



Australian Government

**Department of Infrastructure, Transport,
Regional Development and Communications**

**Secretary
Simon Atkinson**

Department response to the Independent Review of the Leppington Triangle Acquisition

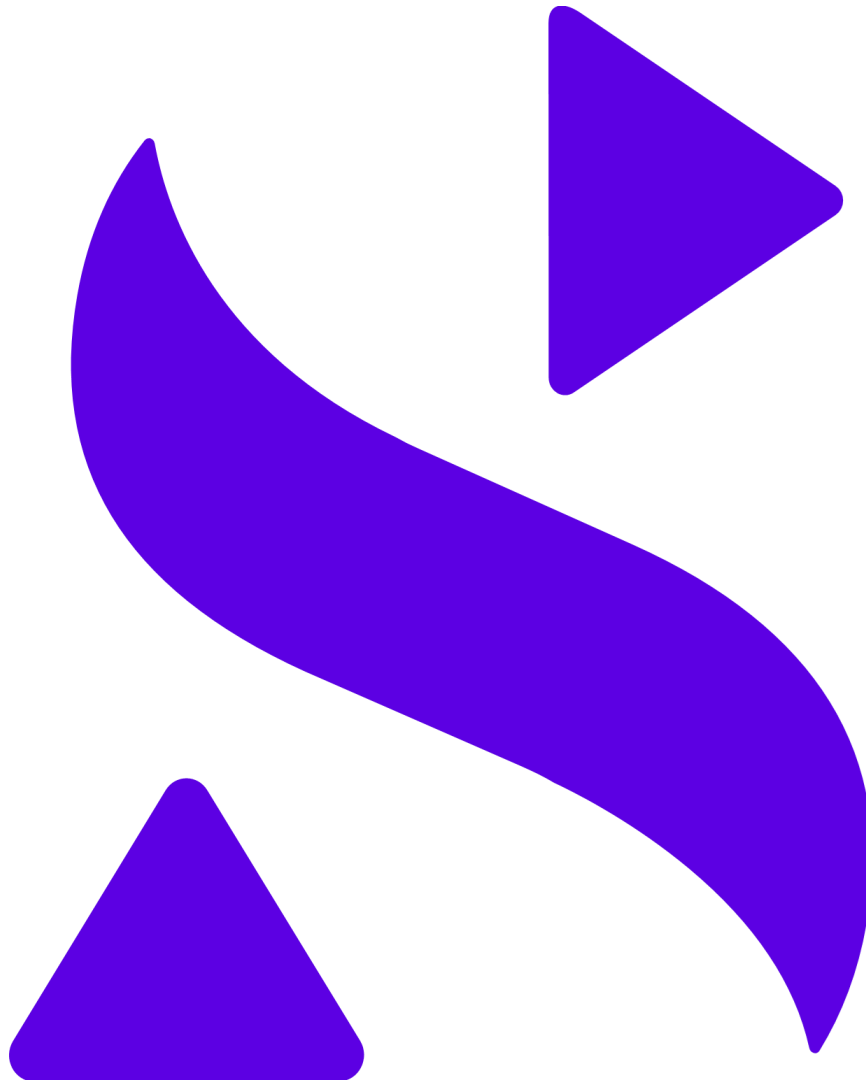
The Department notes the findings of the Independent Review of the Leppington Triangle Acquisition and agrees to the recommendations.

The Department commissioned Sententia Consulting to undertake this additional independent audit of the conduct of the Leppington transaction to build on the ANAO performance audit ‘Purchase of the “Leppington Triangle” Land for the Future Development of Western Sydney Airport’ to identify any further areas for improvement or lessons learnt.

As acknowledged in its report, many of the Independent Review’s recommendations are consistent with work the Department has already commenced to improve departmental processes as a result of the ANAO audit.

The Department will further build on these actions to implement the recommendations of the Independent Review.

21 May 2021



Independent Review of the Leppington Triangle Land Acquisition

Thursday, 20 May 2021

Sententia
CONSULTING

Independent Review of the Leppington Triangle Land Acquisition

This Report sets out the findings and recommendations made by the Independent Review of the Leppington Triangle Land Acquisition.

Prepared by
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Thursday, 20 May 2021

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Executive Summary

On 31 July 2018 the then Department of Infrastructure and Regional Development (herein referred to as the Department) acquired 12.26 hectares (ha) of land in the suburb of Bringelly, New South Wales for \$29.84 million (excluding GST). This land was identified in December 2016 as being part of the proposed long-term layout of the new Western Sydney Airport and was acquired for that purpose. The land (known as the Leppington Triangle) was owned by the Leppington Pastoral Company (LPC) and represented part of LPC's dairy property holdings. The land had been the subject of an attempted and contested compulsory acquisition by the Australian Government in 1989, which in turn included a lengthy legal dispute between LPC and the Government. Part of the agreements made as part of that dispute resulted in the Australian Government not acquiring the Leppington Triangle at that time.

Following the 2018 acquisition, the Department conducted a re-valuation of the land as part of its financial reporting processes, determining that its value for financial reporting was \$3 million based on external valuation evidence.

A subsequent Australian National Audit Office (ANAO) performance audit of the acquisition identified deficiencies in the acquisition process, particularly that the Department: (a) did not exercise appropriate due diligence and ethical standards; (b) did not develop an appropriate acquisition strategy; (c) did not undertake an appropriate approach to value the Triangle; and (d) did not appropriately advise decision-makers.

The Secretary of the Department commissioned an independent review of the Leppington Triangle acquisition to provide guidance on what the Department needed to do to respond to any weaknesses in the acquisition and to avoid similar issues emerging in the future. This Report is the product of that independent review.

Overall Conclusions

The Department's acquisition of the Leppington Triangle was consistent with the requirements of the *Lands Acquisition Act (1989)* (LAA) and was authorised by appropriate delegates and authorities and with appropriate visibility and consultation with the Department of Finance (Finance). The land was acquired through officials of the Department and Finance exercising relevant delegations, and there were no actions or decisions required directly from the Minister for Urban Infrastructure or any other Minister. In completing the acquisition, the Department's decisions and actions were consistent with advice relating to the operation of the LAA from Finance.

While an understandable strategy for the handling of relevant LPC properties was developed, it was heavily focused on maintaining a positive relationship with LPC, and was less clear on how broader risks to the success of the acquisition, including the risk of not achieving value for money, would be managed.

In undertaking the acquisition, relevant officers made, or failed to make, a number of decisions which exposed the acquisition to unnecessary risk. Further, the acquisition failed to apply key process controls to ensure that the Government's outcomes were achieved while its interests were protected. Examples of these included:

- failure to obtain and present sufficient information to inform a judgement on the amount to pay to acquire the property that would represent value for money;
- lack of documented analysis of options and risks in reaching material decisions such as the timing of the acquisition and the acquisition approach;

- absence of a rigorous negotiation plan, thereby potentially weakening the Commonwealth's negotiation position in reaching an agreed amount to pay, that demonstrably represented value for money, to acquire the property; and
- choosing to implement an acquisition by agreement approach without a rigorous analysis of the risks and benefits over a previously approved compulsory acquisition approach, and without consulting with the approver of the Strategy.

This Report will explore the nature and root cause of those process and decision weaknesses.

This Review has not been tasked to assess whether the Department achieved value for money in acquiring the property at the price it paid. However it is clear that the Department did not undertake all reasonable steps to determine what a suitable cost would be for the Government to acquire the property, to demonstrate that the price paid for the property represented an efficient, effective, economical and ethical use of public funds. These are core principles of Australian Government resource management which were not demonstrably applied to this procurement. This is discussed in more detail later in this Executive Summary.

The management and control structures of a Department should be able to identify and address weaknesses in any significant transaction. In this case, those management and control structures were ineffective. There were a range of contributing factors to this, including turnover in the leadership responsible for the acquisition at key points in the transaction lifecycle, and a significant span of control of responsible leaders. A lack of conformance with good processes typically associated with material procurements, an absence of effective "check and challenge" mechanisms to provide effective assurance that the acquisition was managed effectively, and a lack of knowledge and experience in land acquisition contributed to the control weaknesses.

While there is no question that the likely future benefit from the acquisition is significant, it has come at a high reputational cost to the Department.

It is important to note that this Review has identified no evidence to suggest poor integrity, criminal activity or personal benefit for officers involved in the transaction, which contributed to actions taken or decisions made.

How Much Should the Department have paid for the Leppington Triangle?

There is no question that determining a "suitable" or "just" price for the Leppington Triangle was always going to be difficult, given the unique nature of the property and the transaction. For the seller, the land was a part of a larger and highly successful agricultural asset, and located in an area where property prices were notably rising and were expected to continue to rise. For the Department, the land was a designated part of a \$5 billion+ piece of infrastructure, the absence of which would cause significant issues for the long-term operation of that piece of infrastructure (with consequent impact on the value of and economic benefit from the infrastructure). In other words, it is likely that the land had value to both the seller and the Commonwealth above and beyond the "going rate" for agricultural land in Western Sydney. Further, both parties had awareness of the other party's interest in the land and potential source of value. Consequently, the current market value as agricultural land was never going to be viable as the sole basis for any acquisition (under either a compulsory acquisition or an acquisition by agreement).

The Commonwealth, with LPC, used a jointly commissioned valuation as a way to obtain an indication of the value of the land, and to assess whether that indication reflected a value that would be able to progress a transaction to each party.

Irrespective of process issues in the commissioning of the valuation, it is coincidental that the valuation arrived at a price point within the budget that the Commonwealth had provisioned to achieve the infrastructure and economic benefits of a new major international airport, and that LPC was willing to accept to dispose of a value-generating asset in its portfolio.

The joint valuation notes that there were properties being exchanged in the Western Sydney region at a price per square metre that was greater than that paid for the Leppington Triangle. There have been even more since that time.

It is possible that the Commonwealth could have sought to negotiate a lower price for the Leppington Triangle, but there is no guarantee that LPC would have accepted it.

Equally, the Commonwealth could have sought to conduct a compulsory acquisition, which was envisaged by the Department's "LPC Strategy". However, it is possible that the compensation to be paid by the Commonwealth under the various compulsory acquisition heads of compensation outlined in the LAA, as well as the potential legal costs in prosecuting a potential challenge to that compulsory acquisition and compensation amount, would have been significant (and potentially more than \$30 million). The historic experience with LPC, advice from the Department's legal advisers that the Commonwealth "could expect a significant compensation payment to be sought given the size of earlier payouts", as well as the nature of certain messaging received from LPC prior to the acquisition, indicated that this was a real possibility.

The determination of the amount to pay for a property is a judgement. Officers exercised that judgement in the case of the Leppington Triangle, and paid a price per square metre that is not inconsistent with numerous recent transactions in the region. This land will be a part of a multi-billion dollar airport precinct with significant long-term benefit to the Australian people and the Australian economy.

There is no question that there were process weaknesses in how the acquisition was completed. It is also possible that those process weaknesses may have impacted the amount paid. However, addressing those process weaknesses would not have allowed the Commonwealth to acquire the land for \$3 million.

Specific Reportable Findings

The Review has identified the following overarching findings with regards to the Department's conduct in the acquisition of the Leppington Triangle and the subsequent interaction with the ANAO for audits relevant to the acquisition.

1. All evidence obtained by this Review indicates that actions and decisions taken by the team executing the transaction were motivated by achieving the best long-term outcome for the Government and the economy. In particular, the team was seeking to support the timely implementation of a new international airport in Western Sydney, with consequent economic and social benefits for the country. This Review has seen no evidence of criminality or conflicts of interest impacting decision making to the detriment of the Commonwealth.
2. The acquisition of land by the Commonwealth is a complex and sensitive activity that exercises a Government power authorised by the Constitution. Such transactions warrant a skill, diligence and prudent approach that was not consistently applied in this acquisition.
3. The Leppington Triangle acquisition was a relatively small transaction undertaken in the context of a hectic and complex working environment to establish a new international airport. The relevant Departmental leadership was stretched across a wide range of activities and issues, which when combined with leadership turnover at key points in the acquisition's lifecycle, meant that the Leppington Triangle acquisition did not have the focused oversight it required (especially given the scale of investment and the sensitive nature of the activity).

4. The Department had limited experience in land acquisitions using the LAA and in how to execute the acquisition in a controlled manner. Further, the Department had no tailored procedures for officers to follow to guide the transaction. Department of Finance's guidance for land acquisition provided a basis in terms of principles but was insufficient to (and not intended to) provide specific transactional direction.
5. The team responsible for the acquisition of the Leppington Triangle had no experience in acquisition of land for public purposes. While they were experienced and well-regarded officers, this lack of specific experience (even with significant support from legal advisers and consultation with the Department of Finance) contributed to the issues noted in the acquisition. In this regard, the acquisition was not supported by commercial or property acquisition-specific expertise or advice.
6. In the context described above, a range of decisions were made which were inadequately analysed or informed, for the Department to be confident that the Department's risk was effectively managed in this transaction. This included:
 - a. The absence of a comprehensive, tested and rigorous strategy and process for the acquisition;
 - b. The absence of appropriately documented consideration or an articulated approach for balancing the maintenance of a good relationship with the landowner, against a firmer approach to achieve a fair, value for money price for the property; and
 - c. Over-reliance on the jointly commissioned valuation, without due consideration of additional or alternative evidence, as the basis for the fair, value for money price for the acquisition.

While in all cases the Review can understand the rationale for decisions made, it is likely that a more objective, structured and informed approach would have supported better decision-making.

7. Significant, strategic and influential events or decisions occurred in the context of the acquisition of the Leppington Triangle, which should have triggered requests for decision from, or at least formal briefing of, senior leaders. However, these events or decisions were not communicated in any formal sense, reducing transparency and accountability around the transaction.
8. The Department failed to adequately demonstrate that the price paid for the Leppington Triangle represented value for money. Further, the process failures suggest that there were opportunities (not taken) to either better demonstrate that the acquisition represented value for money and/or to achieve better value for money.
9. It is extremely unlikely that the Department could have acquired the Leppington Triangle for an amount solely based on its value as agricultural land. Delayed acquisition, compulsory acquisition and a more confrontational approach to the landowner, may have resulted in different financial outcomes, which may have been better or worse than what was achieved.
10. Briefings to decision makers within the Department, including for the request for approval to spend over \$30 million for the property, were lacking in their analysis. Equally, decision makers did not request sufficient information to satisfy themselves to support key decisions.
11. Probity, control and assurance arrangements in place over the Leppington Triangle acquisition were inadequate, which likely contributed to the findings above and the findings of the ANAO.
12. Departmental officers appear to have used their best endeavours to respond to the ANAO. However, a combination of transactional complexity, staff turnover and lack of guidance in auditor expectations meant that they were unable to effectively respond to the ANAO. Further,

the weaknesses in process and decision making noted above meant that officers were unable to provide the ANAO with what it was expecting.

13. The Department's response to the ANAO's recommendation for a "probity and integrity review" was inadequate. Communication failures and the absence of an assurance framework to guide how such recommendations are addressed, meant the Department did not undertake a review that was consistent with the ANAO's expectations.

Analysis of the Root Causes of these Findings

In order to target recommendations from this Review effectively, we undertook a root cause analysis of the above 13 findings. The Review identified the following root causes for the findings.

Lack of Expertise and Experience

The Department had no lived experience, no tailored policies and procedures and limited historical guidance to draw upon in undertaking an acquisition of land using the LAA.

Unfortunately, in this environment, the Department chose not to buy-in commercial or professional property expertise to assist. While the Department drew on extensive advice from the Australian Government Solicitor (AGS), the commercial and property valuation expertise required for an acquisition is different to the legal expertise and advice provided by legal advisers. The decision not to buy-in specialised expertise for the acquisition was curious, given the Western Sydney Unit (WSU) that was responsible for development of the Western Sydney Airport and this acquisition drew heavily on external expertise in other contexts. The Review believes this decision stemmed from over-confidence, a belief that the transaction was not complex and an expectation of relying on the WSU's legal advisers and the Department of Finance for this experience. With the benefit of hindsight, additional expertise would have provided valuable guidance to the acquisition.

Insufficient Leadership Focus and Capacity on the Acquisition

At the time of the acquisition, a total of five Senior Executive Service (SES) officers – one Band 3 SES (focused on multiple parts of the Department), one Band 2 SES and three Band 1 SES) – had oversight of all of the Department's activities in Western Sydney, including the establishment of Western Sydney Airport, the Western Sydney City Deal, and technical input for the Western Sydney Infrastructure Plan. This is a significant expanse, complexity and variety of bodies of work.

Senior Executives in the then WSU noted that they were dealing with "hundreds of issues" in these programs, and it is possible that the complexity and volume of the projects and issues meant that the Leppington Triangle could not attract what may be seen as an appropriate level of focus and oversight to manage the Department's risks.

This is exacerbated by the absence of an effective assurance or "check and challenge" mechanism to provide objective confidence that important decisions were being taken effectively.

Turnover of Leadership

During the two year period from initiation of the acquisition to its completion, the responsible Deputy Secretary changed four times, the First Assistant Secretary changed two times and the Assistant Secretary changed three times. This level of turnover, and the timing of changes to key roles which resulted in loss of corporate memory, made informed and focused oversight challenging.

Poor Risk Intuition

While there was a clear focus on managing strategic risk in supporting the development of the Western Sydney Airport, in undertaking the acquisition, and the processes leading up to it, the project team accepted a number of process-oriented risks which are unusual compared to Australian Public Service norms in major transactions. These included deviating from approved strategies without seeking approval, meeting with transactional counter-parties without appropriate probity controls, and committing significant public expenditure without typical processes and evidence bases.

Further, based on consultations with relevant officers involved in the acquisition, it is apparent that there was a lack of recognition (or too casual an acceptance) of certain risks that were being faced or being crystallised throughout the transaction and the decisions being made.

There is significant responsibility that comes with public service and with use of the resources at the public service's disposal. Further, the Australian Public Service typically seeks to take a measured approach to process, integrity and value for money risk. Yet, the officers undertaking this acquisition accepted what (in retrospect) were high risks, without appreciating the seriousness of those risks or appropriately mitigating those risks.

The Department did not support those officers in terms of effective definition and promulgation of a risk appetite that guides decision making in these areas.

Lack of a Strong Centre and Control Environment

The WSU was established as a taskforce focused on the outcomes for Western Sydney. The volume and pace of its work was higher than the rest of the Department, which meant that many of the corporate controls and assurance mechanisms were not fit-for-purpose for the WSU. The Unit established its own legal, probity, procurement and financial management (including engagement with the Department of Finance) arrangements which were designed to augment corporate arrangements and to drive efficiency and fit-for-purpose support.

However, in such distinct structures, there is an increased likelihood of varied approaches and risk appetites to core business processes. Further, they typically create a diminution of transparency for decision making and performance in those business areas.

It is likely that these structural arrangements created the opportunity for behaviours and approaches that were inconsistent with Departmental norms, without being identified, called out and remediated.

Poor Communication and Focus on an Organisational-wide Perspective

A number of the issues around the response to and engagement with the ANAO can be traced back to poor communication with the ANAO and between parts of the organisation. Examples of this include the communication issues that resulted in the ANAO's recommendation for a "probity and integrity review" of the acquisition not being adequately undertaken, and (as noted above) the mismatch of corporate controls and assurance mechanisms with the pace and nature of work in the WSU.

Large complex Departments can have difficulty in ensuring a cohesive corporate culture and focus, a seamless flow of information and a spirit of effective cooperation across the organisation. This would appear to be an area for improvement for the Department.

Recommendations

1. Consistent with work already commenced, the Review recommends that the Department strengthen its capability in managing land acquisitions, in particular where the strategy involves agreement with private landowners. This can be achieved through the development and implementation of land acquisition guidance material that sets expectations and establishes business rules, procedures and core processes for the achievement of Departmental objectives and mitigation of integrity related risks. Such material would include guidance on when and how to use land valuations.
2. The Review recommends that the Department require all material, high-risk (or sensitive) land acquisitions and procurements to be considered by the Operations Committee as a form of quality assurance and peer review of process and outcome. Thresholds would need to be designed to ensure only acquisitions and procurements that need such oversight (possibly linked to risk appetite) are escalated.
3. Consistent with work already commenced, the Review recommends that the Department should strengthen its guidance on the achievement and demonstration of value for money, to improve decision making and maximise the impact of its investments. This can be achieved through the development of principles and examples to illustrate the application of value for money in the following contexts:
 - Effectiveness – planning, performance management, and results
 - Efficiency – evidence-based decisions and proportionality
 - Economy – cost consciousness and contestability
 - Ethics – accountability and transparency.

The guidance would include how to identify and analyse benefits, costs and risks of proposals to spend public money.

4. The Review recommends that the Department consider the lessons from this transaction in future strengthening of its program and project governance arrangements. For major programs and projects of work, this could include establishment of:
 - stronger governance arrangements (potentially including project boards with members experienced in program governance, and being clear on roles and responsibilities, including for the Senior Responsible Officer);
 - management processes (potentially including standards and procedures);
 - consistent reporting and oversight (possibly including a Department-wide project management office); and
 - assurance arrangements.

Such arrangements should be structured to improve strategy and coordination of planning, investment appraisal, and program management activities.

5. The Review recommends that the Department consider the lessons from this transaction in future improvement to its risk, control and assurance framework to support decision-making and the achievement of objectives. This can be achieved through:
 - linking assurances from various sources to the Department's key risks;
 - understanding the impact of future risks on the delivery of key outcomes and objectives;
 - more visible use of oversight management activity and associated functions; and
 - improving the understanding of the relationship between the work that business units do, and how that work contributes to the Department's key outputs.

We acknowledge that work in this regard, particularly focussing on risk and assurance has commenced and appears to be consistent with the intent of this recommendation, although there remains a need to focus on controls.

6. The Review recommends that the Department continue to reinforce values and behaviours in connection with probity, quality, teamwork and risk management, in order to ensure that such behaviours are more reliably built into all endeavours of the Department. In this regard, the Review is aware of and supports the Department's strengthening of probity management arrangements that has already commenced.
7. Consistent with work already commenced, the Review recommends that the Department establish thresholds (based on risk and value) for the requirement for appointment of a probity adviser and/or probity auditor for major land acquisitions and procurements.
8. The Review recommends that the Department improve its record keeping practices, in particular to ensure that there is sufficient transparency over key decisions, including the use and availability of contemporaneous notes and other supporting evidence.

Independent Review Terms of Reference

Context

In 2020, the Australian National Audit Office (ANAO) published its performance audit, titled “Purchase of the ‘Leppington Triangle’ Land for the Future Development of Western Sydney Airport”. The report was critical of aspects of the Department’s management of the acquisition of the Leppington Triangle piece of land, including raising questions around the integrity of the Department and its officers in connection with the acquisition.

The Department commissioned a review to provide insight into the circumstances of the acquisition of the Leppington Triangle parcel of land with a view to identifying lessons learned for future similar engagements.

Objective

The objective of this review is to provide clear documentation of how the acquisition of the Leppington Triangle parcel of land and the subsequent holding and management of the asset were handled, with specific, but not exclusive focus on the valuation of the acquisition and the compliance with policy and good practice as well as the Australian Government’s standards of accountability.

The review has also provided recommendations to the Department on how to better manage similar transactions in the future.

Scope

The scope of the review included consideration of the following aspects of the acquisition:

- The management and implementation of an approved Acquisition Strategy;
- The selection of a valuer for the Leppington Triangle;
- The valuation of the Leppington Triangle;
- The acquisition transaction;
- Briefing and engagement with decision makers;
- Management of probity; and
- Engagement with the ANAO.

Scope Extension

Following consideration of an initial draft report, the scope of the review was extended as follows:

- (a) Identify specific details of the interactions between the Department and the ANAO as part of the ANAO’s financial statement audit and performance audit activities related to the Leppington Triangle parcel of land. Considering both provision of information to the ANAO as well as response to advice or recommendations, this component of the review will identify opportunities to improve the management of the relationship with the ANAO in the conduct of audit activities.
- (b) Identify specific details (if any) of deviations of the final acquisition transaction process from the approved acquisition strategy and from the process defined by the *Lands Acquisition Act 1989*, and the root cause of any such deviations.

- (c) Identify specific details of the development of the October 2016 Acquisition Strategy, including advice provided by the Department of Finance and any other relevant agencies that led to the strategy to acquire the Leppington Triangle land well ahead of when it would be required to construct a second runway.
- (d) Identify specific details of the interactions between the Department and the Department of Finance (and any other relevant agencies) throughout the acquisition process, particularly in relation to the steps involved in complying with the *Lands Acquisition Act 1989*.

Approach

In order to deliver against the review scope and the scope extension, the Review considered:

- documentation from the Department made available to the Review
- interviews with relevant personnel within the Department
- interviews with relevant personnel from the Australian Government Solicitor (AGS)
- interviews with relevant personnel from the ANAO
- consultation with relevant personnel from the Department of Finance.

The review has been provided with access to an extensive body of evidence from the Department, including formal records, official correspondence, email records of relevant Department personnel from the period of the acquisition, documentation upon request and briefing to senior officers and to Government.

The review accessed specialist expertise in law, property acquisitions and property valuation.

The review would like to thank all personnel who were consulted in the course of this review for their time, candour and contribution. The review also thanks members of the Department's Assurance Taskforce, which provided excellent support to the Review team.

Scope Limitations and Disclaimers

Consistent with instructions from the Department, the review did not:

- Consult with participants in the transaction outside of Government, including the landowner, the valuer commissioned to undertake the valuation of the Leppington Triangle and the NSW Government. Therefore, the Review has not commented on the actions or roles of those stakeholders;
- Conduct an independent valuation of the property;
- Review any materials or documentation not maintained on the Department's systems; or
- Encompass any potential changes the Finance Minister may make to the *Lands Acquisition Act 1989* arising from a current review of that legislation. In this regard, the Review has not made comment on the LAA legislation or the appropriateness of the role of Finance in the acquisition.

In certain circumstances we have necessarily relied on the representations and recollections from individuals involved in the transaction. In some cases, validation of such representations was not possible or feasible within the scope of the review.

1 Context to the Acquisition

This Chapter presents background information to provide context to the 2018 acquisition of the Leppington Triangle by the Australian Government.

The Chapter describes the Government's decision to build a Western Sydney Airport, including the long-term vision for the airport, which gave rise to the decision to acquire the parcel of land known as the Leppington Triangle. The Chapter outlines the establishment of a division within the Department tasked with giving effect to the Western Sydney Airport. It provides a brief summary of the legislative powers and requirements binding the Commonwealth in the context of acquisitions, and the Commonwealth's previous attempt at acquiring the Leppington Triangle. Finally, the Chapter summarises the 2018 acquisition and subsequent scrutiny of the transaction which has given rise to the commissioning of this independent review.

1.1 A Western Sydney Airport

On 15 April 2014, the Australian Government announced that the Badgerys Creek region in Western Sydney would be the location of Sydney's second international airport. The announcement was made after many decades of consideration by the Australian Government on the appropriate site and timing for the airport.

The need for a second major airport in Sydney was driven by the increasing demand for aviation services in the region and the limited capacity of existing airports to accommodate that growth – in particular the capacity limits at Kingsford Smith Airport (Sydney Airport). Detailed studies were undertaken over a number of years to assess different options and alternatives for the development of a second Sydney airport. This included a *Joint Study on Aviation Capacity in the Sydney Region*¹ ('Joint Study') which was commissioned by the Australian and NSW Governments and delivered a final report in March 2012. The studies consistently found that the most effective way to address increasing aviation demand in Sydney while mitigating environmental and social impacts, was to develop a new airport at Badgerys Creek.

The proposed Western Sydney Airport is intended to be a catalyst for investment and job creation in the Western Sydney region. The Joint Study noted that the costs of not increasing aviation capacity are significant, and included:

- \$59.5 billion in foregone expenditure (in 2010 dollars) by 2060;
- \$34 billion in foregone gross domestic product (in 2010 dollars) by 2060; and
- An estimate of approximately 57,000 jobs in NSW and 77,900 jobs nationally foregone in 2060.²

1.2 The Western Sydney Unit

To implement the vision for a Western Sydney Airport, a new division was established within the then Department of Infrastructure and Regional Development (now, the Department of Infrastructure, Transport, Regional Development and Communications,³ collectively referred to as

¹ *Joint study into aviation capacity in the Sydney region*, Report to the Australian and NSW Governments, 2012 ('*Joint Study*').

² *Joint Study*, 2012, page 5.

³ At the time of report publication, the relevant Department title was 'the Department of Infrastructure, Transport, Regional Development and Communications'. Historically, in the 2018-19 financial year 'the Department of Infrastructure, Transport, Cities and Regional Development'; from the 2016-17 to the 2017-18 financial year, 'the Department of Infrastructure and Regional Development'; from the 2013-14 to the 2015-16 financial year, 'the Department of

‘the Department’) in July 2014. This division was called the Western Sydney Unit (WSU), and was tasked with developing a detailed investment and infrastructure plan that would establish a new airport at Badgerys Creek by the mid-2020s.

1.2.1 Investment and Infrastructure Plan and Right of First Refusal

The Western Sydney Airport investment and infrastructure plan developed by the WSU had to engage the market and operate in accordance with the Government’s obligations to the Southern Cross Airports Corporation Pty Ltd (SCAC) (which was the purchaser of Sydney Airport Corporation Limited, the operator of the Kingsford Smith Airport) under a “Right of First Refusal” (ROFR) process. The SCAC ROFR process was a condition of the sale of the Kingsford Smith Airport in 2002 to SCAC. Under the arrangement, the Government had to offer the opportunity to develop and operate Western Sydney Airport to SCAC before such an opportunity could be offered to the market or before the Government could itself build the airport. This involved developing a proposal, known as a Notice of Intention (NOI) that was offered to SCAC on 20 December 2016.

1.2.2 Establishment of Western Sydney Airport Corporation Limited

On 1 May 2017, SCAC advised it would not accept the Government’s NOI. Immediately following, on 2 May 2017, the Government announced it would develop the airport itself, and in the 2017-18 Budget, the Government committed \$5.3 billion of equity in a Commonwealth-owned company to develop and operate the Western Sydney Airport. The company was called WSA Co Limited (WSA Co). WSU was made responsible for implementing these arrangements and WSA Co was established in August 2017.

1.2.3 Key Functions

Throughout 2014 to 2018, the WSU managed a wide expanse of issues, programs and projects. Other than development of the Western Sydney Airport, the WSU was also responsible for the implementation of the Western Sydney City Deal – an agreement between the Commonwealth, NSW and local governments to transform the Western Parkland City to become a fully realised 22nd-century city and deliver transformative change to the Western Sydney region – and the establishment of a range of transportation infrastructure and other initiatives in the Western Sydney area. WSU comprised around 33 staff in 2015-16, growing to around 40 staff in 2017-18.

