach finance law and fail to act with probity, but still be acting in good faith and for a proper purpose, is clearly and unambiguously wrong.

How accountable authorities can be sure their officers are acting with probity

Acting with probity means pursuing high standards of professionalism; doing the right thing at the right time; being ethical, impartial and accountable; demonstrating complete and confirmed integrity, uprightness and honesty; and complying with the intent and the letter of the law. While accountable authorities may expect their officers to act with probity, knowing they are acting with probity is a different matter. Entities during the inquiry were unable to show how they could be sure, or assess their level of confidence, that their officers were acting with probity.

How one measures honesty, care, diligence, and confirmed uprightness in an officer’s actual behaviour is a difficult question and no doubt imperfect; but agency heads must be confident their officers are acting with probity—it is a legal obligation.

Independent audits, such as those conducted by the Australian National Audit Office, are an important aspect of accountability. They can examine how officers actually perform their tasks, shine a light on instances where officers do not act with probity or ethically, identify where finance law is breached or where the rules are bent to achieve a pre-determined outcome. However, it is neither possible nor desirable to subject agencies to rolling audits, hence, other systemic mechanisms are needed.

Recommendations that seek to embed assurances with regard to probity and ethics in public sector accountability systems and mechanisms include:

- Finance to issue guidance making clear to public officials that if they breach finance law, suggesting there was no malice or personal gain is NOT sufficient to fulfil their obligation to act honestly, in good faith, and for a proper purpose.
- Health to formally review the appropriateness of corporate awards and whether they should be revoked, in particular from senior officers, for a project that knowingly broke finance law multiples times.
- Augmenting the APS Employee Census with questions regarding compliance with both the letter and intent of frameworks to better assess the extent of actual compliance with ethical obligations.
- The Australian Public Service Commission (APSC) to develop guidance with a definition of culture and metrics to build, measure and assess organisational culture as it applies to probity.
- A new requirement for entities to develop and maintain an overarching Integrity Framework.
- A greater focus on the accountability of policy owners: Finance and the APSC to develop a reasonable assurance mechanism to ensure the policy frameworks they administer are effective.

The Committee did not re-litigate in detail the various shortcomings in entity performance uncovered in the audits examined during the inquiry, but does make several recommendations in relation to the administration of the Artbank program.

Ultimately the Committee concluded its most valuable contribution to the ongoing work on public sector integrity is to propose a clearer framework for probity and ethics: where ethical leadership is the 'golden thread' at the centre that binds and animates the system in a positive direction.

Julian Hill MP
Chair

Probity and Ethics in the Australian Public Sector



Frameworks

Frameworks establish the obligations of officials to pursue high standards of professionalism; to be ethical and impartial; to demonstrate complete and confirmed integrity, uprightness, and honesty in their work; and to comply with the intent and the letter of the law.

Culture

Culture stands between the law and achieving outcomes in a manner that is right and proper, more than just mere compliance, and demonstrates probity and ethical behaviour.

Accountability

Accountability means individual officers are accountable for their actions; senior leaders and accountable authorities are accountable for their entities; and policy owners are accountable for outcomes and compliance with their policies.

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Membership of the Committee

Chair

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Senator the Hon Linda Reynolds CSC

Members

Dr Michelle Ananda-Rajah MP

Senator Catryna Bilyk

Senator the Hon Matthew Canavan

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

Dr Carina Garland MP

Hon Dr David Gillespie MP *(to 14 February 2023)*

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

Senator Karen Grogan

Dr Daniel Mulino MP

Ms Peta Murphy MP *(to 1 August 2023, from 9 August 2023 to 28 November 2023)*

Mr Graham Perrett MP *(from 22 June 2023 to 9 August 2023)*

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

Senator Barbara Pocock *(from 31 July 2023)*

Mr Sam Rae MP *(to 22 June 2023, from 1 August 2023)*

Senator Tony Sheldon

Mr Aaron Violi MP

Mr Josh Wilson MP *(from 28 November 2023)*



Terms of reference

On 27 June 2023, the Joint Committee on Public Accounts and Audit adopted an inquiry into probity and ethics in the Australian Public Sector, with a view to examining whether there are systemic factors contributing to poor ethical behaviour in government agencies, and identifying opportunities to strengthen government integrity and accountability.

The inquiry will have particular regard to any matters contained in or connected to the following Auditor-General Reports:

- No. 30 of 2022–23, Probity Management in Financial Regulators — Australian Prudential Regulation Authority
- No. 36 of 2022–23, Probity Management in Financial Regulators — Australian Securities and Investments Commission
- No. 38 of 2022–23, Probity Management in Financial Regulators — Australian Competition and Consumer Commission
- No. 31 of 2022–23, Administration of the Community Health and Hospitals Program — Department of Health and Aged Care
- No. 18 of 2022–23, Acquisition, Management and Leasing of Artworks by Artbank — Department of Infrastructure, Transport, Regional Development, Communications and the Arts.



List of abbreviations

AAI	Accountable Authority Instruction
ACCC	Australian Competition and Consumer Commission
AGS	Australian Government Solicitor
ANAO	Australian National Audit Office
APRA	Australian Prudential Regulation Authority
APRA Act	<i>Australian Prudential Regulation Authority Act 1998</i>
APS	Australian Public Service
APSC	Australian Public Service Commission
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
CGRGs	Commonwealth Grants rules and Guidelines
CHHP	Community Health and Hospitals Program
CoC	Code of Conduct
CPRs	Commonwealth Procurement Rules
DITRDCA	Department of Infrastructure, Transport, Regional Development, Communications and the Arts
DTA	Digital Transformation Agency
EOI	Expression of Interest
Finance	Department of Finance
Health	Department of Health and Aged Care
IAWP	Internal Audit Work Program
JCPAA	Joint Committee of Public Accounts and Audit
NACC	National Anti-Corruption Commission

NGO	Non-Government Organisation
NPA	National Partnership Agreement
PHN	Private Health Network
PGPA Act	<i>Public Governance, Performance and Accountability Act 2013</i>
PS Act	<i>Public Service Act 1999</i>
SES	Senior Executive Service

List of recommendations

Recommendation 1

- 6.22** The Committee recommends the Department of Finance issues guidance that makes clear to public officials that if they breach finance law, suggesting there was no malice or personal gain is not sufficient to fulfil their obligation under the Public Governance, Performance and Accountability Act 2013 to act honestly, in good faith, and for a proper purpose.

Recommendation 2

- 6.41** The Committee recommends that the Secretary of the Department of Health and Aged Care formally reviews the appropriateness of the ‘congestion busting’ awards in light of the ANAO report, and considers whether the awards for this project should be revoked, in particular from senior officers involved.

Recommendation 3

- 6.47** The Committee recommends the APS Employee Census be augmented with questions asking officers of their level of confidence that agencies’ assessments, advice and decisions on issues such as procurement, grants, regulatory actions, and so on, comply with both the letter and intent of legislative and regulatory frameworks.

Recommendation 4

- 6.50** The Committee recommends the Australian Public Service Commission develops clearer guidance for entities that contains a definition of culture, and metrics on building, measuring and assessing organisational culture as it applies to probity. Metrics for culture must be capable of providing insights and assurance of the extent to which officers are in fact behaving in a way that is right and proper, and according to the letter and the intent of the law.

Recommendation 5

- 6.51** The Committee recommends the PGPA Act Framework be amended to introduce a requirement for entities to develop and maintain an overarching Integrity Framework that brings together:

- the relevant legislative, regulatory and policy frameworks through which the agency functions
- assessments of major integrity risks
- statement of the desired culture as it applies to officers demonstrating probity and acting ethically as they carry out their responsibilities
- assurance mechanisms of sufficient substance and scope, appropriate to the size of the entity and its risks, for accountable authorities to be confident officers are acting according to the letter and the intent of the frameworks
- robust accountability arrangements.

Accountable Authorities must report on their Framework, including culture, in their annual report and state they have evidence officers in their agency are acting with probity.

Recommendation 6

- 6.59** The Committee recommends the Department of Finance and the Australian Public Service Commission each develop an approach, including robust metrics, to provide reasonable assurance that the policy frameworks they administer are effective. An update is to be provided to the Committee within six months, including timelines to complete this work.

Recommendation 7

- 6.79** The Committee recommends the Department of Infrastructure, Transport, Regional Development, Communications and the Arts provides an account of exactly how its approach to acquisitions satisfies the requirements of the Commonwealth Procurement Rules, including the requirement that procurements encourage competition; and explain how its acquisitions, collection management and leasing approaches satisfy the four purposes outlined in Artbank's Charter of Operations.

Recommendation 8

- 6.81** The Committee recommends that the Department of Infrastructure, Transport, Regional Development, Communications and the Arts provides to the Committee Artbank's specific methodology for determining value for money in the context of its procurement decisions.

Recommendation 9

- 6.83** The Committee recommends the Department of Infrastructure, Transport, Regional Development, Communications and the Arts provides the Committee

with Artbank's strategic plan and integrity framework and their implementation schedule, and reports on a six-monthly basis for the next two years to the Committee on progress to implement the strategic plan.

Recommendation 10

- 6.85** The Committee recommends the Department of Infrastructure, Transport, Regional Development, Communications and the Arts explains to the Committee how it has implemented recommendation 3 of the 2006 Artbank audit that submissions by artists should have a documented assessment against the acquisition criteria. This should demonstrate how the Department has complied with the intent of the recommendation that there be a documented assessment regardless of whether a decision to acquire the artwork has been made. If the Department does not intend to implement the recommendation then it should explain why.

Recommendation 11

- 6.105** The Committee recommends the Department of Finance reviews the protocols and common practice whereby officials supporting Ministers seeking routine approval for expenditure decisions via correspondence outside full Cabinet processes ensure there is a reasonable balance struck between efficiency and rigour in such decision-making, and that agency advice is robust and appropriate.



1. Introduction

Background to the inquiry

- 1.1 Under section 8(1) of the legislation establishing the Joint Committee of Public Accounts and Audit (the Committee), the *Public Accounts and Audit Committee Act 1951*, one of the duties of the Committee is to ‘examine all reports of the Auditor-General (including reports of the results of performance audits) that are tabled in each House of the Parliament’. The Committee is empowered to ‘report to both Houses of the Parliament, with any comment it thinks fit, on any items or matters in those reports, or any circumstances connected with them, that the Committee thinks should be drawn to the attention of the Parliament’.
- 1.2 On 27 June 2023, the Committee adopted an inquiry into probity and ethics in the Australian Public Sector, with a view to examining whether there are systemic factors contributing to poor ethical behaviour in government agencies, and identifying opportunities to strengthen government integrity and accountability.
- 1.3 The inquiry was to have particular regard to any matters contained in or connected to the following Auditor-General Reports:
- *Probity Management in Financial Regulators — Australian Prudential Regulation Authority*¹
 - *Probity Management in Financial Regulators — Australian Securities and Investments Commission*²
 - *Probity Management in Financial Regulators — Australian Competition and Consumer Commission*³
 - *Acquisition, Management and Leasing of Artworks by Artbank*⁴
 - *Administration of the Community Health and Hospitals Program*.⁵

¹ Australian National Audit Office (ANAO), *Probity Management in Financial Regulators — Australian Prudential Regulation Authority*, No.30 2022–23, hereafter, *APRA report*.

² ANAO, *Probity Management in Financial Regulators — Australian Securities and Investments Commission*, No. 36 2022–23, hereafter *ASIC report*.

³ ANAO, *Probity Management in Financial Regulators — Australian Competition and Consumer Commission*, No. 38 2022–23, hereafter *ACCC report*.

⁴ ANAO, *Management and Leasing of Artworks by Artbank: Department of Infrastructure, Transport, Regional Development, Communications and the Arts*, No. 18 2022–23, hereafter *Artbank report*.

⁵ ANAO, *Administration of the Community Health and Hospitals Program: Department of Health and Aged Care*, No. 31 2022–23, hereafter *CHHP report*.

Conduct of the inquiry

- 1.4 The inquiry received 12 submissions (including one confidential submission), and 22 supplementary submissions containing responses to questions provided in writing by the Committee or taken on notice at public hearings. The Committee held four public hearings in Canberra and by videoconference on Friday, 8 September 2023, Monday, 20 November 2023, Thursday, 1 February 2024, and Tuesday, 12 March 2024.
- 1.5 The list of submissions and supplementary submissions is at Appendix A. The public hearings are listed at Appendix B.

Approach to the report

- 1.6 The five audit reports that formed the basis for this inquiry highlighted different aspects of probity and ethics in the Australian public sector:
- the Artbank report dealt with procurement practices in the broader context of program administration
 - the report on the Community Health and Hospitals Program (CHHP) studied grant management
 - the financial regulator reports examined probity management.
- 1.7 This report deals in separate chapters (chapters 2 and 3) with procurement and grants, which involve an examination of aspects of the audit reports relating to Artbank and CHHP respectively. Chapter 4 examines integrity frameworks and the probity assurance practices of the five entities and discusses whether an integrity framework approach can provide the accountable authority with confidence that officers are acting with probity and ethically. Chapter 5 discusses culture and accountability. In the final chapter the Committee draws its conclusions and makes 10 recommendations.
- 1.8 Ultimately, as will be discussed in chapter six, the Committee finds that the key to ensuring the public sector acts with probity and integrity is through the interrelationship of frameworks, culture and accountability, drawn together with the 'golden thread' of ethical leadership.

Public sector probity and ethics obligations

- 1.9 This section discusses the broad probity obligations that apply to public sector officials. The obligation to act with probity and ethically is contained in the legislation that governs the functioning of the Australian public sector.

Definition

- 1.10 Probity and ethics are closely linked ideas with definitions often explaining one in terms of the other such that probity is generally considered evidence of ethical behaviour. The entities during the inquiry also often referred to ‘integrity’ when speaking about probity (the issues that arise from this are taken up in chapters four and five). The terms have multiple definitions, including those provided by the Department of Finance and the Australian Public Service Commission (APSC).
- 1.11 Establishing and maintaining probity, according to the Department of Finance, ‘involves applying and complying with public sector values and duties such as honesty, integrity, impartiality and accountability’.⁶ Probity is also ‘evidence of ethical behaviour, and can be defined as complete and confirmed integrity, uprightness and honesty in a particular process’.⁷
- 1.12 ‘Ethical’ is defined by the Department of Finance in relation to the proper use of public resources and ‘the extent to which the proposed use is consistent with the core beliefs and values of society’.⁸
- Where a person behaves in an ethical manner it could be expected that a person in a similar situation would undertake a similar course of action. For the approval of proposed commitments of relevant money, an ethical use of resources involves managing conflicts of interests, and approving the commitment based on the facts without being influenced by personal bias. Ethical considerations must be balanced with whether the use will also be efficient, effective and economical.⁹
- 1.13 The ANAO stated ‘it is clearly unethical to comply with the letter of a rule, but in a way which undermines its intent’.¹⁰
- 1.14 The APSC definition of integrity is taken from Stephen Sedgwick’s report dealing with institutional integrity in the Australian Public Service (APS):
- ... the pursuit of high standards of APS professionalism, which in turn means doing the right thing at the right time to deliver the best outcomes for Australia sought by the professionally advised government of the day.¹¹

⁶ Department of Finance, *Commonwealth Grants Rules and Guidelines*, Canberra, 2017, paragraph 13.1.

⁷ Department of Finance, ‘Ethics and probity in Procurement’, www.finance.gov.au/government/procurement/buying-australian-government/ethics-and-probity-procurement, viewed 3 July 2023.

⁸ Department of Finance, ‘Glossary’, www.finance.gov.au/about-us/glossary, viewed 5 February 2024.

⁹ Department of Finance, ‘Glossary’, www.finance.gov.au/about-us/glossary, viewed 5 February 2024.

¹⁰ ANAO, *Submission 5*, p. 11.

¹¹ Australian Public Service Commission (APSC), ‘Integrity in the APS’, www.apsc.gov.au/working-aps/integrity, viewed 22 May 2024; S Sedgwick, *Report into consultations regarding APS approaches to ensure institutional integrity*, October 2020, p. 18.

Legislation

Finance law

- 1.15 Probity and ethics in the APS are legislated in part through finance law. Finance law is defined in the PGPA Act as: the PGPA Act, the rules, any instrument made under the PGPA Act (including the procurement rules and grants rules), or an Appropriation Act.¹² The PGPA Act states ‘to avoid doubt, the finance law is an Australian law ...’ for the purposes of the APS Code of Conduct (CoC).¹³
- 1.16 The APS CoC (see below) is contained in the *Public Service Act 1999* (PS Act), and specifies an APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws, in addition to behaving honestly and with integrity.¹⁴ If an official contravenes finance law, sanctions may be imposed under the PS Act (for breaches to the CoC), up to and including termination of employment.¹⁵
- 1.17 Additional probity requirements may also apply, depending on the type of entity, enabling legislation, government policies and frameworks (including activity-specific frameworks like those applying to grants and procurement), internal policies and accountable authority instructions, and professional codes and standards, amongst other things.¹⁶

Public Governance, Performance and Accountability Act

- 1.18 The PGPA Act contains the governance, accountability and performance framework for Commonwealth entities, and, amongst other things, establishes the general duties of public sector officials.¹⁷ These general duties constitute the overarching framework for probity and ethical behaviour applying to officials of PGPA Act entities.¹⁸ Under the PGPA Act, officials have duties of: care and diligence; to act honestly, in good faith and for a proper purpose; in relation to the use of position and use of information; and to disclose interests.¹⁹
- 1.19 Section 15 of the PGPA Act deals with the duty to govern a Commonwealth entity and applies to the accountable authority (typically the secretary—or equivalent—of an entity). It requires the accountable authority, amongst other things, to govern the entity in a way that promotes the proper (efficient, effective, economical and ethical) use and management of public resources.²⁰

¹² *Public Governance, Performance and Accountability Act 2013* (PGPA Act), section 8.

¹³ PGPA Act, section 32.

¹⁴ *Public Service Act 1999* (PS Act), section 13(2), 13(4).

¹⁵ PS Act, section 15.

¹⁶ ANAO, *APRA report*, p. 18; ANAO, *Submission 5*, pages 3–4.

¹⁷ PGPA Act, sections 6, 25–29.

¹⁸ ANAO, *ASIC report*, p. 18.

¹⁹ PGPA Act, sections 25–29.

²⁰ PGPA Act, sections 8, 15.

- 1.20 Various instruments have been made under the PGPA Act, including the Commonwealth Procurement Rules (CPRs),²¹ and the Commonwealth Grants Rules and Guidelines (CGRGs),²² which as discussed above are part of finance law and legally binding.

Public Service Act

- 1.21 The PS Act mandates that departmental secretaries are responsible ‘to manage the affairs of the Department efficiently, effectively, economically and ethically’ and to ‘implement measures directed at ensuring that the Department complies with the law’.²³
- 1.22 The PS Act also contains the APS Values, which relate to officers being committed to service; ethical; respectful; accountable; and impartial.²⁴ Ethical is defined in the values as demonstrating ‘leadership’, being ‘trustworthy’ and acting with ‘integrity’ in all it does.²⁵
- 1.23 The Australian Public Service Commissioner is able to issue directives with regard to the APS Values and has specified what exactly constitutes ethical behaviour:
- ... subsection 10(2) of the [PS] Act requires the following:
- (a) acting in a way that models and promotes the highest standard of ethical behaviour;
 - (b) following through on commitments made;
 - (c) having the courage to address difficult issues;
 - (d) complying with all relevant laws, appropriate professional standards and the APS Code of Conduct;
 - (e) acting in a way that is right and proper, as well as technically and legally correct or preferable;
 - (f) reporting and addressing misconduct and other unacceptable behaviour by public servants in a fair, timely and effective way;
 - (g) providing leadership in policy development, implementation, program management and regulation;
 - (h) supporting systems that give APS employees appropriate opportunities to develop and demonstrate leadership qualities.²⁶

²¹ PGPA Act, section 105B.

²² PGPA Act, section 105C.

²³ PS Act, sections 57(2)(a), 57(2)(c).

²⁴ PS Act, section 10.

²⁵ PS Act, section 10(2).

²⁶ *Australian Public Service Commissioner’s Directions 2022*, section 14. Directions are made under the PS Act and prescribe standards that Agency Heads and APS employees must comply with in order to meet their obligations under the Act. See: Australian Public Service Commission, ‘Commissioner’s directions’, www.apsc.gov.au/working-aps/commissioners-directions, viewed 18 March 2024.

- 1.24 Agency heads must uphold and promote the APS Values, and officers must at all times behave in a way that upholds the values.²⁷ In particular, senior executive service (SES) officers are required, by personal example and other appropriate means, to promote the APS Values and CoC.²⁸

Codes of conduct

- 1.25 The APS CoC, which is contained in the PS Act, contains 13 requirements, including that: officials behave honestly and with integrity; act with care and diligence; comply with all applicable Australian laws; comply with any lawful and reasonable direction given by someone who has authority to give the direction; and use Commonwealth resources in a proper manner and for a proper purpose.²⁹
- 1.26 The Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) engage employees under their respective enabling legislation and the accountable authority of each institution is required to produce a code of conduct and values.
- 1.27 Employees of APRA are engaged under section 45 of the *Australian Prudential Regulation Authority Act 1998* (APRA Act). The APRA Chair is the accountable authority of APRA and responsible for determining the APRA Values and APRA CoC.³⁰ Amongst other things, under the APRA CoC, APRA staff ‘should demonstrate the highest standards of professional conduct and integrity at all times by living the APRA Values’ and ‘should act to the highest ethical standards at all times and in all of their dealings’. Breaching the standards of conduct established in the CoC may result in disciplinary action up to, and including, termination of employment.³¹
- 1.28 Under the *Australian Securities and Investments Commission Act 2001* (ASIC Act), the ASIC Chairperson is the accountable authority of ASIC, and responsible for determining the ASIC CoC and ASIC Values.³² Under the ASIC CoC, staff ‘must act in accordance with ASIC’s values’, and ‘behave honestly in connection with their employment’. Breaches of the CoC may be subject to disciplinary action up to and including termination of employment.³³
- 1.29 Finance law applies to both ASIC and APRA.³⁴

²⁷ PS Act, sections 12, 13(11).

²⁸ PS Act, section 35(3).

²⁹ PS Act, section 13.

³⁰ *Australian Prudential Regulation Authority Act 1998* (APRA Act), sections 7, 48AB, 48AC.

³¹ Australian Prudential Regulation Authority (APRA), *Code of Conduct*, 15 December 2020 (updated 2 February 2022), pages 5, 9.

³² *Australian Securities and Investments Commission Act 2001* (ASIC Act), sections 9A, 126B, 126C.

³³ Australian Securities and Investments Commission (ASIC), *Code of Conduct*, August 2023, pages 10, 12.

³⁴ ASIC Act, sections 8, 9A; APRA Act, sections 7, 13.

Probity themes highlighted by the Auditor-General

- 1.30 In its submission to the inquiry, the Australian National Audit Office (ANAO) stated its 'audits provide evidence that the Australian public sector regularly falls short of complying with both the intent and requirements of its regulatory frameworks and lacks effective accountability for performance'.³⁵
- 1.31 Ethical behaviour and integrity are not, according to the Auditor-General, 'just doing narrow compliance'.³⁶ The ANAO emphasised the principles-based legislation and frameworks under which the public sector operates establish 'high expectations' and 'meeting mandatory requirements is not sufficient' to meet this standard.³⁷
- 1.32 In general, the ANAO has identified in recent audits a focus on outcomes over compliance with finance law:
- ... the risk tolerance for non-compliance is high, particularly where consequences are low or benefits are high. That is, an "achievement orientation" and "getting things done" —including by "cutting corners" if necessary— has a significantly higher value than compliance.³⁸
- 1.33 The situation, stated the ANAO, is exacerbated by the absence of any effective accountability or assurance for entity performance. Further, 'policy owners are reluctant to take accountability for providing robust advice to entities, defaulting to advising that decisions are for accountable authorities'.³⁹
- 1.34 The Auditor-General told the Committee the ANAO did not undertake sufficient audits to make a statistically based conclusion on whether there existed a systemic problem.⁴⁰ The ANAO submission identified selected areas—procurement, grants administration, record keeping, performance measurement and reporting, and accountability for performance—where its audit work provides evidence of persistent non-compliance across the sector and levels of resistance to accountability for performance.⁴¹
- 1.35 The Auditor-General also stated there is evidence of entities failing to prioritise the resolution of identified issues and failing to take accountability for performance:
- Some responses to audit reports try to diminish their value, by suggesting that: a conclusion refers to a minor issue, when under auditing standards a negative conclusion can only relate to a material finding; the entity was already aware of the issue and was dealing with it, when evidence does not support this; or an

³⁵ ANAO, *Submission 5*, p. 6.

³⁶ Mr Grant Hehir, Auditor-General, ANAO, *Committee Hansard*, 8 September 2023, p. 42.

³⁷ ANAO, *Submission 5*, p. 4.

³⁸ ANAO, *Submission 5*, p. 6.

³⁹ Policy owners include: Department of Finance (PGPA Act framework); Australian Public Service Commission (PS Act integrity framework); National Archives of Australia (record keeping framework); Attorney-General's Department (performance of Commonwealth legal work). ANAO, *Submission 5*, pages 2, 6.

⁴⁰ Mr Grant Hehir, ANAO, *Committee Hansard*, 20 November 2023, p. 9; ANAO, *Submission 5*, p. 6.

⁴¹ ANAO, *Submission 5*, pages 6, 14–16.

audit has not appropriately taken account of context, when the entity is really seeking to hide the conclusions in a narrative of excuses.⁴²

Procurement

- 1.36 The ANAO stated its audit findings indicated ‘there was strong evidence ... the public sector’s approach to procurement regularly fell short of expectations set out in the regulatory frameworks’, which constitute finance law.⁴³ It stated in some cases, procurement arrangements ‘appear[ed] to be primarily an exercise in form over substance’.⁴⁴
- 1.37 By way of example, the ANAO highlighted entities complying with the letter of procurement rules but not their intent. For instance:
- where the provision for ‘extreme urgency brought about by events unforeseen’ is used to exempt a procurement from open tendering because the procurement process was left too late⁴⁵
 - where a procurement is exempted from open competition based on it being a less costly and easier process, rather than focussing on the overall value of the use of taxpayer funds.⁴⁶
- 1.38 In the four years between 2018–19 and 2022–23, the ANAO identified 19 audits that contained findings with regard to procurement. Some of the concerns in these reports were that entities:
- were unable to demonstrate that value for money had been achieved or that value for money requirements had been met⁴⁷
 - managed contracts where contract variations changed the planned cost, scope, and/or delivery timeframes⁴⁸

⁴² ANAO, *Submission 5*, p. 16.

⁴³ ANAO, *Submission 5*, pages 10, 14–15.

⁴⁴ ANAO, *Submission 5*, p. 14.

⁴⁵ ANAO, *Submission 5*, p. 11.

⁴⁶ ANAO, *Submission 5*, p. 10.

⁴⁷ These included: ANAO, *Procurement by the National Capital Authority*, No. 30 2021–22, hereafter *NCA report*, pages 6, 8; ANAO, *Department of Defence’s Procurement of Hunter Class Frigates*, No. 21 2022–23, hereafter *Frigates report*, pages 9, 27; ANAO, *Digital Transformation Agency’s Procurement of ICT Related Services*, No. 5 2022–23, hereafter *DTA report*, pages 9–10; ANAO, *Procurement of Strategic Water Entitlements*, No. 2 2020–21, hereafter *SWE report*, pages 9, 47; ANAO, *OneSKY: Contractual Arrangements*, No. 4 2019–20, hereafter *OneSKY report*, p. 9; ANAO, *Procurement of the Permissions Capability*, No. 34 2022–23, hereafter *Permissions Capability report*, p. 6.

⁴⁸ See, for instance: ANAO, *Management of the Civil Maritime Surveillance Services Contract*, No. 6 2021–22, hereafter *Maritime Surveillance report*, p. 8; ANAO, *The Australian Criminal Intelligence Commission’s Administration of the Biometric Identification Services Project*, No. 24 2018–19, hereafter *Biometric Identification Services report*, p. 9; ANAO, *OneSKY report*, pages 43–44; ANAO, *DTA report*, pages 9–10.

- had probity frameworks in place, but either did not follow or implement them, or could not demonstrate that they had followed them due to poor record keeping⁴⁹
- did not effectively manage conflicts of interest⁵⁰
- engaged in activities did not support the intent of the CPRs, or the intent of the instructions received from the minister.⁵¹

1.39 Specific examples of some of these concerns include:

- only approaching one supplier, despite internal guidance instructing the entity to approach more than one supplier,⁵² and the CPRs stating that officials should ‘encourage competition and be non-discriminatory’ so officials can be satisfied that the procurement will achieve a value for money outcome⁵³
- frequent direct sourcing of suppliers using panel arrangements, undermining the intent of the CPRs⁵⁴
- gaming procurement processes in the Digital Marketplace so the preferred tenderer could be located and then selected⁵⁵
- failing to conduct systematic monitoring to assess whether a panel arrangement was meeting its objectives.⁵⁶

1.40 Entity responses to ANAO findings have included:

- suggesting niche products are something of an exception to the requirements in the CPRs, and that providing better documentation and an auditable trail of decision making would not have materially impacted the decision-making process⁵⁷
- the market being too narrow for robust value for money processes⁵⁸
- management processes were highly complex due to international dynamics impacting timeframes⁵⁹

⁴⁹ See: ANAO, *Defence’s Administration of Enabling Services — Enterprise Resource Planning Program: Tranche 1*, No. 1 2021–22, p. 10; ANAO, *Permissions Capability report*, pages 9–10; ANAO, *DTA report*, pages 8, 34.

⁵⁰ See, for instance: ANAO, *NCA report*, p. 9; ANAO, *Purchase of the ‘Leppington Triangle’ Land for the Future Development of Western Sydney Airport*, No. 9 2020–21, hereafter *Leppington Triangle report*, pages 37–38.

⁵¹ ANAO, *DTA report*, p. 9; ANAO, *SWE report*, p. 40; ANAO, *Establishment and Use of ICT Related Procurement Panels and Arrangements*, No. 4 2020–21, hereafter *ICT Related Procurement Panels*, p. 83; ANAO, *Leppington Triangle report*, p. 14; ANAO, *DTA report*, pages, 9, 80; ANAO, *Procurement of Office Furniture*, No. 37 2022–23, hereafter *Office Furniture report*, pages 8, 23–26.

⁵² ANAO, *Office Furniture report*, p. 8.

⁵³ Department of Finance, *Commonwealth Procurement Rules*, Department of Finance, Canberra, 2023, section 4.4.

⁵⁴ ANAO, *DTA report*, p. 9.

⁵⁵ ANAO, *DTA report*, pages 50–51.

⁵⁶ ANAO, *ICT Related Procurement Panels*, p. 9.

⁵⁷ ANAO, *OneSKY report*, p. 11.

⁵⁸ ANAO, *NCA report*, p. 11.

⁵⁹ ANAO, *Procurement of Garrison Support and Welfare Services*, No. 37 2019–20, pages 11–12.

- suggesting that shortcomings that occurred throughout the tender process were of limited consequence as the department's intended outcome was achieved⁶⁰
- contesting the ANAO's findings that the procurement process undertaken by the entity fell short of the CPRs.⁶¹

Grants

- 1.41 In the administration of grants, the ANAO has found 'evidence of "gaming", or actions designed to achieve pre-determined results by technically meeting mandatory requirements, but in a way that is inconsistent with framework principles'.⁶²
- 1.42 The ANAO has also found evidence of deliberate non-compliance with legal requirements. Its audits indicate 'a view appears to have emerged that likely non-compliance with legal requirements is a risk that can be taken on by entities'.⁶³
- 1.43 In the years between 2017–18 and 2022–23, the ANAO highlighted 14 reports where grant findings were made.⁶⁴ Some of the concerns in these reports were that entities:
- had processes for the selection of grants that did not conform with the underlying intent of the CGRGs or in some cases the CGRGs themselves, either through shortcomings in grant opportunity/program guidelines, or assessment criteria and practices⁶⁵
 - failed to provide key information to Ministers regarding the extent to which applications had been assessed as having met the selection and/or appraisal criteria⁶⁶
 - facilitated ineffective processes⁶⁷
 - lacked adequate probity frameworks and/or probity plans⁶⁸

⁶⁰ ANAO, *Procurement of Combat Reconnaissance Vehicles (LAND 400 Phase 2)*, No. 18 2020–21, pages 11–12.

⁶¹ ANAO, *Frigates report*, pages 13–14; ANAO, *SWE report*, pages 59–60.

⁶² ANAO, *Submission 5*, p. 15.

⁶³ ANAO, *Submission 5*, p. 15.

⁶⁴ ANAO, *Submission 5*, pages 15–16.