WSU asserted itself as a “taskforce” style operating model, drawing on high performing officers to operate in an agile, collaborative manner to progress the broad range of tasks required to establish the new airport and other reforms across the Western Sydney region. It drew extensively on specialist and expert support from a range of consultants, contractors and legal advisers.

In relation to the Western Sydney Airport, WSU managed several functions to support development of the infrastructure and investment plan and the establishment of WSA Co. These functions included:

- Legal analysis and strategy;
- Aviation infrastructure concepts and design;
- Financial, commercial and business case development;
- Environmental and land use planning;
- Communication and stakeholder engagement; and
- Project management.

Infrastructure and Regional Development’. All Department titles are collectively referred to as ‘the Department’ throughout the Report.

WSU comprised two branches, with one branch managing the enabling functions of communications, environment and legal support. The legal section within this branch managed a large breadth of activities, such as supporting engagement with SCAC and development of the NOI, regulatory approvals and issues and land management (including for the removal of tenants on the airport site), the establishment of the WSA Co, and more general management of legislative and regulatory obligations. This scope of responsibilities included managing land acquisitions.⁴ The Department’s human resources data indicates that around the time of the acquisition, in July 2018, the section had five staff members. This section also worked closely with specialist legal advisers contracted to the WSU, being the Australian Government Solicitor (AGS) and Clayton Utz.

The other branch managed the development of the concept design, business case and subsequent financing proposals for government approval for the airport until 2017-18, and then managed implementation of the governance and contract management arrangements for the implementation of the Western Sydney Airport Program and establishment of WSA Co. Additionally, this branch worked with the Department’s Infrastructure Investment Division (IID) to support delivery of the Western Sydney Infrastructure Plan (WSIP). The WSIP is a joint initiative of the Australian and New South Wales (NSW) Governments, funded on a 80:20 basis. The WSIP is investing \$4.1 billion over 10 years in the infrastructure within the western Sydney region, which includes the movement and upgrade of The Northern Road (part of the A9 outer western Sydney bypass route). The WSU provided technical advice to IID and the NSW Roads and Maritime Services (RMS) on whether the roads being designed and developed would meet the airport’s needs.

Throughout the activities related to the development of the second Sydney airport, AGS and Clayton Utz provided legal services as required. Responsibilities were split between AGS and Clayton Utz, across their provision of legal advice in relation to such matters as environmental issues, the *Airports Act*⁵ and Regulations, due diligence, accountability requirements, land management issues, constitutional matters, ROFR negotiation, notice to consult, commercial matters, NOI, dispute management, state laws, and administration. Under this division of responsibilities, AGS was assigned as the lead advisers for land management issues, which included all advice in connection with the acquisition of the Leppington Triangle.

1.2.4 Leadership of and within Western Sydney Unit

The leadership of the WSU experienced turnover between 2015 and the end of 2020 – being the period from commencement of the acquisition planning through to the completion of the ANAO’s performance audit. This is demonstrated in the following table, summarising the number of office holders that served in leadership positions (including in an acting capacity for a material period of time) with leadership and oversight responsibilities over the WSU.

Figure 1: Summary of senior office occupants with oversight of the WSU between 2015 and 2020.

Key Role	Occupants of the Position Between 2015 and 2020
Secretary	Four different office holders, spanning: 29 June 2009 to 17 September 2017; 18 September 2017 to 1 September 2019; 2 September 2019 to 10 November 2019; and 11 November 2019 to beyond 2020.
Responsible Deputy Secretary	Seven different office holders, spanning: 28 January 2010 to 15 March 2016; 18 March 2016 to 9 October 2016; 10 October 2016 to 7 January 2018; 8 January 2018 to 4 December 2019; 5 December 2019 to 26 January 2020; 3 February 2020 to 22 March 2020; 23 March 2020 to beyond 2020.

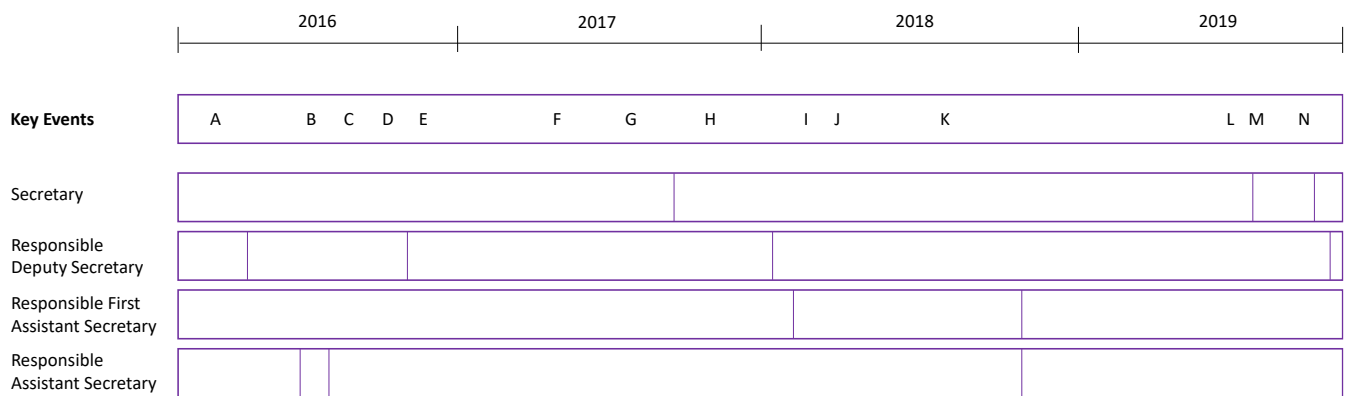
⁴ 2017-18 Business Plan, page 8.

⁵ *Airports Act 1996* (Cth).

Key Role	Occupants of the Position Between 2015 and 2020
Responsible First Assistant Secretary (FAS)	Three different office holders, spanning 28 April 2014 to 25 January 2018; 29 January 2018 to 28 October 2018; and 14 November 2018 to 24 December 2020.
Responsible Assistant Secretary (AS)	Four different office holders spanning 19 May 2014 to 29 May 2016; 30 May 2016 to 10 July 2016; 11 July 2016 to 28 October 2018; and 29 October 2018 to beyond 2020.

As can be seen in the diagram below, a number of the changes in roles occurred at or around significant developments in the acquisition of the Leppington Triangle.

Figure 2: Timeline of key events in the acquisition against changes in key leadership roles.



- A: Revised budget estimates for the acquisition of the property were developed.
- B: Initial versions of the draft LPC Strategy developed.
- C: In principle agreement to re-alignment of the TNR over the “axe handle”.
- D: LPC Strategy approved.
- E: Minister for Urban Infrastructure determines the Western Sydney Airport Plan.
- F: Procurement of services of an independent valuer for a “joint valuation”.
- G: Joint valuation received from valuer.
- H: Discussion on “commercial terms” for the acquisition.
- I: Authorisation received from Minister for Finance delegate for acquisition by agreement.
- J: Approvals provided for acquisition from Deputy Secretary and CFO.
- K: Sale contract for the acquisition of the Leppington Triangle is executed.
- L: Financial statements valuation of the Leppington Triangle is completed.
- M: Audit finalisation, noting further inquiries regarding the Leppington Triangle acquisition.
- N: Receipt of notification of commencement of a performance audit into Leppington Triangle acquisition.

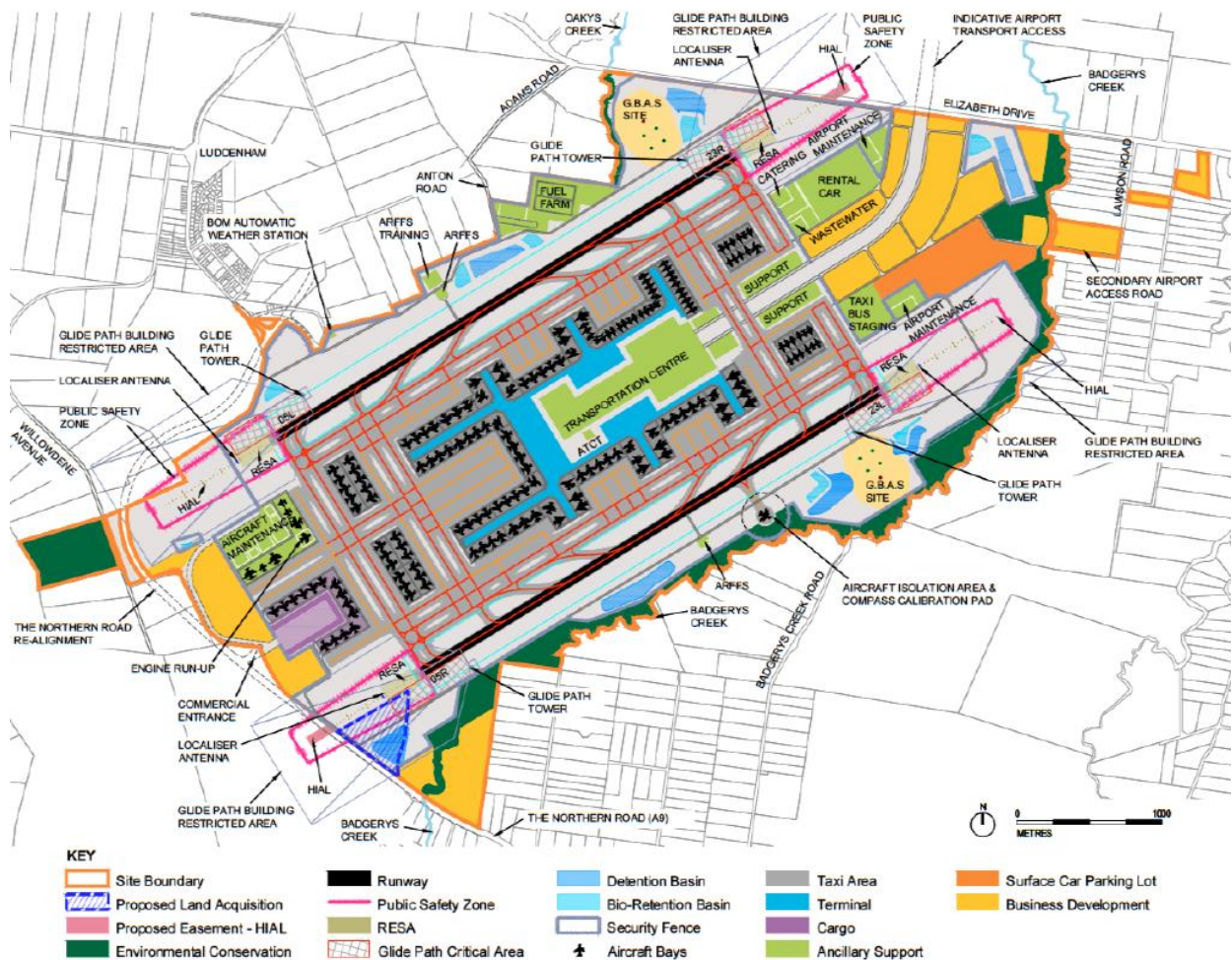
1.3 The Airport Plan and Targeted Land Acquisition

The system for regulating Commonwealth-owned airports in Australia is established by the *Airports Act 1996* (Cth) (Airports Act). The Airports Act provides that the Infrastructure Minister may determine an airport plan for Western Sydney Airport, which authorises the carrying out of a specific development.

On 5 December 2016, the Minister for Urban Infrastructure determined the Airport Plan for Western Sydney Airport pursuant to s 96B(1) of the Airports Act. The Airport Plan authorised the Stage 1 development of the Western Sydney Airport. The long-term indicative airport layout includes operation of a second parallel runway (also referred to as the southern runway). To support realisation of the long-term airport layout, the Airport Plan noted the need for certain land acquisitions, particularly of ‘a triangular portion of land in the south of the site, required to accommodate the development and operation of the southern runway’⁶. This triangular portion of

land is referred to as the Leppington Triangle. The below image is a copy of the indicative long-term layout of the airport presented in the Airport Plan. The Leppington Triangle is highlighted in blue in the bottom-left corner of the site.

Figure 3: The indicative long-term airport layout of Western Sydney Airport.⁷



The long-term airport layout indicated in the Airport Plan was determined after years of work analysing and developing options for the airport site and layout, including the Joint Study analysis and recommendation for a full service airport with a parallel runway layout⁸. Throughout development of the Western Sydney Airport business case and the supporting Airport Concept Design⁹, various models were developed for the airport layout, and assessed according to the following criteria:

- the airport’s parallel runways should be of equal length so that aircraft operations are ‘balanced’, thereby maximising efficiency and operational flexibility;
- minimising additional land acquisition¹⁰, where possible;
- the runway lengths should not limit the type of aircraft that could operate from the airport and the range of destinations served; and

⁷ Sourced from the *Airport Plan –Western Sydney Airport*, 2016, page 21.

⁸ *Joint Study*, 2012, page 29.

⁹ Undertaken by Landrum & Brown. The Airport Concept Design underpins the planning of key aviation components, including airfields (runways and taxiways), aircraft aprons, passenger terminals, cargo, support facilities, navigational aids and general land use.

¹⁰ The Review was advised that certain design decisions were taken with the specific intent of avoiding acquisition of additional parcels of land, on the basis that such acquisitions were seen as costly, time-consuming and risky.

- maximising the lateral spacing between the runways to ensure the airport terminals can provide sufficient aircraft gates and manoeuvring areas to avoid aircraft taxiing and parking congestion.

Following this options evaluation and concept design process, it was identified that some minor and targeted land acquisition would materially improve the ability to maximise the long-term aviation capacity of the site. The Leppington Triangle, comprising around 13.6 hectares (ha) was identified as a targeted land acquisition that would be required to prevent compromises on the long-term airport layout and aviation capacity.

1.4 Legal Backdrop for Land Acquisitions

The Australian Constitution provides a source of authority for the Commonwealth to legislate for the acquisition of property. The Constitution limits the acquiring power to cases where the land is needed for a Commonwealth purpose and is acquired on “just terms”, stating:

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

1.4.1 The Lands Acquisition Act

The *Lands Acquisition Act 1989* ('LAA') is the Act that provides the mechanism for the Australian Government to acquire land for public purposes. Section 16 of the LAA provides two broad key modes of acquisition available to the Commonwealth – by agreement, or by compulsory process. The constitutional requirement for the land to be used for a public purpose and for the acquisition be carried out on just terms is apparent throughout the provisions that guide both broad modes of acquisition.

The LAA is administered by the Department of Finance. The requirements and steps under these two modes of acquisition, have been summarised at a high-level below.

Figure 4: Table summarising the components of acquisition by agreement and compulsory acquisition.

Ref	Acquisition by Agreement	Compulsory Acquisition
i.	Initiation An acquisition by agreement and a compulsory acquisition may be initiated by making a pre-acquisition declaration (PAD), or by satisfying an exemption to the PAD requirement.	
i(a).	PAD A PAD is made by the Minister of Finance and at a minimum, identifies the acquiring authority, the land to be acquired, the interest in the land, and the public purpose (s 22) ¹¹ . The Minister must circulate and publish the PAD in accordance with LAA requirements. A person affected by the PAD may apply to the Minister for a reconsideration of the declaration (s 26), in response to which the Minister must either confirm, revoke or vary the declaration (s 27). Where the Minister has responded to an application for reconsideration of a PAD under s 27, an affected person may apply to the Administrative Appeals Tribunal for review of the PAD (s 28).	
i(b).	Exemptions to PAD requirement Under s 40(2)(b)-(d), a PAD is not required in the following three circumstances:	Exemption to PAD requirement Under s 41(1)(b), a PAD is not required for a compulsory acquisition where the Minister for

¹¹ All references to legislation in this Report refer to provisions under the *Lands Acquisition Act 1989* (Cth) unless otherwise specified.

Ref	Acquisition by Agreement	Compulsory Acquisition
	<ul style="list-style-type: none"> The Finance Minister provides a certificate under s 24 that the land is required urgently (s 40(2)(b)). The land interest is available in the market (s 40(2)(c)). 'Available in the market' is defined in s 40(5), to include: an interest that is currently advertised; an interest listed with a real estate agent or other person performing a similar service; or where the Minister has certified under s 40(6) that the acquisition would be a standard commercial transaction). The Commonwealth or Commonwealth authority owns the interest (s 40(2)(d)). 	<p>Finance provides a certificate under s 24 that the land is required urgently.</p>
ii.	<p>Authorisation</p> <p>The Minister may authorise the acquisition by agreement of an interest in land under s 40(1) of the LAA.</p>	<p>Declaration of a compulsory process</p> <p>Upon a PAD becoming absolute (as per s 43) or the exemption to the PAD requirement being satisfied, the Minister declares that the interest is acquired by the acquiring authority by compulsory process (as per s 41(2)), and must circulate and publish the declaration (as per s 41(3), (4)).</p>
iii.	<p>Making the agreement</p> <p>After the authorisation is provided (and a PAD if issues becomes absolute, or there is an exemption), the acquiring authority and land interest holder(s) formally make an agreement for the acquisition under Part IV of the LAA. There are limited legislative requirements that dictate the form and content of this agreement, including in connection with the price paid in the acquisition. However, this agreement would typically cover the terms of the transaction (including the interests acquired) and the agreed price.</p>	<p>Interest vesting in the Commonwealth</p> <p>Once a copy of the Declaration under step (ii) is published in the <i>Gazette</i>, the interest vests in the acquiring authority (s 41(4)(a)). The interest is freed and discharged from all other interests, trusts, restrictions, dedications, reservations, obligations, mortgages, encumbrances, contracts, licences, charges and rates (s 41(4)(b)).</p>
iv.	<p>Completing the agreement</p> <p>To complete the acquisition, the parties must take actions required by the agreement.</p>	<p>Working out compensation</p> <p>Compensation is worked out in accordance with Part VII of the Act.</p> <p>Section 55 sets out the general principles to work out the amount that will justly compensate a landowner for the acquisition. In summary, regard must be had to:</p> <ul style="list-style-type: none"> the market value of the interest on the day of the acquisition; the value of any financial advantage, additional to market value to the person incidental to their ownership; any reduction or increase in market value of any other interest in land caused by severance by the acquisition;

Ref	Acquisition by Agreement	Compulsory Acquisition
		<ul style="list-style-type: none"> any loss, injury or damage suffered or expense reasonably incurred as a result of the acquisition or the PAD; and any legal or other professional costs reasonably incurred in relation to the acquisition. <p>Other provisions in Part VII provide further guidance on compensation matters such as the definition of market value and matters to be disregarded in calculating compensation.</p> <p>However, it is important to note that Part VII, Division 5 provides that compensation may be determined by agreement. Specifically, s 78 provides that compensation may be determined by pre-acquisition agreement, in which the Minister and the owner of an interest in land may agree on the amount of compensation to which the owner will be entitled if the interest is acquired by compulsory process within a time specified in the agreement.</p>

There are key differences in the processes and principles that underpin the two acquisition methods. Acquisition by agreement has minimal legislative guidance on the content and terms of the agreement reached between the acquiring authority and affected interest holders, including in connection with any price paid as part of the acquisition. Acquisitions by agreement are usually simpler and therefore faster than compulsory acquisitions and are the Commonwealth’s preferred approach.¹²

Compulsory acquisitions do not need the agreement of the interest holder and occur by the Minister using powers under the LAA, based on the advice of the acquiring authority. To support compulsory acquisitions occurring on just terms, the LAA provides an entitlement to compensation and sets out how the amount should be calculated. However, as noted above, the compensation amount can be agreed between parties.

1.4.2 The Public Governance, Performance and Accountability Act

For Commonwealth acquisitions, there must also be regard for the *Public Governance, Performance and Accountability Act 2013*¹³ (PGPA Act) – the cornerstone of the Commonwealth Resource Management Framework, which governs the use and management of public resources. The PGPA Act applies to all officials of Commonwealth entities and establishes rules for financial management, governance, performance and accountability for the Commonwealth public sector.

The PGPA Act also provides the Finance Minister with the power to make instruments about procurement by the Commonwealth, in the form of the Commonwealth Procurement Rules (CPRs).¹⁴ As a Commonwealth land acquisition is a Commonwealth procurement of land interests, the CPRs apply.

1.4.3 Legal Advice

According to the division of responsibilities between legal advisers to the WSU, AGS was assigned responsibility over land management issues, including acquisitions. Therefore, the WSU used AGS as

¹² Department of Finance, *Review of the Lands Acquisition Act 1989: Discussion Paper*, 2020, page 5.

¹³ *Public Governance, Performance and Accountability Act 2013* (Cth) (‘PGPA Act’).

¹⁴ *PGPA Act*, s 105B.

legal advisers for the acquisitions required for the Western Sydney Airport. AGS officers were in effect embedded within the WSU on either a full-time or part-time basis, with other non-embedded AGS staff providing advice as required.

Amongst other things, AGS advice was used to support compliance with the specificity of LAA legal requirements and the complexity of the relationship with the landowner of the Leppington Triangle – the Leppington Pastoral Company Pty Ltd (LPC).

1.5 The Leppington Pastoral Company

LPC operates one of Australia’s largest family-owned dairy farms, located in Bringelly in Western Sydney.

1.5.1 Historical Litigation

In July 1989, the Commonwealth issued a PAD notice and sought to compulsorily acquire approximately 80 ha of LPC land on the western side of the proposed airport site (which included the Leppington Triangle land). LPC challenged the PAD, and the parties agreed to reduce the land to be acquired to 38 ha. This reduction in land resulted in LPC retaining ownership of the Leppington Triangle on the basis that it was “prime land”.

A deed was entered into on 21 August 1991 that set out the arrangements for the acquisition but not the quantum of compensation. A significant focus in the Deed was access to the Leppington Triangle which was going to be separated from the remaining LPC property by a thin strip of land acquired by the Commonwealth (known as the ‘axe handle’). This strip of land had been identified at the time as a possible route for the realignment of The Northern Road, travelling on a north-south axis across the boundary with LPC’s property down the ‘axe handle’. Specifically, clause 6 of the Deed conferred an obligation on the Commonwealth to construct a tunnel or other suitable carriageway, on a design basis acceptable to LPC, to provide LPC access to its main farmland in the event of The Northern Road being re-routed along the acquired axe handle land.

On 21 October 1991, the PADs were varied in accordance with the Deed and the land was acquired by the Commonwealth on 11 December 1991. LPC subsequently lodged a claim for compensation on 17 August 1992, for \$40,790,170, excluding professional fees, which was later adjusted up to around \$52 million. After seeking an extension of time to make an offer, on 21 April 1993, the Commonwealth made an offer of \$8,461,500. This amount was paid by the Commonwealth, while LPC sought further compensation.

After a series of counter offers between the parties, the Commonwealth commenced court proceedings at the Federal Court on 2 May 1994 to determine the compensation payable. Prior to the proceedings, the Commonwealth paid further compensation to LPC on the basis of advice from legal counsel, bringing the total paid by the Commonwealth to \$9,499,100.

Following an extended dispute and further litigation in both the Federal Court and full Federal Court, the parties reached an out of court settlement in December 1999, with the Commonwealth making an additional payment of approximately \$12 million.

In summary, the previous acquisition of land with LPC played out over 10 years, involved four separate proceedings in the Administrative Appeals Tribunal and the Federal Court, and compensation of \$21.5 million paid by the Commonwealth to LPC. This compensation amount does not include costs incurred by the Commonwealth for its own legal and administrative costs. Importantly, the parcel of land acquired from LPC was reduced in size from that initially contemplated, so that Leppington Triangle did not form part of the eventual 1991 acquisition.

1.5.2 Leppington Pastoral Company as Significant Stakeholders

From the inception of the Badgerys Creek site for the Western Sydney Airport, LPC was a significant stakeholder in the Western Sydney Airport program of work. LPC had significant landholdings and leases on and around the airport site, making them an important stakeholder for many aspects of the Western Sydney Airport program of work and WSU's activities.

In particular, LPC had a key role in the realignment and upgrade of The Northern Road Stage 4 (TNR4), which transected the airport site. Realignment options placed TNR4 going through LPC-owned land (to a greater or lesser degree depending on the alignment design). Further, where the realignment would use the axe handle strip of land, impacting LPC access to their land holdings, LPC had approval authority arising from the 1991 Deed with the Commonwealth for the design of a Commonwealth-funded underpass under that part of the road for LPC's use. The Northern Road was an early infrastructure change required on the critical path of the development of the airport.

A brief description of the realignment of The Northern Road, as it relates to the Leppington Triangle is included in **Appendix A: The Northern Road Stage 4 Realignment**.

1.6 The Acquisition of the Leppington Triangle and Subsequent Scrutiny

Following the announcement of the site for the Western Sydney Airport and alongside development of the Airport Plan, initial discussions with LPC occurred in late 2015 to mid-2016 regarding the potential acquisition of the Leppington Triangle. The potential acquisition was discussed with LPC in parallel with consultations between the Department, RMS and LPC regarding the realignment of the Northern Road (TNR4 realignment) that was part of the WSIP. Discussions between the Department, RMS and LPC about the TNR4 realignment route options continued from mid-2015 through to late 2016.

Following these early discussions about the potential acquisition, the Department and LPC undertook a process of valuation and negotiation regarding the Leppington Triangle. Subsequently, the Commonwealth and LPC executed an agreement for sale of the land from LPC to the Commonwealth on 31 July 2018. The sale excluded provision for a 1.36 ha portion of the Triangle to be acquired by RMS to form part of the TNR4 realignment route that had been determined.¹⁵ Therefore, the acquisition of the Leppington Triangle was funded in part by the Commonwealth and in part by the NSW Government Roads and Maritime Services (RMS).

The sale was finalised at \$30 million (excluding GST), comprising \$29,839,025.50 (excluding GST) paid by the Commonwealth for its 12.26 ha portion (at an average rate of \$2,433,852 per hectare), and \$160,974.50 (excluding GST) paid by RMS for its 1.36 ha portion (at an average rate of \$118,363 per hectare).

As part of the sale, it was agreed between the Department and LPC that the Leppington Triangle would be leased back to LPC for an initial term of 10 years with two option terms of five years each, and that the Commonwealth 'axe handle' parcel would also be subleased to LPC (through WSA Co as the sublessor) for an initial term of 10 years with two option terms of five years each. Both leases include break clauses in the event the respective property is required for the airport development.

¹⁵ As noted in section 1.5.2, the Review notes that the TNR4 realignment route that had been determined also crystallised the Department's legal obligations under the 1991 Deed of acquisition with LPC for the construction of a cattle underpass adjoining the Leppington Triangle to LPC's main farmland. This required an investment of approximately \$600,000 by both the Commonwealth and Transport for NSW under the WSIP arrangements.

1.6.1 The Department's Preparation of Financial Statements

As part of the 2018-19 financial statements preparation process, the Department conducted a re-valuation of all non-current assets, consistent with the Asset Revaluation Policy. As part of this, the Department conducted a re-valuation of the Leppington Triangle. That valuation, undertaken by Jones Lang Lasalle (JLL) valued the parcel of land at "around \$3 million" (GST exclusive). A subsequent valuation undertaken by Colliers International was conducted, which arrived at a valuation of \$4 million (excluding GST). For the financial report at 30 June 2019, the Department valued the Leppington Triangle at \$3,065,000. This represented a difference of around \$27 million compared to the acquisition price paid.

1.6.2 Australian National Audit Office Findings

The ANAO, as part of the 2018-19 financial statements audit, raised concerns about the valuation difference that had been reported by the Department. Prior to signing an unqualified audit opinion, the ANAO raised the acquisition as a 'significant and unusual transaction' to the Department.

Subsequently, the ANAO conducted a performance audit titled *Purchase of the 'Leppington Triangle' Land for the Future Development of Western Sydney Airport*. The ANAO's stated objective in the performance audit 'was to examine whether [the Department] exercised appropriate due diligence in its acquisition of the 'Leppington Triangle' land for the future development of the Western Sydney Airport'.

The ANAO performance audit concluded that the Department 'did not exercise appropriate due diligence in its acquisition of the Leppington Triangle... [and] the operations of the [D]epartment, both during and after the acquisition, fell short of ethical standards'¹⁶. Additionally, the ANAO observed that:

- an appropriate acquisition strategy was not developed for the acquisition;
- the approach taken by the Department to value the Leppington Triangle in the context of the acquisition was not appropriate and inflated the value of the land, which in turn led to the Commonwealth paying more than was proper in the circumstances; and
- decision-makers were not appropriately advised on the land acquisition.

Given the significance of the ANAO findings, the Department undertook a number of initiatives and commissioned a number of reviews to investigate and address the questions around integrity and due diligence that were raised. In particular, the Department established an Assurance Taskforce to drive implementation and provide oversight of the Department's response to the ANAO's recommendations and additional measures being undertaken. Further measures being commissioned by the Department include code of conduct reviews to investigate potential breaches of the Australian Public Service Code of Conduct, a review of the culture of the WSU's processes, working environment and capabilities, and this independent review.

This independent review comprehensively examined the conduct of the Leppington Triangle acquisition and has provided recommendations to the Department on how to better manage similar transactions in the future.

¹⁶ Australian National Audit Office, *Purchase of the 'Leppington Triangle' Land for the Future Development of Western Sydney Airport*, Audit Report, page 7.

2 The Strategy for the Acquisition

This Chapter examines the strategy and supplementary plans developed to guide the acquisition of the Leppington Triangle. The Chapter will describe, at a high-level, how the Department came to a position of needing to acquire the Leppington Triangle and the processes undertaken to develop the key strategy document dealing with the acquisition. The Chapter considers the following questions:

- whether an appropriate and adequate strategy was developed to support the acquisition;
- whether appropriate plans and processes were developed to support the proper management of the acquisition; and
- whether the strategy underpinning the transaction was appropriately approved.

2.1 Context – What Occurred in Developing the Strategy for the Acquisition

The Airport Plan¹⁷ for Western Sydney Airport was determined by the Minister for Urban Infrastructure on 5 December 2016 pursuant to s 96B(1) of the *Airports Act 1996*. The Airport Plan authorised the Stage 1 Development of the Western Sydney Airport. Upon completion of the Stage 1 Development, Western Sydney Airport will operate as a single-runway airport. The long-term indicative airport layout includes operation of a second parallel runway (referred to as the southern runway). It was estimated this southern runway would be required around 2050.¹⁸

To support realisation of the airport layout, the Airport Plan states:

It is expected the following areas will need to be acquired to support the development and operation of the Airport, and be incorporated into the Airport Site:

- *The portion of The Northern Road that currently transects the Airport Site; and*
- *A triangular portion of land in the south of the site [(Leppington Triangle)], required to accommodate the development and operation of the southern runway.¹⁹*

The Airport Plan was determined after extensive work analysing options for the airport layout and their impact on flight operability and the surrounding environment. In considering the airport and runway designs, a key design principle was to minimise any required land acquisition.