⁶⁵ See, for instance a range of concerns raised in: ANAO, *Award of Funding under the Building Better Regions Fund*, No. 1 2022–23, hereafter *BBRF report*, pages 31–33; ANAO, *Administration of Commuter Car Park Projects within the Urban Congestion Fund*, No. 47 2020–21, hereafter *CCPP report*, pages 10–11; ANAO, *Award of Funding under the Safer Communities Fund*, No. 16 2021–22, hereafter *SCF report*, p. 11; ANAO, *Award of Funding under the Supporting Reliable Energy Infrastructure Program*, No. 31 2020–21, hereafter *SREIP report*, p. 10; ANAO, *Indigenous Advancement Strategy*, No. 35 2016–17, hereafter *IAS report*, pages 9–10; ANAO, *Award of a \$443.3 Million Grant to the Great Barrier Reef Foundation*, No. 22 2018–19, hereafter *GBRF report*, pages 8–9; ANAO, *Award of Funding under the Community Sport Infrastructure Program*, No. 23 2019–20, hereafter *CSIP report*, p. 10.

⁶⁶ See, for instance: ANAO, *Award of Funding under the Community Development Grants Program*, No. 3 2017–18, hereafter *CDGP report*, p. 28; ANAO, *SREIP report*, p. 10.

⁶⁷ See, for instance: ANAO, *SCF report*, pages 23–24; ANAO, *CCPP report*, pages 27–32.

⁶⁸ See, for instance: ANAO, *SREIP report*, p. 9; ANAO, *GBRF report*, p. 51; ANAO, *Administration of the Data Retention Industry Grants Program*, No. 2 2017–18, hereafter *DRIGP report*, p. 10.

- were unable to demonstrate that value for money had been achieved⁶⁹
- had poor record keeping practices (see further discussion below).⁷⁰

1.44 Examples of some of these concerns include:

- published program guidelines stated that the decision-making panel may use at its discretion the consideration of a non-exhaustive list of 'other factors' to override the results of the merit assessment process, with applicants not asked to specifically address those other factors in their applications for grant funding⁷¹
- the approach taken to identifying and selecting projects for funding was limited in coverage and not demonstrably merit-based, and the assessment work underlying the department's advice to award funding to the selected projects was not to an appropriate standard⁷²
- grants that were awarded high scores against the selection criteria not being recommended for funding, while low scoring applications were recommended.⁷³

1.45 Entity responses to ANAO findings have included:

- contesting findings made by the ANAO that the entity's processes did not comply with the CGRGs⁷⁴
- suggesting projects that were election commitments might be treated differently, and disputing the ANAO's findings⁷⁵
- proposing that once timeframes and various circumstances were considered, the entities' conduct was understandable and/or unavoidable⁷⁶
- placing the emphasis on the outcomes achieved despite the entity not complying with the CGRGs in order to achieve the outcome.⁷⁷

Record keeping

1.46 Of the 211 performance audits tabled in the Parliament in the last five years, the ANAO stated 91.5 per cent included findings with respect to record keeping. The ANAO has found 'a lack of adequate documentation and records to support the

⁶⁹ See, for instance: ANAO, *SREIP report*, p. 26; ANAO, *SCF Report*, pages 30–31, 43–44; ANAO, *CCPP Report*, pages 12, 50, 77; ANAO, *GBRF Report*, pages 9–10, 39–43, 46.

⁷⁰ See, for instance: ANAO, *BBRF report*, p. 13; ANAO, *SCP report*, p. 55; ANAO, *CCPP report*, p. 8; ANAO, *SREIP report*, pages 26–27; ANAO, *IAS report*, pages 10, 42; ANAO, *Management of the Try, Test and Learn Fund Transition Projects*, No. 41 2022–23, p. 8; ANAO, *CSIP report*, p. 42; ANAO, *Award of Funding Under the Regional Jobs and Investment Packages*, No. 12 2019–20, pages 30–31.

⁷¹ ANAO, *BBRF report*, p. 10.

⁷² ANAO, *CCPP report*, p. 6.

⁷³ ANAO, *IAS report*, p. 42.

⁷⁴ ANAO, *GBRF report*, p. 13.

⁷⁵ ANAO, *CCPP report*, pages 94–97.

⁷⁶ ANAO, *DRIGP report*, p. 12; ANAO, *GBRF report*, p. 13; ANAO, *CSIP report*, p. 12.

⁷⁷ ANAO, *GBRF report*, pages 8–9, 13.

rationale for decisions made and the actions undertaken. This often makes it difficult for entities to demonstrate compliance with framework and integrity requirements.⁷⁸

Previous reports on grants and procurement

- 1.47 During the current Parliament, the Committee has concluded reports dealing separately with grants and procurement.

Inquiry into Commonwealth grants administration

- 1.48 The Committee's *Report 495: Inquiry into Commonwealth grants administration*, examined, amongst other things, the administration of a number of grants programs, including Commuter Car Park Projects within the Urban Congestion Fund, the Safer Communities Program, the Building Better Regions Fund, the Regional Growth Fund, and the Modern Manufacturing Initiative. The Committee received evidence of serial non-compliance with the spirit and at times, the requirements, of the CGRGs by officials and decision-makers. This had occurred to such an extent that key grant-making principles of transparency and accountability could not be satisfied in some instances. The Committee came to the view some of the discretion currently in the CGRGs should be removed.⁷⁹
- 1.49 The report examined in detail a number of issues including: the use of non-competitive processes; the funding of election commitments through grants programs; whether officials and decision-makers were fulfilling legal requirements; and the use of unspecified 'other factors' in grants assessments.
- 1.50 Although it is not mandatory under the CGRGs for open and competitive grants processes to be adopted, it is the Australian Government's stated preferred approach. The Committee received evidence that: across all grants, competitive selection processes were chosen in the minority of cases; there were instances where programs announced as being competitive and merits-based actually employed closed, non-competitive processes; and that even when programs were reported as using open and competitive selection processes, the most meritorious applications may not be the applications funded.⁸⁰
- 1.51 Notwithstanding the fact election commitments delivered through grant programs remain subject to the PGPA Act and the CGRGs, the Committee heard there were a number of risks to fair and transparent administration that could arise from a grant being classified as an election commitment, particularly where there was no solid definition of what constitutes an election commitment in the context of grant programs. These risks included the potential failure of a department to undertake robust value for money (CGRGs) and proper use of money (PGPA Act)

⁷⁸ ANAO, *Submission 5*, p. 16.

⁷⁹ Joint Committee of Public Accounts and Audit (JCPAA), *Report 495: Inquiry into Commonwealth grants administration*, June 2023, hereafter *Report 495: Grants*, pages 1, 20–21.

⁸⁰ JCPAA, *Report 495: Grants*, pages 6–7.

assessments; and administering election commitments through existing programs where the criteria were not necessarily fit for purpose.⁸¹

- 1.52 The Committee received evidence of poor record-keeping practices, including where the basis for funding decisions was not recorded or did not clearly address published eligibility requirements and merit criteria; where the documentation of decisions by a minister to overturn advice from a department that a grant not be funded was insufficient; and where applications had been ‘pooled’ and blanket advice and recommendations to the minister had then been attributed to all the applications. This final practice, the Committee was told, allowed ministers wide discretion without having to declare they had overturned merit recommendations.⁸²
- 1.53 The inclusion of ‘other factors’ in grant guidelines, the Committee heard, in some instances had the potential to undermine the awarding of grants on the basis of merit, and was not consistent with the key principles of grants administration in the CGRGs.⁸³
- 1.54 While the Committee accepted that ministers rightly retain discretion and authority in relation to accepting or rejecting departmental recommendations when making grant funding decisions, they remained subject to the law. Further, agencies retained a legal obligation to support ministers by undertaking merit-based assessments of applications in competitive programs based on factors outlined in program guidelines, making clear recommendations and providing helpful paperwork to ministers, and educating and reminding ministers of their responsibilities.⁸⁴
- 1.55 The Committee made eight recommendations, including that the CGRGs be amended to provide that: competitive and merit-based processes be adopted by default; there be clear recommendations for each individual grant; decision-maker approvals of funding against the recommendations be clearly recorded and reported online; and the use of ‘other factors’ be transparent and formally included as part of an assessment. It also recommended that the Department of Finance provide good-practice examples of recording-keeping templates and checklists to give effect to the rules and principles of the CGRGs, and clarify the definition of an election commitment for the purpose of delivering grants programs.⁸⁵

Inquiry into Commonwealth procurement

- 1.56 The Committee’s *Report 498: ‘Commitment issues’ – An inquiry into Commonwealth procurement*, examined five Commonwealth procurements in detail where audit reports had identified significant shortcomings in procurement policies and practices,⁸⁶ including with procurement planning and approaches to market; the use

⁸¹ JCPAA, *Report 495: Grants*, pages 8–10.

⁸² JCPAA, *Report 495: Grants*, pages 13–16.

⁸³ JCPAA, *Report 495: Grants*, pages 16–18.

⁸⁴ JCPAA, *Report 495: Grants*, pages 19–20.

⁸⁵ JCPAA, *Report 495: Grants*, pages xvii–xix.

⁸⁶ These were Home Affairs’ Management of the Civil Maritime Surveillance Services Contract, the Department of Defence’s Procurement of Six Evolved Cape Class Patrol Boats, Procurement by the National Capital

of competition in procurement to deliver value for money outcomes; contract management; ethical procurement and the management of probity; and record keeping.⁸⁷

- 1.57 In addition to findings on the individual audits, the Committee examined common problems in institutional procurement capability and proficiency, noting the ANAO's audit reports indicated a considerable capability deficit in this area. Further, it heard that though the CPRs aim to ensure procurement is conducted in a fair, equitable and transparent manner, and delivers value for money, entities were using certain provisions in the CPRs to exempt procurements from the CPRs, to justify sole-sourcing arrangements, and to use a limited tender approach where it may not be supported.⁸⁸
- 1.58 The report noted that while Finance was a policy owner, it focussed primarily on building the capability of procuring entities rather than on monitoring or compliance, arguing adopting a more compliance-focussed regulatory approach would negatively affect its relationship with entities and result in worse outcomes—which the ANAO suggested was a 'strange view to take'.⁸⁹
- 1.59 The Committee also considered: whether the role of entity audit committees was appropriate, specifically because most do not directly manage risks to an entity but instead provide advice on entity systems and frameworks, and generally have no specific requirement to advise on procurement; the functionality of AusTender; and the difficulty entities have in demonstrating the legal requirement to obtain value for money, particularly through the use of competitive procurement approaches such as open tenders, which are frequently avoided because it is less costly and easier to do so.⁹⁰
- 1.60 While the use of panel arrangements for procurements was designed to improve efficiency and reduce risk, the Committee heard in practice their use often had the effect of reducing fair and transparent competition and increasingly a small number of suppliers on a panel were capturing a large proportion of the contracts awarded through the panel.⁹¹
- 1.61 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, including a failure to adhere to policy requirements such as mandatory fraud training, flawed processes for appointing probity advisers, and failing to address identified probity risks even where proposed treatments were put forward. In addition, the report noted requirements

Authority, the Department of Industry, Science and Resources Procurement of Delivery Partners for the Entrepreneurs' Programme, and the Digital Transformation Agency's Procurement of ICT Related Services. JCPAA, *Report 498: 'Commitment issues' – An inquiry into Commonwealth procurement*, August 2023, hereafter *Report 498: Procurement*, p. 1.

⁸⁷ JCPAA, *Report 498: Procurement*, p. 1.

⁸⁸ JCPAA, *Report 498: Procurement*, pages 7–8, 12, 14–16.

⁸⁹ JCPAA, *Report 498: Procurement*, pages 18–19.

⁹⁰ JCPAA, *Report 498: Procurement*, pages 21–27.

⁹¹ JCPAA, *Report 498: Procurement*, pages 27–30.

with regard to record-keeping under the CPRs were often not met; and contract management was found to be problematic in several audits.⁹²

- 1.62 The Committee acknowledged that while procurement could be a complex endeavour, given the sums of public money involved, improvements in procurement practices and processes had to be made to ensure value for taxpayer money. It called for improvements systemically, across the APS.⁹³
- 1.63 The Committee made 19 recommendations dealing, amongst other things, with: professionalisation of public sector procurement capability; amending the CPRs to emphasise achieving value for money and conducting procurements in a fair, transparent and accountable manner continue to apply when certain exemptions to the CPRs are used; more comprehensive reporting on compliance with the CPRs; increasing the scrutiny provided by entity audit committees in certain circumstances; guidance on the use of probity advisers; amending guidance on the use of panels to make explicit the requirement for separate value for money assessments and multiple competing tenders; refreshing panels at regular intervals and providing for new entrants to be listed; and amending the reporting requirements on AusTender. In many respects, the Committee called for Finance to take a more active role as the policy owner for the CPRs.⁹⁴

⁹² JCPAA, *Report 498: Procurement*, pages 30–34.

⁹³ JCPAA, *Report 498: Procurement*, pages 34–35.

⁹⁴ JCPAA, *Report 498: Procurement*, pages xvii–xxi.

2. Probity in procurement - Artbank

- 2.1 Artbank is an art rental scheme established in 1980 by the Australian Government to ‘provide direct support to Australian contemporary artists through the acquisition of their work and to promote the value of Australian contemporary art to the broader public’.¹
- 2.2 Artbank generates revenue through the leasing of the Artbank collection to individuals, companies and governments.² The Artbank collection presently contains almost 11,000 works and is valued at approximately \$42 million.³ In 2021–22, Artbank reported revenue of \$2.78 million; expenses of \$2.5 million; and an acquisition budget of \$395,140, through which 72 works were acquired.⁴ Since 2015–16, the Artbank acquisition budget has been between 10 per cent and 15 per cent of revenue.⁵
- 2.3 The Australian National Audit Office (ANAO) audited Artbank to provide assurance to the Parliament on the administration of the Artbank program by examining the appropriateness of the approach of the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (DITRDCA) to acquiring, managing, and leasing Australian contemporary art in the Artbank collection.⁶
- 2.4 The audit found Artbank’s approach to acquiring, managing and leasing Australian contemporary art had not been appropriate.⁷ Artbank had no overarching strategy to support the direction of the program, and there were shortcomings in Artbank’s practices with regard to acquisitions, collection management, and leasing. In particular, Artbank’s approach to acquisitions had not been in accordance with the Commonwealth Procurement Rules (CPRs).⁸
- 2.5 This chapter discusses findings in the audit related to procurement and asset management, beginning with a summary of legal obligations under the CPRs and

¹ Office for the Arts, ‘About Artbank’, Department of Infrastructure, Transport, Regional Development, Communications and the Arts, www.artbank.gov.au/about-artbank, viewed 16 May 2024.

² Artbank has operated on a self-sustaining funding model since 1992, though in its 2006 audit, the Australian National Audit Office (ANAO) noted the Artbank program was not fully self-sustaining, with overhead costs (such as salaries and information technology infrastructure) not paid for through Artbank’s revenue stream. Australian National Audit Office (ANAO), *Management and Leasing of Artworks by Artbank: Department of Infrastructure, Transport, Regional Development, Communications and the Arts*, No. 18 2022–23, hereafter *Artbank report*, p. 20.

³ ANAO, *Artbank report*, pages 7, 20.

⁴ Department of Infrastructure, Transport, Regional Development, Communications and the Arts (DITRDCA), *Submission 4.2*, p. [20].

⁵ DITRDCA, *Submission 4.2*, pages [14]–[20].

⁶ ANAO, *Artbank report*, p. 7.

⁷ ANAO, *Artbank report*, p. 7.

⁸ ANAO, *Artbank report*, pages. 6–8.

asset management requirements. It then examines previous Artbank audits. This is followed by a discussion of the audit outcomes in relation to Artbank's strategic direction, acquisitions, collection management, and approach to leasing. Throughout the chapter, the response of DITRDCA to the audit findings is discussed.⁹

Audit outcome

- 2.6 As noted above, aside from lacking an overarching strategy to support the direction of the program, the audit found shortcomings across procurement and asset management. In particular, the audit concluded:
- the approach to acquisitions had not been in accordance with the CPRs and had not demonstrated strong alignment with the targets established in the program's collection plan, which itself was designed to illustrate DITRDCA's strategy to deliver against the program's policy intent
 - management of the collection was insufficient to ensure its integrity
 - the approach to leasing was not appropriate.¹⁰
- 2.7 Of the eight recommendations arising from the audit, DITRDCA agreed to four, noted one, agreed in part to two, and did not agree with one.¹¹ Where relevant, these are discussed in this chapter.
- 2.8 DITRDCA told the Committee, 'looking at the things that we're actually implementing as a result of the audit, as well as some changes that were already in train, we believe we will be fully compliant with the PGPA Act going forward and the CPRs going forward'.¹²

Data and recordkeeping

- 2.9 During the course of the audit, the ANAO found the reliability of Artbank program data and recordkeeping a challenge.¹³ The ANAO found in many instances that records were unreliable or non-existent: there was no documentation of some key decisions/approvals, processes, assessments or agreements;¹⁴ records of deaccessioning were unreliable;¹⁵ and certain data pertaining to program administration was not collected.¹⁶ This observation was not limited to the ANAO.

⁹ This chapter is not an exhaustive discussion of the audit reports, but focusses on key issues as they related to probity and ethics.

¹⁰ ANAO, *Artbank report*, p. 8.

¹¹ ANAO, *Artbank report*, pages 11–14.

¹² Mr Philip Smith, First Assistant Secretary, Office for the Arts, DITRDCA, *Committee Hansard*, 8 September 2023, p. 36.

¹³ The ANAO made reference to the reliability of Artbank program data and recordkeeping in the following paragraphs: 3.21, 3.24, 3.41, 3.60, 4.5, 4.6, 4.11–4.13, 4.24, 4.37–4.40, 4.58, 5.6, 5.10, as well as in notes to Table 2.1, and Table 3.2. See: ANAO, *Artbank report*, footnote 22.

¹⁴ See, for instance: ANAO, *Artbank report*, paragraphs 10, 3.18, 3.21, 3.23, 3.24, 3.27, 3.39, 4.40–4.41, and notes to figure 4.1.

¹⁵ ANAO, *Artbank report*, p. 8.

¹⁶ See, for instance: ANAO, *Artbank report*, paragraphs 3.62, 5.40.

DITRDCA itself, in its corporate plan, stated some Artbank 'data was not available or reliable'.¹⁷

- 2.10 In particular, the lack of documentation for the acquisition process has been a long-running issue in the Artbank program. In the 2006 audit (discussed below), the ANAO identified the need for improved documentation in several areas. For instance, it stated a documented acquisition process would assist in providing evidence to support compliance with Artbank's acquisition criteria and the then Commonwealth Procurement Guidelines.¹⁸ The ANAO found meetings and discussions regarding proposed acquisition were not documented and stated documentation justifying individual artwork purchases could be improved.¹⁹ The 2023 report found there remained a lack of documentation around key decisions and this was not consistent with the CPRs.²⁰
- 2.11 It is notable the financial statements provided by Artbank to the Committee in relation to acquisition budget and number of artworks purchased did not match in any year between 2015–16 and 2021–22 the numbers obtained by the ANAO through its analysis of Artbank's records.²¹

Previous audits and reviews

- 2.12 The 2023 audit was the second audit conducted by the ANAO of the Artbank program; an audit in 2006 made seven recommendations relating to Artbank's strategic direction and collection management practices, all of which the department at that time agreed to.²² In particular, recommendations were made with regard to redrafting the Artbank Charter; the development of a publicly-available, focussed and documented acquisition criteria; greater transparency and accountability in the acquisition process; and the consideration of alternative acquisition strategies, given Artbank is an art supports program not a collecting institution.²³
- 2.13 The Audit Office also identified that a 2014 departmental review had made eight recommendations similar to those in the 2006 audit. The departmental review called for, amongst other things, the development of a strategic plan with defined key performance indicators, and for the immediate clarification of governance arrangements.²⁴
- 2.14 DITRDCA admitted it had not implemented all the recommendations from the 2006 audit, specifying the review of the Artbank Charter was never completed. DITRDCA acknowledged to the Committee 'it would have been good' if the program had had an

¹⁷ ANAO, *Artbank report*, p. 22.

¹⁸ ANAO, *Artbank, Department of Communications, Information Technology and the Arts*, Audit Report No. 39 2005–06, hereafter *2006 Artbank report*, pages 13, 35.

¹⁹ ANAO, *2006 Artbank report*, p. 35.

²⁰ ANAO, *Artbank report*, p. 36.

²¹ See, in particular: DITRDCA, *Submission 4.2*, pages [14]–[20]; ANAO, *Artbank report*, p. 24.

²² ANAO, *2006 Artbank report*, pages 17–18.

²³ ANAO, *2006 Artbank report*, pages 17–18. For discussion on the differences between Artbank as an artists support program and collecting institutions, see for instance, pages 13–14, 39.

²⁴ ANAO, *Artbank report*, p. 17.

overarching plan to pull together its various streams—collection, acquisition, preservation, and conservation.²⁵

- 2.15 DITRDCA is silent on whether it has complied with the recommendation that direct submissions by artists should have a documented assessment against the Artbank acquisition criteria.²⁶
- 2.16 The ANAO in its 2006 report had found that reasons were not documented when artworks submitted directly by artists to Artbank for consideration had not been selected for acquisition. The discussion in the report strongly suggests the ANAO was of the view submissions by artists should have a documented assessment against the acquisition criteria regardless of whether there was a decision to purchase a directly submitted artwork. The ANAO stated ‘a documented acquisition process would assist in providing evidence to support compliance with Artbank’s acquisition criteria’ and the Commonwealth Procurement Guidelines.²⁷
- 2.17 DITRDCA’s ongoing practice of not recording the receipt of unsolicited proposals, or the reasons for decisions not to purchase artworks, whether solicited or unsolicited, is discussed further below.²⁸
- 2.18 Where DITRDCA has implemented a recommendation from the 2006 audit, in some cases this has taken many years. For instance, it was not until 2011 that a digital catalogue of artworks was loaded on the Artbank website; it took until 2019 for all works proposed for acquisition, regardless of value, to be accompanied by an acquisition proposal submitted to the relevant delegate; and it wasn’t until 2023 that Artbank conducted a client satisfaction survey, which appears to have been completed by approximately 44 clients, though not all questions were answered by all respondents. DITRDCA stated it considered the survey ‘an informative tool’.²⁹
- 2.19 The Committee asked DITRDCA how it could have confidence DITRDCA would implement the recommendations from the 2023 audit, given 17 years had passed since the 2006 audit and all those recommendations had yet to be implemented. DITRDCA responded it had documented the actions it intended to take in response to the 2023 audit, and this would be monitored through the Artbank governance committee, the ‘normal departmental chain’, and would be reported to the internal audit committee.³⁰

²⁵ Mr Philip Smith, DITRDCA, *Committee Hansard*, 8 September 2023, pp. 34–35, 36.

²⁶ In response to a question on notice, DITRDCA did not address this part of the recommendation. DITRDCA, *Submission 4.1*, p. [5].

²⁷ ANAO, *2006 Artbank report*, pages 34–36.

²⁸ ANAO, *Artbank report*, pages 34, 36.

²⁹ DITRDCA, *Submission 4.1*, pages [4]–[7].

³⁰ Mr Philip Smith, DITRDCA, *Committee Hansard*, 8 September 2023, pp. 34–35, 36.

Legal obligations

- 2.20 A range of obligations are relevant to the discussion in this chapter, encompassing the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), CPRs, *Public Service Act 1999* (PS Act), and departmental policies.

Commonwealth Procurement Rules

- 2.21 The CPRs are made under section 105B(1) of the PGPA Act and are the basic compliance framework for entities undertaking procurements. The CPRs state:
- The Australian Government promotes the proper use and management of public resources. Proper means efficient, effective, economical and ethical.³¹
- 2.22 The Department of Finance defines probity in the context of procurement as:
- ... evidence of ethical behaviour, and can be defined as complete and confirmed integrity, uprightness and honesty in a particular process.³²
- 2.23 Achieving value for money is a core rule of the CPRs, entities must consider value for money and officials must be satisfied a procurement achieves a value for money outcome. Similarly, competition is a key element of the CPRs, requiring non-discrimination and the use of competitive procurement processes.³³
- 2.24 Accountability and transparency must apply to procurements, including through the keeping of records, publication of procurement plans on AusTender, and the provision of information on request to potential suppliers.³⁴
- 2.25 The keeping of records for each procurement is obligatory and these are to be commensurate with scale, scope and risk. This documentation should provide accurate and concise information on: the requirement for the procurement; the process followed; how value for money was considered and achieved; relevant approvals; and relevant decisions and the basis of those decisions. It must be retained in accordance with the *Archives Act 1983*.³⁵
- 2.26 Further, entities must establish processes to identify, analyse, allocate and treat risk when conducting a procurement.³⁶

³¹ Department of Finance, *Commonwealth Procurement Rules: Achieving value for money*, Australian Government, 13 June 2023, hereafter *CPRs*, p. 15.

³² Department of Finance, 'Ethics and Probity in Procurement', www.finance.gov.au/government/procurement/buying-australian-government/ethics-and-probity-procurement, viewed 6 February 2024.

³³ Department of Finance, *CPRs*, sections 4.4–4.5, 5.1, 7.12.

³⁴ Department of Finance, *CPRs*, section 7.

³⁵ Department of Finance, *CPRs*, sections 7.2–7.5.

³⁶ Department of Finance, *CPRs*, section 8.

Asset management

- 2.27 Under the PGPA Act, officers have an obligation to discharge their duties with care and diligence, and the APS Code of Conduct (CoC) requires officers to use Commonwealth resources in a proper manner.³⁷ DITRDCA's asset policy states asset owners are responsible for the whole-of-life management of the assets used within their domain, including planning for, acquiring or building, using, managing, and disposal of assets. Artworks in the Artbank collection are assets for the purpose of DITRDCA's policy.³⁸
- 2.28 Further, a key purpose of the Artbank program is to operate a rental scheme. The rental income is a public resource. Under the PGPA Act, responsibility for the proper use of public resources rests with the accountable authority of an entity.³⁹

Key findings of the audit

- 2.29 The following discusses some of the key findings from the audit in relation to strategic direction and accountability, acquisitions, collection management, and leasing, and DITRDCA's response.

Strategic direction and governance

Audit findings

- 2.30 The audit found there was no overarching strategy to support the direction of Artbank or measure its success, though a range of policy and planning documents had been approved since 2019, focussed on discrete parts of the program.⁴⁰ There was no strategy to clearly articulate how Artbank would direct activity to achieve the program's purpose or objectives. The program was established to encourage contemporary Australian artists by acquiring their work; stimulate a wider public appreciation of Australian art by making it available for display in public places; operate an Art Rental Scheme; and manage the Artbank collection. Its two policy objectives are to: provide direct support to Australian contemporary artists through the acquisition of their work; and promote the value of Australian contemporary art to the broader public.⁴¹
- 2.31 One consequence of the absence of an overarching program strategy identified by the ANAO was it enabled DITRDCA's problematic approach to acquisitions, which the ANAO described as 'uncoordinated and closed', and not in accordance with the CPRs.⁴²

³⁷ *Public Service Act* (PS Act), section 13.

³⁸ ANAO, *Artbank report*, p. 49.

³⁹ ANAO, *Artbank report*, p. 65.

⁴⁰ ANAO, *Artbank report*, p. 21.

⁴¹ ANAO, *Artbank report*, pages 19–21.

⁴² ANAO, *Artbank report*, pages 8, 32–33.

- 2.32 The Artbank Governance Committee was established in 2019 to be responsible for governance oversight of Artbank's activities, and to monitor whether Artbank is meeting key objectives and is compliant with government rules and processes. The committee's terms of references specified it was responsible for the governance oversight of: acquisitions and deaccessions; outreach and promotion of the collection; and the leasing scheme. However, the committee did not consider itself to be an 'approving committee'. Amongst other things, it saw its role as being a 'conduit to the Executive Leadership Team and the Secretary's Business Committee, providing assurances to them that Artbank is meeting key objectives and complies with government rules and processes'.⁴³
- 2.33 Though it was to meet quarterly under its terms of reference, at December 2022, the governance committee had met three times. While the Artbank program team had prepared reports for the committee in advance of its three meetings that reported on progress against the discrete Artbank purposes and plans (the Business Plan and collection plans), reporting on the overall financial performance of the program had not been developed or provided to the governance committee. Analysis conducted by the ANAO showed Artbank's performance had been progressively declining across a number of key metrics since 2015. The audit was unable to find evidence (in the form of records or out-of-session considerations) that explained how the governance committee had discharged its duty of being 'responsible for the governance oversight of Artbank's activities'.⁴⁴
- 2.34 That the governance committee only met three times and did not consider the overall financial performance of the program, according to the ANAO, 'diminishes the department's management of the program and its performance'.⁴⁵

Recommendations and response from DITRDCA

- 2.35 The ANAO recommended DITRDCA implements an overarching business plan or wholistic program-wide strategy; and that the governance committee appropriately monitors Artbank's performance.⁴⁶
- 2.36 DITRDCA told the Committee it was now reviewing the existing Artbank Charter to assist with creating an overarching program-wide strategy that would pull together the client leasing, art acquisition and public programming arms of Artbank, and this would also include a review of Artbank's approach to rates setting. According to DITRDCA, the strategic review would: better link all of Artbank's operations with CPR and PGPA Act requirements; ensure there is a cohesive strategic direction for the Artbank program supported by appropriate governance arrangements; and define appropriate performance measures against which to gauge the overall performance

⁴³ ANAO, *Artbank report*, p. 26.

⁴⁴ ANAO, *Artbank report*, pages 8–9, 23, 26–27.

⁴⁵ ANAO, *Artbank report*, p. 8.

⁴⁶ ANAO, *Artbank report*, p. 11.

of Artbank. As part of this work, DITRDCA would also consider an appropriate integrity framework for the work undertaken by the Artbank program.⁴⁷

2.37 DITRDCA advised the aim was to have the review completed by the end of 2023, with implementation of new and revised elements from 1 January 2024.⁴⁸

2.38 The Artbank governance committee would meet quarterly and reports on relevant areas of program achievements and operations would be tabled for consideration.⁴⁹

Acquisitions

Audit findings

2.39 Though procurement is a core activity of the Artbank program, the ANAO stated:

The department's approach to acquisitions under the Artbank program has not been in accordance with the Commonwealth Procurement Rules (CPRs) and has not demonstrated strong alignment with the targets established in the program's collection plan designed to illustrate the department's strategy to deliver against the program's policy intent. Key shortcomings in the acquisition approach were: no open or competitive processes; value for money not being documented or demonstrated; and limited public reporting. Alignment with the program's purpose and objectives was not evident due to deviations from the department's Collection Plan for the Artbank program.⁵⁰

2.40 The audit found shortcomings across the procurement process, including in planning, identifying artworks to acquire, and recording procurement decisions and approvals.⁵¹

2.41 In general, the ANAO found the effectiveness of the Artbank program in supporting artists through its acquisitions has progressively declined over time—fewer artworks are being purchased; acquisition budgets have declined; and the cohorts of artists intended to be targeted through the Collection Plan are often not the artists actually targeted by the acquisition approach.⁵²

Planning the procurement

2.42 **Determining a need:** Under the CPRs, procurement commences when a need has been identified and a decision made on the procurement requirement.⁵³ Though the Artbank Collection Plan contains 'five primary marker of breadth'⁵⁴ against which the

⁴⁷ DITRDCA, *Submission 4*, pages 2, [5]; Mr Philip Smith, DITRDCA, *Committee Hansard*, 8 September 2023, p. 38.

⁴⁸ DITRDCA, *Submission 4*, p. [5]; Mr Philip Smith, DITRDCA, *Committee Hansard*, 8 September 2023, p. 38.

⁴⁹ DITRDCA, *Submission 4*, pages 3, [5], [8].

⁵⁰ ANAO, *Artbank report*, p. 28.

⁵¹ ANAO, *Artbank report*, pages 29–39.

⁵² ANAO, *Artbank report*, pages 41–42.

⁵³ ANAO, *Artbank report*, p. 29; Department of Finance, *CPRs*, section 2.7.

⁵⁴ The Artbank Collection Plan, first developed in July 2019, is used to guide the program's acquisition needs by establishing 'five primary markers of breadth': artwork medium; regional distribution; diversity

collection profile is assessed to identify gaps to inform future acquisition decisions, it was not used to guide acquisition activity. Acquisitions have not demonstrated ‘strong alignment’ with targets (associated with the breadth markers) in the collection plan. More broadly, record keeping on the markers was incomplete—for some markers, no data had been collected.⁵⁵ The ANAO’s analysis showed ‘the requirements established in the Collection Plan ... were not effectively used to scope the individual procurements undertaken or any approaches to market’.⁵⁶

- 2.43 **Estimating the value of the procurement:** Under DITRDCA’s procurement-related Accountable Authority Instruction (AAI),⁵⁷ officials undertaking a procurement must comply with DITRDCA’s *Procurement Guide* and other relevant instructions, policies and procedures; and estimate the expected value of the procurement to determine the appropriate procurement method—open or limited tender.⁵⁸ The consequence of these requirements is that procurements of more than \$80,000 must be conducted by open tender and in accordance with Division 1 and Division 2 of the CPRs, unless the procurement is exempt under Appendix A of the CPRs or meets one of the conditions in paragraph 10.3 for limited tender.⁵⁹
- 2.44 **Selecting the procurement method:** Under the relevant policies and legal requirements, officials are encouraged to conduct research to understand the market, including what competition exists, and determine the most appropriate approach to market. In addition to the estimated value of the artworks to be acquired, the ANAO suggested the fact the Artbank program is an artist support program is relevant when determining the most appropriate procurement method to adopt, as required by the CPRs.⁶⁰
- 2.45 The ANAO found that despite the annual acquisitions budget being at least \$400,000 over the past six years, providing a reliable estimate for the planning of procurement activities, acquisitions had been ad hoc and not undertaken in a coordinated or open approach. This approach, the ANAO stated, ‘is at odds with the CPRs and DITRDCA’s procurement guide’.⁶¹ Further, the research activities undertaken by Artbank staff (discussed below) are intended to identify artworks for purchase, not to inform decisions about the procurement method most appropriate to adopt.⁶²
- 2.46 **Approaching the market:** DITRDCA’s Procurement Guide (August 2021) states procurement plans (which are approvals to approach the market) are mandatory for all procurements and must contain sufficient information on the project objectives,

demographics of artist; career state; and market from which the art is acquired. The targets associated with each marker have been established to support program goals around collection diversity. ANAO, *Artbank report*, pages 29–30.

⁵⁵ ANAO, *Artbank report*, pages 8, 28–29, 44–46.

⁵⁶ ANAO, *Artbank report*, p. 30.

⁵⁷ The Accountable Authority Instruction (AAI) was established in accordance with section 20A of the PGPA Act. ANAO, *Artbank report*, p. 30.

⁵⁸ ANAO, *Artbank report*, p. 30.

⁵⁹ ANAO, *Artbank report* p. 30.

⁶⁰ ANAO, *Artbank report*, p. 31.

⁶¹ ANAO, *Artbank report*, p. 31.

⁶² ANAO, *Artbank report*, pages 31–32.

methodology and risk for the delegate to make an informed decision about whether undertaking the procurement would be value for money, this includes documenting and agreeing the procurement method to be used prior to approaching the market. The ANAO found approvals to approach the market (procurement plans) had not been documented for Artbank program-related procurement activities.⁶³

- 2.47 Further, Artbank policies and strategy documents do not address how the art market is to be notified of a procurement opportunity or approached to participate. The ANAO found the policy and strategy documents do not 'refer to, or otherwise seek to promote open, competitive and transparent processed'.⁶⁴ As a consequence, Artbank has not undertaken coordinated approaches to market or open calls for submissions from artists or their representatives.⁶⁵
- 2.48 The CPRs do not require artworks to be procured via open tender. However, the ANAO stated such an approach would provide artists fair and equitable access to opportunities to compete for the purchase of their work; and it would enhance transparency and integrity.⁶⁶ In short, it would help ensure the Artbank procurement process was compliant with the requirements of the CPRs.

Identifying artworks to acquire

- 2.49 **Evaluating candidates for acquisition, including the value for money proposition:** The CPRs stated entities should include relevant evaluation criteria in request documentation to enable the proper identification, assessment and comparison of submissions on a fair, common and appropriately transparent basis.⁶⁷ The ANAO found the Artbank Acquisition Policy and Collection Plan contained the necessary information to develop an appraisal criteria for evaluating acquisitions.⁶⁸
- 2.50 Assessing value for money, under the CPRs, requires consideration of whole of life costs (including initial purchase price, maintenance, decommissioning, remediation, disposal) and benefits, and fitness for purpose. Further, the ANAO stated Artbank's specific business requirements included considerations such as: rentability, appeal to client base, alignment with collection goals, suitability to the rental nature of the collection, and collection management.⁶⁹
- 2.51 The audit found procurements, when they occurred, were not open or transparent, and there was no competitive process. Officers visited galleries, biennales and art fairs, examined catalogues and contemporary art journals, received unsolicited proposals, applied their expert knowledge and identified work suitable for acquisition.

⁶³ ANAO, *Artbank report*, p. 32.

⁶⁴ ANAO, *Artbank report*, p. 32.

⁶⁵ A public version of the Artbank Collection Plan is available on the Artbank program's website. However, the annual procurement activities associated with it are not included in it or foreshadowed as part of the Department's annual procurement plan on AusTender. ANAO, *Artbank report*, pages 32–33.

⁶⁶ ANAO, *Artbank report*, p. 33.

⁶⁷ CPRs, section 7.12.

⁶⁸ ANAO, *Artbank report*, p. 35.

⁶⁹ ANAO, *Artbank report*, p. 35.

This was undocumented.⁷⁰ Artbank's consideration of unsolicited proposals is not documented, they are not formally assessed or their associated risks outlined and reported on; it is not clear which or how many acquisitions have resulted from unsolicited proposals.⁷¹

- 2.52 The ANAO stated there is no transparent assessment and comparison of available artworks. Acquisition proposals are generated only for preferred artworks already determined by Artbank program officers. The ANAO found:

The proposals do not:

- consider alternative artworks, or alternatively, apply a score against a baseline standard expected for the program's acquisitions;
- inform the delegate on how the work was identified and selected;
- include a value for money assessment;⁷² and
- apply weightings to the considerations provided by the three program teams. There is no evidence that comparative analysis is applied to the considerations and selection of artworks for acquisition to demonstrate competition.⁷³

- 2.53 The report includes a case study of an acquisition meeting in September 2022, attended by 13 people, with three decision-makers identified in the records: Artbank Director, Curator, and Assistant Curator. The remaining staff participated in the discussion and voted on acquisition decisions.⁷⁴

- 2.54 The format of this meeting had changed from previous meetings following the ANAO's queries about written comparative evaluations and value for money assessments. DITRDCA's adjusted its approach by recording in writing the group of artworks to be assessed and considered to determine which works to propose to the delegate for approval. The acquisition meeting was to discuss potential acquisitions identified at the Sydney Contemporary Art fair. Information on seven artworks from six artists were circulated beforehand to the attendees; an additional artwork was introduced during the meeting.⁷⁵

Records from the meeting indicate that votes were taken against each artwork, with staff in attendance to indicate whether they agreed that that artwork was suitable for the collection or not. While concerns and other comments were noted, they were not clearly linked to assessment criteria nor the expertise of the staff making the contribution ... Where comments were reported to be 'overwhelming yes' there were no documented comments on the rentability,

⁷⁰ ANAO, *Artbank report*, pages 31–35.

⁷¹ ANAO, *Artbank report*, p. 34.

⁷² The ANAO found 'there is no available evidence demonstrating that value for money has been considered by the Department throughout its acquisition process'. ANAO, *Artbank report*, pages 29, 36.

⁷³ ANAO, *Artbank report*, pages 35–36.

⁷⁴ ANAO, *Artbank report*, pages 36–37.

⁷⁵ The information included artist name, location, artwork title and details, purchase price and expected rental price. ANAO, *Artbank report*, pages 36–37.

conservation needs/requirements of the work; alignment to Collection Plan; or any other value for money considerations.

Of the eight works considered in the meeting, six works were agreed by the majority of the officials in attendance to be 'suitable for the Artbank Collection'.

It is not clear from these records how this suitability was determined; which of the six works were to proceed to Acquisition Proposal; at what point a value for money assessment would be completed; and how (and when) the Artbank Collection Plan and budget limitations would be considered when determining which works to acquire, and where these decisions would be recorded.⁷⁶

Recording procurement decisions and approvals

2.55 DITRDCA's procurement guide, which is consistent with the CPRs, requires the documentation of how value for money was considered and achieved to be sufficient to justify the recommendation to the delegate.⁷⁷ The documentation should capture, under the CPRs, the requirement for the procurement; the process followed; how value for money was considered and achieved; relevant approvals; and relevant decisions and the basis for those decisions.⁷⁸

2.56 The ANAO could not find records of approvals and the rationale for decisions, for all acquisitions, especially for artworks valued under \$10,000. Further, the acquisition proposal template, required for all artworks since October 2018, does not include any reference to ensuring and recording how value for money was achieved in the absence of a competitive process.⁷⁹

Recommendations and response from Department

2.57 The ANAO recommended DITRDCA develops a fit for purpose procurement framework, which is consistent with the CPRs, including open and transparent opportunities for artists to submit their artwork, with clear records made at each step. DITRDCA noted this recommendation, stating it 'understands the Commonwealth Procurement Rules and is committed to abiding by them to ensure that acquisitions of artworks are made in compliance with the requirements ...'⁸⁰

2.58 As discussed above, the ANAO found there were several shortcomings in DITRDCA's approach to acquisitions, including the lack of open or competitive process.⁸¹ The use of competitive procurement processes is required by the CPRs, which state:

⁷⁶ ANAO, *Artbank report*, pages 36–37.

⁷⁷ ANAO, *Artbank report*, p. 37.

⁷⁸ CPRs, sections 7.3–7.4.

⁷⁹ ANAO, *Artbank report*, p. 37.

⁸⁰ ANAO, *Artbank report*, p. 41.

⁸¹ ANAO, *Artbank report*, p. 8.

Competition is a key element of the Australian Government's procurement framework. Effective competition requires non-discrimination and the use of competitive procurement processes.⁸²

- 2.59 The ANAO report suggested there 'would be benefit' in DITRDCA examining the acquisition approach taken by similar entities, such as the Canada Council Art Bank and entities such as the Australian Council, which employ open funding rounds and identify successful applicants through a peer assessment process.⁸³
- 2.60 In evidence to the Committee, DITRDCA did not undertake to make any substantive changes to its procurement practices. DITRDCA stated open tendering was 'not considered the primary procurement methodology'.⁸⁴ Rather, procurement by limited tender was the predominant procurement methodology 'as is the industry practice for most public art institutions'.⁸⁵ As noted by the ANAO, Artbank is not a public art collecting institution.⁸⁶
- 2.61 DITRDCA stated the Artbank team had 'recently had a conversation with the Canadian Art Bank' about their processes. It advised the Committee that as it agreed in 2006, while Artbank is 'happy to also consider alternative processes to the one we have', 'realistically' any alternative would be complementary. At the hearing DITRDCA stated maintaining the current arrangement 'ensures that we can make sure that Artbank is complying with its broader charter',⁸⁷ though it is not clear how this is the case, given the shortcomings identified by the ANAO. In particular, the ANAO found that acquisitions are not strongly aligned with the program's own collection plan and the effectiveness of Artbank in supporting artists through acquisitions has been progressively declining over time.⁸⁸
- 2.62 DITRDCA further justified its approach by stating it was mindful it had to be careful 'that ... [the acquisition process] doesn't become unwieldy and end up with poor results. A lot of the artists and works that are suitable for an Artbank arrangement are from galleries, and we'd need to be very careful about how that was working so that well-resourced galleries weren't the only source from any sort of process'.⁸⁹ It is possible an open and competitive tender process where any artist could submit work for consideration could deal with the potential for the acquisition process to be dominated by well-resourced galleries.
- 2.63 DITRDCA also contended a limited tender approach was consistent with the CPRs and provided for under Rule 10.3(d).⁹⁰ The ANAO states this rule exists due to the

⁸² Department of Finance, *CPRs*, section 5.1.

⁸³ ANAO, *Artbank report*, p. 37.

⁸⁴ The ANAO report did not recommend open tendering. See: Mr Grant Hehir, Auditor-General, ANAO, *Committee Hansard*, 8 September 2023, p. 38.

⁸⁵ ANAO, *Artbank report*, p. 41.

⁸⁶ ANAO, *Artbank report*, pages 41, 49, 52.

⁸⁷ Mr Philip Smith, DITRDCA, *Committee Hansard*, 8 September 2023, p. 38.

⁸⁸ ANAO, *Artbank report*, pages 28, 41–42.

⁸⁹ Mr Philip Smith, DITRDCA, *Committee Hansard*, 8 September 2023, p. 38.

⁹⁰ DITRDCA, *Submission 4*, p. [7]; ANAO, *Artbank report*, p. 41.

‘particular nature of artworks as original and unique articles (where there is no reasonable alternative or substitute)’.⁹¹

- 2.64 Rule 10.3, contained in Division 2 of the CPRs, is an exemption that allows for limited tender. Division 2 applies when a procurement exceeds \$80,000.⁹² The CPRs are clear that ‘the rules set out in Division 2 are additional to those in Division 1 and **must** not be interpreted or applied in a manner that diminishes or negates Division 1 [emphasis in original]’.⁹³ Division 1 contains the rules for all procurements, including: value for money; encouraging competition; conducting efficient, effective, economical and ethical procurement; and accountability and transparency. The CPRs state, ‘Officials of non-corporate Commonwealth entities **must** comply with the ‘rules for all procurements’ listed in Division 1, regardless of the procurement value’ [emphasis in original].⁹⁴
- 2.65 In response to DITRDCA declining to accept recommendation 4⁹⁵ and justifying it through reference to Rule 10.3(d), the ANAO commented:
- Rule 10.3(d) permits entities to conduct limited tenders for works of art ‘when the goods and services can be supplied only by a particular business and there is no reasonable alternative or substitute’. In considering the application of this Rule to the Artbank program, it is important to recognise that the focus of the Artbank program is on supporting contemporary Australian artists, including emerging artists, rather than seeking to acquire particular works of art.⁹⁶
- 2.66 The Auditor-General confirmed to the Committee that while there is an exemption with respect to art, ‘... it was for collections purposes, not necessarily for an artist development program’.⁹⁷
- 2.67 Regardless of whether Artbank legitimately applies Rule 10.3(d)(i) to avoid an open tender, under the CPRs, this rule cannot be used as a device to avoid undertaking a competitive procurement process.⁹⁸
- 2.68 More generally, the Auditor-General told the Committee with regard to Artbank: ‘you’d expect to see a documented procurement strategy which explains why you’ve chosen [the procurement method] ... if the objective of the program is to encourage new and emerging artists, how do you make sure that they know it’s happening and that people understand the processes around it ... If you’re not doing an open tender process, the rules require you to put the rationale within the rules for why you’re undertaking the procurement the way you are’.⁹⁹

⁹¹ ANAO, *Artbank report*, p. 41.

⁹² CPRs, section 9.7.

⁹³ Department of Finance, *CPRs*, section 10.

⁹⁴ Department of Finance, *CPRs*, section 3.5.

⁹⁵ The Department ‘noted’ the recommendation. ANAO, *Artbank report*, p. 41.

⁹⁶ ANAO, *Artbank report*, p. 41.

⁹⁷ Mr Grant Hehir, ANAO, *Committee Hansard*, 8 September 2023, p. 39.

⁹⁸ Department of Finance, *CPRs*, sections 3.5, 5.1, 10.

⁹⁹ Mr Grant Hehir, ANAO, *Committee Hansard*, 8 September 2023, p. 38.

2.69 DITRDCA did commit to improved documentation, and stated:

- it had refined its acquisition processes, documentation and compliance measures¹⁰⁰ by requiring explicit documentation of value-for-money considerations for acquisitions, and documenting the exhibitions, art fairs, catalogues and galleries visited to identify works for potential acquisitions
- curatorial meetings which discuss acquisitions are now minuted
- acquisition documentation has been revised to include: details of the artist, the artwork, artwork condition, rental accessibility, significance, evaluation against the criteria of the Artbank Collection Plan and Acquisition Policy, and a value-for-money assessment
- acquisition decisions are formally recorded and documented.¹⁰¹

2.70 Notwithstanding these actions, DITRDCA has not committed to undertake a comparative assessment of artworks, and it will not formally assess works not considered appropriate for procurement. DITRDCA confirmed to the Audit Office in November 2022 that only works intended for acquisition would be included in proposals 'as it would not be possible to document every work reviewed by the team'.¹⁰² The basis upon which DITRDCA might demonstrate a competitive process in compliance with the CPRs remains unclear.

2.71 When asked specifically to provide its methodology for assessing value for money, DITRDCA did not do so.¹⁰³ The only information DITRDCA provided was that it was 'enhancing capability around assessing value for money, through guidance material and dedicated Value for Money training, which was undertaken by SES employees in early 2022'.¹⁰⁴

2.72 In terms of transparency and providing notice to the market, DITRDCA stated Artbank had:

- run a series of information sessions called Artbank Unpacked that educated galleries, attendees of galleries and artists in general about how Artbank manages its acquisitions
- provided a link in DITRDCA's annual procurement plan to the Artbank website that contains the Collection Plan and the Acquisition Plan
- revising the Collection Plan to state the mechanisms for identifying works
- recently released an Artbank year in review—also on the website—which lists all acquisitions, including where they were purchased and the price
- included links on the website for represented and unrepresented artists that explain the Artbank process

¹⁰⁰ The Department did not identify when this had commenced.

¹⁰¹ DITRDCA, *Submission 4*, p. 2; DITRDCA, *Submission 4.2*, p. [11]; Ms Zoe Rodriguez, Director, Artbank, Creative Industries Branch, DITRDCA, *Committee Hansard*, 8 September 2023, p. 37.

¹⁰² ANAO, *Artbank report*, p. 32.

¹⁰³ DITRDCA, *Submission 4.2*, p. [11].

¹⁰⁴ DITRDCA, *Submission 4*, p. 4.

- established a regular series of 'Artbank Open' events at the Sydney and Melbourne premises.¹⁰⁵

2.73 In light of these actions, DITRDCA stated, 'We feel that we're covering the breadth of the market through that. We also attend galleries off catalogues, art fairs and the like. We feel through that mix and consideration of alternate mechanisms that we'll cover the full breadth of the market'.¹⁰⁶

Collection management

Audit findings

2.74 The ANAO found the management of the Artbank collection was insufficient to ensure the integrity of the collection and did not appropriately support artists or the reputation of Australian contemporary art:

- conservation activities are not consolidated, prioritised, committed and reviewed against a planned, wholistic schedule
- deaccessioning activities are not timely and rarely initiated, records of deaccessioning are unreliable
- integrity has been placed at risk by the absence of a policy to guide the management of digital or time-based artworks.¹⁰⁷

2.75 Under DITRDCA's Asset Accounting Policy, asset owners are responsible for the whole-of-life management of assets within their management area. The ANAO found 'limited consistency' between the asset management principles contained in the Asset Accounting Policy and Artbank's management of the collection. The Audit Office could not find evidence of: asset disposal and life-cycle management being integrated into strategic and organisation planning; of asset planning decisions being based on an 'evaluation of alternatives'; an effective control structure; clear accountability for asset condition, use and performance; or the principle of 'best available net return' guiding deaccessioning decisions.¹⁰⁸

Preservation and conservation

2.76 It was noted by the ANAO that as Artbank is a lending collection, all artworks are income generating assets, 'expected to be widely leased, transported frequently, and not held in storage for extended periods of time'. This means damage, loss and security preoccupations differ from those for a standard collecting institution.¹⁰⁹

¹⁰⁵ DITRDCA, *Submission 4*, p. 3; Mr Philip Smith, DITRDCA, *Committee Hansard*, 8 September 2023, pages 38–39.

¹⁰⁶ Mr Philip Smith, DITRDCA, *Committee Hansard*, 8 September 2023, pages 38–39.

¹⁰⁷ ANAO, *Artbank report*, pages 8, 48, 54, 60.

¹⁰⁸ ANAO, *Artbank report*, pages 49–50.

¹⁰⁹ ANAO, *Artbank report*, p. 49.

- 2.77 Artbank's preservation activities are focussed on artworks being prepared for lease, returning from lease, or identified as having high prospect of rentability. However, the ANAO found the information from individual condition checks was not consolidated or used to develop a preservation or maintenance plan for the collection; and for a range of reasons, the requirement for conservation activities was mostly identified when artworks were being prepared for lease to clients. This truncated the timeframe for repairs and often resulted in a sole-sourced arrangement for the conservation activity or the work being leased in its current state and flagged for conservation at the end of the lease.¹¹⁰
- 2.78 The audit found that prior to 2019, conservation treatments undertaken on artworks had not been recorded centrally in the collection management system, and despite the 2019 Artbank Preservation Policy stating Artbank had an 'ongoing and routine collection maintenance schedule' to help 'reduce the likelihood of serious damage to collection objects', the Audit Office was unable to locate evidence this was the case.¹¹¹ Absent a clear pipeline of conservation activity, the audit concluded it was difficult for DITRDCA to plan for and manage conservation activities more strategically.¹¹²

Deaccessioning

- 2.79 The audit identified deaccessioning as an 'essential collection management process with the capacity to increase the funds available for acquisition and conservation', and to manage and reduce ongoing expenses for conservation and storage.¹¹³
- 2.80 The ANAO found an update to the deaccession policy in October 2019 had raised the bar for deaccessioning and in so doing had limited the effectiveness of deaccessioning as a tool to manage the Artbank collection. Under the new policy, when an artwork has failed to lease for over ten years (previously, not leased to the full-term of the agreement for a period of five years), staff are to attempt to generate interest by reviewing lease fees and increasing the artwork's visibility, prior to considering deaccession against five criteria. The deaccessioning policy also no longer encourages the consideration of whole-of-life costs in deaccession decision-making.¹¹⁴
- 2.81 The ANAO noted that in 2006, Artbank had a 'vigorous and strategic approach to maintaining the integrity of the collection through its deaccessioning program' in respect to non-significant artworks in the collection. This was no longer the case. The ANAO suggested, 'a more active, systematic and strategic approach to deaccessioning would enable conservation and storage costs to be contained; and keep the collection manageable, appropriately sized, and suitable for renting'.¹¹⁵

¹¹⁰ ANAO, *Artbank report*, pages 48–49, 51.

¹¹¹ ANAO, *Artbank report*, pages 49–50.

¹¹² ANAO, *Artbank report*, p. 51.

¹¹³ ANAO, *Artbank report*, p. 54.

¹¹⁴ ANAO, *Artbank report*, p. 55.

¹¹⁵ ANAO, *Artbank report*, pages 55–56.

- 2.82 Where deaccessions were approved, the audit found deficiencies in the implementation of approvals and failures to obtain approvals prior to the sale of some artworks. Of 425 artworks approved for deaccessioning prior to 2014, 424 were returned to the status of 'accessioned' in 2021 and at July 2022, 28 were on loan and 260 available for lease. The remaining 136 were under continuing consideration for deaccession or had been approved again for deaccession and were pending disposal.¹¹⁶
- 2.83 The ANAO also examined an April 2018 approval by the Chief Financial Officer of the disposal by sale of 77 artworks that contained no indication in the approval minute that 76 of the artworks had been sold at least four years earlier.¹¹⁷
- 2.84 In part because of Artbank's deaccession process,¹¹⁸ which the ANAO said did not increase the public's awareness of and appreciation for Australian contemporary art, the audit stated DITRDCA's approach to collection management did not appropriately support artists or the reputation of Australian contemporary art.¹¹⁹

Collection integrity

- 2.85 Museum-standard registration practices of all individual objects and appropriate registration methods for recording technological items are required under Artbank's Preservation Policy. However, the audit found 15 artworks in the Artbank collection were duplicated copies of 14 unique time-based digital artworks.¹²⁰ Since 2012, Artbank had leased these 15 duplicate copies to six separate clients across 22 agreements, with one rented as recently as June 2022.¹²¹
- 2.86 The ANAO suggested the practice presented the following risks: overstatement of the collection; copyright implications; misleading clients who believed they were leasing a unique artwork; potential infringement of the artist's intellectual property; and bringing the Artbank collection into disrepute.¹²²
- 2.87 The Committee received evidence on this matter and had difficulty reconciling DITRDCA's position that 'multi-user leasing and duplicate copying of the video artworks could reasonably be implied based on a broad interpretation of the licence terms under the relevant Acquisition Agreements',¹²³ and internal communication within DITRDCA where the copies were identified as 'rogue'.¹²⁴
- 2.88 The Committee was told DITRDCA in 2019 had 'amended its practice in relation to the treatment of video artworks to reflect industry best practice' and duplicate copies

¹¹⁶ ANAO, *Artbank report*, p. 57.

¹¹⁷ ANAO, *Artbank report*, pages 57–58.

¹¹⁸ The audit contained significant detail on the manner in which artworks were deaccessioned. See: ANAO, *Artbank report*, pages 60–62.

¹¹⁹ ANAO, *Artbank report*, p. 60.

¹²⁰ ANAO, *Artbank report*, p. 62.

¹²¹ ANAO, *Artbank report*, p. 63.

¹²² ANAO, *Artbank report*, p. 63.

¹²³ DITRDCA, *Submission 4.1*, p. [1]; Mr Philip Smith, DITRDCA, *Committee Hansard*, 8 September 2023, p. 32.

¹²⁴ ANAO, *Artbank report*, p. 63.

that had been produced up until 2019 had been destroyed.¹²⁵ However, as noted above, the Audit Office found one of the copies was on rent in June 2022.¹²⁶

- 2.89 In August 2022, after queries were raised by the Audit Office, the director of the Artbank program advised staff:

Time based works we have in collection will now have 1 master file kept and ONLY 1 COPY to go to clients. The only possible exception is if we talk to the artist to get a licenced copy made, although this is not suggested. This is to be really clear.

All of the rogue copies which have been made over time will all be coming back and will be deaccessioned.¹²⁷

Recommendations and response from Department

- 2.90 The ANAO made two recommendations with regard to collection management. The first was that DITRDCA develops a conservation work plan with a more strategic and systemic approach to the conservation (or deaccessioning) of artworks, and maintains accurate data on condition checking and conservation activities.¹²⁸
- 2.91 DITRDCA did not agree with this recommendation, stating its existing conservation work plan and approach to conservation and deaccessioning of artworks was based on guidelines set by the world authority in this area, the International Council of Museums, and met industry practice. The approach recommended by the ANAO, DITRDCA believed, had significant resourcing implications for no discernible benefit. DITRDCA also stated the accuracy of its conservation and deaccessioning records was consistent with industry standard.¹²⁹
- 2.92 The ANAO pointed out the conservation requirements for a program established to support contemporary artists by acquiring and leasing out their work differed in some important respects from those of a collecting institution, like a museum or art gallery. Artworks in a rental scheme are income generating assets expected to be leased and transported. Further, it stated DITRDCA's practices did not in fact accord with guidance from the International Council of Museums.¹³⁰
- 2.93 The audit also recommended DITRDCA revisits its deaccessioning policy to ensure it is consistent with the Artbank program objectives, including the maintenance of an appropriately sized collection that is suitable for leasing. DITRDCA declined to revise its deaccessioning policy, stating revisions would be considered from time to time and the policy would be updated to reflect industry best practice and compliance with

¹²⁵ DITRDCA, *Submission 4.1*, p. [1].

¹²⁶ ANAO, *Artbank report*, p. 63.

¹²⁷ ANAO, *Artbank report*, p. 63.

¹²⁸ ANAO, *Artbank report*, p. 52.

¹²⁹ ANAO, *Artbank report*, p. 52.

¹³⁰ ANAO, *Artbank report*, p. 52.

Commonwealth finance laws and policies. It stated Artbank's collection size was sufficient and had fit-for-purpose storage.¹³¹

- 2.94 The ANAO responded that if Artbank's collection size is sufficient, the rate of deaccession needed to reflect the rate of acquisition—this was not the case. It also pointed out that between 1 July 2015 and 30 June 2022, nearly 60 per cent of the collection was either not leased at all or had spent more time stored than rented and as such:

This situation indicates that an improved approach to deaccessioning would enable conservation and storage costs to be contained, improve the focus of the collection on work that is suitable for renting and (through sales) bring in additional revenue to enable greater support to be provided to emerging artists through new acquisitions.¹³²

Leasing

Audit findings

- 2.95 The ANAO found both rental revenue and Artbank's client base have been in decline since 2017–18,¹³³ and DITRDCA's approach to leasing the Artbank collection had not been appropriate:

- DITRDCA had leased approximately 40 percent of the collection where its target was 70 per cent; between 2015 and 2022, nearly 30 per cent of the collection was not leased at all, and 29 per cent spent more time stored than rented¹³⁴
- the recorded and advertised rental prices for over 50 per cent of the available artworks did not align to the most recent rent price calculator¹³⁵
- there had not been appropriate documentation of the approach to setting rental prices, including discounts; where there had been deviations from the pricing methodology, there was no recorded rationale as to why.¹³⁶

- 2.96 The ANAO also stated:

Achievement of the full breadth of the program's purpose has not been a focus, with no reporting to provide assurance that the department's approach to leasing supports artists or the reputation of contemporary Australian art.¹³⁷

- 2.97 The 2006 audit had found the pricing structure for artwork leasing 'could be more closely aligned to a documented strategy of meeting [the Artbank program's]

¹³¹ ANAO, *Artbank report*, p. 59.

¹³² ANAO, *Artbank report*, p. 59.

¹³³ ANAO, *Artbank report*, pages 65, 73.

¹³⁴ ANAO, *Artbank report*, p. 65.

¹³⁵ ANAO, *Artbank report*, p. 67.

¹³⁶ ANAO, *Artbank report*, p. 65.

¹³⁷ ANAO, *Artbank report*, p. 65.

objectives'.¹³⁸ The ANAO could not find records that any such review or analysis was undertaken to ensure alignment between the pricing structure and the program's strategies. The ANAO was of the view, 'such a review would provide the department with assurance that all rental price considerations have been fully canvassed and carefully considered'.¹³⁹

- 2.98 The audit also found DITRDCA measured the success of the leasing program by the number of artworks leased, and focused the program on supporting artists through new acquisitions. Artbank was established to 'provide direct support to Australian contemporary artists through the acquisition of their work and to promote the value of Australian contemporary art to the broader public'.¹⁴⁰
- 2.99 The ANAO found 'the majority of the Artbank collection spends the majority of its available time in storage' and the Business Plan does not include strategies to promote and activate interest in the unrented portion of the collection.¹⁴¹ This limits Artbank's capacity, the ANAO wrote, to actively support artists or the reputation of Australian contemporary art.¹⁴²
- 2.100 DITRDCA does not collect data on whether the display location for leased artworks is public or private.¹⁴³ DITRDCA does not have a strategy to identify, target, and tailor offerings to clients that display leased works in public locations, to both support artists and the reputation of Australian contemporary art as required under the Charter.¹⁴⁴
- 2.101 DITRDCA did not directly respond to a question from the Committee on whether it collected data on the display locations of leased artworks (that is, public or private locations). DITRDCA responded that lease agreements recorded the precise location of each artwork, including the institution address. DITRDCA said it placed 'works in diverse non-museum settings to reach new audiences who might not visit traditional galleries or arts institutions'.¹⁴⁵

Recommendations and response from DITRDCA

- 2.102 DITRDCA agreed to the two recommendations relating to leasing, specifically that it: undertakes a review of the rental pricing methodology; and reviews its approach to providing discounts.¹⁴⁶

¹³⁸ ANAO, *Artbank report*, p. 66.

¹³⁹ ANAO, *Artbank report*, p. 67.

¹⁴⁰ Office for the Arts, 'About Artbank', Department of Infrastructure, Transport, Regional Development, Communications and the Arts, www.artbank.gov.au/about-artbank, viewed 6 February 2023.

¹⁴¹ ANAO, *Artbank report*, pages 75–76.

¹⁴² ANAO, *Artbank report*, p. 75.

¹⁴³ ANAO, *Artbank report*, p. 77.

¹⁴⁴ ANAO, *Artbank report*, p. 78.

¹⁴⁵ DITRDCA, *Submission 4.2*, p. [9].

¹⁴⁶ ANAO, *Artbank report*, pages 69, 72.

Ethical behaviour

- 2.103 Notably, despite the findings of the audit, in particular that acquisitions had not been in accordance with the CPRs and thus finance law, DITRDCA told the Committee ‘... the ANAO made no finding of unethical behaviour in relation to the management of Artbank ...’¹⁴⁷ When asked to expand on this statement, a departmental official stated:

Certainly, the department would like everything it runs to be 100 per cent compliant with everything. That is the end goal of all frameworks and all governance, and it's certainly the goal of all integrity frameworks. There are some gaps that were identified in the audit report, and we've undertaken to fix and work on those and have an implementation plan to deliver on that. I guess it comes back to the question about whether we think there was anything that was being done deliberately or with malice, and our answer is: no, we do not think so. We think anything that was not fully compliant was either a misunderstanding or just a lack of documentation, or not necessarily understanding the full process, which could go back to simple things like training or documenting things.¹⁴⁸

- 2.104 When asked again in a question on notice why DITRDCA was of the view there were no findings of unethical behaviour, DITRDCA did not answer the question and responded instead that it had a ‘focus on developing a pro-integrity culture which maintains the highest standard of ethical behaviour’.¹⁴⁹
- 2.105 When asked to define ethical behaviour, DITRDCA stated it had adopted the APSC’s definition of integrity: ‘The pursuit of high standards of professionalism, which in turn means doing the right thing at the right time to deliver the best outcomes for Australia sought by the government of the day’.¹⁵⁰
- 2.106 The Audit Office stated that in its experience, the existence of independent external audit, and the accompanying potential for scrutiny improves performance, and that improvements in administrative and management practices usually occur in anticipation of an audit, during audit engagement, as interim findings are made, and/or after the audit has been completed and formal findings are communicated. During the course of the audit of Artbank, the ANAO did not observe changes in DITRDCA’s approach to the acquisition, management and leasing of artworks by Artbank.¹⁵¹

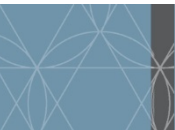
¹⁴⁷ DITRDCA, *Submission 4*, p. 2.