2.1.1 Business Case and Costings

Prior to publication of the Airport Plan, the Department developed the Western Sydney Airport Business Case, to support the Commonwealth in determining whether to proceed with the airport project. In particular, the business case set out detail on the timing, design, benefits and expected costs of the project, to support the Commonwealth make an informed investment decision.

The business case explored the runway concepts developed as part of the airport layout plans, and identified the Leppington Triangle as a targeted land acquisition, without which the southern runway would be compromised and the width of the midfield terminal area would be limited. These compromises or limitations would impact aviation capacity of the airport, and the consequent economic benefits that the airport would provide.

¹⁷ All references to the Airport Plan in this Report reference the December 2016 edition of the *Airport Plan – Western Sydney Airport*, and not subsequent updates, unless otherwise stated.

¹⁸ *Airport Plan – Western Sydney Airport*, December 2016, page 20.

¹⁹ *Airport Plan – Western Sydney Airport*, December 2016, page 23.

As part of developing the costings for the business case, the Department considered the estimated cost of the land acquisition. Land acquisition fell within the category of 'Commonwealth Preparatory Activities' (CPA), being works identified as best undertaken by the Commonwealth due to the nature or requirements of the work and any interface with other government entities. These CPA included cemetery relocation, securing biodiversity offsets, main connecting roadworks and land acquisitions.

The historic litigation with LPC was known to the Department as costings were undertaken. An email from AGS on 5 August 2015 noted that 'even if Leppington is a willing seller, it could expect a significant compensation payment to be sought given the size of the earlier payouts and the stated quality of the triangle land'.

The original costing conducted on 4 September 2015 by WTP estimated a cost of \$2.996 million for acquisition of the Leppington Triangle.

On 25 October 2015, AGS noted in an email that 'compensation for the acquisition of the [Leppington] [T]riangle could be expected to be quite significant given the history of the matter'. The AGS email also observes 'from viewing the site that the triangle appears to be some of the best land' and proposes that the Department carry out specific valuation work to help confirm that CAPEX estimates are appropriate and have not underestimated the cost of acquiring the land.

This likely informed briefing to the Executive Director of the WSU in February 2016 which proposed a desktop analysis by a valuer to gain an improved understanding of potential cost for acquisition of the Leppington Triangle.

In February 2016 the Department developed revised lands acquisitions estimates, based on:

- a \$1,166,713 per hectare rate that had been provided by its commercial adviser for the business case, based on two property sales in the surrounding area;
- an arbitrary²⁰ 50% premium applied to derive a 'premium rate' of \$1,750,000 per hectare; and
- multiplied by 13.6 hectares for the Leppington Triangle

to arrive at an estimated cost of \$23.8 million.²¹

In March 2016, EY was engaged to conduct an analysis of property value escalation of the area around the airport site. The report advised a 6.3% per annum escalation estimate to 30 June 2018, and a 9.1% per annum escalation estimate to 30 June 2019. It appears that this advice was contextual and not directly used in any costing for the anticipated acquisition of Leppington Triangle.

In October 2016, for revised Budget estimates, the cost estimate for the acquisition was updated, based on:

- the same \$1,166,713 per hectare rate previously provided by the commercial adviser;
- an arbitrary²² 100% premium applied to derive a new premium rate of \$2,333,426; and
- multiplied by 13.62 hectares for the Leppington Triangle

to arrive at an estimated cost of \$31.78 million.

This was the estimate used to inform the cost of the Leppington Triangle acquisition as part of the CPA allocation.

²⁰ The premiums do not appear to have been based on any specific advice. Officers responsible for the costing advised that the changed premium factor reflected a view that prices were going to rise significantly in the area around the Western Sydney Airport.

²¹ Officers responsible for this costing advised that it was done quickly, with little notice, as it was expected that the business case would be considered by Government in the 2016-17 Budget. In the end, it was not considered by Government until later in 2016.

²² As per footnote 21.

Prior to consideration by Government, the CPA costings would have been reviewed and endorsed by senior management in the WSU and the Chief Finance Officer (CFO) function within the Department. The Department of Finance approved the costs relating to the Western Sydney Airport CPA on 26 June 2017. The costings were agreed by the Government as part of its decision for CPA on 4 July 2017.

It is noteworthy that the allocation of costs for the CPA was for expenditure within the forward estimates period of four years from July 2017. The Review was advised by officers responsible for the acquisition that this was influential in the determination to attempt to acquire the Leppington Triangle in the short-term.

2.1.2 Key Steps in the Development of the Strategy for the Acquisition

The Department met with LPC on 23 October 2015, and noted that the Leppington Triangle would, in due course, be required for the operation of the Western Sydney Airport. The Department subsequently raised the possibility of an acquisition of the Leppington Triangle with LPC at a meeting on 28 April 2016. Based on notes from that meeting, LPC communicated ‘a strong preference for this acquisition to be delayed until the triangle is actually required for the second runway’.

These meetings with LPC had been arranged between the Department, RMS and LPC predominantly to discuss the TNR4 realignment.

2.1.2.1 Considering The Northern Road realignment

The original realignment option published by RMS on 13 July 2015 identified a route that passed through LPC land, based on runway clearance requirements provided by the Department. LPC provided a submission to RMS on 14 August 2015, strongly objecting to the TNR4 realignment through its land. It is understood that this objection hinted at potential damages being claimed to the extent that the TNR4 realignment disrupted LPC’s business interests.²³ Following this strong objection, RMS engaged with the Department to further discuss and workshop alternative route alignments.

In designing realignment options, the Department and RMS considered the LPC feedback to consider moving the route closer to the airport site, and to use the Commonwealth-owned ‘axe handle’. As the Department continued to consider TNR4 realignment options, the Department came to a view that it could be advantageous to concurrently consider acquisition of the Leppington Triangle. A brief to the Executive Director of WSU, through the General Managers of the WSU in December 2015, notes that ‘[g]iven there is a need for RMS to acquire land from LPC for [TNR4] realignment, and that the Commonwealth has already been in contact with LPC for this purpose and to discuss... the Leppington Triangle land, there are some practicalities in pursuing these transactions concurrently and as part of a package’.

Officers involved in the transaction explained the thinking behind this “package” approach to a number of engagements with LPC, being to establish a collaborative relationship that could support discussions on a range of fronts that were relevant to the airport, as well as provide negotiation options where priorities emerged from the touchpoints between the Commonwealth and LPC.

2.1.2.2 Development of drafts of the Strategy

Between March and June 2016 AGS developed working versions of a ‘Draft LPC Strategy’ following discussions with the Department, comprising two documents. One of the documents, titled ‘LPC proposal DRAFT’ outlined a package of options that could be put to LPC, including:

²³ It is likely that this risk was influential in the Department’s thinking on how to engage with LPC in connection with both the TNR4 realignment as well as intentions with regard to the Leppington Triangle.

- Commonwealth agreement to the TNR4 realignment moving closer to the airport site and onto the Commonwealth-owned ‘axe handle’; and
- the Commonwealth’s intention to acquire the balance of the Leppington Triangle within the next few years.

The accompanying ‘Strategy/Process’ document outlined policy considerations in support of the draft strategy. In particular, the document noted the reasons for an early acquisition of the Leppington Triangle. With regard to Commonwealth value for money considerations, the following was noted in correspondence between the Department and AGS.

- Costs of a delayed acquisition are likely to outweigh costs of early acquisition and leaseback.²⁴
- While the value of certainty for both parties cannot be quantified, the value is expected to be high for both parties, and therefore an area where LPC and the Commonwealth are likely to have common interest.

Having considered the above in relation to a package of land options, timing and costs, on 25 July 2016, the Department shared a draft strategy document with the Department of Finance – as the policy owner of the LAA – to seek their views on the approach to the proposed land acquisitions and disposals related to LPC. (Officers involved in the transaction advised that Finance was seen as an important stakeholder in the development of the LPC Strategy, and its subsequent implementation. Officers also noted that advice from Finance was incorporated in full in order to ensure that Finance would support any land acquisitions or disposals. The role of Finance was characterised as “part approver and part adviser” to the LPC transactions.)

On 12 August 2016, the Department of Finance responded, providing overall support of all the transactions proposed except for a disposal of a Commonwealth-owned parcel of land (221 Greendale Road) to the LPC. Consistent with this Department of Finance advice, the Greendale Road disposal was not part of the final LPC Strategy. The 12 August 2016 advice from the Department of Finance also noted that with regard to the Leppington Triangle, an acquisition strategy specific to the transaction would have to be developed by the Department that is approved by the Minister for Urban Infrastructure. The Department of Finance provided detail on the proposed content of such an acquisition strategy.

On 17 August 2016, the Department wrote to LPC confirming in-principle agreement to the new TNR4 realignment route which LPC had expressed satisfaction with. The letter specified that the route is contingent on the Australian Government agreeing to dispose relevant land parcels, including the axe handle to RMS, and reminded LPC that the Department ‘maintains its intention to acquire the Leppington Triangle’.

2.1.2.3 Final LPC Strategy

On 15 October 2016, the *Western Sydney Airport (WSA) Project – Leppington Pastoral Company land acquisition and disposal strategy* (‘the LPC Strategy’) was finalised, following approval from the Executive Director. The LPC Strategy included the components summarised in the table below.

Figure 5: Summary of key components of the LPC Strategy.

Heading	Key Content
1. Introduction	States the purpose of the document – to outline two key issues and relevant policy considerations in relation to acquisitions and disposals of land relevant to LPC.

²⁴ The Department has not been able to provide financial analysis that underpins this assertion, although the Review can see a certain logic to the assessment.

Heading	Key Content
	States that the Department of Finance was consulted throughout the development of the document.
2. LPC – general background	Provides information on LPC, the historical land acquisition dispute throughout the 1990s, and notes that a number of land transactions necessary to give effect to the Western Sydney Airport as per the draft Airport Plan are likely to significantly impact LPC’s operations.
3. Issue 1 – The Northern Road Realignment	Provides a summary of the discussions and approach undertaken to the TNR4 realignment, and the relevant acquisitions and disposals required to give effect to the proposed realignment. Concludes that the proposed realignment ‘strikes an appropriate balance between value for money considerations, LPC’s views and broader airport project timeframes’.
4. Issue 2 – Acquisition of the Leppington triangle	<p>Provides that the Leppington Triangle will be acquired within the next few years, and ideally by 2019, with the following principles to underpin the acquisition:</p> <ul style="list-style-type: none"> • In-principle agreement to acquire to be confirmed by LPC as soon as possible; • Compensation to be agreed upfront, at market value for the land value and all costs required under the LAA (e.g. business disruption costs and legal expenses); • All interests in the Leppington Triangle to be acquired and extinguished by operation of s 41(4)(b) of the LAA for compulsory acquisitions; • No duplication of payments for disturbance costs, to the extent disturbance costs were paid by the Commonwealth in the 1990s; and • LPC to be granted a lease over the acquired Triangle until it is required for airport development, which may be a number of decades. <p>This section also provides a summary of the case for earlier acquisition (discussed further in Chapter 2.2.1.1).</p>
5. Proposed package of various land interests	Provides that a ‘package’ of up to six different land interests could be offered to LPC ²⁵ , including a description of the land interests and a summary of the process for how they would be offered and effected. This section specifies that the acquisition of Leppington Triangle ‘would be by agreement but by way of compulsory acquisition’.
6. Summary	Provides a summary of the Department’s position and preference to reach agreement with LPC within the next 6-9 months to meet project timeframes, and to capitalise on goodwill that is expected to be created when the Commonwealth formally agrees to the TNR4 being realigned onto the Commonwealth-owned axe handle and airport site.

The supporting brief to the Executive Director noted the immediate priorities for the coming months were to develop a negotiation strategy with AGS drawing on the LPC Strategy and procuring the services of a valuer.

In response to the brief, the LPC Strategy was approved on 15 October 2016, and the next steps to progress implementation of the Strategy were agreed by the Executive Director.

²⁵ The components of this package are described later in this chapter.

2.2 Was an Appropriate and Adequate Strategy Developed for the Acquisition?

A strategy document describes the general plan devised to achieve a particular outcome. The Department developed the LPC Strategy to ‘outline two key issues and relevant policy considerations relating to the acquisitions and disposals of land and other interests required for the proposed Western Sydney Airport... relevant to the Leppington Pastoral Company’.

In assessing the strategy document developed by the Department, the Review considered the appropriateness of key components of the LPC Strategy and the completeness of the Strategy’s content in guiding the acquisition.

2.2.1 Appropriateness of Key Components of the LPC Strategy

The Department’s LPC Strategy articulated three key components for effecting the acquisition of the Leppington Triangle – the timing, the acquisition method, and the package of land interests to be offered to LPC. The reasoning and strategy positions reached on these components are analysed below.

2.2.1.1 Timing of the acquisition

The Airport Plan indicates that the second runway is expected to be required around 2050.²⁶ However, the Airport Plan is silent on the timing for acquisition of the Leppington Triangle.

The business case for the Western Sydney Airport indicated a consistent position to the Airport Plan. The business case categorised the Leppington Triangle acquisition as ‘required for second runway’, as opposed to ‘required preferably pre-lease’ or ‘required as soon as possible post-lease / pre-operations’²⁷, suggesting that there was no requirement for urgent acquisition of the land. However, the business case also noted that ‘there may be other reasons it may be preferable to proceed with all necessary land acquisitions at the same time, ahead of operation of the proposed airport; this decision is yet to be made’.²⁸

The LPC Strategy stated an intention to acquire the Leppington Triangle ‘within the next few years but ideally by 2019, which is when the Airport Lease [wa]s expected to have been granted and substantive site works would have commence[d]’.

The LPC Strategy acknowledged that the Leppington Triangle is not required for the Stage 1 development of the Western Sydney Airport and that it is LPC’s preference to retain ownership of the land until it is required for the second runway. However, the LPC Strategy noted several reasons that support a case for earlier acquisition. The reasoning put forward by the Department in the LPC Strategy are summarised below.

Figure 6: Summary of reasons noted in the LPC Strategy to support the case for early acquisition.

Reason	Commentary
1. Goodwill	An early purchase would allow the Commonwealth to capitalise on goodwill ²⁹ created by the Commonwealth’s recent concessions in negotiations with LPC regarding the TNR4 realignment.

²⁶ *Airport Plan – Western Sydney Airport*, 2016, page 20.

²⁷ *Final Draft Business Case: Western Sydney Airport: Final Draft Business Case for Government decision making*, 2016, page 128.

²⁸ *Ibid*, page 88, footnote 88.

²⁹ Consultations conducted as part of the Review indicated that Departmental officers sensed a warming of the relationship with LPC through regular contact that was made regarding various landholdings impacted by the airport development.

Reason	Commentary
2. Certainty	An early acquisition would provide certainty for all parties. For the Commonwealth, early acquisition would enable planning and development of the proposed Western Sydney Airport on a holistic basis ³⁰ .
3. Coordination	An early acquisition would allow coordination with the RMS process of acquiring their portion of the Leppington Triangle for TNR4. The LPC Strategy notes that coordination will assist achievement of ‘the best possible outcome for the Commonwealth’. It is not clearly explained how Commonwealth coordination with RMS would achieve the best possible outcome. ³¹
4. Land value costs	Early acquisition would likely result in a lower land value cost payable to LPC. The Department’s business advisers had advised that property values around the proposed airport site would likely increase an average of 6.3% per annum to June 2018 and 9.1% per annum to June 2019. Further, scarcity value of land on or around the airport site would likely result in further increases in property values, meaning a near-term acquisition of the Triangle supports the Commonwealth’s long-term interests.
5. Business disruption costs	An early acquisition may result in lower disruption costs payable to LPC as part of compensation under the LAA. As LPC ‘is likely to invest in a further integration of Triangle infrastructure and activities with its main farm land as time goes on,’ ³² there may be higher business disruption costs payable by the Commonwealth later down the track.

The reasoning that the Department put forward for an early acquisition were compelling. However, the Review notes that neither the Strategy nor any other submission assessed other options or considerations to support an informed decision. There were other factors relevant to the issue of timing, as discussed below.

a) Other considerations for timing

The Department was aware of LPC’s preference to hold onto their land and was acutely aware of the history of litigation with LPC. Further, the second runway was not scheduled to be built for several decades. Given these circumstances, the decision to acquire in the short-term had some risks or disadvantages, including:

- The risk of a protracted conflict with LPC or of souring the relationship with LPC.
- The risk of paying a higher price to incentivise LPC to sell their land earlier than they would like.
- The cost of upkeep of the Triangle until it is needed for the airport site.
- The unlikely (but possible) risk that the airport layout would change.

These risks or disadvantages (including how they may be managed) were not put forward to the strategy decision-maker to holistically consider the benefits, drawbacks and risks associated with the

This was perceived as particularly relevant against the backdrop of a history of litigation between LPC and the Commonwealth in connection with previous attempts to acquire this land. This was seen as presenting an opportunity to engage in constructive discussions with LPC to seek agreement on an acquisition.

³⁰ Consultations with Departmental officers noted that acquiring the Leppington Triangle in the short-term, and prior to 2019, was viewed as beneficial in completing the airport site prior to its lease to an airport lessee company.

³¹ This may have alluded to the Commonwealth and RMS’ ability to coordinate the sharing of information to strengthen the agencies’ negotiating positions. Consultations with Departmental officers involved in the transaction also noted that this may have alluded to the benefit of administrative streamlining and minimising the impact on the landowner, to facilitate more cooperative and productive discussions.

³² *LPC Strategy*, page 4.

decision to buy in the short-term or at a later point in time. The LPC Strategy and the accompanying brief to the decision-maker simply reinforces the Department's intention is to buy in the short-term.

The documentation made available to the Review indicated that a specific and formal decision to establish an acquisition in the short-term was never made. In consultations conducted as part of the Review, Departmental officers agreed that this decision to acquire in the short-term was never overtly made, having fully considered the different options on timing. On the other hand, consultation with Departmental officers, including the approver of the LPC Strategy, reinforced to the Review that this short-term acquisition was strongly supported by all relevant officials.

As noted earlier in this Report, another factor influencing the timing of the acquisition was the allocation of funding from Government within the period from 2017 to 2021, as part of CPA. Officers undertaking the acquisition reflected on this as authority from Government to acquire the Leppington Triangle in the short-term.

b) Ability to 'walk away' from an acquisition

According to discussions with Departmental officers and legal advisers involved in the transaction, the Department's position was that the Department could walk away and defer the acquisition if the attempt at acquiring the property in the short-term was not able to be achieved satisfactorily. If this was the approach, arguably, there was little for the Department to lose in testing whether LPC would be willing to sell their land early in bona fide discussions.

This approach is not evident in the LPC Strategy or accompanying brief.³³ Indeed, the LPC Strategy and brief suggest that the Department would be going to considerable effort (with the package of land interests to induce LPC) to acquire in the short-term. Furthermore, the LPC Strategy does not articulate what factors or circumstances would give rise to the Department abandoning a short-term acquisition and attempting acquisition at a later point in time.

2.2.1.2 Method of acquisition

The LPC Strategy states that the method for 'the acquisition would be by agreement but by way of compulsory acquisition'. This method would be underpinned by the following principles:

- The Department would seek agreement from LPC on the acquisition as soon as possible;
- Compensation would be agreed with LPC upfront; and
- All interests in the Leppington Triangle will be acquired and extinguished by operation of section 41(4)(b) of the LAA.

Therefore, the LPC Strategy expressed an intention that an agreement would be reached with LPC for the Commonwealth to acquire the land and for the amount of compensation to be paid. Once those terms were agreed, the Commonwealth would invoke the compulsory acquisition administrative processes under section 41 of the LAA and pay compensation as per the amount agreed with LPC under section 78. This interpretation was consistent with that expressed by the legal advisers involved in the transaction that were consulted as part of the Review.

The Review refers to this method envisioned by the Department as 'acquisition with agreement but by way of compulsory acquisition' or 'compulsory acquisition, with agreement'. The different pathways for acquisition under the LAA are summarised at **Appendix B: Lands Acquisition Act Pathway**.

The LPC Strategy presents only this method of acquisition, and does not reference or note other methods that are available to the Department. Consistent with observations made with regard to

³³ Although not referenced in the LPC Strategy, the ability to "walk away" was noted in correspondence with Finance on 20 September 2017.

the timing of the acquisition, alternative methods and their strategic value or drawbacks were not considered in earlier iterations of the strategy nor formally put to the LPC Strategy decision-maker.

The Review notes that the Department considered the possibility of pursuing a “future acquisition right” over the Leppington Triangle as a contingent alternative where the Commonwealth was unable to acquire the land in the first instance. However, the Department of Finance was not supportive of this method, noting that sufficient justification would have to be provided to support an agreement for this ‘lesser interest in land’. The Department noted this advice, and a future acquisition right option was not pursued further as part of the Leppington Triangle transaction.

a) The alternative methods of acquisition

Despite the future acquisition right not being pursued, there were at the very least,³⁴ three methods of acquisition available to the Commonwealth.

- i. An acquisition with agreement but by way of compulsory acquisition (or ‘compulsory acquisition, with agreement’) as described in the LPC Strategy.
- ii. An acquisition by agreement under s 40 of the LAA.
- iii. A compulsory acquisition under s 41 of the LAA, with compensation calculated in accordance with Part VII Division 2 provisions of the LAA.

The differences between the various approaches are nuanced, and the implications of the differences are important. It has been clear through this Review, that some officers involved in the transaction, and senior leaders approving the transaction, did not fully understand some of those nuanced differences, or could not explain them effectively. Common references to “compulsory acquisition” or “acquisition by agreement”, do not effectively define the approaches in the Act and their use throughout the acquisition transaction and in subsequent public consideration, have increased confusion rather than providing clarity.

In any event, these methods of acquisition would have presented different advantages and disadvantages to the Commonwealth. In considering such advantages and disadvantages, the following factors would likely have been relevant to the Department.

- The likely risk of prolonged conflict or litigation with LPC, including the possibility of damages and additional compensation, particularly given the Department’s previous experience. Consultations with Departmental officers involved in the transaction emphasised that the Department was acutely aware of the risk of conflict with LPC, and wanted to avoid a confrontational approach because of this risk;
- The complexity of the process to complete the acquisition, particularly with regard to the LAA process requirements and the strategy position to acquire in the short-term;
- The likely timeline for the acquisition across the different methods, particularly given the strategy position to acquire in the short-term;
- The nature of the interests acquired over Leppington Triangle once the transaction is finalised;
- The policy position and support of the Department of Finance across the methods; and
- The likely cost estimate across the methods.

These relevant factors and their application across the three potential acquisition methods have been tabulated below for illustrative purposes only. The table has been populated with simple analysis to illustrate the type of comparison that could have been undertaken to assess the

³⁴ The Review notes that the LAA allows for many variations of acquisition methods that may be used in specific circumstances that fall under two categories of ‘acquisition by agreement’ and ‘compulsory acquisition’. While some of these variants (for example, an acquisition by agreement amounting to a normal commercial transaction under s 40(6)), may have been practicable for the Department to pursue, this Chapter of the Report has only drawn on two alternative modes of acquisition that would have been the most obvious for the Department to contemplate at the time of developing its strategy.

preferred acquisition method. The Review also notes that the factors would have reflected different degrees of priority for the Department, which have not been captured in the table.

Figure 7: Illustrative example of advantages and disadvantages across different possible acquisition methods.

Relevant factors	Compulsory acquisition, with agreement	Acquisition by agreement	Compulsory Acquisition
<i>Risk of prolonged conflict</i>	Advantage Presents a cooperative approach to the acquisition, with lower risk of conflict.	Advantage Presents a cooperative approach to the acquisition, with lower risk of conflict.	Disadvantage Presents a confrontational approach to the acquisition, with higher risk of conflict.
<i>Complexity of process</i>	Neutral Presents some complexities, consistent with compulsory acquisition in initial stages.	Advantage Likely presents the simplest process.	Disadvantage Likely presents the most complex process.
<i>Timeliness of acquisition</i>	Neutral Likely presents a quick process.	Advantage Likely presents the quickest process.	Disadvantage Given higher potential for conflict, potentially increases time taken.
<i>Nature of interest acquired</i>	Advantage All other interests in the land are extinguished by operation of the LAA.	Disadvantage All other interests in the land are not extinguished by operation of the LAA.	Advantage All other interests in the land are extinguished by operation of the LAA.
<i>Department of Finance support</i>	Neutral Not the preferred method according to Department of Finance guidance. However, was conditionally supported by Department of Finance in their support of the LPC Strategy.	Advantage Preferred method according to Department of Finance guidance.	Disadvantage Not the preferred method according to Department of Finance guidance. Was not put to Department of Finance to seek support or endorsement.
<i>Estimated cost</i>	Could not be estimated by the Review. Discussed below in (b) <i>Estimating costs</i> .		

At the time of development of the strategy, the factors noted above, and the relative advantages and disadvantages of different available acquisition methods were not formally (or, based on documentation made available to the Review, thoroughly) investigated or prioritised by the Department. The relative advantages and disadvantages of the acquisition methods were also not put to the decision-maker to inform their approval of the LPC Strategy. Limited consideration of the alternative methods available to the Department meant the decision-maker could not make an informed decision on the best method of acquisition for the Commonwealth.

Despite this, it is noteworthy that based on a high-level consideration of the possible approaches to acquisition as illustrated above, the approach taken of compulsory acquisition, by agreement (the approach in the LPC Strategy) presents no substantial disadvantages.

The Review notes that it is apparent that the team thought deeply about the acquisition approach, however that the rigour and structure of comparison of options was lacking and this leaves the potential impression of missed opportunities and an inability to demonstrate how certain courses of action were selected. It is also noted that the dynamic and inter-related nature of events impacting

the WSU and the Western Sydney Airport more broadly drove an iterative approach addressing issues as they arose.

The Review further notes that the issue of potential for dispute with LPC was viewed as an unsatisfactory alternative outcome from the acquisition, which appeared to influence decision making throughout the acquisition process. This is understandable, however without an objective assessment of likelihood and consequence of various scenarios and how these could be managed, it is difficult to assess how pervasive this should have been in decision making.

b) Estimating costs

While the estimated cost of the different acquisition methods was not assessed in this Review, this was an important component for the Department to have considered. There potentially would have been different costs expected from the different acquisition methods available to the Department (in particular a compulsory acquisition without agreement). The likely costs implications of the acquisition methods should have been a key input into the Department’s strategic position on the preferred method, and should have informed the Department’s views on how the acquisition would support achievement of value for money.

Further, the costings estimates conducted for the business case (as described above in sub-Chapter 2.1.1) lacked rigour or contribution from property and valuation experts, with relatively arbitrary calculations as the basis of estimates. It was likely that the costing estimate would be influential in the future acquisition transaction and it represented a view of what the Government would be willing to pay for the Leppington Triangle. However, in reaching the estimate, the Department undertook a relatively arbitrary approach, particularly with the use of the 100% premium applied to the per hectare cost estimate, without any objective or factual basis. Given this approach, the costings estimates did not apply a level of financial analysis commensurate to its use as the basis of making spending decisions, and a more rigorous analysis of expected costs should have been conducted as part of the development of the strategy.

2.2.1.3 Package of land interests

The LPC Strategy identified a package of land interests to be offered to LPC. The package of land interests noted four primary land interests to be offered and a further two land interests that, if required, would supplement the package to strengthen the Commonwealth’s negotiating position to acquire the Triangle. The package is summarised below.

Figure 8: Summary of land package to be offered to LPC as articulated in LPC Strategy.

Primary list of land package	
1	Commonwealth agreement for RMS to utilise part of the Commonwealth-owned “axe handle” parcel for TNR4 realignment.
2	Commonwealth acquisition of the balance (remaining after RMS acquisition) of the Leppington Triangle.
3	Commonwealth to extinguish High Intensity Approach Lighting (HIAL) easement and restrictions on LPC’s property at another location (165 Greendale Road), and to establish a new HIAL easement for the southern runway.
4	Commonwealth’s willingness to leaseback the Leppington Triangle to LPC until required for the airport (but not initially more than 20 years).
Secondary list available to supplement package	
5	An extension by way of long-term lease (but not more than 20 years) over the balance of the Commonwealth-owned “axe handle” parcel currently leased by LPC (which was due to terminate November 2016).

6

An offer of a long-term lease (but no more than 20 years) of the Commonwealth-owned property at 221 Greendale Road.

The LPC Strategy noted that the Department of Finance supported each element of this package. This statement is supported by contemporaneous correspondence.

The LPC Strategy explains the high-level processes or arrangements that would give effect to the package of land interests. The strategy also provides indication of whether there may be cost implications to the Department for certain acquisitions and disposals (such as for the HIAL and leaseback of the Triangle).

It is not made clear in the strategy documentation whether the package of land interests is intended to incentivise LPC to sell in the short-term or to help the Department negotiate a lower compensation amount. Equally, it is not made clear what are the more “important” components of the package to the Commonwealth. Officers involved in the transaction have advised that, because it was on the critical path for the airport development, the highest priority for the Department was the TNR4 realignment, including the establishment of an underpass under the road that was required under the terms of the Commonwealth’s 1991 settlement deed with LPC, with the Leppington Triangle acquisition being a lower priority.

More importantly, it is not clear from the LPC Strategy why and how the offer of the package of land interests represents value for money for the Commonwealth. Specifically, it is not noted what combination of these packages would represent a good and fair outcome for the Commonwealth from this acquisition. It is also unclear what circumstances may trigger the offer of the secondary list of land interests and whether the package of interests offered would change depending on the amount of compensation that is being negotiated for the Leppington Triangle.

Finding: While alternative views may be argued, the Department’s decision to attempt an acquisition of the Leppington Triangle in 2017-18, ahead of its need for the second runway, was understandable, particularly as the Department had the option to walk away from the acquisition if satisfactory terms could not be reached. Further, if acquisition was successful, alternative land uses would be available to the airport company in advance of the second runway being required.

Finding: The Department’s LPC Strategy (and preceding iterations or documentation regarding strategy) did not adequately consider alternative methods and approaches to the acquisition. Key components of the LPC Strategy were assumed, without the Department thoroughly investigating the advantages and disadvantages and value for money considerations of different approaches to achieve outcomes, or putting these considerations to the decision-maker. Consequently, the Department cannot demonstrate that it achieved the Government’s objectives while also meeting obligations around value for money.

Finding: While it may have been suitable for Commonwealth Budget-setting purposes, the Budget estimate for the acquisition of the Leppington Triangle lacked the objective, fact-based rigour to serve as an indication of what the Government should be willing to pay for the Leppington Triangle, which is how it was subsequently used. At the time of developing the Strategy, no other analysis of the estimated cost of the acquisition, and what would represent a fair price for acquisition to the Commonwealth, was conducted.