¹⁴⁸ Mr Philip Smith, DITRDCA, *Committee Hansard*, 8 September 2023, p. 41.

¹⁴⁹ DITRDCA, *Submission 4.1*, p. [21].

¹⁵⁰ DITRDCA, *Submission 4.1*, p. [21].

¹⁵¹ ANAO, *Artbank report*, p. 81.



3. Probity in grants - Community Health and Hospitals Program

- 3.1 Announced on 12 December 2018, the \$1.25 billion Community Health and Hospitals Program (CHHP) was to reduce pressure on community and hospital services by funding projects in four areas:
- specialist hospital services
 - drug and alcohol treatment
 - preventive, primary and chronic disease management
 - mental health.¹
- 3.2 At November 2022, the Australian National Audit Office (ANAO) found there had been 171 CHHP and associated projects approved between 2018–19 and 2020–21,² with the funding delivered through National Partnership Agreements (NPAs), and through grants to Primary Health Networks (PHNs) and non-government organisations (NGOs).³ The grants were for both service delivery and infrastructure projects. At September 2023, in 102 of the 171 projects, services were being delivered (39 projects) or the project had reached completion (63 projects).⁴
- 3.3 According to the Department of Health and Aged Care (Health), were 63 NPAs valued at \$1.07 billion; 25 agreements with PHNs valued at \$583 million; and 83 projects funded through national NGOs totalling \$169.9 million. While there were expression of interest (EIO) processes for the NPAs (sent to states and territories on 24 December 2018) and PHNs (sent on 2 January 2019), there was no EOI process for NGOs.⁵
- 3.4 The projects funded through the CHHP were selected by the minister's office, based on EOIs submitted to Health, and proposals received by the Minister for Health's office.⁶ The grant proposals were not put forward as a new policy proposal and not formally considered by Cabinet. They were instead endorsed via correspondence from the Prime Minister to the Minister for Health and announced as part of the 2019–20 Budget. Health then developed grant guidelines and sought advice from the

¹ Australian National Audit Office (ANAO), *Administration of the Community health and Hospitals Program*, No. 31 2022–23, hereafter CHHP report, pages 7, 14.

² \$1.25 billion was announced during the 2018–19 Mid-Year Economic and Fiscal Outlook, and an additional \$747 was made in the 2019–20 Budget. ANAO, *CHHP report*, pages 14–15.

³ ANAO, *CHPP report*, p. 15.

⁴ Mr Craig Chalmers, Assistant Secretary, Department of Health and Aged Care (Health), *Committee Hansard*, 8 September 2023, p. 16.

⁵ Ms Jessica Pratt, Assistant Secretary, Health, *Committee Hansard*, 8 September 2023, p. 21.

⁶ ANAO, *CHHP report*, p. 14.

Australian Government Solicitor (AGS) on the constitutional and legislative risks associated with the grants.⁷

- 3.5 The ANAO undertook the audit to provide assurance to the Parliament on the effectiveness of CHHP administration, including compliance with the Commonwealth Grant Rules and Guidelines (CGRGs).⁸
- 3.6 The ANAO found Health's administration of the CHHP was ineffective, and fell short of ethical requirements:
- there were deliberate breaches of the relevant legal requirements and the principles underpinning them
 - the classification of the majority of CHHP grants was not appropriately justified
 - no grant opportunity guidelines were developed for seven of 108 CHHP grants, and in at least three instances this represented a deliberate decision by senior management to not comply with finance law
 - controls for, and reporting of, non-compliance with finance law were insufficient
 - where grant opportunity guidelines were produced, they were not fully consistent with the principles of robust planning, transparency and probity in the CGRGs
 - there was no appropriate assessment of risk
 - multiple grants were recommended for funding prior to confirmation there was lawful authority, or despite knowing there was no legislative authority
 - recommendations were made to government to fund grants based on assessment processes that were not fully consistent with the requirements under the grant opportunity guidelines and CGRGs
 - application processes were not fully consistent with the principle of achieving value for money
 - there was limited due diligence prior to recommending funding
 - obligations to publish grant awards on GrantConnect were not met in a timely and accurate manner
 - executive oversight, risk and fraud management were deficient
 - monitoring and evaluation arrangements were only partly effective.⁹
- 3.7 This chapter discusses Health's administration of the grants to PHNs and NGOs¹⁰ by examining some of the key ethical breaches the ANAO identified in its report with regard to: classification of grants; grant opportunity guidelines; the assessment and selection process; and legal authority. Throughout the chapter, key legislative and

⁷ Health, *Submission 7.4*, pages [4]–[5].

⁸ Although not addressed here, the audit examined arrangements made through NPAs and the alignment of CHHP with the principles of the Federation Funding Agreements Framework. ANAO, *CHHP report*, p. 7.

⁹ ANAO, *CHHP report*, pages 6, 8–9, 38.

¹⁰ Primary Health Networks (PHNs) and non-government organisations (NGOs) received funding for 108 projects. ANAO, *CHHP report*, p. 20.

ethical requirements associated with grants administration, and Health's responses to the issues raised, are discussed. The chapter is not an exhaustive examination of all the issues raised by the ANAO, but a selection of some of the key points relevant to considerations of probity and ethics.¹¹

Legal obligations

- 3.8 The CGRGs are issued by the Finance minister under section 105C of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act)¹² and are legally binding on officers. Under subsection 13(4) of the *Public Service Act 1999* (PS Act), officers are required to comply with all applicable Australian laws.¹³ The PGPA Act states, 'to avoid doubt, the finance law is an Australian law for the purposes of subsection 13(4) of the *Public Service Act 1999* ...'.¹⁴ Finance law is defined in the PGPA Act as: the PGPA Act, the rules, any instrument made under the PGPA Act, or an Appropriation Act.¹⁵ The CGRGs are an instrument made under the PGPA Act.¹⁶
- 3.9 As with procurement, the objective of grants administration is to promote proper (efficient, effective, economical and ethical) use and management of public resources.¹⁷
- 3.10 This objective is to be achieved through: compliance with the relevant legislation, policy and reporting frameworks for grant administration; whole-of-government and individual entity grants administration practices; and the application of seven key principles for better practice grants administration. The seven key principles are: robust planning and design; collaboration and partnership; proportionality; outcomes orientation; achieving value with relevant money; governance and accountability; probity and transparency.¹⁸ Entities must put in place practices and procedures to ensure grants administration is conducted in a manner consistent with the seven key principles.¹⁹
- 3.11 In grants administration, probity and transparency is achieved in part by ensuring decisions are impartial, appropriately documented and reported, publicly defensible, and lawful.²⁰

¹¹ The ANAO report also contains an examination of the expenditure made through NPAs and identifies several shortcomings in Health's administration, including in project selection, advice to the minister, and the detail and milestones contained in the NPAs. This is not discussed in this chapter.

¹² Department of Finance, *Commonwealth Grants Rules and Guidelines*, Department of Finance, Canberra, 2017, hereafter CGRGs, section 1.1.

¹³ *Public Service Act 1999* (PS Act), section 13(4).

¹⁴ *Public Governance, Performance and Accountability Act 2013* (PGPA Act), section 32.

¹⁵ PGPA Act, section 8.

¹⁶ CGRGs, p. 3.

¹⁷ CGRGs, section 2.1; *Public Governance Performance and Accountability Act* (PGPA Act), section 8.

¹⁸ CGRGs, section 2. See also, sections 6–13.

¹⁹ CGRGs, section 1.4, 6.3.

²⁰ CGRGs, section 13.

- 3.12 Further obligations under the CGRGs and PGPA Act are discussed as relevant below.

Key findings of the audit

Classification of grants

Ethical considerations

- 3.13 Under the CGRGs, officials should consider the options available for the selection of grant recipients, including: open competitive funding rounds; targeted or restricted competitive funding rounds; a non-competitive, open process; demand-driven or 'first-in first-served'; a closed non-competitive process; or one-off grants determined on an ad hoc basis, usually by ministerial decision.²¹ Regardless of the classification, the CGRGs apply to all forms and types of grants.²²
- 3.14 According to the CGRGs, a one-off/ad hoc grant is 'designed to meet a specific need, often due to urgency or other circumstances'.²³ In its report, the ANAO pointed out that while one-off grants are usually made by ministerial decision, the fact a grant is made as a result of a ministerial decision does not automatically classify it as an ad hoc grant.²⁴
- 3.15 The CGRGs acknowledge in some circumstances it may be appropriate to use a non-competitive and/or a non-application based process. However, officials should document why this approach has been used.²⁵ Acting with probity in grants administration also involves transparency, that is, providing reasons for decisions and the provision of two-way information to government, the Parliament, potential grantees, grantees, beneficiaries and the community. Transparency, according to the CGRGs, 'provides assurance that grants administration is appropriate and that legislative obligations and policy commitments are being met'.²⁶

Audit findings

- 3.16 Health classified the 108 grants to PHNs and NGOS as follows:²⁷
- one-off/ad-hoc – 69
 - closed non-competitive – 5

²¹ Unlike other grant classifications, it is not a requirement that grant opportunity guidelines for one-off/ad hoc grants to be published, though they must still be prepared. ANAO, *CHHP report*, p. 40; CGRGs, section 13.11.

²² CGRGs, section 2.4.

²³ CGRGs, p. 6 (footnote 9).

²⁴ ANAO, *CHHP report*, p. 40.

²⁵ CGRGs, section 13.13.

²⁶ CGRGs, section 13.2.

²⁷ While there was an EOI process for the grants to PHNs, there was no EOI process for grants to NGOs. See: Ms Jessica Pratt, Health, *Committee Hansard*, 8 September 2023, p. 21.

- targeted non-competitive – 18 (which is not a category contained in the CGRGs)
 - open competitive – 9
 - not classified – 7.²⁸
- 3.17 Contrary to CGRG requirements, Health did not document the rationale for using one-off/ad hoc grants and the ANAO was of the view ‘the classification generally did not align with guidance for ad hoc/one-off grants’.²⁹
- 3.18 Health advised the ANAO it had classified the majority of grants as one-off/ad hoc because ‘CHHP and associated grants were government decisions’.³⁰ As noted above, the fact a grant decision has been made by a minister is not sufficient to classify it as a one-off/ad hoc. Even so, the classification did not correspond with the guidance in the CGRGs for one-off/ad hoc grants, specifically: the CHHP ‘was not responding to an urgent or unforeseen circumstance and the program need was not specific’. The ANAO wrote that a characteristic of the December 2018 CHHP announcement was its ‘broad objectives for community health and hospitals projects’.³¹
- 3.19 In September 2019, Health did seek advice from the Department of Finance on whether draft CHHP mental health grant opportunity guidelines were consistent with the CGRGs. In that instance, Finance advised the proposed one-off/ad hoc classification would more appropriately be classified as a ‘closed non-competitive’ grant because the opportunity was only available to those listed in the guidelines. Though Health noted the advice, it did not alter its categorisation or explain its rationale for not doing so. The ANAO found internal Health correspondence relating to this advice, which referred to ‘similar feedback on “the remaining guidelines”’.³²

Grant opportunity guidelines

Ethical considerations

- 3.20 Probity and transparency are key principles for grants administration and entities are required to behave consistently with these principles, which involves applying and complying with public sector values and duties such as honesty, integrity, impartiality and accountability.³³ Entities are also required to demonstrate robust planning and design, which underpins efficient, effective, economical, and ethical grants administration.³⁴

²⁸ ANAO, *CHHP report*, p. 40. See also: footnote 45.

²⁹ ANAO, *CHHP report*, p. 40.

³⁰ ANAO, *CHHP report*, p. 40.

³¹ ANAO, *CHHP report*, p. 40.

³² ANAO, *CHHP report*, pages 40–41; footnote 46.

³³ CGRGs, sections 1.4, 6.3, 13.

³⁴ CGRGs, section 7.

- 3.21 Decisions relating to grant opportunities are to be appropriately documented and reported, publicly defensible, and lawful.³⁵
- 3.22 Under finance law, grant opportunity guidelines are required for all grants, including one-off or ad hoc grants, and they must be consistent with the CGRGs.³⁶ Grant opportunity guidelines establish key requirements for grant opportunities including grant objectives, grant assessment and selection criteria, indicative reporting and acquittal requirements, and funding approval requirements. They are intended to provide sufficient information to inform those who are considering applying for a grant.³⁷

Audit finding—failure to have grant opportunity guidelines in place

- 3.23 The audit report found Health did not develop grant opportunity guidelines for seven of 108 CHHP grants to PHNs and NGOs, and in at least three instances this represented a deliberate decision by senior management to not comply with finance law. Health acknowledged the Executive Board was aware of noncompliance at the time.³⁸
- 3.24 In October 2019, officials proposed that four grants be made without grant opportunity guidelines in place (three were awarded).³⁹ The decision not to comply with the CGRGs was made in the context of concerns raised by the responsible First Assistant Secretary with the responsible Deputy Secretary that ‘there was a risk that these grants [several mental health-related CHHP grants] would be delayed by the requirements of the CGRGs’.⁴⁰
- 3.25 The audit found email correspondence that indicated the Deputy Secretary had discussed the concern about delays with the Secretary and other Deputy Secretaries during a regular Executive Board meeting (though the minutes did not record this discussion). The Deputy Secretary recorded their understanding of discussions at the Executive Board meeting in an email to the First Assistant Secretary, including that: previous approvals had been made by the Deputy Secretary for CHHP grants to ‘progress without full compliance’, and ‘drafting and approval of [grant opportunity guidelines] should not delay prompt execution’. The Deputy Secretary acknowledged this would constitute a breach of CGRG requirements, and requested each use of this approach be subject to their approval.⁴¹ The ANAO was unable to locate any report in Health’s internal breach recording system or to the Audit and Risk Committee of these three breaches.⁴²

³⁵ CGRGs, section 13.3.

³⁶ CGRGs, sections 4.4, 9.3; ANAO, *CHHP report*, p. 41.

³⁷ CGRGs, section 8.7; ANAO, *CHHP report*, p. 21 (footnote 16).

³⁸ ANAO, *CHHP report*, pages 41–42.

³⁹ Of the four grants proposed to be created without grant opportunity guidelines, three were awarded and one did not proceed. ANAO, *CHHP report*, p. 42.

⁴⁰ ANAO, *CHHP report*, pages 41–42.

⁴¹ ANAO, *CHHP report*, pages 41–42.

⁴² ANAO, *CHHP report*, p. 43.

3.26 During the inquiry, Health told the committee:

The activities in question were related to suicide prevention and mental health—a high priority. They had been announced. They were recipients that were known. The concern was that to establish the guidelines and set up various necessary mechanisms would take a significant amount of time. The intent, as I understand from the officer, was to do some of these things in parallel in order to provide that greater assistance. The clear finding—and I think the finance law is very clear—was that the sequencing was wrong and a different solution should have been sought ... it is very clear—and this is the point that the ANAO made—that that is the wrong way to actually do it.⁴³

3.27 Noncompliance was not limited to CHHP. Across all departmental grants between 1 July 2019 and 28 July 2022, Health internally reported breaching the CGRG obligation for grant opportunity guidelines to be in place before awarding grants 24 times; in 12 of the 24 breach reports, approval to breach the CGRG requirement was provided by a senior executive officer prior to the breach occurring.⁴⁴ Health told the ANAO it considered the 24 occurrences of non-compliance to be ‘infrequent’ and not meeting the definition of ‘systemic’; non-compliance had been ‘in response to a decision of government’; it occurred in a context where complying with the CGRGs would result in ‘delays [that] would mean the project not commencing in the timeframe announced’.⁴⁵

3.28 It was not until the final stages of the audit that Health identified the three instances of non-compliance with finance law in 2019-20 directly related to CHHP as ‘significant,’ and these were reported to the Minister for Health and the Minister for Finance on 9 February 2023.⁴⁶

3.29 At the hearing on 8 September 2023, Health suggested the Executive Board had not been aware of the nonreporting of the deliberate noncompliance (discussed above in paragraphs 3.23–3.25). In one instance, Health explained its actions as such:

In the case of what was found during the audit process, which I think came as a surprise to us all, there were three grants being looked at where there was noncompliance and that had not been reported through the voluntary reporting system of noncompliance. When the ANAO brought that to our attention in October-November 2022, we looked at the guidance around ‘significant’, because there are various considerations. ‘Significant’ goes to materiality—the volume, the value of what’s involved. We looked at it through that lens. In the context of that three-year period it was about 22,000 grants, but in the one year, if you just limit it to 2018-19, I think there were around 12,000 grants established ... The value, back then, was about \$7 billion. It came to \$14 million; something like that.

⁴³ Mr Blair Exell, Deputy Secretary, Health Strategy, First Nations and Sport, Health, *Committee Hansard*, 8 September 2023, p. 18.

⁴⁴ ANAO, *CHHP report*, p. 41.

⁴⁵ ANAO, *CHHP report*, p. 43.

⁴⁶ ANAO, *CHHP report*, p. 43. For case study 2, see pages 41–42.

Compared to those criteria, we didn't think it represented 'significant'. But when you then turned to the other elements—the nature of the noncompliance, the fact that we weren't aware of it, and that there was this sense of intentionality and the reputational risk that would represent—we assessed it as being significant.⁴⁷

- 3.30 Health confirmed to the ANAO it had taken a number of actions, including: directing senior management that non-compliance of the nature described was not appropriate; establishing a mandatory performance expectation in all senior executive agreements that officers familiarise themselves with their obligations under finance law, comply with it at all times, and work to build a strong culture of compliance with finance law; initiating a program of increased financial literacy training.⁴⁸ Further responses from Health are discussed below.

Audit finding—consistency of grant opportunity guidelines with Commonwealth Grant Rules and Guidelines

- 3.31 Where grant opportunity guidelines were produced, they were not always fully consistent with the CGRGs.⁴⁹ The Department of Finance (Finance) advised Health in relation to mental health grants that although the grant opportunity guidelines contained the required elements, the substance of the guidelines was not fully consistent with the principles of the CGRGs, in particular robust planning and design, and probity and transparency.⁵⁰ In relation to this advice, one officer in Health remarked the advice did not provide 'much value add'. Health stated this remark was not reflective of Health's culture.⁵¹
- 3.32 However, a level of disregard for advice from Finance was found in an email exchange between senior Health officials to unrelated June 2019 Finance feedback regarding Health's general approach to grant opportunity guidelines and CGRG compliance. The email exchange described Finance's advice as 'a pretty outrageous set of accusations which points to a pretty deep-set culture of mistrust'. A Deputy Secretary stated '[It] would be nice if [Finance's] concerns related to some sort of outcome measure. I can feel some congestion busting coming on'. 'Congestion busting' was the reason given for several internal performance awards to officials involved in the CHHP process.⁵²
- 3.33 When this matter was raised during a public hearing, the Secretary of the Department of Health and Aged Care, Mr Blair Comley, did acknowledge 'the seniority of an officer does matter when it comes to the import of what is done and how it transmits through culture'.⁵³ He went on to emphasise the impact behaviours have on culture:

⁴⁷ Mr Charles Wann, Deputy Secretary, Corporate Operations, Health, *Committee Hansard*, 8 September 2023, p. 17.

⁴⁸ ANAO, *CHHP report*, p. 42.

⁴⁹ ANAO, *CHHP report*, pages 38, 44–46.

⁵⁰ ANAO, *CHHP report*, p. 45.

⁵¹ ANAO, *CHHP report*, p. 45.

⁵² ANAO, *CHHP report*, p. 45.

⁵³ Mr Blair Comley, Secretary, Health, *Committee Hansard*, 1 February 2024, p. 2.

A lot of our responses that we have put back to the committee about improving things are systems related responses to try and embed the right procedures and to require the right considerations to be in briefings of ministers. But I wouldn't underestimate the behaviours and the symbols that drive that culture through an organisation.⁵⁴

Assessment and selection of grants

Ethical consideration

- 3.34 A mandatory requirement under the CGRGs, where an accountable authority or official approves the proposed commitment of relevant money in relation to a grant, is that person must record the basis for the approval relative to the grant opportunity guidelines and the key principle of achieving value with relevant money.⁵⁵
- 3.35 Officials must provide written advice to ministers (in cases where a minister exercises the role of an approver) that at a minimum includes:
- that the spending is a grant
 - information on finance law requirements (contained in the PGPA Act, Rule and CGRGs), including legal authority to make the grant
 - outline the application and selection process followed, including the selection criteria, that were used to select potential grantees
 - include the merits of the proposed grant or grants relative to the grant opportunity guidelines and the key principle of achieving value with relevant money.⁵⁶
- 3.36 Under the CGRGs, the basis for recommending or rejecting each proposed grant should be set out in the assessment material and should reflect the particular merits of each grant activity in terms of the grant opportunity guidelines (including assessment against the selection criteria).⁵⁷
- 3.37 While officials do not have to rank grants when briefing ministers, officials should at a minimum indicate which grant applications: fully meet the selection criteria; partially meet the selection criteria, and do not meet any of the selection criteria.⁵⁸
- 3.38 Entities must have practices and procedures to ensure grants administration is conducted in a manner consistent with probity and transparency principles. Accountability and transparency, under the CGRGs, require officials to demonstrate and justify the use of public resources.⁵⁹

⁵⁴ Mr Blair Comley, Health, *Committee Hansard*, 1 February 2024, p. 2.

⁵⁵ CGRGs, section 4.5.

⁵⁶ CGRGs, sections 4.2–4.9, see also footnote 36.

⁵⁷ CGRGs, p. 11 (footnote 36).

⁵⁸ CGRGs, section 4.7.

⁵⁹ CGRGs, sections 6.3, 13.15.

Audit finding—assessment of proposals

- 3.39 To determine the extent to which Health complied with relevant requirements of the CGRGs, the ANAO reviewed a targeted sample of 16 of the 108 CHHP and associated projects.⁶⁰ Amongst other things, the ANAO reviewed documents relevant to the assessment and selection of the grants. Fifteen grants in the sample were made to NGOs. These had been identified by government, and did not involve an application process.⁶¹
- 3.40 The ANAO stated it was unable to identify, and Health was unable to provide, records for several grants demonstrating CGRG compliance, including documented grant assessments, financial viability assessments, and the basis for assessments of value with relevant money.⁶²
- 3.41 In response to a suggestion from Finance that a non-application-based process may not be appropriate in the particular circumstances,⁶³ Health stated ‘Given decisions of Government about eligibility of particular organisations and projects for the CHHP, the Department is not able to elaborate further on these aspects’.⁶⁴ Health stated that in the absence of a formal application, the key information used in the assessment would be the project proposal.⁶⁵
- 3.42 Health did develop assessment plans establishing how Health would assess grant proposals against criteria in the relevant grant opportunity guidelines. The assessment plans included high-level instructions covering: assessing value with relevant money; assessment of financial viability, governance and risk; and the requirements for recommendations to government and decision making.⁶⁶
- 3.43 According to the assessment plans, staff were to receive training and other materials and information (including on probity and CGRG requirements, as well as the policy intent of the program). This was not provided following a decision to ‘simplify’ the assessment process.⁶⁷
- 3.44 The ANAO found of the 16 grants examined, there was documented assessment against the criteria for 11. Of the 11, one project was assessed as highly suitable and 10 projects were assessed as suitable. One suitable project (Lord Somers Camp) was later assessed as not suitable by a quality assurer. Advice supporting

⁶⁰ The sample included one PHN grant and 15 NGO grants. The ANAO advised the PHN grant was included in the sample due to inaccurate public reporting of the grant. ANAO, *CHHP report*, pages 39–40, see also footnote 38.

⁶¹ ANAO, *CHHP report*, pages 39–40, 46.

⁶² ANAO, *CHHP report*, p. 50.

⁶³ This advice was provided in response to mental health grant opportunity guidelines. ANAO, *CHHP report*, p. 46.

⁶⁴ ANAO, *CHHP report*, p. 46.

⁶⁵ ANAO, *CHHP report*, p. 47.

⁶⁶ ANAO, *CHHP report*, p. 47.

⁶⁷ ANAO, *CHHP report*, p. 50.

recommendations to government did not include the assessment ratings although it did indicate whether Health judged the grant to represent value for money.⁶⁸

- 3.45 The information in project proposals, that was used by Health for assessment because there were no formal applications, was found by the ANAO to be 'varied in terms of clarity, detail, completeness and suitability as the basis for a value for money assessment'.⁶⁹ Assessments, where documented, contained information copied directly from applicants' business cases and requests for funding. In some cases, the ANAO found proposals did not specify how much money was being sought and what would be delivered.⁷⁰
- 3.46 In five of the 11 assessments the ANAO examined, Health stated there was insufficient information to support the assessment but assessed the proposal as suitable for funding. Health recommended additional information including detailed budgets, project plans and timelines should be requested as a grant agreement milestone.⁷¹
- 3.47 As part of its consideration of value with relevant money, the assessment plans and grant opportunity guidelines stated Health would undertake a financial viability assessment on organisations that had not previously received funding from the Commonwealth. Of the 12 organisations in the sample that had not previously received funding from the Commonwealth, Health undertook a financial viability assessment for seven—four were partly completed and three were complete.⁷²
- 3.48 The ANAO found Health assessed as 'suitable' projects with proposed activities that were inconsistent with the requirements of the grant opportunity guidelines, including grants to the Esther Foundation and the Lord Somers Camp.⁷³ The ANAO found the application processes were not fully consistent with the principle of achieving value for money and Health undertook limited due diligence before recommending funding.⁷⁴
- 3.49 Notwithstanding these shortcomings, the ANAO found Health officials involved in the assessment and development of funding recommendations to government formally certified their agreement to be bound by the requirements of the assessment plan and CGRGs.⁷⁵
- 3.50 The ANAO found Health's subsequent submissions to the minister (provided in the form of funding recommendations and requests for funding approval) for tranche one, two and three projects claimed the approach taken was consistent with the PGPA Act

⁶⁸ ANAO, *CHHP report*, p. 47.

⁶⁹ ANAO, *CHHP report*, p. 47.

⁷⁰ ANAO, *CHHP report*, p. 47.

⁷¹ ANAO, *CHHP report*, p. 47.

⁷² A financial viability assessment was not undertaken on the Esther Foundation proposal or the Lord Somers Camp proposal/business case. ANAO, *CHHP report*, pages 47–49.

⁷³ ANAO, *CHHP report*, pages 48–49.

⁷⁴ ANAO, *CHHP report*, p. 38.

⁷⁵ ANAO, *CHHP report*, p. 50.

and CGRGs, but this was not supported by evidence.⁷⁶ It found Health's advice to the minister on value with relevant money was not always supported by robust evidence.⁷⁷

Legal authority

Ethical consideration

- 3.51 The PS Act states that the Australian Public Service is apolitical and provides the government with advice that is frank, honest, timely and based on the best available evidence.⁷⁸ Under the CGRGs, officers are to apply and comply with public sector values and duties, including honesty, integrity, impartiality and accountability.⁷⁹ It is an obligation under the CGRGs that 'before entering into an arrangement for the proposed commitment of relevant money there *must* be legal authority to support the arrangement [emphasis in original].'⁸⁰
- 3.52 The PGPA Act and the CGRGs include requirements that apply to ministers. Officials must advise the relevant minister on these requirements.⁸¹ The CGRGs state that officials must provide written advice to ministers which, at a minimum, provides information on the applicable requirements of the PGPA Act and Rule and the CGRGs, including the legal authority for the grant.⁸²
- 3.53 The PGPA Act requires that a minister must not approve proposed expenditure of relevant money unless satisfied, after reasonable inquiries, that the expenditure would be a 'proper' use of relevant money.⁸³ The terms of the approval must be recorded in writing as soon as practicable after the approval is given. 'Proper' when used in relation to the use or management of public resources means efficient, effective, economical and ethical.⁸⁴

Audit finding—advice to minister

- 3.54 On 11 June 2019, the minister accepted recommendations from Health to approve 44 tranche one grants, pending legal advice from the AGS. In its advice to the minister, Health anticipated 'the majority of projects would receive a "low" or "medium" legal risk assessment from the AGS'.⁸⁵
- 3.55 However, when received, the AGS advice found 11 of the projects were 'likely to be without lawful authority' and of these the AGS advised for six 'there was no legislation that reasonably could be relied on to authorise expenditure on the

⁷⁶ ANAO, *CHHP report*, p. 51.

⁷⁷ ANAO, *CHHP report*, p. 53.

⁷⁸ PS Act, section 10(5).

⁷⁹ CGRGs, section 13.1.

⁸⁰ CGRGs, section 3.6.

⁸¹ CGRGs, section 3.10.

⁸² There are four other requirements. CGRGs, section 4.6.

⁸³ PGPA Act, section 71(1).

⁸⁴ CGRGs, section 3.11.

⁸⁵ ANAO, *CHHP report*, p. 52.

program'.⁸⁶ Included in these 11 were grants to the Esther foundation,⁸⁷ and Lord Somers Camp,⁸⁸ which are highlighted case studies in the audit report.⁸⁹

- 3.56 Health then advised the minister on 25 June 2019 that 'there were 11 projects where the AGS assessment identified there would 'likely be no lawful authority for the expenditure'.⁹⁰ According to the ANAO, the advice did not accurately reflect the nature of the risk, specifically the AGS opinion that for six of the grants there was no legislation that could reasonably be relied upon to authorise expenditure. Further, the ANAO found the advice to the minister lacked detail that had been provided by the AGS on the extent to which risk could be managed or mitigated.⁹¹

- 3.57 The ANAO described the following process:

On 30 June 2019 the Minister noted Health's advice that it execute the 'high' risk agreements despite the AGS risk assessments. Health advised the Minister it would execute the agreements on the grounds that they were one-off grants, legal challenge was unlikely, funding for each project had already been agreed by government, the projects had been announced, and stakeholders were committed. Health noted in its advice that this approach may attract adverse commentary from the ANAO and any parties opposed to the expenditure. Health stated in its advice that risks would be mitigated through obtaining more information in grant milestone reports, such as budgets and risk plans, and through strong grants management.⁹²

- 3.58 The ANAO stated it was unclear 'how additional information on project budgets, or strong grants management, could resolve the issue that the grant had no legislative authority'.⁹³ The ANAO found 'Health acted contrary to requirements of the CGRGs in recommending the Minister approve funding and that agreements be executed notwithstanding the absence of legislative authority'.⁹⁴

- 3.59 The audit also found the 30 June 2019 advice to the minister stated Health had consulted with the Department of Prime Minister and Cabinet on grants assessed to likely be without lawful authority and 'PM&C had advised that the Minister could decide on whether the government would proceed with the 11 projects'.⁹⁵ As noted

⁸⁶ ANAO, *CHHP report*, p. 52.

⁸⁷ This grant was announced by the government on 8 March 2019 and identified as a 'sensitive and priority project'. The AGS advice that making the grant would likely be without lawful authority—there was no legislation at the time the assessment was undertaken that could reasonably be relied upon to authorise expenditure on the proposal as a whole. ANAO, *CHHP report*, p. 48.

⁸⁸ The grant to the Lord Somers Camp was announced by the government on 26 March 2019. The AGS advice of 19 June 2019 was that the proposal was likely to be without lawful authority. ANAO, *CHHP report*, p. 50.

⁸⁹ ANAO, *CHHP report*, pages 48–50.

⁹⁰ ANAO, *CHHP report*, p. 52.

⁹¹ ANAO, *CHHP report*, p. 52; Mr Grant Hehir, Auditor-General, ANAO, *Committee Hansard*, 8 September 2023, p. 20.

⁹² ANAO, *CHHP report*, p. 52.

⁹³ ANAO, *CHHP report*, p. 52.

⁹⁴ ANAO, *CHHP report*, p. 52.

⁹⁵ ANAO, *CHHP report*, p. 52.

above, the CGRGs are part of finance law, and they specify there must be legal authority to support a grant.⁹⁶

3.60 Health told the Committee:

The thinking at the time—reflecting that this is not due process—was that the correspondence from the Prime Minister was providing authority for the grant. The grant was able to proceed; that was the advice that was provided ... and that's not correct.⁹⁷

3.61 During the inquiry, Health suggested at the time there was a view there was something of a 'balance' involved in decisions:

This was not the right way to go about it. I acknowledge that straight off. In what I saw, there was a balancing between an estimation of the likelihood of this risk materialising and then the benefits of providing funding to organisations.⁹⁸

3.62 Health went on to state:

There's a certain element of risk that you have to balance. For sure, the appropriation was in that year; we had to do it by 30 June. I guess a decision needs to be made whether you pull back from that time frame notwithstanding that.⁹⁹

3.63 Health suggested in its evidence that 'decisions of government' had a certain status:

... at that time, election, tight timeframes to implement decisions of government. I would say in terms of election commitments and prebudget announcements, all of them in the end rely on a decision of government. Effectively from a public servant's perspective they are all decisions of government and it's just then the processes we need to follow to implement them.¹⁰⁰

3.64 In its audit, the ANAO highlighted a key message to all Australian Government entities:

Where decisions of government identify preferred recipients for grants funding, grants remain subject to the Commonwealth Grants Rules and Guidelines (CGRGs). It is the administering entity's responsibility to inform the relevant minister of the necessary steps and timeframes required to comply with the CGRGs. This includes providing clear advice where government identified projects or recipients do not align with grants program objectives or value for money.¹⁰¹

⁹⁶ CGRGs, section 3.6.