2.2.2 Completeness of the Strategy

In addition to analysing key components articulated in the LPC Strategy, the Review sought to assess the completeness of the LPC Strategy’s coverage, as the key document guiding acquisition of the Leppington Triangle. In doing so, the Review distinguished between the content expected of a strategic planning document (discussed in this sub-Chapter) to the content expected in supporting plans that guide delivery of the strategy and project (discussed in the next sub-Chapter 2.3).

2.2.2.1 Expected strategic-planning requirements

A strategy document establishes the key outcomes and indicators for success of an activity, and sets out the high-level approach and method that will guide progression of that project to achieve the outcomes. A strategy (where not articulated in a preceding business case) would also assess the different options available to allow for an informed selection of the preferred approach.

The advice from the Department of Finance on 12 August 2016, also outlined some key expected content of an acquisition strategy that should be prepared by the Department in relation to the Leppington Triangle. The advice notes that the strategy should set out the ‘details of the property, the rationale for the compulsory acquisition as opposed to acquisition by agreement, the steps to be taken to negotiate agreement in a s78 pre-acquisition agreement... and LPC concerns’. The Review notes that this transaction-specific acquisition strategy was never developed, and therefore considered the extent to which the advised content was present in the LPC Strategy, noting that no other strategy documents were developed.

Further, an acquisition of land by the Commonwealth is fundamentally a Commonwealth procurement. Therefore, the Review referred to the Commonwealth Procurement Rules (CPRs), and the paramount requirement to demonstrate and achieve value for money.

Having considered the above key purposes of a strategy document, the advice from the Department of Finance and the CPR requirement to achieve value for money, the Review noted several components that would be expected in a strategy document for the acquisition of land, that were not present in the LPC Strategy. The Review notes that no other strategy document was developed. The table below summarises the expected components that were not articulated in the LPC Strategy, and an explanation of why they are important components of a strategy.

Figure 9: Summary of expected components of an acquisition strategy.

Component	Reasoning for inclusion
Analysis of the different acquisition methods available, including their advantages, disadvantages and estimated costs.	As discussed in sub-Chapter 2.2.1 above, this should have been explored to justify the preferred method in the strategy document, particularly given the absence of an overt decision prior to the LPC Strategy.
Enunciation of how the acquisition method of ‘by agreement but by way of compulsory acquisition’ was meant to operate and be realised, including relevant provisions of the LAA and a high-level summary of the timeline.	The acquisition method identified in the LPC Strategy is not clear in how it is intended to operate. Particularly with reference to the LAA, this method is not discretely contained in one section or part of the Act. Further, consultations undertaken with Departmental Officers and other stakeholders as part of the Review, indicated that there was some confusion within the Department on the method and process of acquisition. The inclusion of this component in the strategy would have provided officers involved in the transaction with a common understanding of the

Component	Reasoning for inclusion
	intended method and legislative process for the acquisition from the outset. ³⁵
An articulation of the supplementary plans and processes that would support the acquisition.	This should have been included to provide the strategy decision-maker with a level of confidence that the acquisition would be appropriately managed. Additionally, developing this section for inclusion in the strategy, would have prompted the Department to consider the components of the acquisition that required more active management. Supplementary plans and processes are discussed in further detail in the following sub-Chapter 2.3.
A budget for the acquisition.	A strategy, particularly for a commercial transaction, should articulate the budget parameters. The budget should have been based on a more thorough financial analysis, for example of the estimated cost of different potential acquisition methods, as discussed in the preceding sub-Chapter 2.2.1.2.
An articulation of how value for money would be achieved and demonstrated for the acquisition.	Value for money is the paramount consideration of the CPRs in demonstrating the proper use of public funds. In particular, the strategy should have articulated what amount of compensation and combination of land packages would demonstrate value for money and a fair price for the Commonwealth.
An approach for engaging with LPC.	LPC was the other party to the transaction and was an important stakeholder to the Western Sydney Airport program of work. The acquisition strategy should have articulated how the relationship with LPC would be managed, in particular, how the Department would ensure an arms-length approach would be taken so that the parties would be independent and on equal footing to complete a robust acquisition.
Principles for engagement with key stakeholders including the Department of Finance and RMS.	The Department of Finance administers the LAA and are the policy owners for Commonwealth land acquisitions. The RMS acquisition of its portion of Leppington Triangle for the TNR4 realignment was interlinked with the Department’s acquisition of the remaining portion. Therefore, the LPC Strategy should have articulated key principles for how and when the Department would engage with these stakeholders.
Implication and fall-back options if components of the transaction were not possible, including if the Leppington Triangle could not be acquired for a reasonable amount.	A risk-based approach to any activity considers the consequences of aspects of the activity not being able to be delivered. This allows officers who are implementing the activity to be aware of that eventuality and to prepare for it accordingly.
Measures of success	All strategies should provide guidance on what “success” looks like in terms of outcomes or measures, to allow for evaluation of whether the strategy and its implementation achieved the desired outcomes.

The above key components were not present in the LPC Strategy, representing gaps in its completeness to guide acquisition of the Leppington Triangle. It is likely that had these components been in the Strategy, it would have provided better guidance to Departmental officers, as well as providing stronger accountability for decisions taken during the acquisition. This in turn may have

³⁵ The legislative process to be undertaken for the acquisition was documented by the Department in January 2018, in the *Project Plan in Relation to the Acquisition of the Leppington Triangle and High Intensity Approach Lighting Easement*.

prevented some of the issues that transpired through the acquisition process, which are identified in this Report.

Finding: The LPC Strategy document was incomplete in its consideration and enunciation of key parameters, approaches and methods for the acquisition of Leppington Triangle. Consequently, the LPC Strategy’s usefulness in guiding the acquisition was undermined.

2.3 Were Appropriate Plans and Processes Developed to Guide the proper management of the acquisition?

As a government procurement, the acquisition must reflect the proper use of public resources.³⁶ According to the PGPA Act and CPRs, ‘proper’ in relation to the use or management of public resources, means efficient, effective, economical and ethical.

To demonstrate the efficient, effective, economical and ethical stewardship of public resources, the Department is expected to comply with any relevant legislative requirements, in particular, the CPRs and LAA. The ‘embedding’ of legal advisers across the WSU programs of work, and the consistent legal support provided on the acquisition was an appropriate management technique designed to support compliance with the LAA.

Additionally, in the context of this acquisition – a project to support the broader Western Sydney Airport program of work – the Department would be expected to exhibit elements of project management practices to demonstrate proper management of the acquisition.

Considering that the acquisition was budgeted to cost around \$32 million, that the acquisition was for a high-profile government initiative and that the acquisition was to transact with a well-resourced private entity that was a major stakeholder to the Western Sydney Airport and other WSU projects, there was an increased need for robust plans and processes to guide the acquisition.

The below table summarises the plans or processes that the Department could have been expected to put in place, and the Department’s approach across those areas for the acquisition of the Leppington Triangle.

Figure 10: Summary of plans or processes expected to be prepared for the acquisition.

Expected plan or process	Expected content	Department’s approach
Project Plan	Setting out the specific activities, timeframes and outputs expected from the project.	Not developed. While a ‘project plan’ was developed later in the transaction, this was for a different purpose to guiding the acquisition from the beginning. This is discussed further, below.
Risk management plan	Setting out how key risks of the acquisition would be identified, mitigated and managed. Managing procurement risks is also a requirement of the CPRs.	Not developed. A risk management plan for the acquisition was not developed. The WSU had a broader divisional risk register, however, it did not specifically address the Leppington Triangle acquisition.

³⁶ Department of Finance, *Commonwealth Procurement Rules*, December 2020, rule 6.1. While the December 2020 version of the rules has been noted here, this statement has been a consistent requirement throughout versions.

Expected plan or process	Expected content	Department's approach
Stakeholder engagement and communication plan	Setting out protocols for how the Department would engage and work with the Department of Finance and RMS, and engage with LPC in productive conversations at arms-length.	Not developed. A stakeholder engagement plan or communication management plan was not developed. No other articulation of how the Department would engage with key stakeholders was identified. Arguably this was particularly important given the multi-faceted relationship that existed with each of the key stakeholders.
Roles and responsibilities	Articulating the division of roles and responsibilities within the Department for taking carriage and progressing the acquisition. Additionally, articulating the authority of different officers to make decisions and when or what decisions may require escalation.	Not developed. The Department did not formally articulate the roles and responsibilities for the acquisition, particularly which decisions or considerations would require escalation.
Probity management plan	Articulating how principles of equity and transparency would be managed throughout the acquisition.	Developed Probity management plans and processes were developed as part of the acquisition, including through the engagement of AGS probity advisers. Probity management is discussed in further detail in Chapter 6 (Probity).

As summarised in the table above, the Department did not adequately develop plans and processes to support the proper management of the Leppington Triangle acquisition.

The absence of a stakeholder management plan was particularly troubling given the concerns about maintaining the relationship with LPC. By developing a strategy document predicated upon maintaining the relationship with LPC and considering their land interests, the Department did not consider whether there were other (and better) ways to manage the relationship with LPC and how to manage that relationship at arms-length while still acquiring necessary land holdings.

Additionally, the Department's procurement manual required completion of a procurement plan for high-risk procurements, which the Leppington Triangle acquisition had the characteristics of. The requirements of the procurement plan largely overlap with the expected content of the plans and processes listed above.

The Review notes that a 'Project Plan'³⁷ was developed for the acquisition of the Leppington Triangle by AGS. This Project Plan noted the purpose and timing of the acquisition, high-level commentary on communications and engagement with LPC, the steps and process required under the LAA, and the required post-acquisition activities. However, the document was developed over 15 months after the LPC Strategy was approved, and only after LPC and the Department had substantially agreed on the terms, timing and method of acquisition. The purpose of this Project Plan was to guide completion of the acquisition, particularly the legal processes to be completed to give effect to the transaction. Therefore, this Project Plan had a very different purpose to the type of project plan that would be developed at the beginning of a project to guide all the envisioned activities, their respective timelines and milestones, and the responsible officers.

³⁷ The Department, with drafting by AGS, *Project Plan in Relation to the Acquisition of the Leppington Triangle and High Intensity Approach Lighting Easement*, 2018.

Finding: The Department did not develop appropriate plans or processes to support the proper and robust management of risks, activities and decisions for the acquisition of Leppington Triangle. This likely contributed to some of the poor decision making as the acquisition was being transacted.

Finding: The Department's strategy for the acquisition of the Leppington Triangle was disproportionately focused on managing and leveraging the relationship with LPC, to the detriment of other considerations to achieve the Commonwealth's outcomes related to the Leppington Triangle. A better approach would have been to objectively determine a strategy for the Leppington Triangle, and integrate that with a stakeholder management strategy for LPC.

2.4 Was the LPC Strategy Appropriately Approved?

The LPC Strategy was presented to and approved by the Executive Director of the WSU, a Senior Executive Service (SES) Band 2 Departmental officer.

The approval of business strategy documents for land acquisitions is not a function that is formally assigned using instruments of delegation. While the Australian Public Service Commissioner (APSC) work level standards provides useful guidance on the roles, responsibilities and expectations of SES, there is limited defined guidance on the appropriate level or classification of SES for providing approvals on different decisions of government.

Further, as mentioned in sub-Chapter 2.3, roles and responsibilities for the acquisition of the Leppington Triangle had not been defined. Therefore, the process for seeking approval of the LPC Strategy was largely dependent the judgement of Departmental officials developing the strategy, with reference to norms within the Department. However, it is unclear what the accepted norms of the Department for such an approval were at the time, particularly given the uncommon need to acquire land from a private vendor.

2.4.1 Appropriateness of the Approval Sought

The APSC work level standards for SES Band 2, state that key responsibilities include:

- strategically leading the implementation of programs and initiatives, including programs that operate across a range of activities and initiatives;
- focusing on strategic activities which align with government objectives and anticipate future requirements;
- general management and broad executive direction; and
- major program management.

Considering these work level standards, approving the strategy for the acquisition of Leppington Triangle, to support the realisation of the Western Sydney Airport, was within the ambit of expected responsibilities of the Executive Director of the WSU. The view of Departmental officers involved in the transaction at the time was that the Executive Director seemed to be the most appropriate position to consider the LPC Strategy, given that they were leading the broader Western Sydney Airport program of work.

The Review also notes that the budget allocation for the acquisition was around \$32 million. According to the Accountable Authority Delegations in place at the time³⁸, Executive Directors had no financial limit or restriction to approve the commitment of Commonwealth funds.

2.4.2 Alternative Approval Approach

The Review notes that the subsequent approval to commit funds for the acquisition was provided by the Acting Deputy Secretary, an SES Band 3 in March 2018. The reasoning that approval for the acquisition was requested from the Deputy Secretary, and not the Executive Director, is unclear. However, the view of Departmental officers involved in the transaction was that approval for the acquisition at this point in time seemed appropriately placed at the Deputy Secretary level.

The Review notes that the Executive Director who had approved the LPC Strategy had moved onto a new role by the time the acquisition approval was sought. However, if the expectation of Departmental officials was to have the acquisition approved at the SES Band 3 level, it is arguable that the LPC Strategy should also have been approved at that level. To support transparency and consistency of decision-making, the approach of the Department should have been to have the same Senior Executive that would be committing the funds for the acquisition, to approve the strategy underpinning that acquisition.

³⁸ The Department, *Accountable Authority Delegations 2015 (No.2)*, signed 28 October 2015.

3 Appointment of a Valuer for the Leppington Triangle

As noted in the preceding Chapter, procuring the services of a valuer for the Leppington Triangle was noted as a key priority at the time of finalising the LPC Strategy. To pursue acquisition of the Leppington Triangle ‘by agreement but by way of compulsory acquisition’, a valuation conducted by a suitable valuer would provide useful material to inform future dealings with the landowner regarding the acquisition.

In this regard, appointing a valuer for the Leppington Triangle was a key step in progressing the potential land acquisition.

This Chapter assesses the method used for the appointment of a valuer for the Leppington Triangle. In particular, the Chapter considers the following questions:

- whether the approach to jointly select one valuer was suitable;
- whether relevant procurement requirements were followed in the procurement of the valuer’s services; and
- whether value for money was demonstrated in the procurement of the valuer.

The valuation itself, including the valuation instructions issued to the valuer, is discussed in Chapter 4.

3.1 Context – What Occurred to Select and Appoint the Valuer

The earliest record regarding appointment of a valuer is an email file note of discussions between the Department and LPC on 13 January 2017, outlining agreement to appoint a valuer and seek valuation of the Leppington Triangle.

3.1.1 Agreement on One Valuer

An email exchange between the Department and representatives of LPC³⁹ (between 7 and 10 February 2017) canvassed the following:

- Both LPC and the Department proposed four preferred valuers each.
- The Department confirmed the parties had agreed to a joint valuation of the Leppington Triangle if an appropriate valuer can be confirmed, which will be available to both the Commonwealth and the landowners.
- The Department proposed that it “would be happy to take the lead on the administrative arrangements for any valuation (including paying the costs of the valuer)”.
- The landowner advised that it had a preference to use one of its own nominated valuers and noted that it had previously worked with three of the four of its own nominated valuers. MJ Davis Valuations Pty Ltd (‘MJD’) was the valuer the landowners had not previously worked with. This email concluded with “[p]resumably this means we would need to proceed on the basis of obtaining separate valuations.”
- The landowner advised that the outcomes of their phone call with the Department indicated that the Department is “in a position to investigate appointing [MJD] on the basis that LPC

³⁹ Greenfields Development Company, a related entity to LPC, was acting as a representative for LPC throughout these discussions. The Review report refers to ‘landowner’ or ‘landowners’ or ‘LPC’ to collectively refer to LPC and their representatives.

has no conflict or perceived conflict of interest with this Valuer.” The Department confirmed this as a “good record of our discussion”.

During this exchange of emails between the Department and LPC, an internal Departmental email indicates that a phone call with LPC was made, and that the Department asserted that “MJD seems to have no commercial relationship with the landowners and would be acceptable”.

3.1.2 Procurement Procedures

On 29 March 2017, the Department sent an internal email seeking approval to engage MJD for valuation services in relation to the Leppington Triangle. Key messages in the approval request are noted below.

- The procurement approach proposed is by means of limited tender, or ‘direct-source’ procurement.
- It is not necessary to engage in an open tender procurement as the cost is below \$80,000, and the required criteria for limited tender is satisfied as ‘the services are required urgently, and the normal tendering process is impractical.’
- The following factors are referenced as supporting a direct-source procurement.
 - The need to act quickly to take advantage of the rapport developed with LPC and to maintain momentum. The email notes that LPC is a significant stakeholder in the Western Sydney Airport project and that the procurement ‘will need to be managed cooperatively and without unnecessary delay to ensure LPC continues to cooperate with the Department’.
 - The need to avoid the delay of a ‘more complete valuation process’ as other aspects of the package of land acquisitions and disposals to RMS for the realignment of TNR4 are yet to be finalised and are beyond the control of the Department.
 - Agreement has been reached with LPC on a suitable valuer and the work needs to be pursued urgently.
- A potential risk associated with the Department’s approach to this valuation work has been identified – that disclosure of the valuation activities, including the instructions provided and the land value advised, may invite public scrutiny over the Department’s activities.
- AGS has estimated a cost of \$6,000 to \$9,000 for the valuation.

Approval to engage MJD was provided by the relevant Executive Level 2 (EL2) officer on 31 March 2017. This approval was consistent with the delegations, as noted in sub-Chapter 3.4.4. Prior to the approval, the EL2 Officer briefed the responsible SES Band 1 officer, who approved the procurement approach in-principle, noting that the Department will initially seek a conflict of interest declaration from the landowner.

On 18 April 2017, the Department and LPC executed a deed of confidentiality regarding the valuation of the Leppington Triangle.

On 10 May 2017, the Department issued a request for quotation, attaching a brief for valuation services, to MJD.

On 15 May 2017, MJD provided a quote for the valuation services. The quotation specified an expected cost of \$3,500 (excluding GST) and a turnaround time of 10-15 business days following an initial meeting. MJD included a conflict of interest declaration and confirmation that MJD “perceive no obvious or perceived [c]onflicts of [i]nterest in undertaking the valuation assignment as outlined within the brief”.

A contract for services between the Department and MJD was executed by both parties on 5 June 2017. The contract specified 30 June 2017 as the due date for the final valuation report. The due date was extended by the maximum three-months permissible (to 30 September 2017) under the contract, in late June 2017.

3.2 Purpose of the Valuation

The intended use and application of a valuation obtained by the Department and LPC was not formally defined, nor was that purpose clear from available correspondence between the Department and LPC. However, a valuation at this stage of the acquisition attempt could be expected to serve the following key functions:

- to gauge the buyer's and seller's appetite to progress with a potential transaction based on an estimate of value of the land; and/or
- to use as the basis of negotiations regarding the compensation amount.

Officers involved in the acquisition have asserted that its purpose at the time of commissioning the valuation was the former; that is, to provide an indication of potential value as a method of determining whether and how to continue discussions or commence negotiations. Documentation is clear that it was never intended to providing a binding value for an acquisition.

Finding: At the time of commissioning the valuation, the Department did not intend to use it as the basis for establishing a price for acquisition of the Leppington Triangle.

3.3 Joint Selection of the Valuer

The documentation and correspondence regarding the valuation of the Leppington Triangle confirm that the Department and landowner had agreed on a 'joint valuation'. This approach included jointly agreeing the preferred valuer, jointly agreeing the valuation instructions to be provided and used for the valuation, and for the valuation report to be available to and able to be relied upon by both parties. While commentary regarding the valuation instructions and use of the valuation report will be discussed in future Chapters of this Report, this Chapter will discuss the joint selection of the Valuer.

3.3.1 Was the Approach to Jointly Select One Valuer Suitable?

There is limited Commonwealth guidance regarding the commissioning of valuers in connection with land acquisitions or the procurement of other assets. This review recognises that valuation of land, particularly for the purposes of a land acquisition under the LAA is a technical area requiring relevant expertise, certifications and insurances.

3.3.1.1 Common approach

The appointment of joint valuations is not in itself unusual when there are multiple parties with interest in the outcome of a valuation.

Valuers are routinely engaged to act as either "advocates" for one party or as "determining experts" on behalf of joint or multiple parties where this approach is agreed or mandated such as by a court or tribunal. Examples of this approach may include where lenders and borrowers commission a joint valuation for the purpose of secured lending (although lenders would generally prefer to control the process, in competitive lending markets or for particular client relationship purposes they may adopt a more pragmatic approach), and multiple parties seeking a "determining expert" in a compensation claim or market rent review. In general, a joint valuation is used where there is strong alignment of objectives of the two parties to a transaction and a willingness to accept the outcome based on the accepted experience and impartiality of the "expert". It can also be used where one party lacks the funds, sophistication or knowledge to arrange its own valuation. However, even then, the use of a joint valuation is not common.

As part of the Review, consultations were conducted with experienced valuation practitioners and longstanding members of the Australian Property Institute⁴⁰ (API). These consultations indicated that the common approach in lands acquisitions and analogous circumstances would be for the parties to commission their own valuers and advice, and then seek to compare the assumptions and calculations used to reach a negotiated outcome. This is viewed as prudent, as both parties are represented and can obtain their own expert advice to inform and negotiate the value.

The approach conveyed by practitioners is also consistent with the NSW Government guidance for both compulsory acquisitions and acquisitions by agreement. While the NSW Government approach is not binding on the Commonwealth, it provides a useful indication of common or accepted practice for government acquisitions of land in NSW. The *Compulsory Acquisition: NSW Valuer General's Role*⁴¹ and *Property Acquisition: A Guide for Residential Owners*⁴² describe an approach that involves:

- the acquiring agency instructing an independent valuer to determine the value of the property (taking into consideration market value, special value, severance, disturbance, disadvantages from relocation, and an impact in the value of other property);
- a recommendation for landowners to have their own valuation carried out by an independent valuer;
- the acquiring agency paying the agreed valuation fee for the landowner at the time of settlement, provided it meets certain conditions (including the qualifications of the valuer, the valuation report containing certain mandatory statements, the valuer's valuation report being discussed with the acquiring agency's valuer, and a copy of the final report being signed by the valuer); and
- an exchange of valuation reports and discussions between parties to reach an agreement on compensation and to inform future dealings.

The acquisition of a piece of land (including under the LAA) is by nature an adversarial process. Typically, in a commercial transaction, the objective of the seller is to maximise the price for the property, while the objective of the buyer is to minimise the price to be paid. As a result, it is common and logical for the parties to independently assemble information and a body of evidence that supports their interests and perspectives, and then use that information in structured negotiations to settle on a fair price (or just terms).

Contemporaneous documentation and consultations with Departmental staff as part of the Review indicate that there was limited research conducted on valuations practices or precedents regarding the appointment of valuers for land acquisitions by the Government. Therefore, it is likely that the Departmental officers involved in the selection and appointment of MJD were not aware of common or accepted lands acquisition valuation processes and were therefore heavily reliant on advice from the valuer and, for related legal matters, from AGS.

3.3.1.2 *Reasons for joint selection*

The documentation and discussions with Departmental officers indicate that a joint valuation approach was used to maintain a constructive and cooperative relationship with LPC. There was a strong desire to continue the rapport and cooperative relationship built with the landowners to progress the potential acquisition of Leppington Triangle and encourage their cooperation in other relevant aspects of airport planning and development. The history of litigation with LPC in the 1990s and the status of LPC as a long-term neighbour and stakeholder of the airport site was influential in this approach, as was the desire to establish trust in a fair acquisition process. The Review

⁴⁰ The Australian Property Institute was originally formed as the Commonwealth Institute of Valuers in 1926, and while representing a broader cohort of property-related professionals, remains the recognised professional body for property valuers in Australia.

⁴¹ NSW Office of the Valuer General, *Compulsory Acquisition NSW Valuer General's Role*, 2019.

⁴² NSW Government, *Property Acquisition: A Guide for Residential Owners*, 2019.

understands this rationale and has seen no evidence to doubt its veracity as the primary driver for the approach.

This approach is also understandable in the context of the purpose of the joint valuation, which was to provide a guide for whether negotiations should be commenced.

3.3.1.3 *Potential risk identified*

The Department identified a potential risk with regard to ‘this approach to valuations work’ in the procurement approval request to engage MJD – specifically that were the valuation activities to be disclosed publicly, “there may be public scrutiny over the Department’s activities”.

The approval request notes that ‘the result of any such scrutiny is unlikely to affect the Commonwealth’s ongoing activities or reputation... since seeking a valuation in coordination with a significant landholder is an appropriate approach at this stage of airport planning’. The requirement for LPC and MJD to sign deeds of confidentiality and conflict of interest declarations was noted as a further mitigation of the risk.

The identification of a risk of public scrutiny suggests that there was recognition that the approach being taken was potentially difficult to defend, and subsequent criticism of the Department’s joint valuation approach suggests that this is true.

3.3.1.4 *‘Appropriate approach’*

The approval request does not clearly state why coordinating with a significant landholder is an ‘appropriate approach’. The reasoning likely alludes to the Department’s desire to maintain goodwill with LPC to support their ongoing cooperation across all relevant aspects of airport planning.

However, the approval request does not adequately justify or explain how agreeing to appoint the valuer suggested by the landowner supports value for money outcomes for the Commonwealth.

The need to justify why the selected approach was appropriate was heightened given that jointly appointing one valuer is atypical and inconsistent with common practice, as established in section 3.3.1.1. The Review notes that the decision to jointly select a valuer was not part of the LPC Strategy. This approach was also not formally approved or considered in a separate document. Consultation with officers involved in the acquisition indicate that the responsible Assistant Secretary (SES Band 1) took the lead on this approach, and that it was disclosed to the WSU’s legal advisers. The responsible First Assistant Secretary (SES Band 2) and Deputy Secretary (SES Band 3) have advised that they cannot recall discussions specifically on this matter, although it is referenced in internal documentation and communication within the Department.

The Department did not seek advice regarding the joint commissioning approach from a valuation expert or the Department of Finance before appointing the Valuer. The Review notes that the approach to joint selection of the Valuer was not included in certain briefs requesting approval for the land acquisition. Specifically, the process for selecting and appointing the valuer was not noted in the 14 March 2018 brief to the Deputy Secretary overseeing WSU and the CFO. The brief to the Chief Operating Officer (COO) (as the representative executing the land transaction documents on behalf of the Commonwealth) notes that “LPC agreed to a joint independent valuation of the Triangle”, however, this does not make it clear that the valuer was jointly selected. The completeness of briefs to decision-makers is discussed in further detail in Chapter 7.

3.3.1.5 *Alternative approach*

While the Department had reasons to jointly agree the valuer with the landowners, the Department may have been able to pursue a more common approach for appointing valuers for the valuation of Leppington Triangle. Procuring an independent valuer for the Department may have allowed the

Commonwealth's interests to be better represented in negotiating the compensation amount or price for the acquisition. This is not to say the Department should have been confrontational in their approach, but could have pursued a method where the Department was more informed of the possible valuation outcomes and had its interests represented.

Further to this, the landowners, in their email on 7 February 2017 around 2:30pm, had offered 'proceed[ing] on the basis of obtaining separate valuations', demonstrating the landowner's openness to considering such an approach in the circumstances. In engaging separate valuers, the Department would still have been able to require conflict of interest declarations to ensure the valuers were independent.

The Review notes that there were extensive discussions between the Department and LPC and its advisers before and around the time of the commissioning of the joint valuation, including selection of the valuer. The Review has not been able to determine what, if any, influence LPC had over the decision to commission a joint valuation.

Finding: The Department did not appropriately consider and demonstrate how joint selection of a valuer for the valuation of Leppington Triangle demonstrated good strategy and value for money. There may have been justifiable grounds or reasons for the use of a joint valuation. However, the need for formal consideration was heightened in the context of the atypical approach to the selection and appointment of the valuer and the potential risks identified by the Department.

3.4 Compliance with Procurement Requirements

The Review considered whether the appointment of the valuer was compliant with procurement requirements.

3.4.1 Relevant Procurement Requirements

3.4.1.1 Commonwealth Procurement Rules⁴³

As noted in Chapter 2, the CPRs set out the rules and better practice that Commonwealth officials must consider when they procure goods and services.

a) Value for Money

Achieving value for money is the core principle of the CPRs and Commonwealth officials must be satisfied that a procurement achieves a value for money outcome. In considering value for money, an official must consider the relevant financial and non-financial costs and benefits of each submission, including:

- the quality of the goods and services;
- fitness for purpose of the proposal;
- the potential supplier's relevant experience and performance history;
- flexibility of the proposal (including innovation and adaptability over the lifecycle of the procurement);
- environmental sustainability of the proposed goods and services (such as energy efficiency and environmental impact); and
- whole-of-life costs.

⁴³ The Commonwealth Procurement Rules current at the time of this procurement were *Commonwealth Procurement Rules*, 1 March 2017.

b) Procurement Risks

The CPRs require Commonwealth entities to be mindful of the risks associated with procurements, and to make informed decisions in managing these risks. As such, Departmental officers must identify, analyse, allocate and treat risks when conducting a procurement.

c) Procurement Method

The CPRs in force at the time mandated that Commonwealth procurements are conducted by one of three methods – open tender, prequalified tender or limited tender. Open tender involves publishing an open approach to market and inviting submissions. Prequalified tender involves publishing an approach to market inviting submissions from potential suppliers identified through various shortlisting processes. Limited tender involves approaching one or more potential suppliers to make submissions, only where the procurement does not meet the rules for open tender or prequalified tender.

The expected value of a procurement must be estimated to determine which procurement method to use. According to the CPRs, a limited tender approach may be used for procurements with an expected value of less than \$80,000.

3.4.1.2 Department's procurement manual

As noted in Chapter 2, the Department had a Procurement Manual that Departmental officials were required to comply with. In relation to limited tenders, the Departmental Procurement Manual required the following.

For procurements under \$80,000, the minimum requirement is to seek at least three written offers, or, if the procurement is valued at under \$5000 at least one verbal offer is required. For procurements between \$5,000 to \$80,000 and seeking less than three quotes the following grounds can be used as justification:

- Sole supplier / Government direction;
- Pre-eminent expertise;
- Reasons of urgency and practicality.

3.4.2 Was the Tender Method Compliant with Procurement Requirements?

In procuring the valuer for the Leppington Triangle, the Department utilised a limited tender, single-source approach (i.e. approaching only one potential supplier).

Given the shared understanding with the landowners to jointly select the valuer, the Department was poised from the outset to undertake a limited tender procurement route – to procure the specified valuer, or valuers, agreed between the parties.

While the quotation provided by MJD was for \$3,850, including GST, the estimated cost at the time of initiating the procurement was between \$6,000 and \$9,000. Therefore, a limited tender approach was an available means of procurement under the CPRs, as the estimated cost was below the relevant procurement threshold.

To comply with the Department's Procurement Manual, the Department was required to source at least three quotes unless an exemption applied, as the estimated cost of procurement was between \$5,000 and \$80,000.

3.4.2.1 Single-source procurement

For the procurement of the valuer, the Department did not source three quotes, and sourced only one quote from one supplier. Reasons of urgency and practicality were the grounds provided for this approach in the email approval request for the procurement. Consistent with this, details in the

Department's myJob procurement portal provides, '[t]he Department will be seeking quotes from one supplier for reasons of urgency and practicality – the Department needs to act quickly to take advantage of the rapport developed with the land-owner of the parcel we are looking to value'.

However, the time and process undertaken for the procurement of the valuer does not reflect such urgency or the impracticality of sourcing additional quotes. Between the time of the first record regarding appointment of a valuer to the finalisation of the draft valuation report, over seven months had passed. This included:

- over three weeks between the time of the first record regarding appointment of a valuer to the selection of MJD as the preferred valuer;
- over seven weeks between identifying MJD as the preferred valuer and the internal procurement approval request to engage valuation services;
- over five weeks between the approval to approach MJD for valuation services and the issuance of the brief for valuation services; and
- an extension of the maximum three-months permissible under the contract for the valuer to complete the valuation, based on instructions that were being discussed throughout May and June.

The extended timeframes between key procurement steps diminishes the persuasiveness of the reasons provided for the single-source procurement.

The Department had already identified preferred potential suppliers. Obtaining quotes concurrently from more than one valuer would likely not have led to increased cost and time, compared to what occurred.

Further, as noted in 3.3.1.3, the Department had identified a potential risk regarding public scrutiny over the approach to the valuation. Under the CPRs, the Department must manage procurement risks. In this case, approaching more than the one supplier that was nominated by the landowner, would have helped to mitigate the risk that was identified. Additionally, the Department could have explored approaching multiple suppliers in a way that was consistent with the joint commissioning approach – for example, by agreeing three preferred valuers, or the parties proposing and considering two valuers each.

Finding: The single source procurement process undertaken for procuring the valuer for Leppington Triangle was not consistent with the Department's requirements contained in its Procurement Manual, on the basis that the urgency exemption utilised was not persuasive.

3.4.3 Was Value for Money Adequately Demonstrated?

The response provided for the 'Supplier Selection Reason' on the Department's myJob procurement portal states, '[v]alue for money demonstrated as services expected to cost in the order of \$50,000 and contracted for only \$3,850'.

The low price was stated as value for money. However, in assessing value for money, an official must consider the relevant financial and non-financial costs and benefits – including the quality of the goods and services, the fitness for purpose of the supplier's proposed services, and the potential supplier's relevant experience and performance history.⁴⁴

With regards to costs, the Review also notes that the value for money statement provided in the myJob procurement portal reflects an over-stated expected cost saving of around \$41,000 to \$44,000, as the estimated costs communicated to the procurement approver was between \$6,000

⁴⁴ Department of Finance, *Commonwealth Procurement Rules*, March 2017, rule 4.5.

and \$9,000, rather than \$50,000. Departmental officers consulted could not recall why a higher estimated cost was included in the procurement portal.

3.4.3.1 Investigation of relevant supplier's costs and benefits

The quotation provided by MJD provided a fee quote to undertake the valuation, the estimated turnaround time, and the completed conflict of interest declaration confirming that MJD had not identified any obvious or perceived conflicts of interest. No other information regarding the knowledge, skills, expertise, prior experience, or proposed approach or methodology for the services (and how they represent quality) was requested by the Department or provided in the quotation.

Property valuers are specialist professionals with specific qualification and certification requirements. Property valuers also have specific areas of experience and expertise, spanning different types of properties and land purposes and different valuation methodologies. Furthermore, valuations for compulsory acquisitions of land by government entities is a specialised area of valuation, with the need to understand relevant legislative provisions, legal precedents, and specific valuation methodology. All of this reinforces the need to consider whether a valuer has the skills and experience necessary for a particular valuation.

Departmental representations to the ANAO in August 2019 noted that the Department reviewed publicly available information (which, in consultations conducted as part of the Review, indicated were limited to a review of the valuer's website and consultation with the API) and sought further information directly from the valuer by phone to assess their suitability. This suitability assessment included confirming MJD's experience working on valuations in Western Sydney. The Department noted, in both representations to the ANAO in 2019 and to this Review, that the investigation of MJD's suitability was undocumented, and that high weight had been placed on the conflict of interest declaration process.

The assessments of the valuer's relevant competence and capability was not evident in the contemporaneous documentation, or in the relevant approval request and myJob procurement portal artefacts that should justify the procurement. Further, the rigour and relevance of the enquiries made of the valuer's prior experience and ability to carry out the specified work (for example, for Commonwealth lands acquisitions under the LAA) is unclear.

The key documentation supporting the procurement, including the request for approval of procurement activities, the brief for valuation services, the quotation provided by the supplier and the online procurement portal, do not adequately demonstrate how the supplier provided value for money.

Finding: Whilst the accepted quote was below the estimated cost range, the Department did not demonstrate whether procurement of the valuer reflected value for money. The Department did not effectively assess the capability, experience, capacity and proposed methodology of the valuer. Such an assessment was particularly important as the valuer was nominated by the landowner and was unknown to the Department.

Finding: The Review notes that the valuation was a small transaction and was intended to be used only to provide an indication of the merit in continuing negotiations. In this regard, an extensive procurement process was likely not necessary. However, at the point that the Department decided to rely on the valuation as the basis for an acquisition price, its risk profile increased significantly, and required greater assurance as to the appropriateness of the valuer to perform this different role.

3.4.4 Procurement Approval Delegations

The instrument of delegation in force at the time,⁴⁵ allowed EL2 officers to approve commitments of relevant money up to a financial limit of \$50,000, excluding for legal settlements. The approval sought and provided with regards to the procurement of the Valuer was consistent with the accountable authority delegations.

⁴⁵ The Department, *Accountable Authority Delegations 2015 (No.2)*, signed 28/10/2015, superseded by *Accountable Authority Delegations 2017(No.1)*, signed 19/12/2017.

4 The Valuation of Leppington Triangle

The valuation of the Leppington Triangle, provided by MJD transpired to be significant in the determination of the final agreed consideration for the Commonwealth's acquisition of the property. The purpose of this Chapter is to explore the processes and decisions leading up to the receipt of that valuation, including the approach to valuation and the design of the valuation instructions. The Chapter will assess whether those processes and decisions were consistent with norms in the commissioning of valuations under similar circumstances, and the achievement of Commonwealth objectives in the acquisition of the Leppington Triangle.

This Chapter does not seek to challenge the validity of the valuation or to provide an alternative valuation of the Leppington Triangle. Nor does it provide comment on the Australian Government's broader policy arrangements for commissioning and accessing valuations as part of acquisitions of land under the LAA.

Separately, Chapter 3 explores the process to select and procure the valuer for the purpose of this valuation, and Chapter 5 considers in more detail how the valuation was used in the finalisation of the acquisition.

4.1 Context – What Occurred in the Context of the Valuation

As noted in the previous two Chapters, conducting a valuation of the Leppington Triangle was identified as a key step in the brief seeking approval of the LPC Strategy. While the commissioning of a specific valuation was not mentioned in the LPC Strategy, the Strategy specifies that "compensation to be agreed up front at the market value to LPC for the land value and all costs required under the *Lands Acquisition Act 1989*".

Prior to this, as part of consultation on the development of the LPC Strategy, the Department of Finance provided advice on the draft LPC Strategy on 16 August 2016. The Department of Finance specified, in relation to the acquisition of Leppington Triangle, that a 'valuation report will need to be provided to Finance,' which firmly created the expectation that a valuation would be required. In consultation with relevant officers involved in the acquisition, this Review has been advised that the Department's team "always expected to commission a valuation of the property".

Later in 2016, the Department followed-up with Finance from a meeting on 8 December 2016 on some further information about valuations (there were no records of the meeting) and sometime between 8 December 2016 and 9 February 2017, Finance directed officers from the Department to a source of guidance. Finance also suggested several valuation organisations for the Department to consider.

An email file note of discussions between the Department and LPC on 13 January 2017, indicates the beginning of conversations with the landowner about a valuation. The file note states that 'there's been no commitment on either side but to appoint a valuer and seek a valuation of the triangle, on the basis that it was an airport rather than agricultural property'.

As part of engagement between the Department and the landowner between 7 and 10 February 2017, the following matters were raised in connection with valuation instructions:

- At 3.31pm on 7 February 2017, the landowner noted that "[the Department] would consult with LPC in preparing the instructions for a joint valuation by MJD."
- Infrastructure committed to have "some valuer instructions drafted and to you by the end of this week".
- Infrastructure provided proposed valuation instructions to the landowner noting that "the land value of the Triangle is being obtained to assist our discussions going forward and is not

intended to be binding on either of us. It is not intended to affect our respective rights to obtain additional valuation advice.” The draft valuation instructions, and iterations of the instructions, are detailed in 4.1.1.

As discussed in the previous Chapter, it is clear that when commissioning a valuation in early 2017, the Department’s intent was for that valuation to provide only a “starting point” for negotiations. Officers involved have advised that the Department did not intend for the outcome of that valuation to represent the sole source of evidence to support a negotiating position or a negotiated outcome for the acquisition.

While awaiting comment on the proposed valuation instructions from LPC, the Department documented by email a set of proposed “parameters” that were to define the engagement between the Department and LPC regarding the valuation. The key features, as summarised from an email from the Department to the landowner on 24 February 2017, were as follows:

- The Commonwealth would establish and enter a service agreement with MJD, which would reference the agreed valuation instructions;
- The instructions would be joint between the Commonwealth and LPC, with any follow-up instructions to be provided with full visibility of all parties;
- Any subsequent instruction to MJD must be agreed between the Commonwealth and LPC;
- LPC should provide any details to MJD that it considered relevant to the valuation, with a copy to the Commonwealth;
- The valuation report would be provided concurrently to the Commonwealth and LPC;
- The Commonwealth would pay for the valuation;
- MJD would be required to enter an agreement confirming confidentiality;
- The Commonwealth and LPC would enter an agreement confirming confidentiality; and
- The valuation represents an opportunity for both parties to separately consider respective positions on a proposed land transaction and is not:
 - Intended to be binding on either party;
 - Intended to affect respective rights to obtain additional valuation advice; or
 - Compel either party to take further action.

On 10 March 2017, LPC agreed to the above parameters without change, subject to agreement on the valuation instructions.

4.1.1 Valuation Instructions

The Department developed draft valuation instructions with support from AGS. The draft valuation instructions comprised two pages with the following components:

Figure 11: Summary of key components of the draft valuation instructions.

Component	Details
Background	Defined the valuation as jointly commissioned by the Commonwealth and LPC. The instructions linked the valuation to the Western Sydney Airport project, including a note that the Leppington Triangle was a proposed land acquisition for inclusion in the airport site. The background noted that improvements such as houses may not be relevant to the valuation assessment.
Scope of work – definition of relevant land interest	Provides specific details to identify the Leppington Triangle. Notes that the Leppington Triangle is zoned <i>SP1-Special Activities, Commonwealth Activities</i> .
Valuation required	Requires an assessment of “the current market value of the Leppington Triangle sold by a willing but not anxious seller to a willing but not anxious buyer, having

	regard to the highest and best use that may be undertaken on the Leppington Triangle". Notes that the report will be provided "to and for the benefit of the Commonwealth and LPC" and requests that the valuer "work closely with the Commonwealth and LPC representatives as required".
Valuation Approach	Requests that the work to be undertaken is "via desktop valuation only".
Timing	Requires the valuation to be completed by 17 March 2017.
Other Information	Reinforces that the valuation is for the whole of the Leppington Triangle, despite NSW Government considering the acquisition of a portion of the Leppington Triangle; and that if that should transpire, any valuation may be revised accordingly.
Administrative Arrangements	Notes that the valuation is being procured and funded by the Commonwealth, and that LPC has been consulted in the valuation instructions and that the instructions are jointly issued by the Commonwealth and LPC. Further notes that all communications with and from the valuer will be transparent to all parties.
Conflict of interest and confidentiality	Requires the valuer to confirm that it has no conflict of interest by way of declaration, and that a Deed of Confidentiality will need to be signed.

Prior to the finalisation of the instructions for provision to the selected valuer, there was one change which was requested by LPC. In an email from the landowner to the Department on 10 March 2017, Greenfields noted: "From previous discussions [LPC] was of the understanding that the valuation was to be undertaken on the basis of the triangle (sic) being valued as industrial land adjacent to an airport. The draft brief as it currently stands would not necessarily be interpreted to reflect that."

In response, on 21 March 2017 the Department proposed to LPC the inclusion of "including industrial purposes" as part of the valuation basis (after the words "highest and best use"), after consultation with its legal adviser. This was accepted by the landowner by email later the same day.

On 10 May 2017 an RFQ was issued to MJD with the valuation instructions as amended above (with reference to "including industrial purposes"), with a revised due date for the valuation report of 16 June 2017. The RFQ simply sought a quoted price of the required services and confirmation with regard to potential conflicts of interest.

The contract for services with MJD was entered into on 5 June 2017.

After commencement of the contract for valuation by MJD, the Department contacted MJD on 9 June 2017 to request a change in the valuation instructions. Specifically, it was requested that the valuation instructions be amended as follows:

*"The amended instructions to paragraph 3(a) now reads:
... assess the current market value of the Leppington Triangle sold by a willing but not anxious seller to a willing but not anxious buyer, having regard to the Leppington Triangle re zoned for industrial purposes, adjacent to an operating airport.
I confirm that the revised instructions, limited to only paragraph 3(a) of the brief, are jointly agreed between LPC and the Department."*

This Review was advised that this matter was discussed through phone calls between the Department and LPC and agreed to be put to the valuer.

Following a range of engagements between the Department, LPC and MJD through June and July, it was finally agreed that the instructions attached to the contract would be retained; that is, the valuation would reflect highest and best use, including industrial purposes, and MJD was advised accordingly on 10 July 2017.

On 2 August 2017, the Department received a draft “Valuation Report – Proposed Acquisition” for the Leppington Triangle (dated 31 July 2017) from MJD.

4.1.2 The Valuation Report

The Valuation Report (which was not changed between receipt of the draft on 2 August 2017, and confirmation of its finalisation on 27 September 2020) is a 26-page document. For the purpose of this Review, the following aspects or features are highlighted:

- The purpose of the report is described as “[t]o assess Current Market Value for proposed acquisition” (with no reference to compulsory acquisition as part of the purpose).
- The Brief description explains the following: “We are specifically instructed to provide a market valuation of the land on an Englobo rate per square metre basis based upon existing planning parameters with highest and best use reflected in speculative industrial re-zoning potential within the Western Sydney Priority Growth Area (WSPGA) and Western Sydney Employment Area (WSEA).”
- The valuation was based on a kerbside inspection only (being a Restricted Assessment).
- The Valuation Report was prepared with reference to API Standards, and notes that the valuer was an Associate of the API.
- The Valuation Report describes the particulars of the land subject to the valuation, including that the Western Sydney Airport Plan identifies the parcel as a proposed land acquisition for inclusion in the airport site.
- The Valuation Report outlines a range of “critical assumptions”, including that the parties are “assumed to agree and accept the commercial risks inherent in relying on a Restricted Assessment”.
- Regarding zoning and planning history, the Valuation Report notes:
 - The land is zoned as SP1 Special Activities: Commonwealth Activities
 - In connection with the WSEA and the WSPGA, the land is bordered by (but not in) zones most recently presented as being those areas.
 - “In our view, if the Land to be acquired had not been zoned SP1 – Infrastructure (Local Drainage), it would have been zoned RU1 Primary Production⁴⁶ in line with surrounding lands and our assessment is based on this assumption.
 - Despite the above, the report concludes with regard to land use in respect of the parent property⁴⁷: “... putting aside the public purpose zoning as a step in the acquisition process we believe it reasonable to assume that the subject land would be zoned RU1 Primary Production, however given its proximity within and adjoining those areas identified as ‘future industrial and employment land’ hence speculative industrial re-zoning potential within WSPGA and WSEA would likely be conveyed in any potential sale between a willing buyer and willing seller.”
- The Valuation Report determines that: “Values ascribed to the parent property should therefore be reflective of the present market which is reacting strongly to perceived future opportunities the Badgerys Creek Airport will provide for land adjoining the airport site or that is in reasonably close proximity to it.”
- The Valuation Report notes anecdotal evidence regarding investors being in the market to purchase properties close to the airport site and being willing to pay substantially more than present rural land values, including making reference to land banking.

⁴⁶ The valuation describes the purposes for use of RU1 Primary Production, with those uses being extensive and including some uses which may be perceived as industrial.

⁴⁷ The Valuation Report variously uses the terms “subject property” and “parent property”. These terms are not defined and it is not clear if the reference to “parent property” is a reference to the LPC main land holding, or a reference to the Leppington Triangle.

- The Valuation Report notes that sales transactions in the area in late 2016 and early 2017 were at “circa \$100 to \$150 per square metre”. It further notes that “with the May 2017 Federal Government funding announcement, it would appear that the market significantly increased to \$200-\$250 per square metre”. The report notes that there is a scarcity of reported sales, and therefore reliance has been placed on properties under contract, under offer or on the market.
- The Valuation Report lists six recent sales with an average “cash equivalent” value per square metre of \$145.5 per square metre, and only one with a value of over \$200 per square metre (being at \$228 per square metre). The listed properties were in a range of locations around the airport (none in the South West corner and none within the long-term boundary of the airport site), and all were in the WSPGA and WSEA. (Three were after the 2017 Budget announcement of the Western Sydney Airport.)

The report concludes that “in order to compel a Vendor to sell the land at this point in time, it is apparent that rates of \$200 to \$250 per square metre... would be required in order to facilitate a deal regardless of the scale of the site; though we note all of these sales are being undertaken under favourable purchase settlement terms in the way of either put and call options or delayed settlement terms”. On this basis, the report concludes that the value range is \$210 to \$235 per square metre (\$28.5 million to \$32 million), with the concluded market value as \$220 per square metre (\$30 million for the Leppington Triangle).

4.2 What is ‘Valuation’?

Valuation is generally considered 'the process of establishing the value of an asset or liability' or 'the amount representing an opinion or estimate of value'.⁴⁸

Of particular note in this definition is that any valuation is an “opinion” or an “estimate”. There is no absolute value for any asset (including land) and the estimate of value will be dependent on the circumstances and assumptions in which the valuation is undertaken and the process undertaken to estimate the value of the asset or liability.

Valuation standards exist, as issued by the International Valuation Standards Council (IVSC), which are applied by the API which is, amongst other things, a professional body for valuers.

The Review consulted a number of valuers who noted that all assets have “one market value” at any point in time and that any variation in valuation outcomes should be solely due to the assumptions that a valuer is asked to make, or the considerations that the valuer is asked to consider, in arriving at an estimate of value. This can be particularly relevant in instances where there is a limited market for an item.

As noted by the IVSC, 'value is not a fact but an opinion'.⁴⁹ As with any estimation process, valuation is necessarily subject to judgements made by the valuer. The IVSC issues standards to reduce variation arising from these judgements, however an element of judgement remains. In this regard, valuation has an element of ‘science’, in following defined standards and processes, as well as an element of ‘art’ in determining what methodology to apply, what evidence to take into account, and how to weigh the impact of that evidence to reach an estimate of value.

It is also worth noting that value is contextual and dependent on circumstances. Items which may have a lower inherent (or objective) value, can be highly valuable to individuals due to the circumstances of that item. This was the case for the Leppington Triangle. For the Commonwealth, its location as part of the long-term layout contemplated in the Airport Plan meant that it was

⁴⁸ International Valuation Standards Council (IVSC), *Glossary*, available at: <http://ivsc.org>

⁴⁹ IVSC, *IVS Framework*, 2011, paragraph 8.

necessary to complete the airport site and unlock considerable economic and community benefits to Australia. This dependency on the parcel for the Western Sydney Airport meant that (arguably) it was worth more than its value as a parcel of agricultural land. For LPC, it was part of a highly productive business asset, and with potential options for future development given the investment in Western Sydney, which again (arguably) meant that it was worth more than its value as a parcel of agricultural land.

Consequently, when obtaining a valuation, parties are able to reflect such contextual influences by giving the valuer guidance on matters to consider, which may differ from a more objective 'market value' analysis.

With government land acquisitions, and in particular compulsory acquisitions, the buyer has an additional objective to ensure compensation is based on 'just terms'. The LAA states that the Federal Court or High Court may determine compensation or make such order as is necessary to ensure that the acquisition is on just terms.⁵⁰ Therefore, it is important for valuers and those representing the government to be conscious of past court decisions to ensure acquisition outcomes are fair.

4.3 Was there a Considered and Strategic Approach for the Valuation?

As noted earlier in this Report, the documentation underpinning the commissioning of the valuation, including correspondence with LPC, does not provide guidance on the purpose of the valuation.

While it is clear that it is not intended to be binding on either party, it is not clear whether it was intended to create a potential 'first step' in the acquisition negotiations and therefore would be influential on the negotiation outcomes. Discussions with officers involved in the transaction have indicated that it was only intended to provide an indication of potential value, and thereby allow both the Department and LPC to consider their positions and options. In this latter scenario, the significance of the valuation is less than the former scenario and the implications and consequences of the joint valuation are less significant. Regardless, as discussed in the preceding Chapter, use of a joint valuation is atypical and the Department did not adequately justify its use as the preferred valuation approach.

As it transpired, the valuation became highly significant in determining the agreed price for the acquisition. In this circumstance, there were greater risks in relying on this joint valuation.

The Review was aware of certain questioning and discussion about the existence of a "valuation strategy" that have arisen since the release of the ANAO performance audit report. From the perspective of an organisation commissioning a valuation or engaging in a transaction that may require a valuation, the concept of a valuation strategy is not a common one.

Having said that, given the less common approach the Department employed of using a joint valuation, and retaining the right to obtain its own valuation advice, there was potential merit in establishing such a strategy to provide direction and transparency to how the Department was going to ensure it had the necessary valuation information to inform decision making on the appropriate price to pay for the Leppington Triangle.

Such a strategy could have included information in connection with:

- The rationale for the joint valuation, and the benefits that the Commonwealth was expecting to achieve from the joint valuation;
- Factors influencing the selection of a provider of a joint valuation, including skills and capabilities that a provider of a joint valuation would need to have;

⁵⁰ LAA, s 93.

- Key features of valuation instructions that would be issued to the provider of the joint valuation;
- How the approach to the joint valuation aligned to the approved strategy for the acquisition of the Leppington Triangle;
- Expectations of the likely range of values that the Commonwealth was expecting for the property;
- Triggers or factors that may have prompted the decision to obtain independent valuation advice, and the options for obtaining independent valuation advice (including sources of that independent valuation advice); and, or
- Information that the Department would need or expect to see to be able to assure itself that a final acquisition consideration amount represented value for money, and then how such information would be obtained.

The above information was never defined, outlined, or approved. Yet each is an important tactical aspect of ensuring that the Department has the valuation information it needs to maximise the Commonwealth's outcomes from the acquisition.

This Review is not necessarily advocating the use of a valuation strategy for all land acquisitions or for all engagements of a valuer. Further, it is possible that the matters above could be enunciated elsewhere – such as in a more complete and comprehensive acquisition strategy (which is discussed in Chapter 2). However, given the less common approach to valuation initiated by the commissioning of a joint valuation, it is likely that such a strategy would have been beneficial to guide activities over the 18 months from discussions commencing about a joint valuation to the final execution of the acquisition. It would also have been a useful transparency and accountability tool for senior Department leadership in connection with the acquisition.

Finding: The Department has been unable to validate whether the valuation was intended to provide an “initial view” of value to inform future negotiations and valuation activity, or whether it was expected to be used as the basis for an acquisition (as was subsequently the case).

Finding: At the time of commissioning the joint valuation, the Department had no clear, defined or approved strategy or pathway for how that valuation would support an acquisition or a satisfactory evidence base for the Department to achieve value for money from the Leppington Triangle acquisition.

4.4 Were the Valuation Instructions Sound and Consistent with Applicable Standards?

There is no ‘standard’ for content or inclusions in valuation instructions for a transaction such as this one. While there is guidance issued by the API, there are no templates or guidance issued either by the Department or by the Department of Finance (as the policy lead within the Australian Government for land acquisition).

The API's *Technical Information Paper – Valuation Procedures – Real Property* notes the following regarding instructions:

3.1. Confirmed in writing

Instructions should be confirmed in writing, and include details regarding access arrangements, identification, ownership, agreed fee and, if applicable, the purchase price and the selling agent. The instructions should also list the parties intended to rely on the valuation, the purpose of the

valuation, and agreed time for completion of the report.

3.2. Scope of Work

Before commencing any valuation, it is important to clarify with the client what is to be included in the scope of work as per IVS 101 (International Valuation Standards)⁵¹. Some aspects of the scope of work may be addressed in documents such as standard engagement instructions, service agreements, or a company's internal policies and procedures.

3.3. Interpretation in Specific Cases

Clarification of any matters should be done prior to proceeding with an instruction.

In consultations undertaken as part of the Review, Departmental officers involved in the transaction noted that they had limited experience in conducting, commissioning or reviewing valuation reports for the purpose of acquisitions under the LAA. Consequently, the Department relied heavily on its legal advisers, who supported the development of the first version of the proposed valuation instructions and advised on subsequent considerations of change to the valuation instructions. The API recommends that organisations engaging in valuations draw on legal advice where required. However, it is noteworthy that legal advisers are not valuation professionals or commercial strategy advisers and do not have valuation experience to support guidance in technical matters relating to valuation or tactical matters to support achieving the best commercial outcome.

The Review notes that the valuation instructions as issued meet the requirements outlined above from the API. However, there are several notable aspects of the issued valuation instructions that are worthy of discussion.

4.4.1 No Reference to Compulsory Acquisition Heads of Compensation

The LPC Strategy states that compensation will be agreed, and defines the way it will be calculated – that is, at market value for the land value and all costs required under the LAA, including business disruption costs and legal expenses. Despite this, the valuation instructions do not specifically acknowledge the expectation of the valuation to be used in the context of a compulsory acquisition, nor reference that the property should be valued with consideration of the amount payable under the LAA heads of compensation.

This absence marked a material change in the Department's approach for determining the potential compensation, or price, for the Leppington Triangle. Additionally, the change in approach initiated a more free-flowing method for defining the value of the proposed acquisition.

The Department moved away from the approach of valuing the amount that justly compensates the person for the acquisition as defined under the LAA heads of compensation⁵² (including the market value of the land), to a more commercial assessment of the value of the land to the parties. As a result, the valuation instructions did not include a requirement for the valuation to value suitable compensation based on both the market value land and other permissible costs under the LAA (such as business disruption costs) that are the heads of compensation applicable under Part VII Division II of the Act for a compulsory acquisition.

⁵¹ IVS 101 is titled "Scope of works" and broadly requires the following:

- All valuation advice and the work undertaken in its preparation must be appropriate for the intended purpose.
- It is important that the intended recipient(s) of the valuation advice understands what is to be provided and any limitations on its use before it is finalised and reported.
- It is a valuer's responsibility to ensure that the scope of work has been communicated to all parties to a valuation assignment prior to completion of the assignment.

⁵² The general principles for the amount that 'will justly compensate the person for the acquisition' is noted in s 55 of the LAA.

The Review notes that the Department ultimately used an acquisition by agreement method to acquire the Leppington Triangle, and that the Department of Finance advice was to seek to acquire by agreement in the first instance. Regardless, the price agreed between the parties could have been based on a valuation of the likely amount to be paid using the compulsory acquisition heads of compensation under Part VII Division II of the LAA. Indeed, this was the intention noted in the LPC Strategy – that even though compensation would be agreed between parties, the basis for the amount would be with reference to compulsory acquisition compensation provisions in the LAA.

Finding: The valuation commissioned was inconsistent with the method for acquisition and method for calculating compensation for the Leppington Triangle that was articulated in the LPC Strategy.

4.4.2 Conduct a Desktop Valuation Only

The valuation instructions explicitly require the valuer to undertake a desktop valuation only.

The API defines desktop valuations as follows⁵³:

Desktop Assessments require the Valuer to be specifically instructed to not undertake certain aspects of the processes involved in preparing usual Valuations including, but not limited to the physical inspection of the Subject Property. The aspects of the usual Valuation that are not completed in preparing a Desktop Assessment include, inter alia, the following:

- *An internal and external inspection;*
- *Physical measurement of structures;*
- *Confirmation of internal configuration or design*
- *Compliance with ABFI Residential Valuation Standing Instructions and the API PropertyPRO Supporting Memorandum*
- *Land topography and aspect;*
- *Roads and access;*
- *Site defects;*
- *Impact of adjoining development;*
- *Environmental risks e.g. flood affected, proximity to high voltage power lines, subject to mines subsidence, bush fire risk, etc;*
- *Encumbrances;*
- *Permissible land uses and land use conformity;*
- *Improvements;*
- *Leases and tenancies;*
- *Title searches;*
- *Sales evidence utilised is not inspected or verified but is provided by a Third Party Platform.*

It is expected that the Valuer will highlight any adverse feature or risk that is readily observable from the data/imagery which is provided to identify and assess the subject property.

The API goes on to describe the risks associated with the use of desktop assessments:⁵⁴

- the risk of inaccuracy of information contained in the Desktop Assessment as compared to Valuations is increased;

⁵³ Australian Property Institute, *Residential Desktop Assessment – Memorandum for First Mortgage Purposes*, October 2016, paragraph 3. The Review notes that this is designed for residential desktop assessments, however in consultation with a number of valuers it was determined that the principles equally apply for commercial properties. The API does not issue guidance for desktop assessments for commercial assessments as they are relatively uncommon.

⁵⁴ Australian Property Institute, *Residential Desktop Assessment – Memorandum for First Mortgage Purposes*, October 2016, paragraph 3.1.

- the fact that the Valuer cannot verify the accuracy of information contained in a Desktop Assessment as would be provided in a Valuation; and
- the fact that Desktop Assessments may, in some instances, have significant limitations when compared to Valuations, including a greater degree of variation in the resulting Indicative Assessment.

Departmental officers consulted in this Review advised that the selection of a desktop review was based on time constraints that were felt by the team in finalising the acquisition of the Leppington Triangle, and a belief that any risks associated with not obtaining a full valuation were minimal. It was also noted that the valuation was expected at that time to represent a ‘starting point’ for considerations for an acquisition, and that the Department had reserved the right to get future valuation advice if required, including property due diligence which was being commissioned from AGS, and so that option could be considered once the valuation report was received.