⁹⁷ Ms Jessica Pratt, Health, *Committee Hansard*, 8 September 2023, p. 23.

⁹⁸ Mr Charles Wann, Health, *Committee Hansard*, 8 September 2023, p. 20.

⁹⁹ Mr Charles Wann, Health, *Committee Hansard*, 8 September 2023, p. 24.

¹⁰⁰ Mr Charles Wann, Health, *Committee Hansard*, 8 September 2023, p. 26.

¹⁰¹ ANAO, *CHHP report*, p. 11.

Response from Health

3.65 Health agreed to the four recommendations made by the ANAO, which related to:

- improving the systems of control to identify, assess and report non-compliance with finance law
- ensuring grant assessments are consistent with the requirements of established grant opportunity guidelines and the requirements of the CRGs, are based on sufficient information and due diligence to support a value for money recommendation, and are appropriately documented
- ensuring advice to government on grant funding approval is consistent with the requirements of the CGRGs and the grant opportunity guidelines, and is comprehensive, evidence-based and accurate
- establishing a quality assurance process to confirm and where necessary correct the accuracy of reporting on Grant Connect.¹⁰²

3.66 In evidence to the Committee, the Department stated it recognised it had a responsibility to perform its functions ethically and acknowledged the audit report had found ‘in this instance, the Department did not meet those standards to which we hold ourselves accountable. We have accepted this finding and recognise its serious nature’.¹⁰³

3.67 Notwithstanding the findings of the audit, the Department was not of a view there was a cultural problem at the time, rather the failures, which included deliberate breaches of finance law and recommendations to the minister to approve grants where there was no legislative or constitutional authority, could be attributed to capability and attention to detail. The Committee was told:

I honestly don't think there was a culture that was systemically within the department at that time. I truly don't believe that was the case ... It's capability and attention to detail. If you view that as having some ethical aspect to it—and you could argue that there is—then, yes.¹⁰⁴

3.68 Since the audit, Health told the Committee it had strengthened its approach to grants administration, including by:

- revising the content of guidance and templates to support compliance with the PGPA Act, GGRGs, and required ethical standards
- updating Accountable Authority instruction and Finance Business Rules relating to financial obligations and accountability to clarify financial management responsibilities

¹⁰² ANAO, *CHHP report*, pages 44, 51, 53, 55.

¹⁰³ Mr Charles Wann, Health, *Committee Hansard*, 8 September 2023, p. 14.

¹⁰⁴ Mr Charles Wann, Health, *Committee Hansard*, 8 September 2023, p. 26.

- ensuring the Grants Assurance Program reviews grant administration against mandatory requirements and principles in the CGRGs with results reported to the Executive Committee.¹⁰⁵

3.69 Health stated it had ‘continued to mature the way in which CHHP is managed and the way ... [finance] law is enforced’.¹⁰⁶ In particular:

Projects have been reallocated to closely align with policy expertise, and centralised governance arrangements have been established to oversee the remaining projects. This is underpinned by a new project management reporting system to promote better data hygiene and to simplify and standardise project reports and financial tracking. This enables us to capture lessons learned and support overall program evaluation.

Two centres of excellence have been established to provide advice on capital grants and national partnerships. Under its 2020–24 finance strategy, the department continues to operate a strong financial controls and assurance framework and a financial governance framework which promotes the efficient, effective, economical and ethical use of resources.¹⁰⁷

Malintent

3.70 As was also the case with the Department of Infrastructure, Transport, Regional Development, Communication and the Arts (discussed in chapter 2), the Committee heard from Health the suggestion that an absence of malintent, perhaps mitigated to some extent, the breaching of finance law. Deputy Secretary in the Department of Health and Aged Care, Mr Charles Wann, stated there was a ‘very strong delivery focus’ to deliver on decisions of government and he ‘didn’t see any motivation of malintent, improper purpose or personal bias or any sense of trying to hide anything or lack of transparency and intent to hide’.¹⁰⁸

3.71 The department repeated this in response to questions on notice and in so doing suggested failing to act with probity or to act ethically only applied when such behaviour was motivated by malintent, improper purpose or personal bias:

The Department of Health and Aged Care (the department) acknowledges failures of process with respect to the recording of Community Health and Hospitals Program (CHHP) grant assessments and funding recommendations. The department’s conduct at the time was not motivated by malintent, improper purpose or personal bias.¹⁰⁹

¹⁰⁵ Health, *Submission 7.3*, p. [17].

¹⁰⁶ Mr Charles Wann, Health, *Committee Hansard*, 8 September 2023, p. 14.

¹⁰⁷ Mr Charles Wann, Health, *Committee Hansard*, 8 September 2023, pages 14–15. See also: Health, *Submission 7*, pages [3]–[4].

¹⁰⁸ Mr Charles Wann, Health, *Committee Hansard*, 8 September 2023, p. 26.

¹⁰⁹ Health, *Submission 7.3*, p. [29].

- 3.72 The Secretary of Health, Mr Comley, however, told the Committee during a subsequent hearing, 'A lack of malintent is not an acceptable justification for not adhering to finance law'.¹¹⁰

Decisions of Government

- 3.73 The ANAO had found in its report that Health had used the rationale 'decisions of government' to administer grants in a manner that did not meet the requirements of the CGRGs and as the basis for not responding to advice from the Department of Finance.¹¹¹
- 3.74 As noted above, in its report, the ANAO emphasised 'decisions of government' remained subject to the CGRGs.¹¹²
- 3.75 Health suggested in a letter to the minister, in November 2022, the creation of an additional category of grant in the CGRGs to 'support timely delivery of published and explicit decisions of Government,' and the development of 'program level grant guidelines that can be re-used over subsequent years and funding rounds'.¹¹³
- 3.76 The Auditor-General stated, 'we found ... [the proposal for an additional grant category] a strange suggestion really, because the framework [CGRGs] has been put in place for the purpose of getting transparency and accountability around government decision-making, and it has a fair amount of flexibility in it to facilitate things ... I don't know what the objective was other than to make things work faster, I assume, without applying the rules to them'.¹¹⁴
- 3.77 When questioned by the Committee, Health responded it was of the view it was 'possible both to strengthen and streamline the grant policy framework' to reduce the administrative burden and improve safeguards at the government decision-making level.¹¹⁵
- 3.78 During the Committee's public hearings, Health expressed its view the rules with regard to grants must be regularly reviewed, particularly because this improves compliance. The Committee was told:
- ... the ability to keep reviewing those [CGRGs] to make sure they represent the best articulation of process and delivery is important. There's nothing special in this, but I think the ability to keep reviewing, keep talking to Finance and to keep looking at those guidelines and rules is always important ... maintaining a focus on those guidelines: Are they up to date? Are they best practice? Do they

¹¹⁰ Mr Blair Comley, Health, *Committee Hansard*, 1 February 2024, p. 1.

¹¹¹ See, for instance: ANAO, *CHHP report*, pages 44–46, 52.

¹¹² ANAO, *CHHP report*, p. 11.

¹¹³ ANAO, *CHHP report*, p. 42.

¹¹⁴ Mr Grant Hehir, ANAO, *Committee Hansard*, 8 September 2023, p. 28.

¹¹⁵ Health, *Submission 7.3*, p. [32].

manage the issues that we're trying to deal with appropriately? This is always important.¹¹⁶

- 3.79 Prefacing his comments by specifying he did not 'want to in any way dilute the opening statement about malintent not being the threshold', the Secretary, Mr Comley stated:

... if we want compliance across a range of things, we actually need to have a system that is as lean as it possibly can be so ... those individuals don't get frustrated on the way. You increase compliance if you have a better set of rules.¹¹⁷

- 3.80 The Secretary pointed out:

The way this process should work is that, if you find a rule that's inconvenient or difficult, you should look at the purpose of the rule and then engage with the person who's responsible for making that rule to see if there's a more flexible way of doing that. If that can't be done, we still need to emphasise to people: how do we build our systems and processes from the start to make them as smooth as possible? A lot of it is asking how we can stay outcome focused but potentially build in the time in the process to allow the rules to be followed but the outcomes always to be delivered.¹¹⁸

¹¹⁶ Mr Blair Exell, Health, *Committee Hansard*, 1 February 2024, p. 7.

¹¹⁷ Mr Blair Comley, Health, *Committee Hansard*, 1 February 2024, pages 7–8.

¹¹⁸ Mr Blair Comley, Health, *Committee Hansard*, 1 February 2024, p. 3.



4. Integrity frameworks and probity assurance

- 4.1 In evidence to the inquiry, the Auditor-General emphasised that ‘ethical behaviour and integrity aren’t just doing narrow compliance’¹ and that ‘meeting mandatory requirements is not sufficient to ensure compliance with the high expectations set out in the principles-based legislation and frameworks’ that govern work in the public sector.²
- 4.2 This was also a message in the recent APS Integrity Taskforce report, *Louder Than Words*, which stated ‘the law was never intended to be the maximum standard of behaviour required. Legality is the minimum standard expected of public servants’.³ During the inquiry, the Australian Public Service Commission (APSC) agreed acting with probity is more than just meeting mandatory minimum compliance standards.⁴
- 4.3 The sentiment is also contained in the APSC guidance on acting in accordance with the APS values contained in the *Public Service Act 1999* (PS Act).⁵ The guidance specifies that upholding the ‘ethical’ value requires officers to act not just in a way that is technically and legally correct, but in a way that is right, such that knowing what is ‘right’ is likely to require having regard to the intent of a relevant law or policy.⁶
- 4.4 However, notwithstanding the requirement to act ethically and with probity, the Australian National Audit Office (ANAO) is of the view its reports ‘provide evidence that the Australian public sector regularly falls short of complying with both the intent and requirements of its regulatory frameworks ...’⁷
- 4.5 As part of the inquiry, the Committee put questions to the five entities, asking how agencies assess whether they are acting in a way that is right and proper, and not just in a way that is technically and legally correct. The intention was to understand

¹ Mr Grant Hehir, Auditor-General, Australian National Audit Office (ANAO), *Committee Hansard*, 8 September 2023, p. 42.

² ANAO, *Submission 5*, p. 4.

³ Department of Prime Minister and Cabinet (DPMC), *Louder Than Words: An APS Integrity Action Plan – APS Integrity Taskforce*, November 2023, hereafter *Louder Than Words*, p. 4.

⁴ Ms Jo Talbot, Acting Deputy Commissioner, Australian Public Service Commission (APSC), *Committee Hansard*, 20 November 2023, p. 2.

⁵ PS Act, section 10.

⁶ Australian Public Service Commission, *Values and Code of Conduct in Practice*, August 2017, paragraph 1.2.9.

⁷ ANAO, *Submission 5*, p. 6.

how agencies evaluate how they are positively acting according to the intent of the law and thus demonstrating probity as they conduct their activities.

- 4.6 While entities can often demonstrate they have policies in place to prevent fraud, corruption, other illegal activity or conflicts of interest, the mere absence of illegality, fraud, conflicts or corruption does not prove an entity is acting with probity. What probity goes to is behaviours and ethics, described by Andrew Podger as ‘the processes by which you went about trying to achieve the results that you required’.⁸
- 4.7 The responses from the entities, discussed in this chapter, show that agencies—drawing upon guidance from the APSC and the National Anti-Corruption Commission (NACC)—have expended significant effort to define probity (subsumed under the concept of integrity) in a way that is measurable through a range of metrics, and consequently, typically measure their integrity by such things as dealing with conflicts of interest, implementing fraud controls, and ensuring staff have completed training and have performance agreements.
- 4.8 The focus is broadly on administrative and process arrangements; on putting measures in place in an attempt to prevent particular types of behaviour that are not ethical, not on examining behaviour that has occurred to see if officers, when working to achieve outcomes, are acting with probity. The measures might more accurately be considered integrity management rather than integrity performance.
- 4.9 This chapter questions whether the integrity metrics would be effective in resolving the issues that were uncovered in the Artbank and Community Health and Hospitals Program (CHHP) audits in particular, and other audits highlighted by the ANAO and discussed briefly in chapter 1.

Audits into financial regulators

- 4.10 This chapter touches, in the context of entity integrity frameworks, on the audits into the financial regulators. The audits into the Australian Securities and Investments Commission (ASIC), Australian Prudential Regulatory Authority (APRA), and the Australian Competition and Consumer Commission (ACCC) examined ‘probity management’ and followed a standard methodology.⁹
- 4.11 The audits were not an examination of the effectiveness of these regulatory bodies or particular regulatory decisions taken. In this way they differ significantly from the performance audits of Artbank and CHHP, and cannot be used for a comparative performance assessment. Rather, the financial regulator audits assessed whether there were effective administrative arrangements (for instance, frameworks, guidelines, policies, procedures) in place to address nine selected probity risks, and

⁸ Mr Andrew Podger AO, *Committee Hansard*, 20 November 2023, pages 15–16.

⁹ See: ANAO, *Probity Management in Financial Regulators — Australian Securities and Investments Commission*, No. 36 2022–23, hereafter *ASIC report*; ANAO, *Probity Management in Financial Regulators — Australian Competition and Consumer Commission*, No. 38 2022–23, hereafter *ACCC report*; ANAO, *Probity Management in Financial Regulators — Australian Prudential Regulation Authority*, No.30 2022–23, hereafter, *APRA report*.

whether these were enforced. In essence, the audits examined whether the agencies were in a position to act with probity when they undertook their regulatory roles.

- 4.12 The nine selected probity risks were: code of conduct; probity in procurement; management of public interest disclosures; management of senior executive remuneration; management of conflict of interest; oversight of credit card expenditure; management of gifts, benefits and hospitality; identification and management of fraud risks; and management of key regulatory risks (regulatory capture risk and financial trading).¹⁰
- 4.13 The findings of the reports were broadly positive: probity management at APRA and ASIC was found to be largely effective; at the ACCC it was found to be partly effective, however, initiatives were underway to strengthen internal arrangements.¹¹ The ANAO stated with regard to the ACCC, 'Policies, procedures and arrangements relating to probity management in regulatory activities could be improved'.¹²
- 4.14 Some shortcomings were identified in the performance of all entities. For instance, agencies had not consistently identified regulatory capture in their entity-level documents (for instance, corporate plans) though entities did identify and/or otherwise address it to varying extents in other subordinate policies.¹³
- 4.15 Questions were raised about gifts and benefits policies. The ANAO found, amongst other things, that APRA should review whether its policy settings with regard to the receiving of gifts and benefits aligned with the internal principle established in the APRA Chair's Finance Instructions and Policies.¹⁴ The ANAO identified scope for ASIC to improve its gifts and benefits policies. In particular, the ANAO recommended that ASIC review its financial thresholds for declaring gifts, benefits, and hospitality, with a view to managing the risk of conflicts of interest when engaging with regulated entities.¹⁵ The ANAO identified multiple issues with the ACCC's approach to conflicts of interest with regard to its gifts, benefits, and hospitality register.¹⁶
- 4.16 Some issues were identified in procurement processes. Notwithstanding the requirement to work with the APRA procurement team for procurements above \$20,000, an internal APRA audit undertaken in January 2022 found there was no evidence of consideration of conflict of interest for procurements less than \$80,000,¹⁷ that 67 per cent of procurements made by APRA between \$20,000 and \$80,000 were not compliant with APRA's policy to obtain at least three quotes; and that

¹⁰ See: ANAO, *ACCC report*, pages 8–9.

¹¹ ANAO, *APRA report*, p. 9; ANAO, *ASIC report*, p. 9; ANAO, *ACCC report*, p. 9.

¹² ANAO, *ACCC report*, p. 38.

¹³ ANAO, *APRA report*, pages 9, 26–27, 33–36; ANAO, *ASIC report*, pages 27, 31–33, 35; ANAO, *ACCC report*, pages 10, 29–30, 38–41.

¹⁴ ANAO, *APRA report*, pages 86–87.

¹⁵ ANAO, *ASIC report*, p. 11.

¹⁶ ANAO, *ACCC report*, pages 61–65.

¹⁷ In February 2022, APRA added a check box to the procurement process where the requestor has to confirm there are no conflicts of interest. ANAO, *APRA report*, p. 44.

APRA's tender evaluation methodology did not specify that no changes should be made to evaluation methodology after tenders had opened.¹⁸

- 4.17 For the ten high-value procurements reviewed by the ANAO, ASIC partly complied with the requirements established in its internal 'Procurement guideline — probity'. The selected requirements were not met in four of the procurements (40 per cent non-compliance); only one of the selected requirements was met in four of the procurements (40 per cent partial compliance); and all four of the selected requirements were met in only two of the procurements (20 per cent compliance).¹⁹ The ANAO examined ten high value procurements that had been reviewed by the ACCC's central procurement team and found absences of documented evidence of probity management, and probity plans that were not fully followed.²⁰
- 4.18 In credit card usage, the ANAO found that between June and July 2022 there were 106 credit card transactions made,²¹ with 42 transactions considered non-compliant with APRA's requirements.²² The ANAO found that between June and July 2022 there were 197 credit card transactions made,²³ with 24 transactions considered non-compliant with ASIC's acquittal requirements.²⁴ The ANAO found that ACCC personnel were compliant with requirements relating to corporate credit cards. However, there was no documentation of the process for approving the ACCC Commissioners' credit card expenditure, nor was there mandatory training within the ACCC with respect to credit card use.²⁵
- 4.19 With regard to senior executive remuneration policies, at the time of the audits, neither APRA nor ASIC had senior executive remuneration policies; the ACCC did have a senior executive remuneration policy.²⁶

Entity probity responses

Department of Infrastructure, Transport, Regional Development, Communications and the Arts

- 4.20 The Artbank program sits within the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (DITRDCA). As discussed previously, the audit of the Artbank program found there was no overarching strategy to support the direction of the program or measure its success; acquisitions had not

¹⁸ ANAO, *APRA report*, pages 44, 60.

¹⁹ ANAO, *ASIC report*, p. 11.

²⁰ ANAO, *ACCC report*, pages 91–95.

²¹ The ANAO examined the credit card use of the accountable authority, deputy chairs, and chief operating officer. ANAO, *APRA report*, p. 81.

²² ANAO, *APRA report*, p. 81.

²³ The ANAO examined the credit card use of the accountable authority, deputy chairs, and chief operating officer. ANAO, *ASIC report*, pages 76–77.

²⁴ ANAO, *ASIC report*, p. 77.

²⁵ ANAO, *ACCC report*, pages 11, 56, 73.

²⁶ ANAO, *APRA report*, pages 9–10; ANAO, *ASIC report*, p. 38; ANAO, *ACCC report*, p. 48.

been in accordance with the Commonwealth Procurement Rules (CPRs) or DITRDCA's own policies and Artbank's Collection Plan; management of the collection was insufficient to ensure its integrity; and the approach to leasing was not appropriate.²⁷

- 4.21 DITRDCA's view of integrity is such that it was able to state, notwithstanding this assessment, that the ANAO had made no finding of unethical behaviour.²⁸

Assessing whether behaviour is right and proper

- 4.22 When responding to the Committee's question on how DITRDCA assesses whether its officers are acting in a way that is right and proper, and not just in a way that is technically and legally correct, it provided information on its integrity strategy.²⁹
- 4.23 According to DITRDCA, its Integrity Strategy (launched in 2022) 'delivers a clear and easy to understand narrative on the Department's position and expectations of all staff when it comes to embedding integrity in their work'.³⁰
- 4.24 DITRDCA equates its definition of integrity with probity. DITRDCA's Integrity Strategy defines integrity as 'the pursuit of high standards of professionalism, which in turn means doing the right thing at the right time to deliver the best outcomes for Australia sought by the government of the day'. This is the definition provided by the APSC, and according to DITRDCA, aligns with the Department of Finance's definition of probity, which requires complete and confirmed integrity, uprightness and honesty in a particular process.³¹
- 4.25 Part of the Integrity Strategy is an Integrity Framework for managing integrity risks, and an Integrity Dashboard, which contains data identified using the APSC's Integrity Metrics Resource.³²
- 4.26 DITRDCA's Integrity Framework contains 'three lines of defence' for the management of integrity risks:
- people and procedure: policies, guidelines and frameworks front line staff use to manage integrity risks
 - check and challenge: quality assurance processes to ensure work is evidence based and in line with the required frameworks
 - independent assurance: providing the Executive with assurances that integrity risks are being managed effectively.³³

²⁷ ANAO, *Artbank report*, pages 7–8, 30–31.

²⁸ Department of Infrastructure, Transport, Regional Development, Communications and the Arts (DITRDCA), *Submission 4*, p. 2.

²⁹ DITRDCA, *Submission 4.2*, p. [1].

³⁰ DITRDCA, *Submission 4.2*, p. [1].

³¹ DITRDCA, *Submission 4.2*, p. [1].

³² DITRDCA, *Submission 4.2*, pages [1]–[2].

³³ DITRDCA, *Submission 4.2*, pages [1]–[2].

- 4.27 No further detail was provided on the substance of the Integrity Framework, or the mechanism by which it would allow DITRDCA to assess whether officers are acting in a way that is right and proper.
- 4.28 It is through the Integrity Dashboard that DITRDCA states it is able to identify areas of integrity 'that are doing well, and those that require greater focus', allowing it to target education and awareness raising campaigns 'to ensure staff are acting in a way that is right and proper'. Trend data, DITRDCA stated, would be used to 'ensure the controls that govern integrity arrangements within the Department are working as intended'.³⁴
- 4.29 DITRDCA did not explain how the Integrity Dashboard would allow it to assess whether officers are acting in a way that is right and proper, for instance, undertaking procurements in compliance with finance law. However, given its prominence in DITRDCA's response, it might be assumed the substance of the metrics identify what DITRDCA believes constitutes probity.

Integrity Metrics Resources

- 4.30 As noted above, DITRDCA's Integrity Dashboard contains data identified using the APSC's Integrity Metrics Resource. The Integrity Metrics Resource provides a way, according to the APSC, for an agency to measure, monitor and report on integrity performance. It contains three tools:
- Integrity Metrics Maturity Model—a tool for an agency to self-assess its capability level in measuring and monitoring integrity
 - Integrity Metrics Register—a list of metrics that can be used to measure integrity performance
 - Integrity Dashboard—guidance on the effective display of integrity information.³⁵
- 4.31 The Integrity Metrics Maturity Model is concerned with the capability of an agency to measure integrity. It is a self-assessment tool where agencies determine where they sit at one of three levels in the following categories:
- the extent to which an agency undertakes integrity measurement, monitoring and reporting functions
 - the quality/complexity of the data an agency is able to use to measure integrity
 - the type of governance structures in the entity for reporting on integrity
 - the frequency at which measurement occurs
 - whether and to what extent integrity is explicitly referenced in employee performance agreements or duty statements.³⁶

³⁴ DITRDCA, *Submission 4.2*, p. [2].

³⁵ Australian Public Service Commission (APSC), *Integrity Metrics: Resource*, Commonwealth of Australia, 2022, hereafter APSC, *Integrity Metrics Resource*, pages 4–5.

³⁶ APSC, *Integrity Metrics Resource*, pages 6–7.

4.32 The Integrity Metrics Register contains metrics across four categories that the document states can be used to measure agency and employee integrity.³⁷ These are:³⁸

- human resources metrics:
 - employee perception survey data—responses to integrity-related questions including perceptions of integrity issues such as APS values, bullying and harassment, corruption and fraud
 - performance management data—for instance, percentage of staff with performance management agreements in place and cycle assessments, data on underperformance
 - unscheduled absences data
 - overtime and leave balances data
 - Code of Conduct (CoC) reports and investigations
 - compensable claims
 - work, health and safety reports and incidents
 - training completion rates
 - evaluation and feedback reports on integrity-related activities, training and events
 - issue resolution timeframes
 - cessation processes—exit interviews and surveys
- declarations and self-reporting metrics
 - monitoring and reporting on conflict of interest declarations and management plans
 - monitoring and reporting of gifts and benefits
 - monitoring and reporting on request for approval of outside employment and volunteering
- security metrics including pre-employment suitability screening, security clearances, breaches, access controls, and reporting under the protective security policy framework
- risk, fraud and corruption metrics
 - monitoring of fraud and corruption reports and investigations
 - monitoring privacy breaches
 - monitoring Public Interest Disclosures.³⁹

Assessing whether the agency is acting positively according to the intent of the law

4.33 DITRDCA stated it monitors and evaluates its activities, in part, through governance committees, including the Executive Leadership Team, Enabling Committee, Priority

³⁷ APSC, *Integrity Metrics Resource*, page 9–15.

³⁸ This is a summary of key points.

³⁹ APSC, *Integrity Metrics Resource*, page 9–15.

and Delivery Committee, and Audit and Risk Committee.⁴⁰ No information was provided on how these committees assess whether the agency is positively acting according to the intent of the law or what evidence they consider.

- 4.34 DITRDCA also has a 'dedicated probity team', that 'supports internal stakeholders in ensuring that probity considerations are front and centre in decisions made'. The probity considerations were not identified by DITRDCA, but it assured the Committee ethical decision making and appropriate record keeping 'are cornerstones of the Department's approach to its actions'.⁴¹ Amongst other things, the Artbank audit found shortcomings in record keeping, and the reliability of Artbank data a challenge.⁴²
- 4.35 DITRDCA stated it also has a conflict of interest process, and an internal audit program dealing with risk management, control, and governance processes. Internal audits are 'periodically undertaken on key aspects of the department's processes and frameworks to assess whether they are fit-for-purpose and achieving their intended objectives'.⁴³
- 4.36 The mechanism by which DITRDCA identified the intent of the laws and regulatory frameworks it is required to follow, for instance in procurement, and how it assessed whether it is complying with the intent of these laws and regulatory frameworks, or even just the letter, was not identified. The Artbank report provided evidence departmental officials were not undertaking procurements consistent with the CPRs or DITRDCA's own policies.⁴⁴

Department of Health and Aged Care

- 4.37 The CHHP was administered by the Department of Health and Aged Care (Health). As discussed in chapter 3, the ANAO found the administration of the CHHP was ineffective and fell short of ethical requirements, including:
- deliberate breaches of the Commonwealth Grants Rules and Guidelines (CGRGs)
 - failing to advise the minister there was no legislative authority for some grants
 - governance and administration of funding arrangements that were not effective
 - monitoring and evaluation arrangements that were only partly effective.⁴⁵
- 4.38 Health's view of integrity is such that it was able to state that what lay at the heart of the issue was not a cultural problem but 'capability and attention to detail. If you view

⁴⁰ DITRDCA, *Submission 4.2*, p. [3].

⁴¹ DITRDCA, *Submission 4.2*, p. [3].

⁴² The ANAO made reference to the reliability of Artbank program data and recordkeeping in the following paragraphs: 3.21, 3.24, 3.41, 3.60, 4.5, 4.6, 4.11–4.13, 4.24, 4.37–4.40, 4.58, 5.6, 5.10, as well as in notes to Table 2.1, and Table 3.2. See: ANAO, *Artbank report*, footnote 22. See also, for instance: ANAO, *Artbank report*, paragraphs 10, 3.18, 3.21, 3.23, 3.27, 3.39, 4.41, and notes to figure 4.1.

⁴³ DITRDCA, *Submission 4.2*, pages [3]–[4].

⁴⁴ ANAO, *Artbank report*, pages 7–8, 30–31.

⁴⁵ ANAO, *Administration of the Community health and Hospitals Program*, No. 31 2022–23, hereafter *CHHP report*, pages 6, 8–9.

that as having some ethical aspect to it—and you could argue that there is—then, yes’.⁴⁶ And further, Health argued the department at the time was of the view it had to balance the risk between managing the appropriation for CHHP within a tight timeframe and confirming legality, which ‘had to be dealt with retrospectively’.⁴⁷

- 4.39 As also discussed in chapter 3, Health suggested in a letter to the minister, in November 2022, the creation of an additional category of grant in the CGRGs to ‘support timely delivery of published and explicit decisions of Government’, and the development of ‘program level grant guidelines that can be re-used over subsequent years and funding rounds’.⁴⁸ The Audit Office had found in its report that Health had used the rationale ‘decisions of government’ to administer grants in a manner that did not meet the requirements of the CGRGS and as the basis for not responding to advice from the Department of Finance.⁴⁹

Assessing whether behaviour is right and proper

- 4.40 Health stated it has an Assurance Framework that provides guidance to staff on ensuring outcomes are being met in an efficient, accountable, and ethical manner. The framework identifies areas of assurance need, and provides advice on conducting assurance, and communicating findings to the Executive. It described the Assurance Framework as ‘an effective system of risk management and internal control to support the achievement of outcomes’ and one that had ‘promoted a culture of probity’.⁵⁰ No further substantive information was provided, in particular what constitutes ‘assurance’ and the substance of these activities.
- 4.41 Health also has a risk-based Internal Audit Work Program (IAWP), developed through an annual assurance mapping process. The IAWP has included audits dealing with fraud management, public interest disclosures, physical and cyber security, and conflicts of interest.⁵¹
- 4.42 Health stated it undergoes independent external assurance, citing the ‘Halton Review of COVID-19 Vaccine and Treatment Purchasing and Procurement’ and ANAO audits. It ‘actively monitors the implementation of all internal and ANAO recommendations to promote a culture of improvement in relation to compliance’.⁵²
- 4.43 Health has an Essential Learning Program that includes modules on integrity and ethical conduct, dealing with fraud and integrity, and covering topics including the APS CoC, conflicts of interest, and responding to fraud.⁵³

⁴⁶ Mr Charles Wann, Deputy Secretary, Corporate Operations, Department of Health and Aged Care (Health), *Committee Hansard*, 8 September 2023, p. 26.

⁴⁷ See discussion between Mr Wann and members of the Committee: *Committee Hansard*, 8 September 2023, pages 23–24.

⁴⁸ ANAO, *CHHP report*, p. 42.

⁴⁹ See, for instance: ANAO, *CHHP report*, pages 44–46, 52.

⁵⁰ Health, *Submission 7.3*, pages [12]–[13], [16].

⁵¹ Health, *Submission 7.3*, pages [12]–[13].

⁵² Health, *Submission 7.3*, p. [13].

⁵³ Health, *Submission 7.3*, p. [13].

- 4.44 Health states that the Assurance Framework and Essential Learning Program are underpinned by its Integrity Framework of policies, procedures, programs and committees ‘designed to promote a pro-active integrity culture which supports ethical behaviour ...’ This framework is informed by the Commonwealth Integrity Maturity Framework—a set of eight integrity principles derived from key Commonwealth integrity laws, policies and procedures.⁵⁴
- 4.45 The purpose of the Commonwealth Integrity Maturity Framework (produced by the National Anti-Corruption Commission), which contains four levels of agency maturity, is to support Commonwealth agencies to ‘design, implement and review the effectiveness of their integrity frameworks so they are tailored to their risk profiles, size and contexts’.⁵⁵
- 4.46 The Integrity Maturity Framework is accompanied by a ‘self-assessment tool’ for agencies to self-assess their integrity maturity and plan to strengthen their pro-integrity culture and controls and address integrity risks. The self-assessment tool focusses on strategies for preventing integrity breaches; its purpose is not to detect, investigate or sanction integrity failures.⁵⁶
- 4.47 Health has developed a range of tools and policies against each of the integrity principles, which are summarised in the table below.⁵⁷

Table 4.1 Department of Health and Aged Care Integrity Approach: Selected examples

Integrity principle	Integrity approach
Values and Code of Conduct	Performance policies; guidelines for handling suspected and determined breaches of APS CoC; procedures for determining breaches and sanctions
Integrity knowledge and performance management	Induction program, including essential learning training program; essential learning policy
Integrity policies, resources and systems	Gifts and hospitality register; conflict of interest policy and resources; bullying and harassment policy; public interest disclosure policy; NACC framework; fair treatment and review of actions guidelines; complaints management policy
Integrity risk management and integrity controls	Risk management policy and framework
Prevent, detect and manage fraud and corruption	Fraud and corruption control plan; enterprise fraud and corruption risk assessment

⁵⁴ Health, *Submission 7.3*, p. [13].

⁵⁵ National Anti-Corruption Commission (NACC), *8 Integrity Principles and Maturity Indicators: Commonwealth Integrity Maturity Framework*, undated, p. [2].

⁵⁶ NACC, *Self-Assessment Guide and Frequently Asked Questions: Commonwealth Integrity Maturity Framework*, undated, p. 4.

⁵⁷ Health, *Submission 7.3*, pages [13]–[15].