While these are reasonable considerations, the advice this Review has received from a number of professional valuers is that for a transaction the size and significance of the Leppington Triangle acquisition, a desktop valuation would not have been sufficient to manage risk to an acceptable level. The Review also consulted with Commonwealth officers who had been involved in other LAA land acquisitions, and noted that a desktop valuation had never been relied upon to support the valuation of a land acquisition in their experience. Further, it is noted that given the time taken to consider the Valuation Report, it is likely that there was sufficient time to conduct an unrestricted valuation. This is discussed further in sub-Chapter 5.8.

It is noteworthy that the valuation undertaken was in fact a restricted valuation, which includes certain other steps beyond simple desktop procedures, including a visit to the property. However, a restricted assessment is subject to many of the same risks as noted above for desktop assessments.

Finding: The use of a desktop or a restricted assessment for the acquisition of the Leppington Triangle was unlikely to be sufficiently reliable to support management of risk of an inappropriate price being paid for the property to an acceptable level.

4.4.3 Defined Valuation Basis

The valuation instructions are very specific in terms of the valuation basis for the valuer to apply. The specific instructions are:

assess the current market value of the Leppington Triangle sold by a willing but not anxious seller to a willing but not anxious buyer, having regard to the highest and best use, including industrial purposes, that may be undertaken on the Leppington Triangle

The use of “current market value” is typical in a valuation for this purpose. The API defines “market value” as “the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller⁵⁵ in an arm’s length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion”.

The valuation instructions drew on terminology consistent with s56 of the LAA, which defines market value.

The concept of market value is consistent for most valuations (including all valuations, during the transaction period and since the acquisition, undertaken of the Leppington Triangle). However, the

⁵⁵ The concept of “a willing but not anxious” buyer and seller was established in 1907 in *Spencer v Commonwealth* 5 CLR 418. For the purpose of this Review it is not perceived that there is any material difference brought about by the insertion of “but not anxious”, which features in the LAA definition of ‘market value’ in s 56.

defined valuation instructions agreed incorporated some specific variations or assumptions included by the Department and LPC. These are discussed below.

4.4.3.1 Highest and best use

The valuer is asked to “have regard to the highest and best use” of the property.

The IVSC suggests that unless there is a reason not to, market valuations are to take into account the 'highest and best use' of an asset which the IVSC defines as “the use of an asset that maximises its potential and that is physically possible, legally permissible and financially feasible”.⁵⁶ On this basis, the inclusion of this term in the valuation instructions is relatively non-controversial and is consistent with standards.⁵⁷

It is noteworthy that the determination of what is 'highest and best use' is typically determined by the valuer based on available evidence, including consultation with interested parties. As will be discussed later in this Report, different views of valuers who have valued the Leppington Triangle as to what is the 'highest and best use' is the most significant influence on different valuation outcomes.

4.4.3.2 Include industrial purposes

The second variation that the valuer is asked to consider in these instructions is to “include industrial purposes” in the consideration of highest and best use. The inclusion of this specific consideration of highest and best use was made at the request of LPC.

At the time of this request from LPC, the Department consulted with AGS who noted a preference not to include the proposed words on the basis that a reference to industrial purposes could be seen as a limitation on the valuer, who would presumably consider all possible uses or purposes in independently determining what was highest and best use, including industrial purposes.

This Review has consulted with a number of valuers regarding the valuation instructions, all of whom validated that the specific reference to “industrial purposes” was an unusual inclusion and that more typically it would be expected that a valuer would be at liberty to use their professional judgement as to what the highest and best use of an asset would be based on local circumstances.

This Review notes that by phrasing the reference to industrial purposes as “*including* [emphasis added] industrial purposes”, it served to remind the valuer to consider industrial purposes, but to consider other possible uses to determine highest and best use. An alternative reading of this is to give the valuer some direction of the proposed use for valuation purposes, however consultation with officers involved in the development of the instructions have indicated that this was not the intent of the Department.

In summary, considering the components of the basis for valuation included in the valuation instructions, none of them place any inappropriate constraint on the professional judgement of the valuer.

⁵⁶ IVSC, *Highest and Best Use*, available at: http://www.ivsc.org/glossary#letter_h.

⁵⁷ It is noted that this term was not included in the valuations commissioned by the Department to value the land for 2018-19 financial statement purposes, however the Australian Accounting Standards Board (AASB) *13 Fair Value Measurement* does include consideration of “highest and best use” in the determination of fair value for financial reporting purposes.

Finding: While acknowledging a lack of clarity on why the valuation was being commissioned and how it was to be used, the valuation instructions issued by the Department were broadly consistent with relevant professional standards and allowed a valuer to exercise independent professional judgement.

4.4.4 Negotiated Approach to the Valuation Instructions

The fact that the valuation instructions were a negotiated outcome was inevitable once it was decided that the valuation would be a joint one.

There were a number of matters considered in that negotiation, all of which were resolved in a manner that resulted in minimal change from the intent of the original draft instructions. These are outlined below:

Figure 12: Summary of matters considered by the Department in negotiating valuation instructions.

Date	Request from LPC	Resolution	Review Comment
10 March 2017	LPC notes that the draft brief provides for the current market value of the triangle being assessed having regard to the highest and best use that may be undertaken. LPC notes that from previous discussions, it was of the understanding that the valuation was to be undertaken based on the Leppington Triangle being valued as industrial land adjacent to an airport. The draft brief as it currently stands would not necessarily be interpreted to reflect that.	Insertion of “including industrial purposes” after the reference to highest and best use in the valuation instructions.	The approach taken by the Department retained the intent and integrity of the instructions as originally drafted, while providing a reference that was seen as important to LPC. (However, this relied on the valuer not perceiving the reference to industrial purposes as specifying a highest and best use for the property, even where it may not be practical or feasible.)
9 June 2017	At the request of LPC, a revised set of instructions were issued to the valuer that stated: <i>“... assess the current market value of the Leppington Triangle sold by a willing but not anxious seller to a willing but not anxious buyer, having regard to the Leppington Triangle re zoned for industrial purposes, adjacent to an operating airport.”</i>	Following concerns raised by the valuer, and consideration by the Department, the valuation instructions were reverted to the version outlined in the row above.	The fact that the revised instructions were issued is concerning for a range of reasons which are discussed below. However, as the instructions reverted to the version outlined in the row above, they retained the intent and integrity of the instructions as originally drafted.
7 July 2017	In connection with the 9 June 2017 request, explanation was provided as follows: <i>“to value the triangle land as if:</i> <ul style="list-style-type: none"> • <i>The land was already re-zoned industrial land</i> • <i>The land is adjacent to an operational airport</i> • <i>The seller is not a distressed seller and the buyer is not a distressed buyer”</i> 	As with the row above, the valuation instructions were reverted to the version outlined in the row above.	As above.

The changes proposed by LPC on 9 June 2017 and reinforced or explained on 7 July 2017 were highly problematic as they in effect changed the valuation from a current market value assessment to an assessment of future value which was necessarily dependent on a series of future, speculative events.⁵⁸ While it is uncertain whether the changes would have had any impact on the resultant valuation estimate reached by the valuer, the fact that it was considered and tried to be pursued by the Department is surprising. The proposed change would have created a set of instructions which was inconsistent with any standards or norms for a valuation to be used as the basis for Commonwealth expenditure on acquisition of property.

Departmental officers involved in the valuation process advised that they saw little disadvantage in “testing” the LPC-proposed changes in order to obtain the benefit of the valuer’s expertise regarding the changes and their consistency with industry standards for valuation. Officers advised that it expected that if the revised instructions were problematic, this would be raised by the valuer. In this regard, it is again noted that the Department lacked access to experienced property and valuation expertise.

It is arguably fortunate that the valuer raised concerns about the request, which prompted the Department to re-consider the request and ultimately agree to revert the instructions to the original instructions issued.

Finding: The Department’s apparent initial acceptance of the change to the Valuation Instructions after finalisation of the contract with the valuer exposed the Commonwealth to additional risk relating to process, integrity and a potentially worse financial outcome in the acquisition of the Leppington Triangle.

Finding: Even though the change to the Valuation Instructions after finalisation of the contract with the valuer was not implemented, the Department nonetheless took on considerable risk by allowing various iterations of the instructions to be tested, without sufficient documented risk management planning.

4.4.5 Existence of Other, Unwritten Instructions

It is understood that the valuer engaged with the Department numerous times during the valuation process. One of these is conducted by email and seeks advice from the Department regarding appropriate comparable sites to be considered in the valuation. Officers involved with the valuation have advised that there were numerous conversations with the valuer. It is possible that these conversations may have included topics that were considered as other, unwritten instructions.

It is also understood that LPC engaged with the valuer during the valuation process, although this Review has no access or information about such discussions, or any instructions that may have come from LPC.

The significant differences between the valuation instructions issued by the Department (as discussed above) and the instructions included in the Valuation Report, discussed in section 4.5 and Figure 13 of this Report, suggests that the resultant valuation was informed by other, unwritten instructions that the valuer considered in finalising the valuation. The Valuation Report does not provide clarity of the source or purpose of these other, unwritten instructions. In addition, there is no evidence of other written confirmation of the additional instructions. Further, as discussed later

⁵⁸ As the changes to the instructions on 9 June 2017 and 7 July 2017 were issued by the Department, it appears that they were supported by the Department. Officers involved have advised the Review that this was not the intention.

in this Chapter, it is not clear what impact those other, unwritten instructions had on the resultant valuation outcome.

This reduces the transparency and usefulness of the valuation for the purpose for which it was subsequently used.

Valuation experts consulted as part of this Review have noted that the provision of subsequent, other, unwritten instructions should be avoided to avoid the potential of misunderstanding of the valuation outcomes included in a valuation report. This is particularly true for a jointly instructed valuation, where the source of particular instructions may not be clear and coordinated between the joint instructing parties.

4.4.6 LPC’s Commitment to the Joint Valuation

Officers involved in the acquisition advised the Review that at different times through the valuation process, LPC “backed away” from the joint valuation. It is understood that this occurred at times during the valuation process when LPC was uncomfortable with approaches and assessments being made by the valuer, including not applying the changes proposed by LPC on 9 June 2017 and reinforced or explained on 7 July 2017.

This Review has seen no evidence of this beyond the representations of officers, however it raises questions about the appropriateness and benefit of the joint approach under the circumstances.

4.5 Did the Department Adequately Consider the Valuation Report prior to Accepting it?

As noted at the commencement of this Chapter, this Review has not sought to undertake another valuation or to make comment on the assessments made by the valuer in its valuation estimate.

The Review has considered the Valuation Report from the perspective of reviewing it to identify if there are matters that the Department should have sought to question or explore before finalising the Valuation Report and then using it as the primary basis for establishing the consideration for acquisition of the Leppington Triangle.

Our review of the Valuation Report identified a range of observations and questions as summarised below.

Figure 13: Summary of issues raised from reading the Valuation Report.

Issue	Explanation and Comment
Reported instructions different from issued instructions	<p>The Valuation Report notes the following in connection with the instructed basis for valuation: <i>“We are specifically instructed to provide a market valuation of the land on an Englobo rate per square metre basis based upon existing planning parameters with highest and best use reflected in speculative industrial re-zoning potential within the WSPGA and WSEA.”</i></p> <p>This is materially different to the instructed basis for the valuation in the valuation instructions (quoted in 4.4.3). It is likely that the difference would have had a material impact on the outcome of the valuation.</p> <p>In response to this, at a minimum, the Department should have undertaken analysis or enquiries as to what the impact of this apparent change in valuation basis had on the final estimated value, in order to be able to take this into account in its own consideration of the valuation. Such analysis or enquiries were not undertaken.</p>
Critical assumptions	<p>The report (appropriately) identifies a set of critical assumptions associated with the approach to the valuation, including the fact that it was a Restricted Assessment.</p>

Issue	Explanation and Comment
	<p>Upon receipt of the report, it is appropriate for the Department to assess the risks associated with those assumptions and their potential impact on the final valuation. This may involve engagement with the valuer.</p> <p>The Department did not undertake such an assessment nor make any such enquiries of the valuer. Discussions with officers from the Department involved with the valuation identified that such a step was not considered by the Department at the time.</p>
Town Planning Zoning	<p>The report describes the town planning zoning for the property, with specific inclusion of reference to the WSPGA and WSEA, including references to planning history dating back to as early as 2009. The description is confusing and inconclusive as to whether the Leppington Triangle is in the WSPGA or WSEA, or adjoining the WSPGA and WSEA (or excluded from the WSPGA and WSEA by virtue of being on SP1 zoned land).</p> <p>Given the reference to WSPGA and WSEA in the revised instructions, it would be appropriate to seek clarification on the influence of these areas on the valuation outcome, a definitive determination of whether the Leppington Triangle was in these areas, and whether that definitive determination would influence the valuation outcome.</p> <p>Discussions with officers from the Department involved with the valuation identified that these queries were not considered by the Department at the time.</p>
Current Zoning	<p>In different parts of the Valuation Report, the zoning of the Leppington Triangle land is alternatively described as ‘SP1-Commonwealth Activities’ and ‘SP1-Infrastructure (Local Drainage)’. It is not clear from the Valuation Report whether this difference is accidental or whether it is material to the valuation outcome.</p> <p>In order to gain comfort on the rigour in the valuation process, it would have been appropriate for the Department to enquire about this difference and any impact it may have on the valuation outcome.</p> <p>Discussions with officers from the Department involved with the valuation identified that these queries were not considered by the Department at the time.</p>
Alternate Use Zoning	<p>The Valuation Report notes that if the Leppington Triangle had not been zoned SP1, it would be zoned ‘RU1 – Primary Production’. The description of the RU1 zoning includes a range of environmental protection and a large range of agricultural, light industrial, residential, infrastructure and related uses (with consent). The report is unclear if this includes the ‘industrial purposes’ referenced in the valuation instructions, or not.</p> <p>It is also noted that this alternate use zoning is different to the zoning of the comparator properties in the valuation. The implications of this difference on the valuation outcome is unclear.</p> <p>It would have been appropriate to seek clarification on the influence of RU1 zoning and the difference to the comparator properties on the valuation outcome.</p> <p>Discussions with officers from the Department involved with the valuation identified that these queries were not considered by the Department at the time.</p>
Meaning of “speculative industrial rezoning potential”	<p>One of the components of the changed valuation instructions that the valuer includes in the Valuation Report is the concept of ‘speculative industrial rezoning potential’.</p> <p>Noting that the issued and contracted valuation instructions reference a requirement to estimate value on the basis of ‘highest and best use’⁵⁹, there is a need to reconcile the extent to which ‘speculative industrial rezoning potential’ is in fact ‘physically possible, legally permissible and financially feasible’.</p> <p>Whether there is in fact a plausible legal pathway to an industrial purpose is not made clear in the Valuation Report. It would have been prudent to ensure that the Commonwealth understands what that legal pathway is to best understand the valuation.</p>

⁵⁹ Noting that the definition of “highest and best use”, as per the IVSC means that the use must be “physically possible, legally permissible and financially feasible”.

Issue	Explanation and Comment
	<p>Further, risks to that pathway, and the impact of those risks on the valuation outcome would have been beneficial to the Commonwealth to assess the valuation outcome.</p> <p>Further, it would have been beneficial for the Commonwealth to understand the likelihood of that ‘speculative industrial rezoning potential’.⁶⁰ This is not explained in the report, but is potentially highly influential on the estimated value.</p> <p>Discussions with officers from the Department involved with the valuation identified that these queries were not considered by the Department at the time.</p>
<p>References to “parent property” and “subject property”</p>	<p>The Valuation Report variously uses the terms ‘subject property’ and ‘parent property’, including in certain material conclusions within the report. These terms are not defined and it is not clear if the reference to ‘parent property’ is a reference to the LPC main land holding, or a reference to the Leppington Triangle.</p> <p>For the avoidance of confusion, it would have been prudent for the Commonwealth to clarify these terms and ensure that the impact of the use of them on the valuation outcome is clearly understood.</p> <p>Discussions with officers from the Department involved with the valuation identified that these queries were not considered by the Department at the time.</p>
<p>Impact and likelihood of “perceived future opportunities the Badgerys Creek Airport will provide”</p>	<p>The Valuation Report appears to place significance on the market “reacting strongly to perceived future opportunities the Badgerys Creek Airport will provide”.</p> <p>Given this apparent influence on the outcome, and the uncertainty associated with those future opportunities, it would have been beneficial for the Department to understand the influence of those opportunities on the valuation outcome, and any judgement on the likelihood of those occurring. This information would have given the Department an opportunity to conduct its own sensitivity analysis on the valuation outcome and make its own estimations on the valuation (especially as it arguably had more information on plans for the Western Sydney region than the valuer had access to).</p> <p>Discussions with officers from the Department involved with the valuation identified that these queries were not considered by the Department at the time.</p>
<p>Impact of the 2016 Airport Plan</p>	<p>In the 2016 Airport Plan, which included approved uses for the airport site, the Leppington Triangle was zoned as AD4, which is land reserved for aviation use in the long-term. The Airport Plan notes that this land can be used in the short-to-medium-term for a range of uses including low-intensity retail and some industrial as well as a range of other public uses.⁶¹</p> <p>This zoning appears to be significant to the potential future use of the land, and yet the Valuation Report is silent on it.⁶²</p> <p>It would have been beneficial for complete and fully informed valuation information, for the Department to explore with the valuer the impact of the Airport Plan (if any) on the final valuation outcome.</p>
<p>Relevance of comparator property information</p>	<p>The Leppington Triangle is a unique property, being a piece of land that is on the long-term proposed Western Sydney Airport site, marked as being for Commonwealth acquisition, and subject to an existing (1989) PAD for its acquisition by the Commonwealth.</p> <p>The Valuation Report’s commentary through the report relates to land that is adjoining or near the Airport Site. Yet the Leppington Triangle does not neatly fit that description – it is</p>

⁶⁰ For example, if the valuer was of the view that the likelihood of the speculative industrial rezoning of this specific area of land was 90%, this would have a considerably different impact on the likelihood of achieving a certain value, than if it was 1%. This would likely require engagement with authorities responsible for zoning and town planning, but would be potentially influential on a final “likely” value for the property.

⁶¹ *Airport Plan – Western Sydney Airport*, December 2016, section 2.4.3 (pages 58-68).

⁶² It is noteworthy that the zoning noted in the Airport Plan did not take effect until May 2018.

Issue	Explanation and Comment
	<p>a nominated proposed acquisition by the Commonwealth for future use as part of the airport⁶³.</p> <p>Consequently, any future use and any buyer is faced with the prospect of a time-limited use and benefit until such time as the airport requires it for aviation purposes consistent with the Airport Plan (assuming the plan does not change).</p> <p>None of the commentary, and none of the comparator properties that are used as evidence to underpin the valuation, are similar in this rather profound characteristic.</p> <p>To this Review, this appears to be a significant feature of the Valuation Report that requires further understanding of its implication and influence on the estimated valuation amount, to assess the appropriateness of using the Valuation Report as a basis for consideration for an acquisition of the Leppington Triangle (or even as the starting point for negotiations).</p> <p>Discussions with officers from the Department involved with the valuation identified that these queries were not considered by the Department at the time.</p>
<p>Consideration of negative aspects of the land, including development restrictions given it was on land zoned for Commonwealth purposes.</p>	<p>The ANAO in its performance audit raised concerns regarding the fact that the valuation did not satisfactorily take into account the certain negative aspects of the land given its location on an airport site. Matters raised included the likelihood of airport noise given proximity to the northern runway, and development controls given the property was on land zoned for Commonwealth purposes.</p> <p>These are reasonable considerations, which are not clearly explained in the valuation. It would have been beneficial for the Department to explore with the valuer the impact of these features of the property (if any) on the final valuation outcome.</p>
<p>Selection of a price per square metre at the upper end of the range of known transactions</p>	<p>The Valuation Report presents six land transactions around the Western Sydney Airport site as influential on the estimated valuation outcome. Five of the six were after the release of the 2016 Airport Plan (in December 2016) and all were for properties considerably smaller than the Leppington Triangle. Of these, only one valued the property at over \$200 per square metre (\$228 per square metre). The valuation outcome for Leppington Triangle was \$220 per square. This appears to be on the generous-side and to rely on a range of projections and assumptions for future activity and land use, and a number of offers for properties (some of which remain unsettled at the time of this report).</p> <p>The Department had an opportunity to request some sensitivity analysis on potential alternative future scenarios for land pricing in and around the airport, to understand the impacts of those scenarios on a potential valuation outcome. It also had the opportunity to enquire about certain ‘market evidence’ that was referenced in the report.</p> <p>Discussions with officers from the Department involved with the valuation identified that these queries were not considered by the Department at the time.</p>
<p>Reference to “compel” a vendor to sell</p>	<p>The Valuation Report notes on page 25: <i>“Therefore noting our specific instructions; in order to compel a Vendor to sell the land at this point in time, it is apparent that rates of \$200 to \$250 per square metre ... would be required in order to facilitate a deal regardless of the scale of the site; though we note all of these sales are being undertaken under favourable purchase settlement terms in the way of either put and call options or delayed settlement terms”.</i></p> <p>The use of the word “compel” is inconsistent with the valuation instructions and the meaning of ‘current market value’, which assumes that the buyer and seller are ‘willing’ to transact.</p>

⁶³ The use of the Leppington Triangle land as part of the Western Sydney Airport is subject to Government decision as part of the Airport Regulations, which had not at the time of the valuation taken place.

Issue	Explanation and Comment
	Given it would be inappropriate for the Commonwealth to compel an acquisition, other than in accordance with the LAA (which this Valuation Report explicitly notes it is not for that purpose), it would have been appropriate for the Department to understand the implications of the use of that term, and any influence it may have on the estimated valuation outcome.

Having not spoken with the valuer, it is emphasised that none of these points are presented as criticisms of the Valuation Report or the valuer. Rather, they represent observations or issues which the Department could or should have considered that may have an impact on how it used the Valuation Report in the context of the consequent acquisition.

Finding: There were a range of questions about the Valuation Report that the Department did not explore (but should have) prior to relying on it as a primary basis for the consideration for an acquisition of the Leppington Triangle by agreement. Exploring these questions may have resulted in a different final agreed consideration for the acquisition or a different assessment of whether and/or how the valuation outcome reflected value for money.

4.6 Did the Department Overly Rely on the Joint Valuation?

The decision to rely on the single joint Valuation Report as the sole objective and expert evidence to support the price to be paid for the Leppington Triangle (especially considering the unanswered questions that the Valuation Report posed, as noted above) was a significant one.

As noted in the previous chapter, the acquisition of a piece of land (even one that is not by compulsory acquisition) is by its very nature an adversarial process. As a result, it is usual practice that the parties to an acquisition will assemble information and a body of evidence that supports their objectives from the acquisition, and then use that information in a (structured) negotiation. That information and body of evidence generally includes independently obtained valuation information.

A joint valuation on its own does not achieve that outcome, and in many respects leaves the parties to the negotiation in no better place to achieve their objectives than without the joint valuation, beyond having a starting point for the negotiation.

It is notable that the following was agreed as ‘parameters’ between the Department and LPC for the joint valuation:

The valuation represents an opportunity for both parties to separately consider respective positions on a proposed land transaction and is not:

- *Intended to be binding on either party*
- *Intended to affect respective rights to obtain additional valuation advice*
- *Compel either party to take further action.*

Given these parameters and notwithstanding the joint instructions, the valuer was clearly not engaged as a determining expert, nor as an independent advocate for either party. This indicates that there was an opportunity for the Commonwealth to obtain additional valuation advice to support its position in a negotiation intended to achieve the best value for money outcome. At the time of the joint valuation, the Commonwealth was not bound to using the determination of the joint valuation as the basis for the consideration for the acquisition.

It is not clear whether the team had any specific expectation of obtaining its own advice in addition to the joint valuation. Officers in the team advised that they could not recall decisions being taken

at the time of commissioning the joint valuation, and the outcome of the joint valuation would likely have been influential on the next steps that the Commonwealth would take.

Finding: The reliance on the joint valuation as the primary basis for the consideration for the acquisition was a significant tactical decision which was not formally approved by the approver of the LPC Strategy and not consistent with best practice.

Finding: The reliance on a non-binding joint valuation (based on a restricted assessment and the application of special assumptions) as a primary driver of the consideration for acquisition of the Leppington Triangle materially diminished the Commonwealth’s negotiating position to support achievement of a value for money from the acquisition.

4.7 Comparison of Valuation to the Department’s Financial Statements Valuations

As noted in Chapter 1 (Context), the Department conducted a revaluation of the Leppington Triangle as part of the 2018-19 financial statements preparation process. This included obtaining two valuations undertaken by different valuers, which arrived at valuations of around \$3 million and around \$4 million, excluding GST.

4.7.1 Why were the Financial Statements Valuations materially different to the price paid for the Leppington Triangle?

There are several key differences between the valuation obtained from MJD compared to the valuations obtained for the 2018-19 financial statements. These are enumerated below.

Figure 14: Explanation of the differences between the valuations of Leppington Triangle.

Issue	Explanation and Comment
Purpose of the report	<p>The valuations were noted to be for different purposes. The MJD valuation was noted to be for the purpose of “assess[ing] current market value for proposed acquisition”. The financial statements valuations were both noted as being for financial reporting purposes.</p> <p>While in principle these should not result in different valuation outcomes, it is possible that the differing purposes prompted different assumptions and judgements being made in the conduct of the valuation activities.</p>
Definition of “highest and best use”	<p>The MJD valuation concludes that the highest and best use is based on “speculative industrial re-zoning potential”. As noted earlier in this Chapter, the Valuation Report is unclear on whether this was an instruction to the valuer or a judgement made by the valuer.</p> <p>On the other hand, the financial statements valuations both determine that a highest and best use of the property, as rural use “given the existing lease agreement and the surrounding Agricultural and Agribusiness precinct”.</p> <p>These two different bases for valuation judgements are key to the creation of a significant difference in the valuation outcomes.</p> <p>Having not consulted with any of the valuers, it is impossible to assess the rationales for the different judgements. This Review can appreciate an argument for both judgements, noting that one (the financial statements valuations) is much more conservative than the other, and is taken after the commencement of the lease agreement from the</p>

Issue	Explanation and Comment
	Commonwealth to LPC which restricts the use of the property to agricultural and ancillary purposes.
Valuation Approach	<p>The MJD valuation relied on comparative property sales information as the primary evidence base to determine a valuation range and a valuation outcome.</p> <p>One of the financial statements valuation reports alternatively chose to apply a “discounted analysis of the assessed land value” as its basis, drawing on the gazetted purpose of the land as an airport raising questions on the terminal value of the property.</p> <p>It is likely that these two approaches would also have been significant in driving different valuation outcomes.</p>

These differences highlight the influence of valuer judgement on the outcomes of a valuation, as well as the influence of instructions provided to the valuer. It also reinforces the need for the Department to have undertaken deeper consideration of the joint Valuation Report and to have obtained additional advice and evidence to support determination of a suitable price to pay for the Leppington Triangle.

Finding: The financial reporting valuations of the Leppington Triangle commissioned by the Department were based on materially different instructions and were for different purposes which contributed to the different valuation outcomes. The MJD valuation applied certain instructed assumptions which likely contributed to the materially different valuation outcome.

4.7.2 Precedence for Difference Between Price Paid and Financial Statements Valuation of Acquired Land

There is precedence for land in connection with the Western Sydney Airport being acquired at a premium to its recorded value in financial statements.

The following is extracted from Commonwealth Hansard from September 1996:

- (7)(a) Since the Badgerys Creek airport site was selected in 1986, a total of \$131.9 million has been spent on property acquisition. This includes \$124.7 million for the airport site and \$7.2 million for potential aircraft noise-affected properties nearby.*
- (8) Commonwealth property at Badgerys Creek was valued in 1995 at \$32.7 million. This valuation includes \$30 million for the airport site as a consolidated title zoned for continued airport use, and \$2.7 million for the noise-affected properties taking account of expected aircraft noise.⁶⁴*

4.8 Separate Valuation for Lease Purposes

Part of the LPC Strategy, was for the Department to offer to leaseback the Leppington Triangle land to LPC following purchase. This was discussed and agreed with LPC.

In order to determine a suitable rental payment for the lease, the Department commissioned MJD (by then ownership of the valuation firm had changed, and the trading name changed to CivicMJD) to conduct a valuation for “an annual current market rent on a permitted use for agricultural purposes and purposes ancillary thereto”, for the benefit of both the Commonwealth and LPC. This valuation was requested on 26 April 2018, and the report was issued on 5 June 2018.

⁶⁴ <https://parlinfo.aph.gov.au/parlinfo/search/display.w3p;db=CHAMBER;id-chamber%2Fhansardr%2F1996-09-17%2F0070;query-Id%3A%22chamber%2Fhansardr%2F1996-07-17%2F0058%22>

While it was not made clear to the valuer, the parties' intention was to use the valuation as the basis for a lease agreement for potentially as long as 20 years (being 10 years plus two 5-year options after a market rent review).

4.8.1 Why were the Valuation Assumptions used for the Market Rent Valuation different from those used for the Acquisition Valuation?

The most notable feature of this valuation instruction was a specific instruction for the leaseback valuation to be for a permitted use of "agricultural purposes and purposes ancillary thereto", while the previous valuation to support the sale was on a "highest and best use basis, including industrial purposes".

The specification of agricultural and ancillary purposes for the leaseback, which would result in a lower value than the valuation for the sale, clearly disadvantages the Commonwealth by limiting the potential lease returns for a piece of land that had been subject to "speculative industrial rezoning potential" for the sale valuation.

Departmental officers, when questioned about this dichotomy and the disadvantage it presented to the Commonwealth, were unable to explain why the approach was taken.

Despite that, the Review can see a rationale for using an agricultural purpose for the lease value determination, as the Department was aware that it would be used for an agricultural purpose for the lease term. Further, it would have been highly undesirable in the context of the future use on the airport site, for the lease to permit development of the Leppington Triangle parcel of land.

Finding: The valuation for lease purposes, which valued the property on the basis of use for agricultural purposes, was understandable given this was the known and limited purpose of the leaseback to LPC.

5 The Acquisition of Leppington Triangle

The purpose of this Chapter is to explore the process undertaken by the Department, including in discussions with its advisers and LPC, to reach an agreement and give effect to the acquisition of Leppington Triangle on 31 July 2018.

The Chapter considers the following questions:

- whether the acquisition was carried out in a manner consistent with the Department's LPC Strategy;
- whether the Department considered the best acquisition method to give effect to the transaction;
- whether the acquisition was progressed with appropriate consideration of Commonwealth outcomes and strategy;
- whether the Department complied with the LAA;
- whether appropriate risk management was applied; and
- whether the Department can be confident it obtained value for money in the acquisition.

The Chapter does not seek to assess whether a different compensation amount or different contractual terms would have, or should have, been reached. The assessments made in this Chapter are not intended to be legal advice.

5.1 Context – What Occurred to Finalise the Acquisition?

A representative of the Department met with LPC on 20 September 2017 following release of the draft valuation report. A file note of the meeting noted the following.

- The parties had no issues with the valuation methodology;
- LPC were "not happy with the outcome" and 'suggest[ed] [the Triangle] could be worth more';
- The Department clarified that \$30 million was not being offered as LPC was not a willing seller; and
- The Department conveyed that this figure was "the upper end of the Commonwealth's intention... but it could be turned into an offer if LPC was a willing seller".

Later the same day, the Department provided an update to the Department of Finance highlighting the following.

- The parties agreed to a joint valuation of the Triangle, resulting in a valuation viewed by the Department as "reasonable, albeit reflecting the sharp increase in property prices in the area". The valuation report was provided as part of the update.
- The Department proposed to use the valuation as the basis for commencing discussions with LPC, in particular to ascertain whether LPC is genuinely willing to sell in the short term.
- In response to the Department of Finance advice to develop a transaction-specific acquisition strategy, the Department committed to considering the implementation issues (in relation to negotiating an agreement with LPC) once initial discussions with LPC had been undertaken. As noted in Chapter 2, this transaction-specific acquisition strategy was not developed.

A few weeks later on 8 November 2017, the Department emailed LPC with reference to a discussion on 12 October at which LPC reportedly advised that they "may be interested in discussing further a potential sale", and proposed setting up a meeting. It is unclear from documentation what made LPC reconsider the acquisition. Officers involved in these discussions have advised that LPC had determined that it was supportive of the airport and wanted to cooperate with the Government.

5.1.1 Commercial Terms

On 16 November 2017, the Department met with LPC to discuss the potential acquisition of Leppington Triangle, with AGS in attendance. On 22 November 2017, the Department emailed LPC to confirm the details of the main commercial principles that had been discussed. In summary, the draft commercial terms included the following.

1. Lump sum all-inclusive compensation payment for all claims under the LAA to be \$30 million⁶⁵, less the amount of compensation payable by RMS for its acquisition of the TNR4 portion.
2. Acquisition to be with Leppington's agreement but via compulsory process under the LAA.
3. Acquisition to occur and the compensation payment to be made on or before 31 July 2018.
4. The Triangle would be leased back to LPC, and this agreement would be entered into between LPC and the Commonwealth or WSA Co.
5. HIAL restrictions would be removed and new restrictions put in place.

The draft commercial terms also included arrangements regarding the 'axe handle' parcel lease. Along with the commercial terms, the Department noted that "policy and legislative approvals rest with the Department of Finance and of course no legally binding rights or obligations can arise until all required Commonwealth approvals required to progress the terms of any acquisition have been obtained and the necessary formal documents are signed".

LPC responded to these draft commercial terms on 24 November 2017, adding two amendments.

- Regarding the 31 July 2018 completion date, LPC added that "in the event that completion is not achieved by 31 July 2018 (through no fault of the Vendor) then interest will be payable at the rate of 8% per annum".
- Regarding the 'axe handle' parcel lease, LPC specified that it shall be entered into "prior to 18 February 2018".

Officers involved in these discussions advised that they were not aware of the rationale for the selection of the proposed completion date, or the establishment of the penalty interest rate. Stakeholders recollected that the completion date of 31 July 2018 was likely suggested by LPC, and agreed by the Department as it seemed to be a reasonable timeframe. It is possible that the date was selected as it was 12 months after the date of the MJD valuation, after which time the valuation may not be viewed as a reliable indication of the value of the land.

Following receipt of these amendments, the Department asked AGS to consider the feasibility of a compensation 'adjustment mechanism' of the like proposed by LPC of 8% per annum. The Department noted concerns with the unpredictability of Ministerial decisions required under the LAA that are outside of the Department's control that impact certainty over the completion date.

Additionally, the Department responded to LPC noting LPC's desire to include a compensation adjustment mechanism to incentivise momentum and progress towards a deadline on the part of the Commonwealth. However, the Department made clear that until there is policy approval for the purchase, the Department would not be able to commit to such a term. The Department committed to giving the adjustment mechanism some thought. Officers involved in the acquisition have advised that the penalty interest clause was never agreed, and the Review has seen no documentation confirming any such agreement.

⁶⁵ The email and attachment containing the draft commercial terms does not specify whether this amount is inclusive or exclusive of GST. However, subsequent correspondence and documentation makes clear that this is exclusive of GST. This is consistent with the MJD Valuation Report which advises that the assessed market value is \$30,000,000, exclusive of GST.

5.1.2 Reconsideration of Acquisition Method

On 27 November 2017, AGS provided email advice on the adjustment mechanism for the compensation package. AGS advised that ‘it is probably worth reconsidering whether a compulsory acquisition process is locked in, or whether given LPC’s willingness to move quickly and an in-principle agreed figure, an acquisition by agreement could be reconsidered now.’ Some of AGS comments include detail on the following.

- Three key ways in which the Department could acquire land under the LAA at this point in time:
 - i. a compulsory process, with issuance of a PAD,
 - ii. an acquisition by agreement, with issuance of a PAD, and
 - iii. an acquisition by agreement, with certification from the Finance Minister under s 40(6) of the LAA that the transaction ‘would amount to a normal commercial transaction between parties dealing with each other on equal terms’.
- That an acquisition by agreement, in addition to possible time savings, may have other benefits such as the LPC tenants not needing to be moved, and potentially eliminating the need to deal with Endeavour Energy in relation to its easement on the Triangle.
- That an acquisition by agreement may come with some downsides, such as possibly having to deal with GST which might not be ideal for LPC, not extinguishing other interests in the land, and not acquiring mineral rights in the land.

AGS also set out some alternative approaches to dealing with an adjustment mechanism for compensation that would provide the financial delegate with certainty of a capped price.

The Department emailed LPC on 30 November 2017 to gauge their interest on the acquisition by agreement method. The Department conveyed to LPC that an acquisition by agreement would have the following benefits:

- would be less complex;
- would allow the parties to reach a binding agreement on the acquisition earlier, giving parties certainty at an earlier point; and
- would allow parties to be more confident of completing acquisition by 31 July 2018.

The email noted LPC may need to consider GST and Capital Gains Tax implications.

LPC replied on 7 December 2017, stating that they generally agreed to the Department’s suggestions.

On the same afternoon, the Department met with the Department of Finance to discuss the Leppington Triangle acquisition. Based on emails prior to the meeting, the discussion covered the following:

- The in-principle discussions and agreement between LPC and the Department.
- That LPC is interested in obtaining certainty around the timing of acquisition completion, and that “certainty of timing is becoming a crucial issue”.
- Finance’s views on whether a compulsory acquisition process could be achieved by 31 July 2018.
- Finance’s views on whether a certificate for acquisition by agreement under s 40(6) of the LAA could be granted certifying that the acquisition would be a standard commercial transaction.

Following this meeting, the Department suggested to Finance that advice be sought from AGS to clarify issues that need to be considered in obtaining a certificate under s 40(6). Accordingly, the Department and the Department of Finance jointly commissioned AGS to prepare advice regarding the possible use of a certificate under s 40(6) of the LAA for the acquisition.

On 10 January 2018, AGS provided advice that on the specified circumstances, it would be open to the Minister for Finance to certify the proposed acquisition as a normal commercial transaction between parties dealing with each other on equal terms under s 40(6) of the LAA. However, this method was never pursued as the Department of Finance did not support use of the s 40(6) method. However, the method of an acquisition by agreement through issuance of a PAD was still being considered by the Department.

It appears that the Department settled on the method of an acquisition by agreement in early 2018 (although decisions in advance of that suggested that the Department was progressing towards that outcome, without removing the possibility of a compulsory acquisition). On 12 January 2018, AGS provided a draft Project Plan for the acquisition of the Leppington Triangle, which provided detail on the steps required for an acquisition by agreement. The draft Project Plan was refined and incorporated comments from the Department of Finance and was finalised on 13 February 2018.

5.1.3 Process to give Effect to the Acquisition

On 25 January 2018, a Department of Finance delegate of the Minister for Finance issued a PAD under s 22 of the LAA. In February 2018, the PAD was notified to relevant interest holders, and distributed for public notice in relevant newspapers.

On 28 February 2018, a Department of Finance delegate of the Minister for Finance provided authorisation for an acquisition by agreement under s 40(1) of the LAA.

On 6 March 2018, the Department prepared a brief for the consideration of:

- The relevant Acting Deputy Secretary – to approve the expenditure of up to \$31,780,000 (excl GST)⁶⁶ of allocated capital funding in the 2018/19 financial year; and
- The CFO – to approve the acquisition of the parcel of land through a limited tender⁶⁷ process.

Consultation with the relevant Acting Deputy Secretary as part of the Review, noted that a verbal briefing supported the written brief, and provided an opportunity for the Deputy Secretary to ask questions. In consultations, the CFO noted there was no verbal briefing or conversations accompanying the written brief, but that this was not unusual.

Approvals were provided on the 14 and 15 March 2018 from the Deputy Secretary and CFO, respectively, with no substantial comment.

On 1 June 2018, a draft acquisition document suite prepared by AGS was emailed by the Department to LPC. The email included a contract based on the New South Wales Law Society standard terms for sale and purchase of land, with a small number of special conditions tailored for the acquisition, including the contemporaneous exchange and completion approach. The contract also accounted for an adjustment mechanism in respect of the RMS acquisition of the 1.36 hectare portion of the Triangle. The Department and LPC had agreed that the aggregate of the purchase price of the land acquired by the Department and RMS should equal \$30 million exclusive of GST. Given that RMS' price had not been settled, the Department proposed a pro-rata land value, resulting in:

- \$27,004,405.29 as the price for the land, subject to clause 45 of the contract terms (discussed in the next point). The formula used to come to this number was: total \$30 million / 13.62 hectares x 12.26 hectares.

⁶⁶ This was the amount of administered funding agreed as part of the Government's decision for funding of Commonwealth Preparatory Activities.

⁶⁷ Under the Commonwealth Procurement Rules, Commonwealth procurements (the process of acquiring goods and services by the Commonwealth) must be conducted by open or limited tender. Procurements of land are explicitly excluded from Division 2 of the CPRs.

- Special conditions (in cl 45.1.1)⁶⁸ outlining the method for adjusting the price should the RMS compensation be less than or more than the remaining \$2,995,594.71 (excl GST).

On 23 June 2018, LPC emailed the Department attaching a letter from RMS ascribing value to the land of \$130,876 per ha. On 27 June 2018, LPC emailed the Department clarifying that using the RMS per ha rate, a value of \$178,384 (incl GST) should be ascribed to the 1.363 ha RMS portion of the Triangle.

The Department responded on 29 June 2018, with an amended contract suite, presuming a GST exclusive figure of \$162,168 (as opposed to \$178,384 GST inclusive) for the RMS compensation. Therefore, the proposed compensation under the contract for sale was amended to \$29,837,832 (being \$30,000,000 minus \$162,168).

On 25 July 2018, AGS provided a contractual documentation suite – with an attachment summarising the key terms of the agreement, and providing legal sign-off for the acquisition.

Following this, on the same day, WSU provided a brief to the COO, attaching the documents for execution of the acquisition and the AGS legal sign-off.

The documents were exchanged and executed on 31 July 2018, and the acquisition took effect with the Commonwealth making the payment of \$29,837,832, excluding GST.

5.1.4 RMS Compensation Adjustment

In March 2019, LPC emailed the Department attaching the Notice of Determination for the acquisition of land for the RMS portion of Leppington Triangle. The Notice provided a compensation amount based on market value of \$1,716,000 (incl GST) for two parcels in addition to the RMS portion of the Leppington Triangle, comprising a total 132,088m² (or 13.2088 ha). Based on the contract for the acquisition, the compensation payable by RMS was to be apportioned on an area basis for the purposes of the adjustment mechanism. Accordingly, the Department and its legal advisers concluded:

- that RMS had paid \$160,974.50 (excluding GST) for their portion of the Leppington Triangle, based on the formula: $(1.363/13.2088) \times \$1,716,000$ (incl GST) = \$177,071.95 incl GST = \$160,974.50 excl GST.
- the Department owed LPC \$1193.50 (excluding GST), based on the formula:
 - \$162,168 (assumed RMS compensation amount) – \$160,974.50 (actual compensation amount).

This supplementary payment brought the total amount paid by the Commonwealth to \$29,839,025.50 (excluding GST), for the Commonwealth acquisition of the Leppington Triangle.

The effect of the RMS compensation adjustment was for the Department to underwrite the value of the 1.363 hectare RMS acquisition for LPC. As it transpired, this came at a cost of \$2.83m to the Commonwealth. Officers involved in the transaction advised that it had been considered that the Department could recover this amount from RMS. However, as the funding that would have been recovered from RMS would have come from WSIP funding (which was 80% funded by the Commonwealth), it was determined that the recovery of this would have limited impact beyond largely recouping previously dispensed funding for use in Western Sydney and was not consistent with the intent of that funding. Further, it was considered that seeking to recoup this funding from RMS would impact the working relationship between the agencies. None of these considerations were documented.

⁶⁸ This term in effect meant that the Commonwealth would subsidise the RMS acquisition of its portion of the Leppington Triangle, where it was less than the estimated RMS compensation. Discussions with officers involved in the acquisition have acknowledged this, but noted that it was not considered in the value for money considerations for the acquisition.

While this review can see the logic in this decision, it is not a transparent or accountable way to manage Commonwealth funds. Further, it should have been formalised as a specific and separate commitment of Commonwealth funds.

Finding: In underwriting the RMS acquisition of 1.363 ha of the Leppington Triangle to the value of \$2.83m, the Department committed Commonwealth funds of over \$500,000 without demonstrable transparency and accountability.

5.2 Was the Acquisition Consistent with the Approved Strategy?

As outlined in Chapter 2, the Department developed the LPC Strategy to guide the acquisition and disposal of land relevant to LPC. Throughout the transaction, no amendments were made to the LPC Strategy and no other strategy documentation was developed.

In assessing whether the acquisition was consistent with the Department’s approved LPC Strategy, the Review considered the core outcomes and ancillary objectives expressed in that document. The table below summarises the outcomes and objectives relevant to the Leppington Triangle acquisition and provides commentary on whether the acquisition was consistent with those components.

Figure 15: Summary of analysis of acquisition’s consistency with approved LPC Strategy.

Ref	Key outcomes and objectives	Consistency	Comments
1	The Department would acquire the Leppington Triangle (less any portion acquired by RMS) and all other interests on it (for example, any existing easements).	Partially consistent	The Department acquired the Leppington Triangle, however, it did not acquire and extinguish all interests on it, as this only occurs by operation of the LAA for a compulsory acquisition.
2	The Department would acquire ideally by 2019.	Consistent	The Department acquired the Leppington Triangle prior to 2019. While the acquisition was largely agreed and the process was underway to finalise the transaction prior to the Airport Lease to WSA Co, the acquisition officially took effect about two months after the Airport Lease.
3	The acquisition would occur with LPC’s agreement on the transaction and the compensation amount, but by way of compulsory acquisition.	Not consistent	The acquisition occurred as an acquisition by agreement, and not by way of compulsory acquisition.
4	Compensation would be agreed upfront, at market value for the land value and all costs required under the LAA, such as business disruption costs and legal expenses.	Partially consistent	Compensation was agreed upfront based on a market rate which reflected a speculative investment premium. However, it was without consideration of other costs that may be required under the LAA (which reflected a more commercial-negotiated valuation approach). As discussed in section 4.4.1 of this Report, the LAA heads of compensation can be used as the basis for an agreed price, as was the intention noted in the LPC Strategy.

Ref	Key outcomes and objectives	Consistency	Comments
5	RMS would acquire the part of the Leppington Triangle required for the TNR4 realignment	Consistent	RMS acquired the portion of the Leppington Triangle required for the TNR4 realignment.
6	A specified package of various land interests would be presented to LPC to encourage their willingness to sell and / or strengthen the Department’s negotiating position.	Consistent	A package of various land interests was offered to LPC and transacted. The land interests offered and transacted were consistent with the package identified in the LPC Strategy. All primary land interests and one (of two) secondary land interests noted in the LPC Strategy (summarised at 2.2.1.3) was transacted.

As outlined above, key points of divergence from the LPC Strategy included:

- (i) Changing the method from an ‘acquisition by agreement but by way of compulsory acquisition’, to an acquisition by agreement (point 3 in the table). This in turn meant all interests on the Triangle were not acquired (point 1 in the table).
- (ii) Basing the compensation amount on a market rate which reflected a speculative investment premium for the Triangle, rather than with regard to the heads of compensation under the LAA (point 4 in the table). This is discussed in further detail in Chapter 4. At the point the MJD valuation was used as the basis for the compensation for the acquisition, it officially became a deviation from the approved LPC Strategy.

The change in acquisition method is explored below, and the use of the valuation to inform the acquisition price is explored in sub-Chapters 4.6 and 5.8.

5.2.1 Change to an Acquisition by Agreement

Consultations with Departmental officers and legal advisers involved in the transaction noted that although the acquisition method changed to a non-compulsory approach, it was not viewed as significant as it had little material effect on the process and was expected to have little material effect on the outcomes of the acquisition.

It is noted that the Department could not initiate a compulsory agreement with LPC without the Department of Finance’s approval (as the delegation for a compulsory acquisition is with the Minister for Finance). As noted elsewhere in this Report, Finance had provided only conditional approval for the compulsory acquisition of the Leppington Triangle, if agreement with LPC could not be achieved.

The Review compared the process and outcomes of both methods. The table below sets out this comparison between the acquisition ‘by agreement but by way of compulsory process’ method that was originally envisioned, and the acquisition by agreement through issuance of a PAD that was undertaken.

Figure 16: Summary comparison between acquisition ‘by agreement but by way of compulsory process’ and acquisition by agreement.

Component	Comparison across methods
Issuance of a PAD by the Minister for Finance or a delegate	Consistent between both methods. The LAA section under which the PAD is required is different for the two methods. The required content, format and distribution of the PAD is consistent and is as set out in s 22 of the LAA.
Requirement for an authorisation of the	Mostly consistent between both methods. Under the acquisition by agreement method, the LAA requires the Minister to authorise the

Component	Comparison across methods
agreement from the Minister for Finance or delegate	<p>acquisition under s 40(1). Under the compulsory process envisioned by the Department, the Minister would reach agreement with LPC on the amount of compensation under s 78 of the LAA. This process would have required the Department to receive confirmation and approval of the compensation amount for the acquisition from the Minister for Finance or Department of Finance delegate. Therefore, in essence, both methods required authorisation or endorsement from the Minister for Finance or delegate. The compulsory acquisition method required an additional step for the Finance Minister to make a declaration of the acquisition and publish this declaration in the Gazette under s 41(2) of the LAA.</p> <p>The Review notes that the need for the Minister for Finance to approve the compensation amount under a compulsory acquisition, with agreement on compensation, would have provided an additional control and risk mitigation in connection with the acquisition.</p>
Agreement of contractual terms and compensation between the Department and LPC	<p>Consistent between both methods. Even under a compulsory acquisition method, the Department always envisioned that LPC would be a willing seller and would agree the compensation amount. This is consistent with the acquisition by agreement method.</p>
Interests gained at acquisition	<p>Not consistent between both methods. The compulsory acquisition method, by operation of s 41(4)(b) of the LAA, frees and discharges all other interests on the land. On the other hand, for an acquisition by agreement, only the interest that the agreement covers, vests in the Commonwealth.</p>
Timing	<p>Somewhat consistent between the two methods. As noted in the first three rows of this table, there were similarities in the type of processes to follow between the two methods of acquisition. Therefore, the length of time taken to complete the acquisition may not have been materially different between the methods. However, as the timing for the Minister⁶⁹ to sign-off on a compulsory acquisition could not be contractually fixed, an acquisition by agreement was able to provide further certainty around the acquisition effect date. This is discussed in further detail in sub-chapter 5.3.</p>

In this way, the key material difference between the two methods was that the acquisition by agreement method which the Department used, did not extinguish all other rights on the land. This was relevant because the Department was aware that there were leases and easements on the Leppington Triangle, and those interests would persist beyond the acquisition.

The Review additionally notes that the extinguishing of all other interests on the land was noted throughout the LPC Strategy to be an outcome from the acquisition.⁷⁰ Consultations with officers involved in the transaction noted that the continued existence of these other interests was not considered problematic. Specifically, the Department and AGS had made provision for LPC to be responsible for removing the tenants under the lease arrangements, and the easement held by an energy company was not considered as a significant concern given the nature of the electricity assets on the site.

Other than this point on not extinguishing all other interests on the land, the divergence in acquisition method had little impact on the process the Department would have followed and the outcomes that would have been achieved. The continuance of the other interests in the land was

⁶⁹ This power, to give effect to a compulsory acquisition through issuance of a declaration and publication of that declaration in the Gazette under s 41(2) and 41(3) of the LAA were not delegated powers, giving rise to the idea that the completion date could not be fixed under this method.

⁷⁰ Noted in the LPC Strategy twice on page 3 and once on page 5.

not considered to materially impact the Department's acquisition and future use of the Leppington Triangle. Regardless, the change in method invoked different sections of the LAA and impacted the nature of the Commonwealth's interests that were ultimately acquired, especially in comparison to what was conveyed to decision-makers in the LPC Strategy.

The WSU Executive Director was not asked to consider or decide on the change in method. Further, the change to an acquisition by agreement was not clearly or overtly communicated or explained in briefs to decision-makers (discussed further in Chapter 6). Although officers may have determined that the change in direction was not sufficiently material to require notification or consultation with WSU Executive Director, it remains the position of this Review that any change in direction, particularly one that uses different legislative authority or process, should be analysed and approved by the Senior Responsible Officer.

Finding: The acquisition method that was used by the Department diverged from the method outlined in the approved LPC Strategy, but was consistent with advice from Finance. The change in acquisition method did not substantially change the outcomes achieved by the Department – the land was acquired, with LPC's agreement to the acquisition and the price paid, and within the timeframe intended in the LPC Strategy. However, the non-compulsory acquisition method was not approved by the relevant Executive Director or noted in briefs to decision-makers.

Finding: By not using the compulsory method of acquisition, the transaction lost the risk mitigation of separate assurance by the Department of Finance to support the exercise of the Minister for Finance's decision-making power.

5.2.2 Did the Department consider 'Walking Away' from the Acquisition

As noted in Chapter 2 in connection with the LPC Strategy, although it was not enunciated in the LPC Strategy, the Department was initially mindful that it had the option to 'walk away' from the acquisition process should it become apparent that a satisfactory outcome could not be achieved.

Discussions with relevant officers confirmed that this ability to 'walk away' was not actively considered once discussions had commenced on progressing the acquisition on the basis of the estimated value indicated in the joint valuation.

Officers involved in the acquisition noted that at times through the process, it appeared that LPC had 'walked away' from the acquisition. Officers advised that they did not actively seek to bring LPC back to the negotiating table, and that LPC made its own decisions for its own reasons regarding suspending and re-activating discussions with the Department in connection with the acquisition.

5.3 Did the Department Appropriately Consider the Best Methodology to Acquire?

In late 2017, following progress in negotiations with LPC, the Department, with advice from AGS, considered three methods of acquisition available under the LAA. These three methods, noted below, were put to the Department by AGS for consideration on 27 November 2017.

- 1) Compulsory acquisition with issuance of a PAD under s 41(1)(a) of the LAA and compensation to be determined under Part VII of the LAA, including possibly as agreed between the Commonwealth and land interest holders.
- 2) An acquisition by agreement with the issuance of a PAD under s 40(2)(a) of the LAA, and the compensation as set out in an agreement between the Commonwealth and LPC.

- 3) An acquisition by agreement in circumstances where the Minister for Finance certifies under s 40(6) of the LAA that the transaction is a normal commercial transaction between parties dealing with each other on equal terms.

The third option appeared to be appealing to the Department as a PAD would not need to be issued, resulting in substantial time savings. AGS drafted advice to the Department and the Department of Finance concluding that, based on the circumstances, it would be open to the Minister to certify that the proposed acquisition is a normal commercial transaction between parties dealing with each other on equal terms. However, Departmental and AGS officers consulted as part of the Review indicated that the Department of Finance advised that it did not support use of the s 40(6) acquisition by agreement. As issuance of a certificate under s 40(6) requires the exercise of a delegation by the Minister for Finance, the lack of support for the option from Finance removed the approach from consideration by the Department.

Therefore, acquisition methods one and two, noted above, were open to the Department to consider. More specifically, the compulsory acquisition method (method one) being contemplated by the Department was to be with LPC’s agreement on the acquisition and compensation amount, as per the LPC Strategy. This in essence meant the Department was deciding between the method envisioned in the LPC Strategy, or a change to an acquisition by agreement. The table below summarises the key advantages and disadvantages of the two acquisition methods, which were communicated to the Department by AGS by email on 27 November 2017.

Figure 17: Summary of advantages and disadvantages of acquisition methods being contemplated.

Method	Advantages	Disadvantages
Compulsory acquisition, with agreement⁷¹	On completion of necessary PAD and declaration processes, the land vests in the Commonwealth and is freed and discharged from all other interests by force of the LAA.	Potential for more dealings, including additional compensation, required with other affected land interest holders, including the LPC tenants and Endeavour Energy which hold an easement. Lower ability to provide certainty of acquisition timing.
Acquisition by agreement	Improved certainty around the date of acquisition. Less potential dealings necessary with other affected land interest holders prior to the acquisition (such as with LPC tenants and Endeavour Energy), including absence of required compensation. More options available to agree on an adjustment mechanism for the compensation amount beyond 31 July 2018.	On completion of necessary PAD and declaration processes, other interests in the land are not extinguished. Possibly having to deal with GST and capital gains tax, which LPC may take issue with. Mineral rights in the land would not be acquired (Department of Finance had expressed this as a preference rather than an absolute requirement).

The Review notes that in addition to the considerations listed above, the Department of Finance guidance advises that an acquisition by agreement should be applied wherever possible and that compulsory acquisition occurs as a last resort.⁷²

⁷¹ As noted in Chapter 2, ‘compulsory acquisition, with agreement’ refers to the method outlined in the LPC Strategy, where agreement to acquire would be confirmed by LPC and compensation would be agreed upfront, before the land is acquired by compulsory administrative processes under the LAA.

⁷² Finance advice before and during the acquisition was that its preference was for acquisition by agreement if that could be achieved on a value for money basis, and then if not, the Department should then seek approval from Finance to proceed with a compulsory acquisition.

The Review also notes that the amount paid for the Leppington Triangle would likely not have been different between the two acquisition methods being contemplated by the Department at the time. Specifically, the compensation, or price paid, would have been agreed with LPC under either circumstance (although under the compulsory approach, LPC may have sought to claim other compensation elements available to them under Part VII of the LAA).

5.3.1 The Benefit of Providing Certainty over Timing

The issue of timing of the acquisition was a primary driver for the Department considering alternative methods of acquisition. Although it is not clear from the documentation, relevant officers advised that LPC requested 31 July 2018 as the acquisition completion date, and that this did not seem unreasonable to the Department.

It is not clear from the documentation why the 31 July 2018 completion date was of high importance to LPC (or to the Department). Adhering to LPC's suggested completion date may have been viewed as important for the Department to maintain momentum towards finalisation of the various components of the LPC Strategy (including in relation to the Leppington Triangle and TNR4). Further discussion about the Department's consideration of the completion date and whether this could have been negotiated is at sub-Chapter 5.4.1.

The potential time savings associated with an acquisition by agreement was particularly noted as advantageous, including in representations to LPC. This benefit was particularly relevant to the s 40(6) method of acquisition by agreement, where a PAD is not required.

As discussed in the preceding sub-chapter 5.2.1, there were minimal differences in the types of processes to follow between the Department's original vision for the compulsory acquisition with agreement, and an acquisition by agreement through issuance of a PAD. However, where one of the process requirements do diverge is that under a compulsory acquisition, once a PAD becomes absolute, the Finance Minister makes a declaration⁷³ identifying the land concerned and the public purpose for which the interest is being acquired.⁷⁴ This declaration must also be published in the Gazette.⁷⁵

The power of the Finance Minister to make the declaration is not able to be delegated,⁷⁶ and the Department, after seeking advice from AGS, felt doubtful in its ability to provide certainty to a specified completion date under these circumstances and requirements. The acquisition by agreement method has no such requirement of the Finance Minister.

Therefore, the acquisition by agreement method had the particular advantage of providing certainty around the acquisition effect date.

5.3.2 Consideration of the Advantages and Disadvantages

There was no evidence that the Department considered and assessed the advantages and disadvantages of the different available acquisition methods in a structured manner. Having been advised of the pros and cons by AGS, the Department did not adequately analyse (beyond an intuitive consideration by officers at the time) or put to decision makers their relative weight and importance to the Department and its achievement of outcomes. Particularly given that the decision to pursue an acquisition by agreement was prompted by LPC's suggested timing (rather than a need of the Commonwealth), and that this approach was inconsistent with the approved strategy, the Department should have applied rigour in making the decision on the preferred method. As noted in

⁷³ LAA, s 41(1).

⁷⁴ LAA, s 41(2).

⁷⁵ LAA, s 41(3).

⁷⁶ LAA, s 139(2).

sub-Chapter 5.2.1, the change of acquisition method was also not approved by the relevant Executive Director or noted and explained in briefs to decision-makers.

This Review does not necessarily believe that such a structured and approved consideration of the process options would have resulted in a different decision, or a different outcome. However, for a significant transaction such as this, and applying appropriate public service principles of accountability and transparency, it is appropriate that such an analysis and structured decision making be applied.

Finding: The Department did not adequately consider and assess the advantages and disadvantages associated with the possible acquisition methods to reach an informed decision on the most appropriate acquisition method. While the acquisition method used was consistent with the Department of Finance guidance, it deviated from the method approved (and thereby, expected) by the Departmental Senior Executive.

5.4 Was there Appropriate Consideration of Outcomes and Strategy?

As noted in Chapter 2, a Leppington Triangle transaction-specific acquisition strategy or negotiation strategy was not developed. This remained the case even after the Department had confirmed that LPC was a willing seller, and despite having committed to develop an acquisition strategy to the Department of Finance.

The Review notes that consultations with AGS and emails on 18 and 19 September 2017 indicate that prior to key meetings with LPC, there were meetings between the Department and AGS to discuss the likely content and approach to the discussions. The results of those discussions with AGS were not documented, and no other formal agenda or talking points for the meetings with LPC were developed throughout the transaction that were available to the Review. The Review notes that while this documentation was not available, holding planning meetings with AGS prior to discussions with LPC reflects expected and appropriate preparation for the discussions.