Integrity principle	Integrity approach
Integrity in public resource management	Accountable authority instructions; Finance business rules; HR and financial delegations; grants management toolkit; templates for procurement, contract management and grants; managing procurement risk guidance; confidentiality conflicts of interest, privacy and secrecy deed poll (contractors); travel policy
Protect people, information and assets	Health security policy framework; security risk management policy; personnel security policy; ICT acceptable use policy; information security policy; insider threat program
Monitor and evaluate organisational integrity	Assurance framework and IAWP; Executive Committee oversight and reporting; Audit and Risk Committee; Security, Workforce Integrity and Assurance Committee

Source: Department of Health and Aged Care, Submission 7.3, pages [13]-[15]

- 4.48 As encouraged by the guidance materials produced by the APSC and the NACC, Health's approach might be described as one of developing policies based on risk assessments, for instance conflicts of interest, and of assessing integrity on the basis of whether the policies are being followed, for instance, whether 'essential learning' has been undertaken, whether a conflict of interest declaration has been completed, whether the template for procurement or grants has been completed. The capacity of such a framework to assess whether officers are actually behaving in a way that is right and proper, to get at the issues raised by the ANAO in its report, such as ignoring advice from the Department of Finance and the Australian Government Solicitor, and generally administering a program in a manner that is not ethical, is not clear.

Assessing whether the agency is positively acting according to the intent of the law

- 4.49 Health stated it assessed whether it was positively acting according to the intent of the law through the following activities:
- risk-based IAWP, which has included audits dealing with fraud management, public interest disclosures, physical and cyber security, conflicts of interest
 - Assurance Framework (discussed above)
 - improving its approach to grants administration, including by improving the content of guidance and templates to support compliance with finance law
 - financial governance framework containing layered and integrated controls, including training and guidance, financial reporting and tiered governance, publication of legislation and rules, review of delegation schedules and Accountable Authority Instructions, including internal assurance over procurement and grant processes
 - procurement controls, including guidance on ensuring probity through the procurement process, and a Procurement Assurance Program that tests a sample

of procurement activities on a quarterly basis against the procurement framework, including the adequacy of the probity plan and the probity register.⁵⁸

- 4.50 Having a policy in place, such as conflict of interest policy, and requiring officers to undertake learning and make a declaration, may give an indication of whether an officer is in a position to act with probity. Absent robust assurance, however, it is difficult to see how an entity can determine whether its officers are positively acting according to the intent of the law by reference to administrative arrangements. Health did not provide any indication of whether it does undertake robust assurance, though it did say it ‘tests a sample of procurement activities’ against the procurement framework. While this has the potential to provide assurance, the lack of detail means this cannot be definitively determined.

Australian Competition and Consumer Commission

- 4.51 As discussed above, the ACCC’s probity management was found to be partly effective, but the ANAO noted there were initiatives underway to strengthen internal arrangements.⁵⁹

Assessing whether behaviour is right and proper

- 4.52 The ACCC stated that demonstrating an absence of fraud, corruption, illegal activity or conflicts of interest is relevant to an assessment of levels of probity. Likewise, demonstrating, through an arm’s length audit, an entity is meeting legislated requirements is ‘a positive indication an agency is acting in accordance with expected standards but also has a broader culture of probity’.⁶⁰
- 4.53 However, providing some broader insight, the ACCC added, ‘... compliance with requirements is not a definitive measure of probity’. The objectives, values and culture of an agency, and the expectations set by senior leadership around acceptable behaviour, significantly influence how an agency operates—that is, whether it operates with probity. Indicators of culture can be monitored through staff census results, levels of engagements and trends in performance management.⁶¹
- 4.54 The ACCC acknowledged there was scope for agencies to set their own standards of conduct beyond what was required by legislation by adopting additional transparency actions, which the ACCC had done, including by adding ‘independent’ and ‘trustworthy’ to the APS values of impartiality, committed to service, accountable, respectful and ethical. Agencies could also go beyond best practice, including by reducing the value for disclosure of gifts and making public disclosures.⁶²
- 4.55 The ACCC also noted demonstrating the absence of something or a negative obligation, for instance illegality or fraud, was difficult. Instead, an agency could

⁵⁸ Health, *Submission 7.3*, pages [12], [16]–[17].

⁵⁹ ANAO, *ACCC report*, p. 9.

⁶⁰ ACCC, *Submission 6.2*, p. 1.

⁶¹ ACCC, *Submission 6.2*, p. 1.

⁶² ACCC, *Submission 6.2*, p. 1.

demonstrate appropriate measures were in place to prevent unwanted conduct occurring, and to detect and address any such conduct—the ACCC detailed a range of activities it undertakes in this area, including reviewing data from the APS Census; reviewing structures, policies and procedures; and undertaking audits or inspections.⁶³

- 4.56 When asked how it tracked and traced compliance with integrity requirements and identified good behaviours, the ACCC responded it was cataloguing the obligations it had under legislation, policies and procedures; establishing ways to survey, audit and test for compliance; and building these into its systems and annual processes.⁶⁴ By way of example, the ACCC stated:

Conflict of interest is one of the key issues that we look at for probity and integrity. We've got a number of requirements but, historically, not always the best practice to work out in a measurable way whether our people are complying. For example, annually, every one of our people must put in a conflict of interest form. They must also do regular updates to that, depending on the issues that they're working on or the change in their own circumstances. We've had reasonable systems and are now getting much better systems to actually put that in train. As for the essential training that we require, we've had reasonable systems for making sure that people comply with such training. We're really stepping that up now through this compliance tool to make sure that we can track and trace whether people are actually doing that. That can then feed through to the layers of accountability, so it's not just the individual but also their leader and manager through to their senior executive: what are they doing and what do their results look like, in terms of the people for whom they're responsible?⁶⁵

Assessing whether the agency is positively acting according to the intent of the law

- 4.57 The ACCC stated it undertakes regular audits and compliance surveys; provides disclosure opportunities and requires staff training. However, it noted fundamental assurance that an agency was acting appropriately and demonstrating probity occurred through independent assessments. Agencies may assess their own levels of compliance, but this was not a substitute for independent, third party scrutiny.⁶⁶

- 4.58 The ACCC stated each year:

... consumer engagement and a survey tests the response of the community in general to the way that, as consumers, they see the responsiveness, trustworthiness and delivery of outcomes being in the interests of consumers. Also, we benchmark ourselves against other agencies in this regard ... So we continue to measure ourselves against what that consumer survey tells us that

⁶³ ACCC, *Submission 6.2*, pages 1–2.

⁶⁴ Mr Scott Gregson, Chief Executive Officer, ACCC, *Committee Hansard*, 8 September 2023, p. 6.

⁶⁵ Mr Scott Gregson, ACCC, *Committee Hansard*, 8 September 2023, p. 6.

⁶⁶ ACCC, *Submission 6.2*, p. 2.

the community is thinking about the way in which we're discharging our consumer protection responsibilities.⁶⁷

Australian Securities and Investments Commission

4.59 ASIC told the Committee it had a 'robust and fit for purpose integrity management framework, overseen by an executive integrity committee', and noted the findings of the ANAO report.⁶⁸

4.60 It emphasised:

- it had developed a Code of Conduct and Values, as required by its enabling legislation; identified key probity risks (conflict of interest, regulatory capture, financial trading, senior executive remuneration, procurement, corporate credit care expenditure, gifts, benefits and hospitality, fraud, and public interest disclosures)
- it had policies and procedures to manage identified risks
- personnel were effectively informed of probity requirements through training and messaging from senior officials
- it had a framework and arrangements for monitoring the effectiveness of internal controls and compliance with probity requirements, and providing assurance to the accountable authority
- it promoted, checked and followed up compliance with probity requirements
- it kept records to demonstrate probity.⁶⁹

4.61 ASIC also provided its 'Guidance on using the Code', under which, when faced with a decision, staff are asked to consider if they can answer 'yes' to a series of questions:

- Is the decision consistent with ASIC's policies?
- Does it comply with legislation?
- Is it in ASIC's best interests?
- Would I feel OK telling friends or family about this?
- Is it aligned to ASIC's vision and values?
- Would it be OK if someone did this to me?⁷⁰

4.62 If staff answer 'no' or 'not sure' to any of the questions, they are to contact their people leader or seek further advice and guidance.⁷¹ While the fact responses can only be 'yes' or 'no' might suggest the guidance results in definitive outcomes,

⁶⁷ Ms Gina Cass-Gottlieb, Chair, ACCC, *Committee Hansard*, 8 September 2023, p. 5.

⁶⁸ ASIC, *Submission 3.1*, p. [1].

⁶⁹ ASIC, *Submission 3.1*, pages [1]–[2].

⁷⁰ ASIC, *Submission 3.1*, p. [4].

⁷¹ ASIC, *Submission 3.1*, p. [4].

responding yes or no requires significant judgement and is dependent, for instance, on how officers understand ASIC's 'best interests', the ethical convictions of friends and family, and what officers believe is 'okay'.

- 4.63 It remains unclear from ASIC's response how it assesses whether its officers are actually acting in a way that is right and proper, and not just in a way that is technically and legally correct. It should be noted the ANAO audit was not an examination of the effectiveness of ASIC or of any particular regulatory decisions taken. Rather, it assessed whether there were effective administrative arrangements (for instance, frameworks, guidelines, policies, procedures) in place to address nine selected probity risks.

Australian Prudential Regulation Authority

- 4.64 APRA provided a brief response to the Committee's questions, stating its Integrity Review Group examined probity-related metrics to ascertain whether behaviours corresponded with APRA's expectations. Any insights or thematic observations were reported to the Audit and Risk Committee—an 'independent' committee.⁷²
- 4.65 APRA stated its Code of Conduct supported right and proper behaviour, and senior management communicated regularly with staff on probity-related procedures (such as declaring conflicts of interest), APRA's expectations, and the importance of probity to the APRA's operation and reputation.⁷³
- 4.66 To determine whether APRA is operating according to the intent of the law, APRA stated it had a 'three lines of defence' approach:
- Line 1—Management: operationalising adherence to probity procedures and ensuring the intent is understood
 - Line 2—Independent Risk Team: owns and regularly reviews the probity-related policies and examines metrics (including incidents) to monitor the effectiveness of management activities
 - Line 3—Internal audit: independent controls testing on whether 'key controls are adequately enabling policy expectations', with results communicated to the Audit and Risk Committee.⁷⁴
- 4.67 During the hearing, APRA stated it thought about probity from two perspectives—top-down or 'stick', and 'carrot'.

You can think about it from two perspectives. If you like, there's the top-down framework, which really provides for probity and ethics across the organisation. So, at a high level, all APRA staff and statutory appointees, which are our executive board members, are required to comply with APRA's Code of Conduct, our Conflicts of Interest Framework and, of course, relevant legislation, and to

⁷² APRA, *Submission 8.1*, p. [1].

⁷³ APRA, *Submission 8.1*, p. [1].

⁷⁴ APRA, *Submission 8.1*, p. [2].

adhere to the APRA values, which are binding on all of us. To support everyone in that, we have a raft of policies and guidance materials for staff to assist them to understand their obligations. We also have mandatory training and regular internal communications to ensure that people understand what it is that they need to do. In recent years, we've also rolled out a new capability framework for staff, which includes, amongst those capabilities, integrity as an important aspect. If you like, they are perhaps more 'the stick'.

Going beyond that, in terms of 'the carrot', we very much have a culture and environment where we support, encourage and recognise people who are adhering to the APRA values; for instance, rewards are given to people who meet particular standards of behaviour and ethics.⁷⁵

- 4.68 During the hearing APRA also disclosed it had been evolving the ways it thinks about measuring ethical behaviours, and had implemented an Integrity Review Group, comprising senior officers in the organisation including the senior executive, representatives from the culture team, general counsel and CRO.

What we do is meet quarterly and bring together and look at different data points across the organisation around joining the dots, if you like, to see where there may be potential vulnerabilities or integrity, fraud or risk issues emerging. So we look at whether any public interest disclosures have been made and whether staff conduct issues have been raised. Obviously, it's all anonymised, but it's getting a sense of whether themes or patterns are emerging. It's also looking at whistleblower reports: again, is there anything that's relevant to APRA that might give rise to concerns and things that we should look into more deeply?⁷⁶

- 4.69 Like the reports into the other financial regulators, the ANAO report was not a performance audit.

⁷⁵ Ms Lucinda McCann, General Manager, Legal and General Counsel, APRA, *Committee Hansard*, 8 September 2023, p. 3.

⁷⁶ Ms Lucinda McCann, APRA, *Committee Hansard*, 8 September 2023, p. 5.



5. Culture and accountability

- 5.1 It is through a range of frameworks that the obligations of public sector entities and officers are established, operationalised and assessed, including probity and ethical obligations. One such framework through which the public sector assesses whether it is acting with probity and ethically is the integrity framework. In the previous chapter, the Committee examined whether the practice of subsuming probity under the concept of integrity, then using a range of predominantly administrative metrics to demonstrate integrity, allowed agencies to be confident their officers are acting with probity. The Committee questioned this approach.
- 5.2 Integrity frameworks are important and integral to satisfying obligations in the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) to act honestly, in good faith and for a proper purpose. However, a conflict of interest declaration, a positive performance review, or training in preventing fraud and corruption (and an assurance program to ensure these are undertaken and completed), does not guarantee an officer will undertake a procurement in compliance with the law (as shown in the Artbank audit), or administer a grants program ethically (as shown in the Community Health and Hospitals Program (CHHP) audit).
- 5.3 The previous chapter discussed the Australian Competition and Consumer Commission's (ACCC) comment that fundamental assurance an agency was acting appropriately and demonstrating probity could occur through independent assessment.¹ Independent audits, such as those conducted by the Australian National Audit Office (ANAO), are an important aspect of accountability. They can examine how officers actually perform their tasks, shine a light on instances where officers do not act with probity or ethically, identify where finance law is breached or where the rules are bent to achieve a pre-determined outcome. However, it is neither possible nor desirable to subject agencies to rolling audits.
- 5.4 Having considered the evidence before it, the Committee concluded what stands between the law (and its regulatory frameworks), and the achievement of outcomes by ethical means, is culture. Possibly the best way to ensure officers act with probity as they go about achieving results is by fostering an organisational culture that expects it.
- 5.5 To this end, the Committee requested agencies:
- provide their definition of culture and explain how a culture that fosters integrity and probity could best be built
 - identify metrics and ways by which culture could be measured

¹ Australian Competition and Consumer Commission (ACCC), *Submission 6.2*, p. 2.

- specify how an agency and its leaders could and should be accountable for culture.
- 5.6 In making this request, the Committee was clear that the integrity metrics agencies were embedding appeared able to provide only limited insight on whether officers are actually discharging their duties with probity—if probity is understood in its full sense as acting in a way that models and promotes the highest standard of ethical behaviour, complying with relevant laws and professional standards, acting in a way that is right and proper as well as technically and legally correct, addressing misconduct, and providing leadership.² What the evidence provided by entities indicates is that culture is mostly measured by integrity metrics.
- 5.7 This chapter first discusses in general terms the broad themes in responses provided by entities to the Committee’s culture questions.³ It then addresses the issue of public sector accountability, of entities and policy owners. As outlined in chapter one and discussed further in chapter six, culture and accountability are two of the critical and interdependent aspects of the system necessary to foster an Australian public sector that acts with probity and integrity.
- 5.8 In this chapter, elements of *Louder than Words* are discussed. *Louder than Words* is the APS Integrity Plan developed by the APS Integrity Taskforce, which was established by the Secretaries Board to examine APS integrity, identify gaps, and suggest opportunities to learn and improve. The report examined three areas: culture, systems, and accountability, and emphasised the unique role of Australian Public Service (APS) leadership as ‘cultural architects for integrity’.⁴ It contains 15 recommendations, some of which are discussed below.

Culture

What is culture

- 5.9 When asked to define culture, the Australian Prudential Regulation Authority (APRA) and the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (DITRDCA) told the Committee about their positive cultures and work to embed integrity.⁵ DITRDCA made three statements with regard to its understanding of culture:

² This definition is drawn from the Australian Public Service Commissioner’s 2022 directions with regard to the APS Values. See: *Australian Public Service Commissioner’s Directions 2022*, section 14.

³ The full detail of entity responses can be found in their respective submissions to the inquiry; this chapter summarises key points only.

⁴ Department of Prime Minister and Cabinet (DPMC), *Louder Than Words: An APS Integrity Action Plan – APS Integrity Taskforce*, November 2023, hereafter DPMC, *Louder than Words*, pages 2–3.

⁵ Department of Infrastructure, Transport, Regional Development Communications and the Arts (DITRDCA), *Submission 4.3*, p. 1; Australian Prudential Regulation Authority (APRA), *Submission 8.2*, pages [1]–[2].

- it considers culture in the context of the standards⁶ that outline expected behaviours
- it supports staff to understand and embed the standards expected of the public service
- the standards provide DITRDCA with confidence in the way officers work to achieve their objectives.⁷

5.10 The Department of Health and Aged Care (Health), the ACCC and the Australian Securities and Investments Commission (ASIC) provided working definitions of culture as encompassing, variously, shared values, beliefs, attitudes, norms, goals, expectations and practices.⁸ The ACCC noted culture is dynamic and evolves over time,⁹ and Health stated, ‘conduct represents the tangible manifestation of culture through actions, behaviours, and decisions of ... individuals’.¹⁰

Building culture

5.11 In terms of building culture, the entities provided similar responses, including that:

- the tone starts at the top¹¹ with senior executives playing a key role in shaping culture and being accountable through the SES performance framework that places equal emphasis on outcomes and behaviour¹²
- agencies must communicate clearly the expectations for behaviour, including by providing appropriate guidance, tools and training¹³
- there must be a ‘psychologically safe’ environment where staff feel able to contribute ideas, share information and report mistakes, or ‘speak up’¹⁴
- there must be processes to support the reporting and assessment of instances of non-compliance and misconduct¹⁵

⁶ These standards were encompassed by the legal obligations on public servants: APS Code of Conduct, APS Values, APS Employment Principles, and *Public Governance, Performance and Accountability Act (2013)* (PGPA Act). DITRDCA, *Submission 4.3*, p. 1.

⁷ DITRDCA, *Submission 4.3*, p. 1.

⁸ Department of Health and Aged Care (Health), *Submission 7.5*, p. [3]; Australian Competition and Consumer Commission (ACCC), *Submission 6.3*, p. [1]; Australian Securities and Investments Commission (ASIC), *Submission 3.2*, p. 2.

⁹ ACCC, *Submission 6.3*, p. [1].

¹⁰ Health, *Submission 7.5*, p. [3].

¹¹ Health, *Submission 7.5*, p. [3]; ACCC, *Submission 6.3*, pages 2–3; APRA, *Submission 8.2*, p. [4].

¹² Health, *Submission 7.5*, p. [3]; ACCC, *Submission 6.3*, pages 2–3; DITRDCA, *Submission 4.3*, p. 2; APRA, *Submission 8.2*, pages [3]–[4].

¹³ DITRDCA, *Submission 4.3*, p. 1; Health, *Submission 7.5*, p. [4]; ASIC, *Submission 3.2*, pages 2–3; APRA, *Submission 8.2*, pages [1], [5].

¹⁴ DITRDCA, *Submission 4.3*, p. 2; ASIC, *Submission 3.2*, pages 3–4; APRA, *Submission 8.2*, p. [5]; Health, *Submission 7.5*, p. [5].

¹⁵ Health, *Submission 7.5*, p. [4]; ASIC, *Submission 3.2*, pages 3–6.

- there must be broader structures in entities such as integrity and assurance divisions, integrity committees and risk committees, as well as robust internal audit, risk and integrity management frameworks and strategies.¹⁶
- 5.12 The responses from entities were broadly consistent with the recommendations in *Louder than Words* with regard to culture, which deal with appointing the right leaders; incentivising good leadership; recognising those who lead with integrity; bolstering the capability of the public sector to lead with integrity by focussing on ethical decision making and fostering psychological safety; and promoting role clarity for the APS.¹⁷
- 5.13 With regard to the role of senior public servants, Mr Andrew Podger stated the new SES Performance Leadership Framework offered ‘a step in the right direction’. Senior public servants:
- ... must believe they will be sufficiently rewarded for ethical behaviour, and sufficiently punished for breaches, to outweigh any incentives to the contrary, whether through pleasing Ministers or their offices or public service superiors, because of ‘results’ achieved ... for this to have real impact, however, it must feed into the processes for appointment (and termination).¹⁸

Measuring culture

- 5.14 The following discusses briefly the approach the entities take to measuring culture. Though there is some variation, in general, entities fold probity into integrity, then use a range of integrity metrics (discussed in the previous chapter), in addition to census/survey results, to determine whether their culture is positive.

Department of Infrastructure, Transport, Regional Development, Communications and the Arts

- 5.15 DITRDCA acknowledged it regarded probity and ethics as part of integrity and it built integrity through its Integrity Strategy.¹⁹ DITRDCA told the Committee again about its Integrity Dashboard, which it said provided the Executive with ‘insights on the Department’s Integrity culture and where work may be needed to uplift culture’.²⁰ The utility of integrity metrics in understanding whether officers are acting with probity and ethically was discussed in the previous chapter.
- 5.16 DITRDCA also told the Committee it participated in the APS Employee Census, which provided useful insights on the ‘department’s workforce planning initiatives that aim to create a skilled, respectful and innovative workplace’.²¹ It stated the

¹⁶ Health, *Submission 7.5*, p. [4]; ASIC, *Submission 3.2*, p. 3; ACCC, *Submission 6.3*, p. 3; APRA, *Submission 8.2*, p. [2].

¹⁷ DPMC, *Louder than Words*, p. 7.

¹⁸ Mr Andrew Podger AO, *Submission 1.1*, p. 2.

¹⁹ DITRDCA, *Submission 4.3*, p. 1.

²⁰ DITRDCA, *Submission 4.3*, p. 2.

²¹ DITRDCA, *Submission 4.3*, p. 2.

Department rated highly on diversity, equity and inclusion.²² Further, it highlighted that 68 per cent of staff who participated in the census agreed they 'have read and understand the department's Integrity Strategy'.²³

Department of Health and Aged Care

- 5.17 Health stated it followed the APSC guidance on measuring an integrity culture, and used employee surveys (including the APS Employee Census) and pulse checks. It stated questions in the APS Employee Census that are indicators of an integrity culture included those around the APS Values, bullying and harassment, corruption and fraud, wellbeing, innovation and leadership.²⁴
- 5.18 Health stated it also used internal audit measures and metrics. In particular, it assessed the adequacy and effectiveness of the internal control environment as the internal control environment was directly impacted by culture. It is not clear which aspects of the 'internal control environment' this refers to. Health also stated it: assessed programs and procedures that communicate values, strategies and objectives; assessed the value and alignment of culture-related training; analysed culture information such as training rates and compliance measures; conducted pre- and post-surveys to analyse aspects of culture; conducted guided behavioural-based interviews; and identified root causes across areas that have received audit based recommendations regarding culture. For instance, Health had recently undertaken an audit of cybersecurity culture and developed a plan to measure security culture uplift.²⁵

Australian Competition and Consumer Commission

- 5.19 The ACCC's approach to measuring culture was to make its expectations of officers transparent. It stated it had three main ways an integrity culture could be measured:
- public transparency and reporting, including through the use of clear metrics, such as those contained in the APS Employee Census, as well as gauging the level of internal fraud and corruption and monitoring 'whistleblower' reports
 - requiring leaders to demonstrate pro-integrity behaviours
 - setting higher expectations above mandated requirements (for instance through its gifts and benefits policy) and adopting best-practice guidance.²⁶

Australian Securities and Investments Commission

- 5.20 ASIC highlighted a number of measures it used to measure culture, including:
- key risk factors: training completion rates; annual attestations of compliance with integrity policies; monitoring of declarations of conflicts of interest, gifts register

²² DITRDCA, *Submission 4.3*, p. 3.

²³ DITRDCA, *Submission 4.3*, p. 3.

²⁴ Health, *Submission 7.5*, p. [5].

²⁵ Health, *Submission 7.5*, p. [6].

²⁶ ACCC, *Submission 6.3*, p. 2.

entries, code of conduct investigations, and reported breaches of integrity policies; and monitoring of the number and nature of complaints about agency team members

- exit surveys
- culture surveys and diagnostics, including asking officers to what extent they believe the agency expects them to behave ethically, which includes acting according to the intent of the law
- external reviews, including by the Financial Regulator Assessment Authority.²⁷

5.21 In particular, ASIC stated its Code of Conduct specifically required officers to go further than simply complying with the law and policies, and that when making decisions, officers are required to consider factors broader than whether the decision complies with legislation.²⁸

Australian Prudential Regulation Authority

5.22 APRA stated its Integrity Review Group received reporting from data points across the organisation including: whistleblowing; public interest disclosures; and risk and people and culture incidents. It also recently undertook an initial assessment against the APSC Integrity Metrics Maturity Model, and encourages the reporting of wrongdoing by current and former public officials in accordance with the *Public Interest Disclosure Act 2013*.²⁹ As discussed in the previous chapter, the capacity of integrity metrics to reveal whether officers are acting with probity or ethically can be limited.

5.23 APRA also assesses itself against the integrity maturity framework published by the National Anti-Corruption Commission; gathers data that can indicate how the organisation's culture fosters ethical behaviour, including through the annual Engagement Survey; measures staff perceptions relating to risk culture through a Risk Culture Survey; and uses 'various psychometric tools' to build strong teams with high trust and integrity.³⁰

APS Employee Census

5.24 Aside from ASIC and APRA,³¹ entities mentioned the utility of the APS Employee Census to measuring culture and understanding whether officers are acting with probity and ethically. The APS Census asks questions in a range of areas, including:

- general impressions of current job, including whether the officer feels a sense of accomplishment or is inspired, views on remuneration, willingness to go the extra mile, and ability to participate in decision-making

²⁷ ASIC, *Submission 3.2*, p. 7.

²⁸ ASIC, *Submission 3.2*, p. 3.

²⁹ APRA, *Submission 8.2*, p. [2].

³⁰ APRA, *Submission 8.2*, p. [3].

³¹ ASIC stated it conducts 'culture and engagement' surveys; and APRA spoke of its annual Engagement Survey and Risk and Culture Survey. ASIC, *Submission 3.2*, pages 1, 7; APRA, *Submission 8.2*, pages 2–3.

- general impressions of current work group, including communication, cooperation, adapting to new priorities and tasks, and resourcing
- general impressions of immediate supervisor, including communication, ability to provide feedback, inclusion, and openness to alternative views
- general impressions of senior executive service, including communication, cooperation, persuasion, creating a positive environment, promoting the use of data and evidence
- general impressions of agency and APS, including feelings of personal attachment and pride, whether an officer would recommend their agency, whether an agency inspires the officer to do their best work every day
- a self-assessment of current workloads and productivity, including potential barriers to an officer working at their best (such as clarity, competing priorities, layers of decision making, mobility, flexible work practices)
- how an agency develops officer capability
- staff perceptions of their wellbeing
- staff plans for their future employment, and mobility opportunities
- whether officers feel their agency encourages innovation
- APS Code of Conduct (CoC) questions asking whether staff have observed discrimination, harassment, bullying and corruption
- a variety of entity-specific questions.³²

- 5.25 There are no questions that test whether and to what extent officers are aware of the legislative and regulatory frameworks under which they work, and whether they act in a way that complies with the intent, rather than just the letter, of the law. Audit reports show officials have repeatedly fail to comply with both the letter and the intent of the law, and it is not clear how the APS Employee Census would provide insights on this.
- 5.26 The absence of questions in the census on sensitive subjects, such as staff confidence in agency advice on grants or decisions on procurement, is discussed below.

Accountability for performance

- 5.27 The Committee heard that accountability for performance rightly sits with individual officers and the accountable authority, however, it does not only sit there—policy owners also have a central role in integrity in the public sector.

³² Australian Public Service Commission (APSC), '2023 APS Employee Census', www.apsc.gov.au/initiatives-and-programs/workforce-information/aps-employee-census-2023, viewed 21 May 2024.

Accountability of accountable authorities

- 5.28 The PGPA Act establishes the governance framework for the public sector. Section 15 of the PGPA Act deals with the duty to govern a Commonwealth entity and applies to the accountable authority. It requires the accountable authority, amongst other things, to govern the entity in a way that promotes the proper (efficient, effective, economical and ethical) use and management of public resources.³³
- 5.29 The *Public Service Act 1999* (PS Act) mandates that departmental secretaries are responsible 'to manage the affairs of the Department efficiently, effectively, economically and ethically'.³⁴ Under the PS Act the responsibilities of the Secretary of a department include: 'to implement measures directed at ensuring that the Department complies with the law'.³⁵
- 5.30 The APS CoC, which is contained in the PS Act, contains 13 requirements, including that officials behave honestly and with integrity; act with care and diligence; comply with all applicable Australian laws; comply with any lawful and reasonable direction given by someone who has authority to give the direction; and use Commonwealth resources in a proper manner and for a proper purpose.³⁶
- 5.31 The heads of public sector organisations are also required to establish internal frameworks within their organisations to instruct their personnel on certain matters. For example, the accountable authority of a PGPA entity is authorised to issue Accountable Authority Instructions (AAIs), which can impose obligations additional to the minimum standards established under the PGPA Act and PGPA Rule.³⁷
- 5.32 Despite this governance framework that sets expectations for public sector officials, including accountable authorities, Andrew Podger suggested a number of reviews had shown accountability for performance had not been firm enough, and when there was accountability, it was lower level public servants who were held to account, not the senior executive service. These reviews included the Robodebt Royal Commission, which identified a large number of individual public servants who allegedly breached the CoC; and audits by the ANAO which also reveal situations where public servants do not actually meet their obligations under the CoC. However, Mr Podger stated, there is no evidence anybody has been held accountable. He was of the view the matter of holding senior public servants accountable for their performance was not 'taken very seriously'.³⁸

The facts are that senior public servants are extremely rarely held directly to account let alone charged with breaching the Code of Conduct, notwithstanding the responsibilities and duties set out in the Public Service Act and PGPA Act

³³ PGPA Act, section 15.

³⁴ *Public Service Act 1999* (PS Act), section 57(2).

³⁵ PS Act, section 57(2)(c).

³⁶ PS Act, section 13.

³⁷ ANAO, *Submission 5*, p. 2.

³⁸ Mr Andrew Podger AO, *Committee Hansard*, 20 November 2023, p. 16.

(including to promote, not just to uphold, the APS Values, Employment Principles and Code of Conduct).³⁹

5.33 When asked by the Committee whether anyone senior has ever been held accountable for failures to deliver, the APSC did not provide an answer, stating secretaries were accountable to the Prime Minister and the relevant minister for their performance, including through an annual review.⁴⁰ When further asked whether there were any consequences for failed programs—which failed in terms of ethics, probity, contracting, management, delivery of a contract—the APSC referred to its previous answer and explained to the Committee how the APS CoC functions and its Tranche 2 APS Reforms that would ‘hold senior leaders to account’ including through merit-based appointment.⁴¹

5.34 In his evidence, Mr Podger stated it was:

... evident ... that the incentives for secretaries are not sufficiently aligned to probity and ethical behaviour. Pleasing ministers has too often outweighed probity responsibilities. ... for secretaries, the probity issues have not been as important to them and their careers as pleasing ministers’.⁴²

5.35 Part of the problem, Mr Podger suggested, was that performance in the public sector emphasised too heavily the results or outcomes, which was a consequence of a framework adopted in the 1980s of ‘management for results’, which means there is accountability as to results but insufficient accountability for the ethical behaviours, or lack thereof, behind them.⁴³

5.36 This focus on outcomes was illustrated in an audit report on the performance of the Digital Transformation Agency (DTA), highlighted by the ANAO in its submission. For nine ICT-related procurements examined by the ANAO, the DTA’s procurement of ICT-related services was ineffective and fell short of ethical requirements. None of the procurements fully complied with the CPRs: the DTA did not conduct approach to market or tender evaluation processes effectively, and it did not consistently provide sound advice to decision-makers. The DTA’s frequent direct sourcing of suppliers using panel arrangements did not support the intent of the CPRs including achieving value for money. The DTA responded ‘While the audit report identifies shortfalls in relation to internal procurement processes, controls and education, each of the sampled procurements still achieved their intended outcomes’.⁴⁴

5.37 Andrew Podger suggested there was perhaps a misunderstanding amongst ministers and senior public servants as to what is meant by ‘accountability’. He stated:

Under Section 3 of the Act, the first main object of the Act is:

³⁹ Mr Andrew Podger AO, *Submission 1.1*, p. 4.

⁴⁰ APSC, *Submission 12.2*, p. [1].

⁴¹ APSC, *Submission 12.2*, pages [2]–[3].

⁴² Mr Andrew Podger AO, *Committee Hansard*, 20 November 2023, p. 14.

⁴³ Mr Andrew Podger AO, *Committee Hansard*, 20 November 2023, pages 15–16.

⁴⁴ ANAO, *Digital Transformation Agency’s Procurement of ICT Related Services*, Auditor-General Report No. 5 2022–23, pages 8–9, 12.

‘to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public’.

Accordingly, the APS has responsibilities to the Parliament and the public, not just the Government. It must act according to the law. And it has a degree of independence reflected in the words used in the APS Values and Employment Principles such as ‘professional’, ‘apolitical’, ‘impartial’ and ‘merit’.

This requires ‘frank and fearless advice’, keeping records and following ‘due process’, actions which, from time to time, Ministers or their staff may prefer not to occur ...

Getting the balance right is a perennial challenge, but the evidence suggests that in recent years it has drifted seriously awry, and the rewards for pleasing Ministers have exceeded any penalties from being held to account for lapses in due process.⁴⁵

- 5.38 Mr Podger stated there was a need for a stronger performance framework for secretaries conducted by the Secretary of the Department of Prime Minister and Cabinet, and the Australian Public Service Commissioner, which would look more carefully at the behaviour of secretaries in addition to the results they achieve. While providing ‘frank and fearless advice is a function of character’, it is nevertheless affected by the incentive framework in which people operate.⁴⁶ He emphasized:

... there are a lot of good words and good intentions, but the rubber has to hit the road at some point. The performance management of secretaries has to be serious. The incentive framework for secretaries has to be that getting those things wrong is going to be far more serious for their careers ... than making a minister feel good that they can make a decision which has political benefits but isn't actually abiding by the rules.⁴⁷

- 5.39 The Department of Prime Minister and Cabinet acknowledged under the second tranche of APS reforms, greater accountability would be put on Secretaries:

... [the reforms] include legislative initiatives around merit based appointments and, particularly, performance of secretaries of departments and agency heads. So that work is looking at strengthening requirements in relation to sustained underperformance in the context of a transparent performance framework, including through consideration of appropriate consequences. Another one of the initiatives that the minister has announced is the strengthening of the commissioner's powers by looking at own motion powers and expanded inquiry powers for the APS commissioner to initiate reviews and investigate alleged code

⁴⁵ Mr Andrew Podger AO, *Submission 1.1*, pages 4–5.

⁴⁶ Mr Andrew Podger AO, *Committee Hansard*, 20 November 2023, pages 14–15.

⁴⁷ Mr Andrew Podger AO, *Committee Hansard*, 20 November 2023, p. 18.

of conduct breaches. So there are some strengthening of legislative provisions that go to some of these issues at a whole-of-system level.⁴⁸

- 5.40 The APS integrity action plan, *Louder than Words*, contains several recommendations relating to accountability. Mr Podger stated the recommendations in *Louder than Words* could be strengthened so as to provide the Committee 'with more confidence that they would lead to sufficient accountability of secretaries and the SES for the performance of their agencies in terms of probity, ethics and integrity'.⁴⁹
- 5.41 The accountability recommendations in the report call for: building a strategic approach to integrity; upscaling institutional integrity; strengthening the integrity of supplier conduct; addressing risks associated with 'revolving door' and other conflicts of interest; and measuring and reporting on integrity data across the APS.⁵⁰
- 5.42 Mr Podger suggested the recommendations dealing with building a strategic approach to integrity and upscaling institutional integrity foreshadowed APS-wide and agency-level efforts to promote integrity, but did not, in themselves, provide any metric for measuring integrity performance or ensuring there were consequences for failure.⁵¹
- 5.43 With regard to the recommendation on measuring and reporting integrity data across the APS, Mr Podger noted the absence of information on what this would entail. He suggested the APSC's annual employee census could provide relevant information if it included questions on sensitive subjects such as staff confidence in agencies' advice on grants, or in agencies' decisions on procurements, or more generally in their managers' promotion of the APS values, and in relations with Ministers and their offices. Mr Podger suggested such information would complement direct data on breaches of the CoC; on adverse reports by the ANAO, Information Commissioner or Ombudsman; and on promotion appeals.⁵²

Accountability of policy owners

- 5.44 The ANAO stated the 2019 Thodey Review of the APS, the 2023 Capability Review of the APSC, and the 2023 Robodebt Royal Commission had highlighted the 'critical role of policy owners in maintaining a culture of integrity in the sector, including respect for the rule of law'.⁵³ The Auditor-General stated:

While entity accountable authorities and agency heads must be responsible for compliance within their organisations, policy owners should at least have

⁴⁸ Dr Rachel Bacon, Deputy Secretary, Australian Public Service Reform Office, DPMC, *Committee Hansard*, 20 November 2023, p. 10.

⁴⁹ Mr Andrew Podger AO, *Submission 1.1*, p. 2.

⁵⁰ DPMC, *Louder than Words*, p. 8.

⁵¹ Mr Andrew Podger AO, *Submission 1.1*, p. 3.

⁵² Mr Andrew Podger AO, *Submission 1.1*, p. 3.

⁵³ ANAO, *Submission 5*, p. 7.

processes in place to identify the level of compliance across the sector and be willing to modify their regulatory approach if it is not working.⁵⁴

5.45 As noted previously, policy owners in the Australian public sector include the Department of Finance; Australian Public Service Commission; National Archives of Australia; and Attorney-General's Department.⁵⁵

5.46 However, the Auditor-General suggested policy owners were not well informed about how their frameworks were used:

The problem that we see with the system is that those responsible for establishing the frameworks rarely undertake any action to assess whether the frameworks are successful or not. They don't collect data. They don't look at whether the system needs to be changed in order to drive improvement, or it's not transparent to the Parliament that action is taken on systemic noncompliance and transparency, which I think is an important role in accountability.⁵⁶

5.47 When considering the fact there is almost no formal mechanisms in public sector integrity frameworks to provide assurance on compliance,⁵⁷ the Auditor-General was of the view:

It is currently difficult to see how most framework owners are able to provide assurance to government or the Parliament on the effectiveness of the frameworks they, largely, advised should be implemented and which they administer.⁵⁸

5.48 When Finance was asked whether it was responsible for 'holding accountable people accountable', an official stated it was responsible and accountable for the framework, in particular understanding the practices occurring under the framework and updating the framework as necessary; accountability for compliance with the framework lay elsewhere:

... it comes down to the actions and the practices that exist under that framework, and how people are going about their day-to-day work and businesses, and making sure they comply with that framework. There are accountability mechanisms in place. They include where people act inconsistently with finance law. There are actions that can be taken under the [APS CoC] ... So I don't think there's an absence of accountability mechanisms ... more often than not performance audits go to practices of individuals and organisations rather than the framework.⁵⁹

⁵⁴ ANAO, *Submission 5*, p. 6.

⁵⁵ ANAO, *Submission 5*, p. 2.

⁵⁶ Mr Grant Hehir, Auditor-General, ANAO, *Committee Hansard*, 20 November 2023, p. 10.

⁵⁷ ANAO, *Submission 5*, p. 6.

⁵⁸ ANAO, *Submission 5*, p. 7.

⁵⁹ Mr Nathan Williamson, Deputy Secretary, Department of Finance (Finance), *Committee Hansard*, 20 November 2023, p. 4.

5.49 Finance expressed its view the framework was functioning:

... there's a difference between practices that are occurring that are inconsistent with the framework and causing problems, and the framework being fundamentally broken, and I don't agree that the framework itself is fundamentally broken.⁶⁰

5.50 The Auditor-General questioned whether policy owners did, in fact, understand the practices occurring under their frameworks:

The idea is to know what's going on. We hear a lot about some changes that are going on, but, in any of the information and reports that I see, I never hear an entity responsible for the policy framework suggesting that they haven't been doing a wonderful job and that nothing needs to change. It's always a case of doing some improvement without recognising that there's a problem. Certainly you don't ever hear any suggestion that the problem may be with those who are establishing the policy framework. If the problem exists, it exists in entities and accountability authorities or in individuals. I struggle to see how you can develop a learning culture if you don't confront the issues in the first place.⁶¹

5.51 When it comes to providing advice on the use of the frameworks, the ANAO stated its audits had observed that 'policy owners are reluctant to take accountability for providing robust advice to entities, defaulting to advising that decisions are for accountable authorities'.⁶²

5.52 When asked whether it expected entities to follow its advice, the Department of Finance stated the weight its advice carried:

... depends on the nature of the advice and whether we're being asked for a specific view versus a good-practice view. Where we are giving specific advice we expect it to be taken into consideration and actioned.⁶³

5.53 The AGS took a similar approach to Finance with regard to accountability. When asked directly whether the AGS considered entities should follow its advice, the AGS emphasised its role as legal *adviser* [emphasis in original]; stating that the AGS was accountable to the Attorney-General as the First Law Officer and consistent with its role, 'seeks to provide expert and accurate legal advice to government'.⁶⁴ The AGS continued:

... compliance with the law is ultimately a matter for government, informed by the legal advice it receives, including advice from AGS.⁶⁵

⁶⁰ Mr Nathan Williamson, Finance, *Committee Hansard*, 20 November 2023, p. 4.

⁶¹ Mr Grant Hehir, ANAO, *Committee Hansard*, 20 November 2023, p. 10.

⁶² ANAO, *Submission 5*, p. 6.

⁶³ Mr Nathan Williamson, Finance, *Committee Hansard*, 20 November 2023, p. 9.

⁶⁴ Australian Government Solicitor, *Submission 11*, p. 4.

⁶⁵ Australian Government Solicitor, *Submission 11*, p. 4.

- 5.54 When asked during the hearing, the Australian Government Solicitor stated 'I have no doubt that, when AGS advice is sought, agencies do take our advice very seriously.' The AGS confirmed it did 'routinely and regularly' tell decisions makers, whether officials or ministers, where it would locate a proposed decision with respect to lawful power.⁶⁶
- 5.55 However, the AGS said ultimately it did not always have visibility of how that advice was used; and how it was used was 'something for the agencies ... in the context of ... their roles, responsibilities and duties'. The AGS role is to 'assist our clients and those in government by advising in relation to how we would locate a proposed decision with respect to lawful power'.⁶⁷

⁶⁶ Mr Matthew Blunn, Australian Government Solicitor (AGS), *Committee Hansard*, 20 November 2023, p. 21.

⁶⁷ Mr Matthew Blunn, AGS, *Committee Hansard*, 20 November 2023, p. 21.



6. Committee comment and recommendations

- 6.1 Acting with probity and demonstrating ethical behaviour is a legal requirement of public sector officials. Officials are obliged by a myriad of **frameworks** (including legislation, regulations, rules, policies, codes and guidelines) to pursue high standards of professionalism; to do the right thing at the right time; to be ethical, impartial and accountable; to demonstrate complete and confirmed integrity, uprightness and honesty in their work; and to comply with the intent and the letter of the law. Narrow compliance—that is, complying with the letter of the law or rule while ignoring its intent in order to deliver outcomes—does not cut it.
- 6.2 In its submission to the inquiry, the Australian National Audit Office (ANAO) told the Committee its ‘audits provide evidence that the Australian public sector regularly falls short of complying with both the intent and the requirements of its regulatory frameworks and lacks effective accountability for performance’.¹ During the course of this and previous inquiries, the Committee has received ample evidence that this is too often the case.
- 6.3 In this inquiry, the Committee examined audit reports that showed public officials were running procurements not in accordance with the Commonwealth Procurement Rules (CPRs); that grant programs were administered contrary to the Commonwealth Grants Rules and Guidelines (CGRGs); and that Australia’s financial regulators could improve their probity management.
- 6.4 Agencies, when asked how they could provide assurance that their officers were acting with probity and ethically, were largely unable to provide satisfactory responses. Most often witnesses or agencies defaulted to administrative and process metrics on such things as the number of employees who had completed conflict of interest declarations, whether performance management agreements were in place, ensuring arrangements to prevent fraud and corruption were implemented, or requiring staff to complete mandatory training. While these integrity metrics are important, they provide inadequate insight as to whether officers are actually discharging their duties with probity.
- 6.5 Independent audits, such as those conducted by the ANAO, are an important aspect of accountability. However, it is neither possible nor desirable to subject agencies to rolling audits or to audit everything. What stands between the law and the achievement of outcomes in a manner that demonstrates probity and ethical behaviour, the Committee concluded, is **culture**. Agencies have much work to do to

¹ Australian National Audit Office (ANAO), *Submission 5*, p. 6.

develop metrics by which organisational culture can be more accurately measured and assessed.

- 6.6 The Committee concurs with the Auditor-General's observations regarding a lack of **accountability** within and across the system. Cultural metrics are critical to help provide assurance that officers are in fact acting with probity. There is also much to do to ensure senior officers are accountable for lapses in probity, and in particular that agency heads are accountable for the *culture* of their agency, as well as its performance. It is not acceptable that entities are found by the ANAO to be repeatedly breaching finance law, yet there remains no accountability for leaders or officers involved. Policy owners, also, must take greater responsibility for the system-wide outcomes of policies they own and in particular for compliance by entities with finance law.
- 6.7 In essence, the Committee has identified three critical and interdependent aspects of the system necessary to foster an Australian Public Sector that acts with probity and integrity:
- **Frameworks**—the myriad of legislation, regulations, rules, policies, codes and guidelines which set the requirements of entities and officers, including but not limited to, finance law.
 - **Culture**—‘the way we do things around here’ will rightly vary across entities depending on their missions, but within the limits set by cross-government frameworks; the tone is set by governments and the Parliament, while entity culture is overwhelming set by senior leaders.
 - **Accountability**—of individual officers for their actions; of senior leaders and accountable authorities for their entities; and of policy owners for outcomes of and compliance with their policies.
- 6.8 The key, however, to ensuring the public sector acts with probity and integrity is overwhelmingly not the rules per se—it is **ethical leadership: the ‘golden thread’** that binds and animates the system in a positive direction. Evidence received over numerous inquiries indicates that perhaps 80 per cent of organisational culture is set by the behaviour of leaders—at all levels, but starting at the top.
- 6.9 The following contains the Committee's views on each part of the preceding report and makes recommendations which, if implemented in good faith by the relevant entities, will go some way to dealing with the accumulated concerns the Committee has about probity and ethics in the Australian public sector.
- 6.10 It should be noted that during the course of the inquiry, the Committee did not undertake an exhaustive re-analysis of the audit reports considered—the findings of these reports speak for themselves. Instead, it examined a select number of reports and issues raised by the ANAO as case studies. These had insights and value in their own right, and also helped to identify key themes and recommendations for systemic reform. Where necessary, specific comment and recommendations on individual reports are provided at the end of this chapter, following the systemic conclusions.

Frameworks

- 6.11 Public sector probity and ethics obligations are established, operationalised and assessed through a range of cascading frameworks. The *Public Governance, Performance and Accountability Act 2013* (PGPA Act) sets the governance, accountability and performance framework for Commonwealth entities and establishes the general duties of public sector officials. Public sector officials have a duty of care and diligence; a duty to act honestly, in good faith and for a proper purpose; a duty not to improperly use their position or information gained through their position; and a duty to disclose interests.²
- 6.12 The PGPA Act requires the accountable authority to, amongst other things, govern the entity in a way that promotes the proper (efficient, effective, economical and ethical) use and management of public resources.³
- 6.13 Probity and ethics in the APS are legislated in part through finance law. Finance law is defined in the PGPA Act as: the PGPA Act, the rules, any instrument made under the PGPA Act (including the Commonwealth Procurement Rules and Commonwealth Grants Rules and Guidelines), or an Appropriation Act.⁴ The PGPA Act states ‘to avoid doubt, the finance law is an Australian law ...’ for the purposes of the APS Code of Conduct (CoC), which is contained in the *Public Service Act 1999* (PS Act).⁵
- 6.14 The *Public Service Act 1999* (PS Act) specifies an APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws.⁶ The PS Act also contains the APS Values, which relate to officers being committed to service; ethical; respectful; accountable; and impartial.⁷
- 6.15 The PS Act mandates that departmental secretaries are responsible ‘to manage the affairs of the Department efficiently, effectively, economically and ethically’ and to ‘implement measures directed at ensuring that the Department complies with the law’, amongst other things.⁸

The unacceptable and erroneous ‘absence of malice’ defence

- 6.16 Under the PGPA Act, officials have a duty to act honestly, in good faith and for a proper purpose.⁹ Evidence received by the Committee shows that even when officials are found acting contrary to finance law, reference is frequently made to a lack of malintent, to having acted in good faith, and delivering on decisions of government, as if that somehow excuses a breach of the law. **The Committee’s firm conclusion is that any claim or view that it is acceptable for officers to breach finance law**

² *Public Governance, Performance and Accountability Act 2013* (PGPA Act), sections 25–29.

³ PGPA Act, sections 8, 15.

⁴ PGPA Act, section 8.

⁵ PGPA Act, section 32.

⁶ *Public Service Act 1999* (PS Act), section 13(4).

⁷ PS Act, section 10.

⁸ PS Act, sections 57(2)(a), 57(2)(c).

⁹ PGPA Act, section 26.

and fail to act with probity, but still be acting in good faith and for a proper purpose is clearly and unambiguously wrong.

- 6.17 It is of value to reproduce the evidence discussed earlier in the report here. Deputy Secretary in the Department of Health and Aged Care (Health), Mr Wann, told the Committee there was a ‘very strong delivery focus’ to give effect to decisions of government and he ‘didn’t see any motivation of malintent, improper purpose or personal bias or any sense of trying to hide anything or lack of transparency and intent to hide’.¹⁰
- 6.18 Health repeated this in response to a question on notice:
- [The department] acknowledges failures of process with respect to the recording of ... CHHP grant assessments and funding recommendations. The department’s conduct at the time was not motivated by malintent, improper purpose or personal bias.¹¹
- 6.19 The Committee was concerned and disturbed by the cultural signal this sent to the department and requested the Secretary of Health to appear and explore these issues further. It was appreciated that during a public hearing, the Secretary clarified his department’s stance, stating clearly ‘a lack of malintent is not an acceptable justification for not adhering to finance law’.¹²
- 6.20 A similar rationale was provided by DITRDCA First Assistant Secretary in the Office for the Arts, Mr Philip Smith, who stated:
- I guess it comes back to the question about whether we think there was anything that was being done deliberately or with malice, and our answer is: no, we do not think so. We think anything that was not fully compliant was either a misunderstanding or just a lack of documentation, or not necessarily understanding the full process, which could go back to simple things like training or documenting things.¹³
- 6.21 When officers fail to comply with finance law, they are not fulfilling an obligation to act honestly, in good faith, and for a proper purpose, regardless of whether there was or was not malice. Similarly, a lack of corruption does not equate to acting with probity. The Committee recommends the Department of Finance issues guidance to this effect.

¹⁰ Mr Charles Wann, Deputy Secretary – Corporate Relations, Department of Health and Aged Care (Health), *Committee Hansard*, 8 September 2023, p. 26.

¹¹ Health, *Submission 7.3*, p. 29.

¹² Mr Blair Comley, Secretary, Health, *Committee Hansard*, 1 February 2024, p. 1.

¹³ Mr Philip Smith, First Assistant Secretary, Office for the Arts, Department of Infrastructure, Transport, Regional Development, Communications and the Arts (DITRDCA), *Committee Hansard*, 8 September 2023, p. 41.

Recommendation 1

- 6.22 The Committee recommends the Department of Finance issues guidance that makes clear to public officials that if they breach finance law, suggesting there was no malice or personal gain is not sufficient to fulfil their obligation under the *Public Governance, Performance and Accountability Act 2013* to act honestly, in good faith, and for a proper purpose.
- 6.23 While the PGPA Act sets the overarching governance, accountability and performance framework, and in so doing establishes public sector probity and ethics obligations, it is through subordinate frameworks that public sector entities implement and provide assurance on probity and ethics requirements—one such framework is an entity integrity framework.

Integrity frameworks and their limitations

- 6.24 Throughout the Committee's report, it has been emphasised that **probity is more than narrow compliance; meeting mandatory requirements is not sufficient to demonstrate probity and ethics; and the law was never intended to be the maximum standard of behaviour**. This is not just the Committee's view, it is the view of the Auditor-General, the APS Integrity Taskforce, and the Australian Public Service Commission.
- 6.25 It was discussed in chapter 4 that when entities were asked how they assessed whether they were acting in a way that is right and proper, and how they evaluated how officers were positively acting according to the intent of the law, they mostly provided their integrity frameworks.
- 6.26 These integrity frameworks, drawing typically on the APSC's Integrity Metrics Resource, suggest agencies measure their integrity through several of administrative and process-oriented metrics. These include human resource metrics like performance management data, unscheduled absences data, code of conduct reports and investigations, training completion rates, and compensable claims. The Resource also suggests declarations and self-reporting metrics dealing with conflict-of-interest declarations, and gifts and benefits; security metrics covering security clearances, breaches, access controls and reporting; and risk, fraud and corruption metrics.
- 6.27 In all, the Integrity Metrics Resource contains 22 metrics. The Committee is not suggesting that agencies should not be monitoring the issues identified in the resource—they should be. The Committee's concern is that these measures alone are necessary but not sufficient. The capacity of such metrics to provide insight into the actual behaviour of officers may be limited and not sufficient grounds for accountable authorities to be confident their officers are acting in a way that is right and proper.
- 6.28 Probity is demonstrated through the *behaviour* of officers when they conduct their business to deliver outcomes for the Government of the day. The five entities that

responded to the questions did not explain the mechanism by which they identified and educated staff regarding the *intent* of the laws they were required to follow, for instance with regard to procurement, and then the metrics to assess their organisational culture and whether officers were complying with the intent of the laws.

- 6.29 Entities did put forward a range of internal assurance and audit programs, that while important, did not appear able to get at the heart of the issue—how to be confident officers are acting with probity and ethically. In its recent report into the Commonwealth Financial Statements, which examines more than 240 entities, the ANAO noted between 2020–21 and 2022–23, there had been a decrease in internal audits completed on procurement.¹⁴ Audits into grants management over this three year period for all entities was around fifty. In some entities, internal audits completed are falling, for instance between 2020–21 and 2022–23, APRA reduced its internal audit activity by between 40–49 per cent.¹⁵
- 6.30 As was noted in this report, both Artbank and Health were found not to be complying with the intent, and in some cases, the letter, of the law. Officers who were behaving contrary to finance law may well have completed conflict of interest declarations, undertaken fraud and corruption training, and have received positive performance assessments for having delivered on decisions of Government. But it is manifestly apparent in some instances they were not acting with probity or ethically, even where they may not have been breaking the strict letter of the law.
- 6.31 Integrity frameworks in and of themselves are not sufficient to animate officers in a positive direction—that is the job of leaders who set the culture and signal what behaviours are acceptable within the frameworks. As the old maxim goes, ‘just because you can, doesn’t mean you should’. Similarly, frameworks are unable to get at whether, when they carry out their duties to achieve results, officers are acting with probity. That requires entities to assess culture, accompanied by robust individual and collective accountability mechanisms.

Culture

- 6.32 The Committee concluded, having examined and reflected upon the submissions from entities, that organisational culture was the key element that sits between the law and the achievement of desired outcomes in an ethical manner. When it examined the APS Integrity Taskforce report, *Louder than Words*, the Committee found that while there were recommendations with regard to culture, there was no

¹⁴ The ANAO stated 159 entities had an internal audit function. ANAO, *Audits of the Financial Statements of Australian Government Entities for the Period Ended 30 June 2023*, Report No. 9 2023–24, hereafter *CFS report*, p. 54.

¹⁵ The ANAO found there had been a decrease in internal audits conducted on procurement, ICT, systems of risk management and enterprise level internal controls, and programs associated with COVID–19, but an increase in internal audits on cyber security and performance reporting. Australian National Audit Office, *CFS report*, pages 10, 32, 55–57.

definition of a sound organisational culture, no metrics by which it could be monitored or assessed, and no guidance on how an agency could be accountable for its culture.

- 6.33 To gather information on how the entities understood and nurtured their respective organisational cultures, the Committee asked each to provide their definition of culture and how it could best be built; identify metrics by which it could be measured; and specify how leaders should be accountable.
- 6.34 The responses from entities were similar. Culture was defined as shared values, norms and expectations which was manifest through behaviours. **In the simplest sense, culture is ‘the way we do things around here’.**
- 6.35 To build a positive culture, entities highlighted the importance of senior executives playing a key role and being accountable; clear communication of expectations to staff; the creation of a psychologically safe environment; following through on instances of misconduct; and creating broader integrity structures in entities.
- 6.36 As to measuring culture, the majority of responses defaulted to some variation of the APSC Integrity Metrics Resource and the APS Employee Census. The capacity of the integrity metrics resource to provide an accountable authority with confidence officers are acting with probity and ethically is not clear; and as discussed in the chapter, while the employee census does measure important aspects of departmental performance and culture, there are no questions, for instance, that test the extent to which officers are aware of the legislative and regulatory frameworks in which they work and whether they and their leaders and colleagues act according to the intent not just the letter of the law.
- 6.37 It is the case that workplaces are expected to be respectful and productive and officers should feel their contributions are valued (metrics assessed by the employee census). However, creating a workplace with these characteristics does not guarantee staff will operate with probity. Probity is not simply demonstrating an absence of conflicts of interest, fraud or corruption, or bullying and harassment, as important as these are. The integrity metrics are minimum requirements—they are not measures of probity.
- 6.38 The audit into the CHHP program revealed a Deputy Secretary dismissed advice from Finance on Health’s general CGRG compliance and suggested ‘congestion busting’ was in order. Subsequently, internal performance awards to officials involved in the CHHP process were given on the basis of ‘congestion busting’.¹⁶ Officials may have been able to point to creating a positive team environment where there was clear communication, and where staff felt valued and rewarded for performance; there may have been a view that the approach was innovative; there were likely no conflicts of interest; there was no evidence of corruption or fraud; performance agreements were probably in place; there was very likely compliance with computer

¹⁶ ANAO, *Administration of the Community Health and Hospitals Program*, No. 31 2022–23, hereafter *CHHP report*, p. 45.

system access and cybersecurity requirements. The audit makes it abundantly clear, however, officials were not behaving with probity or ethically—laws were broken.

- 6.39 Frankly, the Committee wishes that breaking finance law was indeed innovative and a new situation, but unfortunately the evidence in this and numerous other inquiries makes clear that it most certainly is not. What appears truly innovative in this instance, however, was that a corporate award was given for performance within a program where the law was deliberately broken.
- 6.40 In retrospect, the provision of any award for administering a scheme where ultimately public money was paid without any legal authority, in defiance of legal advice, seems to be not just wrong, but a form of trolling that perverts the proper purpose of internal agency awards—to recognise good practice and desired behaviours within an organisation's culture. It is difficult to see why the awards should stand in light of the damning audit report, although the Committee is mindful that junior officers involved in the delivery of these projects may well have had no insights or role into the actions of senior officers.

Recommendation 2

- 6.41 The Committee recommends that the Secretary of the Department of Health and Aged Care formally reviews the appropriateness of the 'congestion busting' awards in light of the ANAO report, and considers whether the awards for this project should be revoked, in particular from senior officers involved.**

Integrity metrics and culture

- 6.42 The guidance material produced by the APSC, the Integrity Metrics Resource, does not measure probity, unless probity is equated with: having performance agreements in place; maintaining corruption and fraud controls; managing unscheduled absences, and overtime and leave balances; tracking code of conduct reports; monitoring compensable claims; ensuring conflict of interest declarations are completed; registering gifts and benefits; ensuring staff have appropriate security clearances; dealing with privacy breaches; and tracking public interest disclosures. As noted above, these are the minimum requirements of the law under which the public sector operates.
- 6.43 When probity (and a positive culture) is equated with integrity metrics, it allows officers to make a judgment that if they do not have a conflict of interest, if they are not engaging in fraud or corruption, if they have a positive performance review, if they do not take unexplained absences, if they have completed mandatory training, they are acting with probity. As a consequence, interpreting finance law in opportune ways and thus failing to act with probity, can be explained away as taking a problem-solving approach to deliver for the government of the day or senior officers, or rationalised as demonstrating efficiency in the achievement of an outcome. Even when a finding is made that officers contravened finance law, it is perplexing that entities keep trying to suggest there was no unethical behaviour.

- 6.44 It is not necessarily problematic to subsume probity within the concept integrity (and to some extent this may seem intuitive); what is problematic is the metrics by which integrity is measured and the relationship these have to probity. How one measures honesty, care, diligence, and confirmed uprightness in an officer's actual behaviour is a difficult question and no doubt imperfect. None of the entities, however, provided a seriously thoughtful or compelling response which accounts for how they could be sure that, or quantify or assess the extent to which, their officers were acting with probity. The discussion in chapter 1 of a series of audit reports provides evidence officers frequently fail to act with probity—whether intentionally or otherwise.
- 6.45 As to the APS Employee Census, while important and an indicator of culture, there are no questions that test whether and to what extent officers are aware of the legislative and regulatory frameworks under which they work, and whether they and their leaders and colleagues act in a way that complies with the intent, rather than just the letter, of the law.
- 6.46 During the course of the inquiry, Andrew Podger suggested the APS Employee Census could be strengthened through specific questions on sensitive issues such as those included in 2003 and 2004 on relations with ministers and their offices, or for example, questions on the confidence of staff that advice on grants administration fully follows the relevant criteria and Finance directions.¹⁷ The Committee agrees the APS Employee Census should be strengthened and makes a recommendation to this effect.

Recommendation 3

- 6.47 The Committee recommends the APS Employee Census be augmented with questions asking officers of their level of confidence that agencies' assessments, advice and decisions on issues such as procurement, grants, regulatory actions, and so on, comply with both the letter and intent of legislative and regulatory frameworks.**
- 6.48 The Committee notes there is a difference between having an *expectation* that something occurs, for instance, that officers are expected to have regard to the intent of the legislation, and being able to know whether this *does* occur. Accordingly, it makes two recommendations with regard to measuring and being assured officers are behaving with probity and ethically.
- 6.49 As discussed above, the work of the Australian public sector is governed by a range of frameworks, including legislation, regulations, rules, policies, codes and guidelines. Some of these are common to all entities, such as the PGPA Act framework, the CPRs and the CGRGs; others are entity specific, such as those established in accountable authority instructions or an entity's enabling legislation. It is the Committee's view that entities should bring together in one place the elements

¹⁷ Mr Andrew Podger AO, *Submission 1.1*, p. 2.

of the governance and integrity frameworks within which they operate, and their assurance mechanisms, including:

- the relevant legislative, regulatory and policy frameworks through which the agency functions
- assessments of major integrity risks
- statement of the desired culture as it applies to officers demonstrating probity and acting ethically as they carry out their responsibilities
- assurance mechanisms of sufficient substance and scope, appropriate to the size of the entity and its risks, for accountable authorities to be confident officers are acting according to the letter and the intent of the frameworks
- robust accountability arrangements.

Recommendation 4

- 6.50 The Committee recommends the Australian Public Service Commission develops clearer guidance for entities that contains a definition of culture, and metrics on building, measuring and assessing organisational culture as it applies to probity. Metrics for culture must be capable of providing insights and assurance of the extent to which officers are in fact behaving in a way that is right and proper, and according to the letter and the intent of the law.**

Recommendation 5

- 6.51 The Committee recommends the PGPA Act Framework be amended to introduce a requirement for entities to develop and maintain an overarching Integrity Framework that brings together:**
- the relevant legislative, regulatory and policy frameworks through which the agency functions
 - assessments of major integrity risks
 - statement of the desired culture as it applies to officers demonstrating probity and acting ethically as they carry out their responsibilities
 - assurance mechanisms of sufficient substance and scope, appropriate to the size of the entity and its risks, for accountable authorities to be confident officers are acting according to the letter and the intent of the frameworks
 - robust accountability arrangements.

Accountable Authorities must report on their Framework, including culture, in their annual report and state they have evidence officers in their agency are acting with probity.

Accountability

6.52 Accountability is critical in three distinct senses:

- individual officers are accountable for their actions and the manner in which they achieve outcomes
- accountable authorities are accountable for governing their entity in a way that complies with legislated obligations, regulation and government policies
- policy owners are accountable for the outcomes of and compliance with their policies.

6.53 It was suggested during the inquiry that it is often only lower-level public servants and not the senior executive service that are held accountable for performance.¹⁸ It is concerning that senior leadership in departments does not seem to be held accountable for serious breaches of finance law or for maladministration. In fact, in response to specific questions, the APSC provided no examples where this had occurred.

6.54 The Committee noted the frameworks governing behaviour in the public sector do not always seem to determine the behaviour of senior officers as they deliver outcomes, and asked the APSC how the activities it is undertaking impact behaviour. The APSC stated it had a focus on the ‘uplift of SES leadership behaviours,’ in addition to ‘mechanisms’ that can examine accountability and performance ‘which are the levers that foster a pro-integrity culture’.¹⁹ It stated that at the system level, ‘integrity frameworks and data on integrity will be key to holding accountable authorities across the system to account’.²⁰ It also pointed to the APS Employee Census and APS Agency Survey.²¹ The limitations of integrity frameworks and the APS Employee Census were discussed above, and recommendations were made with respect to these mechanisms.

6.55 The Committee agrees with Andrew Podger that the performance management of secretaries has to be serious and rigorous,²² and will watch with interest the implementation of the next round of APS reforms to see evidence of greater accountability on secretaries. These reforms, according to the APSC, are to include measures to hold senior leaders to account including: the merit-based appointment and performance of secretaries and agency heads; and new own motion powers for the APS Commissioner to initiate reviews and investigations into CoC breachers by current and former agency heads.²³

6.56 Accountability does not apply only to individual officers and accountable authorities; policy owners should also hold some accountability for how their policy frameworks

¹⁸ Mr Andrew Podger AO, *Committee Hansard*, 20 November 2023, p. 16.

¹⁹ Australian Public Service Commission (APSC), *Submission 12.2*, p. [8].

²⁰ APSC, *Submission 12.2*, p. [8].

²¹ APSC, *Submission 12.3*, pages [1]–[2].

²² Mr Andrew Podger AO, *Committee Hansard*, 20 November 2023, p. 18.

²³ APSC, *Submission 12.2*, p. [3].

are operationalised. This does not of course mean a policy owner is responsible for every individual action taken pursuant to a policy. The Committee agrees, however, with the Auditor-General that while agency heads must be responsible for compliance within their organisations, policy owners at the least should have processes in place to identify the level of compliance across the sector and be willing to modify their regulatory approach if it is not working.²⁴

- 6.57 During the hearings, Finance told the Committee it did not believe ‘the framework’ administered by Finance was fundamentally broken, instead what was causing problems was practices that were inconsistent with the framework.²⁵ With respect to Finance, it is a statement of the obvious that practices are inconsistent with the framework! The problem which is apparent is that this continues to be the case, repeatedly across many frameworks, yet policy owners generally have limited systemic data on what is actually happening and inadequate measure or assurance mechanisms.
- 6.58 Indeed, the Auditor-General noted policyowners rarely undertake any action to assess whether the frameworks they own are effective—they do not collect data.²⁶ Accordingly, the Committee recommends policy owners establish metrics to understand how their policies are used and satisfy themselves and the Parliament, objectively, on the effectiveness of the frameworks they administer.

Recommendation 6

- 6.59 The Committee recommends the Department of Finance and the Australian Public Service Commission each develop an approach, including robust metrics, to provide reasonable assurance that the policy frameworks they administer are effective. An update is to be provided to the Committee within six months, including timelines to complete this work.**
- 6.60 In summary, the Committee appreciates the complexity of the issues grappled with in this report and that genuine efforts are being made by senior leaders and across the Australian public sector to build a system that operates with integrity, promoting and ensuring probity and ethical behaviours.
- 6.61 Notwithstanding these genuine efforts, the Committee considers there remains a way to go and that the public sector is yet to find a way to effectively bring together policy, funding and outcome delivery in a manner where entities can demonstrate they have delivered what has been paid for and done so in a manner that demonstrates probity and ethics.
- 6.62 From the thousands of words given in evidence to this inquiry, and the experience of the Committee in other inquiries and fora, we are confident in our conclusion that the ‘golden thread’ necessary to bind and animate the system toward probity and ethics

²⁴ ANAO, *Submission 5*, p. 6.

²⁵ Mr Nathan Williamson, Deputy Secretary, Governance and Resource Management, Department of Finance (Finance), *Committee Hansard*, 20 November 2023, p. 4.

²⁶ Mr Grant Hehir, Auditor-General, ANAO, *Committee Hansard*, 20 November 2023, p. 10.

is ethical leadership. Leadership happens at all levels of the Australian public sector, however, accountable authorities and senior leaders bear the greatest responsibility for implementing frameworks and building ethical cultures and must be accountable for the results.

- 6.63 Frameworks, culture and accountability do not sit in some kind of hierarchy, they form a mutually interdependent triangle. Ensuring entities can act with probity and ethically requires ethical leadership to ensure the faithful implementation of frameworks, the building of a strong and ethical culture, and accountability for performance.

Figure 6.1 Framework for probity and ethics in the Australian Public Sector

Probity and Ethics in the Australian Public Sector



Key findings of case studies

Artbank

- 6.64 Probity in the context of procurement is, according to the Department of Finance, 'evidence of ethical behaviour, and can be defined as complete and confirmed integrity, uprightness and honesty in a particular process'.²⁷ That the ANAO found Artbank's approach to acquiring, managing and leasing Australian contemporary art has 'not been appropriate'²⁸ suggests practices and procedures at Artbank may not demonstrate probity.
- 6.65 The ANAO report into the Artbank program found several shortcomings including: there was no overarching strategy to support the direction of the program and measure its success; Artbank's approach to acquisitions had not been in accordance with the CPRs; the management of the collection was insufficient to ensure its integrity; and the approach to leasing was not appropriate.²⁹
- 6.66 Artbank is administered by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (DITRDCA). Specifically, key shortcomings in Artbank's acquisition of artworks were: there was no open or competitive process; value for money was not documented or demonstrated; and there was limited public reporting. It was not clear, according to the ANAO, how acquisitions aligned with Artbank's purpose and objectives because acquisition decisions deviated from the program's own collection plan.³⁰
- 6.67 Deficiencies found in the management of the collection included the fact conservation activities were not consolidated, prioritised, committed and reviewed against a planned, wholistic schedule; records of deaccessioning were unreliable; and deaccessioning was not undertaken in a timely manner.³¹
- 6.68 Further, the Committee read with concern the fact Artbank had in its collection 15 duplicate copies of 14 digital artworks, and had leased the duplicate copies to six separate clients across 22 agreements. One was rented as recently as June 2022.³² As noted in chapter 2, the Committee had trouble reconciling DITRDCA's rationalisation for what was essentially pirating videos, with the manner in which they were described internally. Legally, DITRDCA stated its view prior to 2019 was that permission to duplicate video artworks could reasonably be implied based on a broad interpretation of the licence terms under the relevant Acquisition Agreements.

²⁷ Finance, 'Ethics and Probity in Procurement', www.finance.gov.au/government/procurement/buying-australian-government/ethics-and-probity-procurement, viewed 6 February 2024.

²⁸ ANAO, *Management and Leasing of Artworks by Artbank: Department of Infrastructure, Transport, Regional Development, Communications and the Arts*, No. 18 2022–23, hereafter *Artbank report*, p. 7.

²⁹ ANAO, *Artbank report*, pages 6, 8.

³⁰ ANAO, *Artbank report*, p. 8.

³¹ ANAO, *Artbank report*, p. 8.

³² ANAO, *Artbank report*, p. 63.

However, these same copies were described in August 2022 as ‘rogue’ by the Director of Artbank, and as noted above, one was rented as recently as June 2022.³³

- 6.69 In its leasing of the collection, Artbank failed to meet targets. There was no recorded basis for how the pricing methodology for individual artworks was established, and undocumented deviations from the methodology meant it was not clear how the majority of rental prices and discounts were set. The full breadth of the program’s purpose had not been a focus of the leasing activity; there was no reporting to provide assurance the approach to leasing supported artists or the reputation of contemporary Australian art.³⁴
- 6.70 More generally, the audit found multiple instances where data and records were unreliable or non-existent, including a lack of documentation for some key decisions and approvals, processes, assessments and agreements.³⁵ This has been a long-running issue in the Artbank program, with concerns about records and documentation of decisions raised in an earlier 2006 audit.³⁶
- 6.71 The Committee was concerned to read about the Artbank acquisition (procurement) process and its failure to comply with its own department’s procurement requirements³⁷ and the CPRs. In particular, Artbank was found to have failed to ensure an open or competitive process or to demonstrate and document value for money.³⁸ Procurement is a core function of the Artbank program and the CPRs are the basic compliance framework for entities undertaking procurements; the rules are part of finance law—entities do not have a choice as to whether they comply with finance law.
- 6.72 That Artbank is a small program, with a procurement budget of around \$400,000 annually, is not a mitigating factor in its failure to meet basic obligations to ensure the proper use and management of public resources, where proper means efficient, effective, economical and ethical.³⁹ Public sector compliance with the law must not depend on the price tag. It must not kick in where a spending threshold has been reached; regardless of the value of a program, there is a legal requirement that finance law is followed.

³³ See: DITRDCA, *Submission 4.1*, p. [1]; Mr Philip Smith, DITRDCA, *Committee Hansard*, 8 September 2023, p. 32; ANAO, *Artbank report*, p. 63.

³⁴ ANAO, *Artbank report*, pages 8–9.

³⁵ The ANAO made reference to the reliability of Artbank program data and recordkeeping in the following paragraphs: 3.21, 3.24, 3.41, 3.60, 4.5, 4.6, 4.11–4.13, 4.24, 4.37–4.40, 4.58, 5.6, 5.10, as well as in notes to Table 2.1, and Table 3.2. See: ANAO, *Artbank report*, footnote 22. See also for instances where documentation was missing or decisions were not recorded: ANAO, *Artbank report*, paragraphs 10, 3.18, 3.21, 3.23, 3.24, 3.27, 3.39, 4.40, 4.41, and notes to figure 4.1.

³⁶ ANAO, *Artbank, Department of Communications, Information Technology and the Arts*, Audit Report No. 39 2005–06, hereafter *2006 Artbank report*, pages 13, 35.

³⁷ ANAO, *Artbank report*, pages 30–32.

³⁸ ANAO, *Artbank report*, pages 28, 31–35.

³⁹ Finance, *Commonwealth Procurement Rules: Achieving value for money*, Australian Government, 13 June 2023, hereafter, *CPRs*, section 6.1.

- 6.73 It is notable that while DITRDCA claimed the audit had made no finding of unethical behaviour,⁴⁰ it did not agree with the ANAO's recommendation that it develop a fit for purpose procurement framework consistent with the CPRs, including open and transparent opportunities for artists to submit their artwork, and clear records made at each step throughout the procurement processes employed.⁴¹
- 6.74 DITRDCA informed the Committee it would continue to rely on an exemption in the CPRs to conduct limited tender acquisitions (Division 2, Rule 10.3(d)(i)), which the ANAO stated was intended for collecting institutions seeking to acquire a particular work of art. The ANAO reminded DITRDCA the Artbank was not a collecting institution; it was a program established to support contemporary Australian artists.⁴²
- 6.75 The Committee highlights—as should be well known by departmental officers who told the ANAO they understood the CPRs and were committed to complying with them⁴³—that the use of the exemption in Division 2 of the CPRs does not negate the requirements in Division 1 of the CPRs, under which procurements must demonstrate value for money; encourage competition; be conducted in an efficient, effective, economical and ethical manner; and demonstrate accountability and transparency.⁴⁴ Competition is a key element of the Australian Government's procurement framework and effective competition requires non-discrimination and the use of competitive procurement processes.⁴⁵
- 6.76 Evidence from the Department showed it had not committed to undertake a comparative assessment of artworks to demonstrate competition, and it would not formally assess works not considered appropriate for procurement.⁴⁶ It was suggested by Artbank 'it would not be possible to document every work reviewed by the team.'⁴⁷
- 6.77 The Committee reiterates compliance with finance law is not optional and DITRDCA should consider whether its preferred approach to acquisitions, where staff examine catalogues, visit galleries, attend art fairs and biennales, and look at contemporary art journals to make undocumented decisions on works not suitable for acquisition, then only provide a rationale for works they wish to acquire is an appropriate acquisition approach that complies with the CPRs. It should consider whether staff 'voting' on whether they agree an artwork is suitable for purchase is a robust strategy that satisfies the CPRs.⁴⁸ As noted by the ANAO, Artbank is not a collecting institution, it was established to support contemporary artists by acquiring and

⁴⁰ DITRDCA, *Submission 4*, p. 2.

⁴¹ ANAO, *Artbank report*, pages 12, 41.

⁴² See: ANAO, *Artbank report*, p. 41; Mr Grant Hehir, ANAO, *Committee Hansard*, 8 September 2023, p. 39.

⁴³ ANAO, *Artbank report*, p. 41.

⁴⁴ Finance, *CPRs*, sections 3.5, 10.

⁴⁵ CPRs, section 5.1.

⁴⁶ ANAO, *Artbank report*, pages 35–37.

⁴⁷ ANAO, *Artbank report*, p. 32.

⁴⁸ See, in particular, ANAO, *Artbank report*, pages 31–37.

leasing out their work,⁴⁹ and its approach to collection management has not appropriately supported artists or the reputation of Australian contemporary art.⁵⁰

- 6.78 The Committee therefore recommends DITRDCA provides an explanation as to how its acquisition process for the Artbank program complies with all the requirements of the CPRs and the Artbank Charter of Operations. In pushing this point and making this recommendation, the Committee is not seeking to be 'difficult' or proposing unrealistic burdens on a small program. Rather, the Committee considers there is no alternative but to ensure compliance with finance law, even for small programs. There is ample flexibility available within the CPRs—the point is that officers must turn their minds to the issue and appropriately document an adequate rationale.

Recommendation 7

- 6.79 The Committee recommends the Department of Infrastructure, Transport, Regional Development, Communications and the Arts provides an account of exactly how its approach to acquisitions satisfies the requirements of the Commonwealth Procurement Rules, including the requirement that procurements encourage competition; and explain how its acquisitions, collection management and leasing approaches satisfy the four purposes outlined in Artbank's Charter of Operations.**
- 6.80 Although it claimed to have refined its acquisition process to require explicit documentation of value-for-money considerations, when asked for the methodology, DITRDCA did not provide this.⁵¹

Recommendation 8

- 6.81 The Committee recommends that the Department of Infrastructure, Transport, Regional Development, Communications and the Arts provides to the Committee Artbank's specific methodology for determining value for money in the context of its procurement decisions.**
- 6.82 The Committee was pleased to hear the Department had begun work on an overarching strategic plan, but notes it had undertaken to commence this work in 2006. Evidence presented to the Committee indicated the strategic plan and integrity framework would be implemented in early 2024.⁵² The Committee does not understand how the preparation of a strategic plan could take 18 years. The Committee recommends accordingly that DITRDCA completes these documents (if it has not done so already) within three months of this report being tabled, and provides these documents to, and continues to, update the Committee on the implementation of the strategic plan and integrity framework.

⁴⁹ ANAO, *Artbank report*, p. 52.

⁵⁰ ANAO, *Artbank report*, p. 60.

⁵¹ DITRDCA, *Submission 4.2*, p. [11].

⁵² DITRDCA, *Submission 4*, p. [5]; Mr Philip Smith, DITRDCA, *Committee Hansard*, 8 September 2023, p. 38.

Recommendation 9

- 6.83 The Committee recommends the Department of Infrastructure, Transport, Regional Development, Communications and the Arts provides the Committee with Artbank's strategic plan and integrity framework and their implementation schedule, and reports on a six-monthly basis for the next two years to the Committee on progress to implement the strategic plan.**
- 6.84 The Committee also notes DITRDCA's silence on its compliance with a procurement-related recommendation (recommendation 3) of the 2006 audit of the Artbank program, despite claiming it had implemented the recommendation.⁵³ The recommendation was that direct submissions by artists should have a documented assessment against the Artbank acquisition criteria.⁵⁴ The Committee therefore recommends the Department explains how it implemented this recommendation. If the Department does not intend to implement the recommendation then it should explain why rather than simply ignore the issue or commit again to do something but not do it.

Recommendation 10

- 6.85 The Committee recommends the Department of Infrastructure, Transport, Regional Development, Communications and the Arts explains to the Committee how it has implemented recommendation 3 of the 2006 Artbank audit that submissions by artists should have a documented assessment against the acquisition criteria. This should demonstrate how the Department has complied with the intent of the recommendation that there be a documented assessment regardless of whether a decision to acquire the artwork has been made. If the Department does not intend to implement the recommendation then it should explain why.**
- 6.86 The Committee notes with significant disappointment the ANAO's observation that contrary to usual behaviour, there was no observable changes in Artbank's approach to the acquisition, management and leasing of artworks during the course of the audit.⁵⁵
- 6.87 Notwithstanding the Committee's frustration with the administration of the Artbank program, the Committee appreciates that officers in the Artbank Directorate are there primarily for their particular professional expertise in the creative industries and that they are passionate and genuine about their work—this came through at the public hearings. Officers in the Artbank unit are presumably not employed primarily because they are experts in the CPRs or public administration. The Committee makes the point that the broader Department—including senior leadership above the Director and relevant corporate area—need to accept responsibility for the longstanding

⁵³ DITRDCA, *Submission 4.1*, p. [4].

⁵⁴ In response to a question on notice, DITRDCA did not address this part of the recommendation. DITRDCA, *Submission 4.1*, p. [5].

⁵⁵ ANAO, *Artbank report*, p. 81.

administrative shortcomings in Artbank and work to sort out the remaining concerns. The Committee does not wish to reach the 20th anniversary of the 2006 audit report with recommendations still not actioned!

Community Health and Hospitals Program

- 6.88 The ANAO found the Department of Health and Aged Care's (Health) administration of the Community Health and Hospital's Program (CHHP) was ineffective, and fell short of ethical requirements.⁵⁶
- 6.89 Officials are required to administer grants programs in accordance with the CGRGs, and other relevant obligations including those specified in the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and *Public Service Act 1999* (PS Act). The requirements are not particularly complex or onerous, and the documents themselves are not impenetrably worded. It can hardly seem an unreasonable expectation that public officials are familiar with the requirements established to ensure the proper use and management of public resources. Compliance is a legal requirement—finance law is not optional.⁵⁷
- 6.90 A range of concerning behaviours were identified in the evidence before the Committee. Some of the most egregious examples found in the audit included a senior executive deliberately breaching finance law on at least three occasions—a decision that was discussed at an Executive Board meeting. These breaches were not reported until prompted by the ANAO.⁵⁸
- 6.91 The Committee notes Health took a number of actions to address this situation, including establishing a mandatory performance expectation in all senior executive agreements that officers familiarise themselves with their obligations under finance law and comply with it all times.⁵⁹ It is not clear why up until that point compliance with the law was not part of Health's performance expectations for its senior executives.
- 6.92 It is notable Health was unable to provide to the ANAO records for some grants demonstrating CGRG compliance, including documented grant assessments, financial viability assessments, and the basis for assessments of value with relevant money.⁶⁰ In the small sample of grants examined by the ANAO in detail, there was documented assessment against the assessment criteria for only 11 of 16 grants. In five of these 11, Health assessments stated there was insufficient information to support the assessment but assessed the proposal as suitable for funding.⁶¹ Health

⁵⁶ ANAO, *CHHP report*, pages 6, 8–9.

⁵⁷ See: Commonwealth Grant Rules and Guidelines (CGRGs), section 1.1, p. 3; *Public Service Act 1999* (PS Act), section 13(4); *Public Governance, Performance and Accountability Act* (PGPA Act), sections 8, 32.

⁵⁸ ANAO, *CHHP report*, pages 41–43.

⁵⁹ ANAO, *CHHP report*, p. 42.

⁶⁰ ANAO, *CHHP report*, p. 50.

⁶¹ ANAO, *CHHP report*, p. 47.

assessed as 'suitable' projects with proposed activities that were inconsistent with the requirements of the grant opportunity guidelines.⁶²

- 6.93 Notwithstanding these shortcomings, the ANAO found Health officials involved in the assessment and development of funding recommendations to government formally certified that they had agreed to be bound by the requirements of the assessment plan and CGRGs, though it must be acknowledged Health did not provide staff training in accordance with its assessment plans following a decision to 'simplify' the assessment process.⁶³
- 6.94 The ANAO found Health advised the minister 'there were 11 projects where the Australian Government Solicitor (AGS) identified there would 'likely be no lawful authority for the expenditure'.⁶⁴ The written advice to the minister did not accurately reflect the AGS opinion that for six of the grants there was no legislation that could reasonably be relied upon to authorise expenditure.⁶⁵
- 6.95 Despite this, Health advised the minister could execute the agreements, noting this approach might attract adverse commentary from the ANAO and any parties opposed to the expenditure.⁶⁶ The suggested actions to mitigate the legal risk were plainly nonsense. Finance law is clear, there must be legal authority to support a grant—it is not possible to mitigate unlawfulness, and the idea it might be done by obtaining more information from recipients in grant milestone reports, as suggested by Health at the time,⁶⁷ is fanciful.
- 6.96 Evidence before the Committee suggested Health officials drew on the rationale 'decisions of government' when disregarding advice from the Department of Finance or when acting contrary to the CGRGs.⁶⁸ The Committee reiterates decisions of government remain subject to the CGRGs, which are part of finance law.
- 6.97 It was Health, in a submission to the Committee, that acknowledged 'the principles of probity and ethical conduct are essential to building trust with both Government and the Australian people and are central to the core values of the Australian Public Service'.⁶⁹
- 6.98 It is the Committee's view that departmental officers were not acting with probity and ethically in their administration of the CHHP. The Committee makes no specific recommendations for Health in relation to its administration of CHHP. It is notable, that in comparison to Artbank, Health accepted all the recommendations of the ANAO's report, and further, during the course of the audit, Health made a number of

⁶² ANAO, *CHHP report*, pages 48–50.

⁶³ ANAO, *CHHP report*, p. 50.

⁶⁴ ANAO, *CHHP report*, p. 52.

⁶⁵ ANAO, *CHHP report*, p. 52; Mr Grant Hehir, ANAO, *Committee Hansard*, 8 September 2023, p. 20.

⁶⁶ ANAO, *CHHP report*, p. 52.

⁶⁷ ANAO, *CHHP report*, p. 52.

⁶⁸ See, for instance: ANAO, *CHHP report*, pages 44–46, 52.

⁶⁹ Health, *Submission 7.4*, p. [3].

policy, governance and process changes to address shortcomings in its administration of the CHHP program.⁷⁰

- 6.99 The Committee welcomed the evidence to the Committee by Secretary of Health, Mr Blair Comley who stated unequivocally:

The audit into the Community Health and Hospitals Program, known as CHHP, found that the department's administration of the program was ineffective and fell short of ethical standards ... the department has accepted these findings and recognises the seriousness of their nature and the need for a strong response ... I would like to emphasise there are no circumstances in which a deliberate breach is acceptable.⁷¹

- 6.100 The Committee reiterates officers should be sufficiently familiar with the legislative and regulatory frameworks under which they are legally obligated to operate that inadvertent breaches should be vanishingly rare.
- 6.101 The Committee examined, briefly, the role of the AGS in providing advice to agencies and government. The Committee acknowledges that Constitutional Risk Assessments (CRAs) have a degree of inherent uncertainty and that it can frequently be difficult to advise with a high degree of confidence in the absence of judicial decision. In the case of other types of legal advice, however, the Committee considers that the AGS should reflect on circumstances where advice provided to agencies and senior officials should be less equivocal.
- 6.102 The Committee understands that New Policy Proposals subject to full Cabinet process would, as a matter of course, be subject to a CRA, however, decisions taken outside or pursuant to a Cabinet process may not require these ordinary disciplines. This includes decisions taken with authority provided by the Prime Minister, Treasurer or Minister for Finance via correspondence, which is an accepted part of ordinary government decision-making.
- 6.103 While not seeking to unduly constrain such decision-making with mandatory CRAs and such requirements in all instances, the Committee considers it would be worth Finance reviewing the protocols and practices regarding such approvals to determine if any further guidance or safeguards are necessary.
- 6.104 The Committee is compelled to state what should be obvious: that writing a letter to your boss—whether the Prime Minister or Secretary or Deputy Secretary—is not a magic spell that can cure a lack of lawful authority to make a decision let alone blatant illegality.

⁷⁰ ANAO, *CHHP report*, pages 82–83.

⁷¹ Mr Blair Comley, Health, *Committee Hansard*, 1 February 2024, p. 1.

Recommendation 11

- 6.105 The Committee recommends the Department of Finance reviews the protocols and common practice whereby officials supporting Ministers seeking routine approval for expenditure decisions via correspondence outside full Cabinet processes ensure there is a reasonable balance struck between efficiency and rigour in such decision-making, and that agency advice is robust and appropriate.**

The financial regulators

- 6.106 As noted in chapter 4, the audits into the financial regulators were not the type of performance audits performed on the Artbank Program and CHHP. The audits into the Australian Securities and Investments Commission (ASIC), Australian Prudential Regulatory Authority (APRA), and the Australian Competition and Consumer Commission (ACCC) examined 'probity management' and followed a standard methodology.⁷² They assessed whether there were effective administrative arrangements in place to address nine selected probity risks, and whether these were enforced and effective.
- 6.107 The nine selected probity risks were: code of conduct; probity in procurement; management of public interest disclosures; management of senior executive remuneration; management of conflict of interest; oversight of credit card expenditure; management of gifts, benefits and hospitality; identification and management of fraud risks; management of key regulatory risks (regulatory capture risk and financial trading).⁷³
- 6.108 At this point, the Committee notes acting with probity is not synonymous with addressing the 'probity risks' examined by the ANAO, though managing these risks is part of acting with probity.
- 6.109 While the findings of the reports were broadly positive, the Committee is of the view 'largely effective' is not a standard that is appropriate for Australia's key financial regulators, APRA and ASIC. Further, 'partly effective' is not an acceptable standard for the ACCC.⁷⁴
- 6.110 The reports commented on the extent to which regulatory capture was identified and addressed; there were shortcomings in gifts and benefits policies; compliance with internal policies and procedures in procurements was not universal; the administration of some credit card transactions was non-compliant with entity

⁷² See: ANAO, *Probity Management in Financial Regulators — Australian Securities and Investments Commission*, No. 36 2022–23, hereafter ASIC report; ANAO, *Probity Management in Financial Regulators — Australian Competition and Consumer Commission*, No. 38 2022–23, hereafter ACCC report; ANAO, *Probity Management in Financial Regulators — Australian Prudential Regulation Authority*, No.30 2022–23, hereafter, APRA report.

⁷³ See: ANAO, *ACCC report*, pages 8–9.

⁷⁴ ANAO, *APRA report*, p. 9; ANAO, *ASIC report*, p. 9; ANAO, *ACCC report*, p. 9.

requirements; and in the case of APRA and ASIC, neither had senior executive remuneration policies.⁷⁵

- 6.111 The Committee was pleased to hear from each of the regulators that they accepted the recommendations of the ANAO and were implementing the recommendations, in addition to addressing the opportunities for improvement identified by the ANAO.
- 6.112 The Committee agrees with the OECD that ‘strong governance strengthens the legitimacy and integrity of ... regulator[s], supporting the high level policy objectives of the regulatory scheme and ... lead[ing] to better outcomes’.⁷⁶
- 6.113 With regard to gifts and benefits, the Committee supports the ANAO’s insight, ‘for officials of a regulatory entity, there is a risk that accepting any gift, benefit or hospitality from a regulated entity could be perceived as a conflict of interest’.⁷⁷ And further, ‘the perception of a conflict of interest can be just as important as an actual conflict of interest’.⁷⁸
- 6.114 The Committee urges the regulators to consider the advice of the ANAO that an entity’s gifts and benefits policy sets the tone for an organisation.⁷⁹ And further:

If you have a gifts policy and an expectation ... that people don't accept gifts, do you expect people to report gifts offered and declined? That is a really strong signal to gift givers, because it will be public that a gift was offered and declined. It is a very strong signal to the organisation that leaders get offered a gift and say no. When we look at the policies, we look at what impact that policy might have, flowing through the culture of an organisation.

Again, pay for your own coffee. Have a meeting. Take notes. If it's a meeting, it's a meeting.⁸⁰

Mr Julian Hill MP
Chair
19 June 2024

⁷⁵ See the discussion in chapter 4.

⁷⁶ ANAO, *ACCC report*, p. 7.

⁷⁷ ANAO, APRA report, p. 86.

⁷⁸ ANAO, *ACCC report*, p. 65.

⁷⁹ Mr Grant Hehir, ANAO, *Committee Hansard*, 8 September 2023, p. 13.

⁸⁰ Ms Rona Mellor, Deputy Auditor-General, ANAO, *Committee Hansard*, 8 September 2023, p. 13.



A. Submissions

- 1** Andrew Podger AO
 - 1.1 Supplementary to submission 1
- 2** Department of Finance
 - 2.1 Supplementary to submission 2
 - 2.2 Supplementary to submission 2
- 3** Australian Securities and Investments Commission
 - 3.1 Supplementary to submission 3
 - 3.2 Supplementary to submission 3
- 4** Department of Infrastructure, Transport, Regional Development, Communications and the Arts
 - 4.1 Supplementary to submission 4
 - 4.2 Supplementary to submission 4
 - 4.3 Supplementary to submission 4
- 5** Australian National Audit Office
- 6** Australian Competition & Consumer Commission
 - 6.1 Supplementary to submission 6
 - 6.2 Supplementary to submission 6
 - 6.3 Supplementary to submission 6
- 7** Department of Health and Aged Care
 - 7.1 Supplementary to submission 7
 - 7.2 Supplementary to submission 7
 - 7.3 Supplementary to submission 7
 - 7.4 Supplementary to submission 7
 - 7.5 Supplementary to submission 7
- 8** Australian Prudential Regulation Authority
 - 8.1 Supplementary to submission 8

- 8.2 Supplementary to submission 8
- 9** Confidential
- 10** Coalition of Women's and LGB Organisations
- 11** Australian Government Solicitor
 - 11.1 Supplementary to submission 11
- 12** Australian Public Service Commission
 - 12.1 Supplementary to submission 12
 - 12.2 Supplementary to submission 12
 - 12.3 Supplementary to submission 12



B. Public hearings

Friday, 8 September 2023, Canberra

Australian National Audit Office

- Mr Grant Hehir, Auditor-General
- Ms Rona Mellor PSM, Deputy-Auditor General
- Dr Tom Ioannou, Group Executive Director, Performance Audit Services Group
- Ms Michelle Page, Senior Executive Director, Performance Audit Services Group

Australian Securities and Investments Commission

- Mr Warren Day, Chief Executive Officer
- Mr Peter Dunlop, Chief Financial Officer
- Ms Shelley Denniss, Senior Executive Advisor to CEO

Australian Prudential Regulation Authority

- Ms Lucinda McCann, General Manager, Legal and General Counsel
- Mr Shane Campbell, Chief Internal Auditor
- Mr Eugene Jalba, Chief Financial Officer

Australian Competition & Consumer Commission

- Ms Gina Cass-Gottlieb, Chair
- Mr Scott Gregson, Chief Executive Officer, ACCC
- Ms Anthea Harris, Chief Executive Officer, Australian Energy Regulator
- Mr Richard Home, Chief Risk Officer and Executive General Manager Digital Transformation
- Mr Geoff Purvis-Smith, General Counsel, Australian Energy Regulator
- Ms Lisa Anne Ayres, General Manager Executive and Governance

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
- Dr Tom Ioannou, Group Executive Director, Performance and Audit Services Group

- Ms Christine Chalmers, Executive Director, Performance Audit Services Group

Department of Health and Aged Care

- Mr Charles Wann, Deputy Secretary, Corporate Operations
- Mr Blair Exell, Deputy Secretary, Health Strategy, First Nations and Sport
- Ms Jessica Pratt, Assistant Secretary
- Mr Craig Chalmers, Assistant Secretary

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
- Dr Tom Ioannou, Group Executive Director, Performance and Audit Services Group
- Mr Brian Boyd, Executive Director, Performance Audit Services Group

Department of Infrastructure, Transport, Regional Development, Communications and the Arts

- Mr Philip Smith, First Assistant Secretary, Office for the Arts
- Ms Anne-Louise Dawes, Assistant Secretary, Creative Industries Branch, Office for the Arts
- Ms Zoë Rodriguez, Director of Artbank, Office for the Arts

Monday, 20 November 2023, Canberra

Department of Finance

- Mr Scott Dilley, First Assistant Secretary, Governance and Grants, Governance and Resource Management
- Mr Calan McKay, Acting Assistant Secretary, Public Governance, Performance and Accountability and Digital Reporting Branch, Governance and Grants, Governance and Resource Management
- Mr Nathan Williamson, Deputy Secretary, Governance and Resource Management

Australian Public Service Commission

- Mr Shyam Raghupathi, Acting Assistant Commissioner
- Ms Jo Talbot, Acting Deputy Commissioner

Department of the Prime Minister and Cabinet

- Dr Rachel Bacon, Deputy Secretary, APS Reform 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
- Dr Tom Ioannou, Group Executive Director, Performance Audit Services Group
- Ms Michelle Page, Senior Executive Director, Performance Audit Services Group

Andrew Podger AO, Private capacity

Australian Government Solicitor

- Mr Andrew Buckland, Chief General Counsel
- Mr Matthew Blunn, The Australian Government Solicitor

Thursday, 1 February 2024, Canberra

Department of Health and Aged Care

- Ms Rachel Balmanno, First Assistant Secretary, People, Communication and Parliamentary Division
- Mr Craig Chalmers, Assistant Secretary
- Mr Blair Exell PSM, Deputy Secretary, Health Strategy, First Nations and Sport
- Mr David Hicks, Acting First Assistant Secretary, Financial Management
- Mr Charles Wann, Deputy Secretary and Chief Operating Officer

Tuesday, 12 March 2024, Canberra

Australian Public Service Commission

- Dr Gordon de Brouwer, Commissioner
- Dr Rachel Bacon, Deputy Commissioner, Integrity, Reform and Enabling Services