The Review has not identified any formal documentation that states the negotiation approach that was used to guide the Department's approach in reaching agreement with LPC for the acquisition. While a draft document titled 'LPC Negotiation Approach' was drafted, around August 2017, it was high-level and officers involved in the transaction could not recall its use in approaching discussions and negotiations. The Department did not develop formal positions, on the following:

- what contractual terms and compensation amount would represent a fair price and value for money from the perspective of the Department (also discussed in sub-chapter 5.8).
- what concessions the Department would and would not be willing to make, and potential graduated use of those concessions.
- what key decisions, contractual terms and concessions would require escalation and approval from the Senior Responsible Officer or consultation with the Department of Finance.

Therefore, there was inadequate articulation of the strategic guiding principles or parameters for the acquisition agreement with LPC that was commonly understood and agreed within the Department. Without these guiding principles, the Department took a relatively unstructured approach to negotiations with LPC.

Consultations with Departmental officers involved in the transaction supported this analysis, noting that discussions with LPC to finalise acquisition “took on a life of its own”. The desire to continue the momentum of discussions and capitalise on the opportunity to complete the transaction, may have overtaken the attention to the risks, options and demonstration of value for money that a transaction-specific acquisition or negotiation strategy may have prompted.

Finding: The Department did not develop an acquisition-specific strategy for the Leppington Triangle, despite a commitment to the Department of Finance to do so, and the prudence this would demonstrate.

5.4.1 Discussion and Negotiation of Terms

The Department’s unstructured approach to negotiations with LPC is particularly evident in the contemporaneous documentation and correspondence regarding the treatment of the compensation amount and completion date terms.

5.4.1.1 Compensation amount

With regard to compensation, as further discussed in sub-chapter 5.8, the Department did not consider and reach an informed position on whether the \$30 million valuation amount was just and represented value for money for the Commonwealth. The Department represented to LPC that \$30 million would be a price the Commonwealth was willing to pay, before satisfying itself that it was value for money and without considering whether this price should be negotiated.

5.4.1.2 Acquisition completion timing

With regard to the completion date, recollections of officers consulted as part of the Review noted that the 31 July 2018 completion date was suggested by LPC. In the contemporaneous records, the Department noted that certainty of timing was highly important to LPC. However, documentation available to the Review did not specify why certainty of completion by 31 July 2018 was of such importance to LPC and the bearing this date had, if any, on whether an acquisition would occur. Officers involved in the transaction noted that from the point that the completion date was nominated by LPC, there was over eight months to achieve completion, which was assessed as reasonable. Notwithstanding, the Department seemed to accept the suggestion of 31 July 2018 as the strict completion date, without adequate consideration of whether this could or should be negotiated (or whether it was ‘worth’ something to LPC which could have impacted the price the Department negotiated for the property).

The Department also considered LPC’s proposal of a graduated escalation in price to incentivise compliance with the completion date. The Department never formally agreed⁷⁷ to a price escalation mechanism for the compensation (such as the application of an 8% interest rate) in correspondence to LPC or in the final suite of contractual documents. However, the Department sought AGS advice on price escalation, apparently without considering the Department’s position on whether this would reflect fair value and just terms, and whether it would be value for money for the Commonwealth.

⁷⁷ While the Department never agreed to the application of an 8% interest rate to the compensation amount in correspondence to LPC or in the suite of contractual documents for the acquisition, briefs to key decision-makers reference this interest rate term. The Review is of the view that this treatment of the interest term reflects poor briefing practices and inadequate questions being asked by decision-makers (discussed further in Chapter 7.3), rather than an issue of the Commonwealth having agreed to payment of interest.

5.4.1.3 Engagement with LPC

Contemporaneous emails indicate that there were meetings and discussions between LPC and the Department without appropriate transparency – such as one-on-one discussions and inadequate records of discussions. One departmental officer noted that there were “dozens” of discussions with LPC, however this review has identified documentation of only a small proportion of such meetings in Departmental records. Given the lack of a formalised negotiation approach, acquisition parameters or consistent use of talking points in relation to the Department’s position on key topics being discussed at meetings, the need for transparency was heightened. Commentary on the appropriate engagement with stakeholders is discussed in further detail in Chapter 6 (Probity).

Finding: The Department undertook discussions and negotiations to progress and finalise the transaction in a manner that was not sufficiently strategic or guided by clearly defined parameters and outcomes.

5.5 Was the Acquisition Undertaken Consistently with the Lands Acquisition Act?

The Commonwealth purchased the Leppington Triangle through an acquisition by agreement under the LAA. The relevant legislative provisions and requirements were summarised by the AGS in the Project Plan for the Leppington Triangle and provided to the Department. The table below provides a summary of the relevant LAA requirements for an acquisition by agreement, based on the text of the LAA and the Project Plan summary. The table also provides commentary on the Department’s compliance with the requirements, noting that commentary on Minister for Finance delegations is discussed in the next sub-chapter 5.6.

Figure 18: Analysis of the Department’s compliance with LAA requirements.

LAA Requirement	Compliance notes
The Minister for Finance or a delegate makes a PAD (s 40(2)(a)).	A PAD was signed and issued by a Department of Finance delegate of the Minister for Finance on 25 January 2018.
The Finance Minister or delegate provides a copy of the PAD to each person affected by it, with accompanying documents specified in s 22(7) (sketch of the land and statement of principal rights).	The PAD and accompanying documents were sent to relevant affected persons identified as having an interest through the AGS due diligence searches. The letters were addressed from the Department of Finance delegate for the Minister for Finance on 9 February 2018.
The Finance Minister or delegate shall cause a copy of the PAD to be published in the Gazette, and if practicable, in a newspaper circulating in the district (s 23).	The PAD was published in the Commonwealth Gazette on 12 February 2018, and published in four newspapers circulating in Western (and wider) Sydney on 14 February 2018.
The Secretary of the Department shall cause to be lodged a memorandum setting out particulars of the PAD with the Registrar-General of NSW within 28 days after the PAD is made (s 38(1)).	A memorandum was lodged to the NSW Registrar-General by way of a ‘Request’ document, attaching the PAD. AGS lodged the relevant form with the NSW Land Registry Services, and certified the form as correct on behalf of the Commonwealth.
The PAD becomes absolute: <ul style="list-style-type: none"> at the end of 28 days after the last day on which an application could have been made for reconsideration of the PAD, or 	No applications for reconsideration of the PAD were made. AGS advised that the last date for an application for reconsideration to be made was 16 March 2018, noting that letters issued for the purposes of s 22(7) of the LAA were deemed to have been received on 16

LAA Requirement	Compliance notes
<ul style="list-style-type: none"> where an application for reconsideration of the PAD was made, at the end of 28 days after the day on which the PAD was confirmed or varied. 	February 2018 (4 working days after they were posted, with reference to s 29(1) of the Acts Interpretation Act 1901 and s 160 of the Evidence Act 1995). Therefore, the PAD became absolute 28 days after the reconsideration period.
The Finance Minister may authorise the acquisition of the interest by agreement (s 40(1)).	A Department of Finance delegate of the Finance Minister provided s 40(1) authorisation of an acquisition by agreement on 28 February 2018.
After the PAD becomes absolute, the Department and LPC may enter into an agreement for the acquisition of the interest (s 40(2)).	The Department and LPC entered into an agreement and transacted the acquisition on 31 July 2018.

The Leppington Triangle Project Plan noted the s 40(3) LAA requirement wherein after the acquisition agreement is entered into, the Minister for Finance shall present a statement describing the interest, situation of the land, price and the public purpose of the acquired land before each house of the Parliament. The documentation made available to the Review did not indicate that the Minister for Finance or a delegate presented such a statement to the houses of Parliament. The LAA notes in s 40(4) that failure to comply with subsection (3) does not invalidate the acquisition.

Finding: The Department complied with the relevant legislative requirements to give effect to an acquisition by agreement of the Leppington Triangle under the LAA.

The Review notes that in determining the compensation to be paid for the acquisition, the parties did not apply the heads of compensation that are included in the Act, and they were not required to do so in an acquisition by agreement. However, as noted elsewhere in this Report, it represented a different approach to that stated in the LPC Strategy.

5.6 Did the Department Comply with Relevant Delegations for Approvals?

To progress and give effect to the acquisition, the Department sought approvals and authorisations from decision-makers within the Department and from Department of Finance officials that were delegated with LAA powers and functions of the Minister for Finance.

This section explores whether the officials that provided approvals and authorisations had the necessary and appropriate delegations as per the instruments current at the time. Commentary on the content of the briefs seeking approval and the decision-making disciplines applied by senior executives of the Department is discussed in more detail in Chapter 7 (Briefing to Decision Makers).

5.6.1 Departmental Delegations

To progress the acquisition, the Department obtained two key internal approvals.

- 1) An approval from the Acting Deputy Secretary overseeing the WSU, to approve expenditure of up to \$31,780,000 (GST exclusive) of administered funding, as the s 23 PGPA Act⁷⁸ delegate.
- 2) An approval from the CFO for use of a limited tender process for the acquisition of the Leppington Triangle.

According to the *Accountable Authority Delegations 2017 (No.1)*⁷⁹, Deputy Secretaries, the COO and the CFO had general delegations with no financial limit and no restriction additional to the general directions to delegates. There were no other WSU-specific or procurement-specific delegations relevant to the acquisition that were articulated in the instrument. Therefore, the relevant Deputy Secretary had delegation to approve the expenditure for the acquisition. The Review notes that the Deputy Secretary that approved the expenditure for the acquisition was not the senior executive officer (or position) that signed off on the LPC Strategy. This was discussed in sub-Chapter 2.4.

The brief does not clearly state the basis for seeking approval from the CFO. The Department's Procurement Manual stated that for limited tenders worth \$80,000 or more, approval must be sought from the Executive Director or Deputy Secretary and CFO or Deputy CFO. The Department noted that the condition for limited tender was satisfied on the basis that the goods (the Leppington Triangle) can only be supplied by one supplier (LPC). While the *Accountable Authority Delegations 2017 (No.1)* did not prescribe a specific role for the CFO in approving the expenditure for the acquisition, it is likely that the direction in the Procurement Manual prompted WSU to seek CFO approval for the limited tender.

Following these approvals, the COO was nominated as the officer to sign contractual documents on behalf of the Commonwealth for the acquisition. There was no formalised delegation to the COO to sign contracts for lands acquisitions of the kind for the Leppington Triangle on behalf of the Department. However, the COO held delegations relevant to other disposals and acquisitions of interests that were being transacted along with the acquisition of Leppington Triangle (as part of the package of land interests), such as the extinguishment of the existing HIAL easement and the lease of the Leppington Triangle.⁸⁰

Consultations indicated that the role to sign off on the Leppington Triangle acquisition documents likely fell on the COO as the relevant delegate got transactions being pursued as part of the package of land interests offered as part of the Leppington Triangle acquisition. Further, consultations suggested that the COO was viewed as the relevant senior executive overseeing property management functions and therefore, most familiar with land matters within the Department at the time. This does not appear to be an unreasonable approach for obtaining sign-off on the transaction documents.

5.6.2 Department of Finance Delegations

The *Lands Acquisition Delegation 2016* noted the delegation of powers and functions of the Minister for Finance to officers in the Department of Finance.

The instrument specified that the following were delegated to 'Category A position' and 'Category B position' officers:

- the s 22(1) power to make a PAD,
- the s 22(7) power to distribute copies of the PAD and accompanying documents, and

⁷⁸ Section 23 of the *Public Governance, Performance and Accountability Act 2014* (Cth) sets out the power of accountable authorities of non-corporate Commonwealth entities to enter into arrangements and approve commitments of money for which the accountable authority is responsible.

⁷⁹ Made on 19 December 2017 and current at the time of the acquisition.

⁸⁰ As per the *Lands Acquisition Act Delegations, 2016, Schedule 2*, the COO and CFO had these delegations within the Department.

- the s40(1) power to authorise an acquisition by agreement.⁸¹

The LAA delegation instrument defined ‘Category A position’ as including the Assistant Secretary of the Property Legislation and Advice Branch. ‘Category B position’ was defined to mean the Director of the Property Legislation and Advice Branch. All documentation considered by the Review that invoked the powers or functions of the Minister of Finance under the LAA, were signed off or authorised by Category A or B position officers, thereby complying with the relevant delegations.

Finding: The Department complied with relevant Departmental and LAA delegations in seeking approvals to progress the transaction and ultimately acquire the Leppington Triangle.

5.7 Was Appropriate Risk Management Exercised in Finalising the Acquisition?

5.7.1 Management of Legal Risks for the Acquisition

AGS was retained and provided advice throughout the Department’s efforts to progress and finalise the transaction.

Early in the potential acquisition, AGS developed a draft due diligence report,⁸² which clearly set out the following (spanning over 30 pages):

- the interests registered on the title;
- the utilities infrastructure and improvements on the land;
- relevant encroachments;
- tenancies and occupation rights on the Triangle;
- heritage, land use and planning considerations;
- native title and indigenous heritage considerations;
- any relevant disputes, including court registry searches; and
- relevant statutory licences.

The draft due diligence report also included a large suite of attachments to provide further context, and called out specific issues or areas for the Department to consider in its thinking on the strategy and progress of the transaction.

Throughout 2017 and up until the acquisition, AGS provided ongoing legal assistance and guidance on the transaction. This was evident across multiple emails and formal letters of legal advice.

Further, AGS developed a Project Plan once it became clear that LPC was a willing seller and discussions on the acquisition gained traction. The Project Plan provided advice on the required acquisition by agreement processes under the LAA, including associated timeframes, and indicated that additional land title searches were conducted on 12 January 2018. The Project Plan identified relevant interests on the land based on the more recent due diligence, that needed to be considered in progressing the transaction.

To support finalisation of the acquisition, AGS was engaged to provide legal advice in connection with the preparation, negotiation and execution of the acquisition agreement with LPC and the contract for the Commonwealth’s purchase of the Leppington Triangle. AGS reviewed the final version of the contractual documents and noted that the terms reflected the parties’ negotiations. The AGS legal sign-off provided on 25 July 2018 advised that ‘the documents contain provisions

⁸¹ *Lands Acquisition Act Delegations*, 2016, schedule 1.

⁸² The Due Diligence Report was dated 15 February 2017.

which reflect the Commonwealth's instructions and are in a satisfactory form for execution by the Commonwealth'.

With the engagement of AGS and their provision of legal advice throughout the transaction, risks associated with the legal process and transaction were managed well by the Department.

5.7.2 Management of Other Acquisition Risks

While legal risks were being regularly identified and considered, more general acquisition or transactional risks were not specifically or robustly managed. As discussed in Chapter 2, the Department did not adequately identify and consider risks in planning for the transaction itself. As the Department moved towards finalising the acquisition, there was no specific risk management plan for the Department to revisit to assure itself of the proper management of procurement and acquisition risks. The Department also did not identify or consider new or emerging risks that would have to be managed to support achievement of the Department's outcomes.

Finding: The Department actively managed compliance with the LAA and relevant legal risks through regular engagement with legal advisers, however, did not robustly consider and manage transactional risks throughout the acquisition.

5.8 Can the Department be Confident that it Obtained Value for Money in the Acquisition?

As discussed in preceding Chapters of the Report, achieving value for money is a paramount consideration in Commonwealth procurements.

In the conversation with LPC following release of the draft MJD valuation, the Department noted that the \$30 million valuation 'could be turned into an offer if LPC was a willing seller'. With this statement, the Department represented that \$30 million was an amount that the Commonwealth was willing to pay for the Leppington Triangle. Following the Department and LPC's meeting to discuss a potential acquisition, an in-principle agreement on the settlement amount was reached. The draft commercial terms coming out of that discussion specified an all-inclusive compensation of \$30 million, less the amount of compensation payable by RMS for its acquisition of a portion for TNR4 realignment.

The premise that the Commonwealth will compensate LPC for a total of \$30 million, less the RMS compensation, remains unchanged until the finalisation of the acquisition. Based on the documentation and correspondence considered as part of this Review, the Department does not interrogate the appropriateness of this amount or seek to negotiate with LPC on the price.

5.8.1 Reliance on the Joint Valuation Report

The key basis for deriving a compensation amount of \$30 million was the jointly commissioned MJD valuation report. As noted in the preceding Chapters, the valuation was atypical and the degree of reliance on the valuation report was problematic, as discussed in sub-Chapter 4.6 and below.

5.8.1.1 *The only valuation commissioned by the Department was a restricted assessment*

In the context of the valuation's use as the basis for a compensation figure, one particular shortcoming of the valuation was that it was a restricted assessment. The restricted assessment resulted in identifying an indicative value range that the 'market value of the property is likely to fall within *should a fully researched valuation assessment of the property be undertaken* [emphasis

added]'. In this way, the Valuation Report itself makes clear that a fully researched valuation assessment of the property should be undertaken to inform the transaction. However, the MJD valuation was the only valuation commissioned by the Department for the purposes of the acquisition.

5.8.1.2 Availability of other valuation assessments

Prior to finalisation of the MJD Valuation Report on 3 September 2017, the Department provided a copy of the draft Valuation Report to RMS. On 20 September 2017, RMS shared their valuation report for the Leppington Triangle from February 2017, which noted a much lower valuation.

The RMS valuation noted a value of \$50 per square metre, as opposed to the Department and LPC's joint valuation of \$220 per square metre. The RMS also provided some comments on the joint MJD Valuation Report, including a suggestion that "the respective valuers of [the Department] and RMS meet to discuss the difference in assessments". However, the comments were not addressed and there is no evidence to suggest that MJD and the RMS valuer discussed the difference in assessments or assumptions used.

Despite the significantly different RMS valuation, the Department did not seek additional valuations or relevant expert advice on typical valuation processes or approaches that would be considered suitable in the circumstances.

Finding: Despite the difference in valuation between the RMS valuation and the Commonwealth valuation being brought to the Department's attention, no structured analysis was undertaken to explore whether this exposed the proposed acquisition to unnecessary risk.

5.8.1.3 Other anomalies in the joint Valuation Report

As discussed in sub-Chapter 4.5, there were aspects of the Valuation Report that should have prompted the Department to question or explore details and assumptions made before its finalisation and acceptance. These areas represent issues which the Department could or should have considered that may have impacted its assessment of the Valuation Report and its basis for the primary basis for establishing the consideration for the acquisition

5.8.2 Reliance on Consistency with the Department's Estimations

The other key factor that supported use of the \$30 million estimated value as the compensation amount was that it was "consistent with [the WSU's] own estimations, albeit reflecting the recent sharp increase in property prices in the area".

As discussed in Chapter 2, the Department's estimate of around \$30 million was based on the application of a per hectare rate derived from a limited check of properties, and the application of a generous contingency (of 100%) to derive a premium rate. The contingency rate that was applied had no specific or logical rationale. Therefore, the estimates that were conducted lacked rigour.

As the estimates lacked rigour and defensibility, and were dated, consistency of the valuation with these estimates did not provide a strong enough basis for the Department to demonstrate value for money.

Departmental officers maintained a record of publicly available information on property transactions in the Western Sydney region as well as public commentary on property prices in the Western Sydney region, which are attested as being part of the Department's estimations of supportable value for the Leppington Triangle. In addition, prior to the completion of the acquisition, an AGS representative conducted some searches of publicly available information to obtain updated

information on recent land sales. These showed that sale prices remained broadly consistent with those noted by MJD in its Valuation Report. However, the Department's analysis of this information vis-à-vis the Leppington Triangle was cursory, and was not adequately noted in briefs to support a value for money assessment.

The consistency with the estimate may have provided the Department with some comfort over their estimation and presented an opportunity to initiate discussions with LPC. However, the valuation's consistency with Departmental estimates did not of itself demonstrate a fair price or value for money to support its use as the compensation amount for the Leppington Triangle.

Finding:

- a) The Department placed too much reliance on the single joint valuation in reaching the agreed compensation amount with the landowners. Further, given the Department's knowledge of a significantly different valuation, using this valuation as the only basis for compensation without further enquiry, was not prudent.
- b) The Department placed too much reliance on the valuation report being 'consistent with [the Department's] own estimations' in demonstrating a fair price for the acquisition. The Department's estimates were not sufficiently robust to support an argument that consistency of the valuation report outcome with the Department's estimates demonstrated value for money.

6 Management of Probity

The purpose of this Chapter is to assess the management of probity for the acquisition of the Leppington Triangle. Probity is the evidence of ethical behaviour, and can be defined as complete confirmed integrity, uprightness and honesty in a particular process.⁸³ The Review has assessed whether the probity framework and controls were adequate in supporting the integrity of acquisition processes and decisions, with reference to relevant better practices.

6.1 Context – How Probity was Managed for the Acquisition of Leppington Triangle

6.1.1 Probity Risks for the Leppington Triangle Acquisition

Like any major procurement, the acquisition of the Leppington Triangle was exposed to probity risks around potential for conflict of interest impacting (or being seen to impact) the achievement of the Government's objectives. This was arguably even more pronounced in Western Sydney given previously reported probity issues in land transactions in that region. Typical controls for this risk include rigorous management of conflict of interest declarations and ensuring all engagement with counterparties and stakeholders are monitored and documented.

Confidentiality is also a common probity risk in transactions such as this, which is typically managed through confidentiality commitments.

Other probity risks that would have been particularly relevant to the Leppington Triangle acquisition include:

- Risks associated with poor transparency of decision making;
- Risks around compliance with standard Government and Departmental processes associated with procurement and land acquisition; and
- Risks associated with the ability to demonstrate achievement of value for money from expenditure on the Leppington Triangle acquisition.

At the formative stage of any procurement, it is important to analyse and document procurement risks. This allows the whole procurement team to have a shared understanding of the risks, and to establish processes to mitigate them (i.e. in order to provide appropriate assurances that the procurement itself does not present an unacceptable risk). However, in this case this was not undertaken.

The Review recognises that probity planning and risk management planning are not ends in themselves, but are a means of achieving a common objective. Properly integrated procurement plans, probity plans and risk management plans are typically prepared for complex transactions such as the acquisition of the Leppington Triangle.

6.1.2 Probity Framework and Controls

There are currently no professional standards and capability requirements for probity practitioners. However, there are many publications that set out better practice for managing procurement risk. They recognise the important role of procedural integrity in managing probity risks.

Finance also provides extensive guidance over probity related matters in the context of: procurement policy and legislation; the resource management framework; and the procurement

⁸³ Department of Finance, *Ethics and Probity in Procurement*, updated 15 June 2020.

framework. The CPRs issued under s 105B(1) of the PGPA Act, form a keystone of the Government’s policy framework in this area, and reflect the expectations and obligations of procuring officials. This includes expectations around ethical behaviour and the management of actual, potential and perceived conflicts of interest in supporting sound decision-making and achievement of value for money.

The Department has a probity framework that is designed to be consistent with the CPRs and applied to procurement activities through its Accountability Authority Instructions (AAs) and supporting operational guidelines.

In 2017-18 the Department undertook a range of activities as part of its Ethics in the Workplace communication strategy. This included arrangements to improve staff understanding and awareness of their ethical responsibilities. In March 2018 the Department conducted its annual employee declaration of personal interests for SES level staff, which also included general reminders to other staff to complete a declaration where necessary.

6.1.3 Probity Framework and Controls in the Western Sydney Unit

To augment the Departmental policies and procedures for the high probity risk nature of the WSU’s business, a separate *Probity Framework* was developed for the Western Sydney Airport Project (WSA Project) in September 2014, and updated in July 2017. These higher probity risks related to the broad span of WSU activities, with multiple stakeholders and interest groups, covering a wide range of industries, complexities and sensitivities, in which accountability, transparency, value for money, and conflicts of interest are to be managed.

Key aspects of the content of the Probity Framework are summarised below.⁸⁴

Figure 19: Summary of key components of the WSA Project Probity Framework.

Heading	Summary of content and purpose of section
Context and Application	Provides that the Framework applies to the project as a whole, outlines responsibilities depending on project role, and establishes that AGS are engaged to provide legal advice including legal probity advice.
Key Probity Principles	Establishes the importance of the Framework to guide practice and as a key risk measure. Outlines seven overarching principles (ensuring fairness, integrity and impartiality, adopting consistency and transparency, protecting security of information, compliance with Share Sale Agreement, identification and management of conflict of interest, ensuring compliance with government laws and policies and Accountable Authority Instructions, and maintenance of a clear audit trail).
Confidentiality Principles	Covers sensitive information and risk of information leaks.
Overarching Obligations on Project Team Members	Outlines obligations including the maintenance of a register of advisers and regular review of the Framework by the AGS and Directors.
Role of AGS Probity Adviser	Establishes the role of the AGS probity adviser, including: real time probity advice; drafting probity protocols, guides and briefings; commentary on documents having a probity risk; assisting with identification and management of conflict of interest; briefing personnel; regularly reviewing and updating the Framework; advising on compliance with the information management plan and consultation protocols;

⁸⁴ Based on *Probity Framework – Western Sydney Airport Project*, Version 3.0, Revised July 2017.

Heading	Summary of content and purpose of section
	assisting with ANAO review; maintaining registers; briefing project teams on protocols; and monitoring compliance with the Plan.
Conflicts of Interest	Outlines advice and instructions for the declaration of COI (actual, potential or perceived).
Procurements	Outlines the requirement to discuss procurement matters with AGS before commencing such activity.
Monitoring Compliance	Establishes that the probity adviser is to monitor compliance, and at the end of the WSA Project, to report on compliance with the Framework
Attachments	Attaches: COI Declaration, Compliance Declaration, Probity Onboarding Procedure, Probity Exit procedures, Acknowledgement of Confidentiality Obligations, Information Management Plan, Probity Principles Summary, Probity Onboarding Procedures and a Quick Reference Card.

The WSU Probity Framework was intended to facilitate the achievement of the following overarching principles:

- ensuring fairness, integrity and impartiality in the conduct of the WSA Project;
- the adoption of a consistent and transparent approach to the WSA Project;
- protecting the security and confidentiality of all WSA Project documents;
- compliance with the requirements of the 2002 Share Sale Agreement;
- the identification and management of all actual, potential and perceived conflicts of interest;
- ensuring compliance with all applicable legislative obligations, Australian Government policies, Accountable Authority Instructions (formerly Chief Executive Instructions) and with any decisions taken by the Australian Government in relation to the Sydney West Airport Project; and
- the maintenance of a clear audit trail.

The Probity Framework also contained guidance and processes in relation to the management of conflict of interest, and to ensure compliance with the Department's AAls. The WSU Probity Framework was developed by AGS, as the provider of legal services and probity advice.

The AGS legal services contract with the WSU included the provision of legal advice in relation to governance issues (which was interpreted to include probity matters).⁸⁵ More specifically, section 5 of the Framework describes the role of the probity adviser as follows:

- 5.1. *AGS is responsible for advising and guiding the WSU and its advisers in respect of probity arrangements for the Sydney West Airport project, including monitoring compliance with this Framework.*
- 5.2. *The role of the AGS as probity adviser includes*
 - a. *providing "real time" probity advice to the WSU (not after the event auditing)*
 - b. *drafting and updating as necessary this overarching Probity Framework for the project*
 - c. *drafting the information management plan and other probity protocols, documents, briefing notes etc and ensuring there are processes in place for the protection of all confidential information which are monitored and regularly reviewed*
 - d. *providing comment/advice on documents that have a probity/process impact such as the consultation protocols, risk register, project plans (stakeholder communication etc)*

⁸⁵ AGS guidance recognises the importance of not having one person providing both legal and probity advice, and a focused probity team approach from AGS was applied for the WSU.

- e. attending project management and associated work stream meetings as required, to monitor, observe and contribute from a probity framework to the conduct of the Sydney West Airport project and to provide ad hoc advice as required
- f. establishing and maintaining a process for the identification and management of all conflicts of interest
- g. briefing the team on this Probity Framework and associated protocols for the project
- h. advising on compliance with the information management plan, the probity framework, the Consultation Protocols and any other protocols of a probity nature that are developed from time to time and
- i. assisting as required with any ANAO review.

In early 2018, the then new WSU Executive Director requested a review of the probity and integrity management processes for the WSU. This resulted in the issue of a *Probity Management Plan: Western Sydney Projects (v4.0 June 2018)*, as well as strengthening of the protocols and guidance for *Meeting with Interested Parties* – a draft of this document was provided by the AGS to the WSU in March 2018, with a final version circulated to WSU staff on 2 July 2018,⁸⁶ together with a link to its reference in the records management system.

It is noted that in early 2019, the Department’s internal audit function had conducted a review of probity and integrity and found that “the WSU has appropriate and effective probity and integrity measures and controls in place to mitigate integrity and fraud risks”.⁸⁷ The audit made two recommendations, reflecting opportunities to strengthen processes for managing confidential information, and to ensure that probity, integrity and fraud related risks identified in the WSU Risk Register are sufficiently detailed and specific. The Department reported that both recommendations were implemented in 2019.

6.2 Quality of Probity Management

6.2.1 Was the Probity Framework(s) Appropriately Designed?

The WSA Project Probity Framework emphasised the importance of probity and dealt with relevant principles, including the management of confidential and sensitive information, and provided instructions for the management of conflict of interest declarations (for actual, potential or perceived conflicts of interest). An extensive range of attachments was also provided that covered such matters as probity onboarding and exit procedures, compliance with the WSU information management plan, and consultation protocols. Therefore, the design of the WSU’s probity framework was broadly consistent with good probity practice in the Australian Government and was adequate for the broader context in which the unit operated.

Finding: The Probity Framework for the Western Sydney Airport program established a good baseline for broader probity management across all Western Sydney Airport activities.

The Review noted that the WSU strengthened its Probity Framework with a revised Probity Plan issued in June 2018. The improvements included a useful section on protocols for meeting with interested parties, a draft of which was provided to the WSU in March 2018. However, the WSU Probity Plan and the associated protocols for meetings were not circulated to staff until June 2018,

⁸⁶ Noting that this occurred only a few weeks before completion of the acquisition.

⁸⁷ McGrathNicol (as internal auditors for the Department): *Western Sydney Unit Probity and Integrity Audit Report* (13 March 2019).

which meant that they were developed too late to impact the management of probity risks associated with the acquisition.

Finding: In addition to the Probity Framework, the development of a protocol related to meetings with interested parties was sensible under the circumstances, but was developed too late to materially impact the acquisition transaction.

6.2.2 Was the Probity Framework Followed and Complied with?

Over the course of the conduct of the Leppington Triangle acquisition, the Probity Adviser provided the following, all of which are consistent with the Probity Framework:

- regular advice on probity matters (including in real time);
- development of probity protocols, guides and briefings;
- comment on documents having a probity risk;
- assistance with the identification and management of conflict of interest;
- briefing of personnel and project teams on probity requirements; and
- maintaining probity registers.

However, there were two areas described in the WSU Probity Framework or the WSU Probity Plan where the Review has sighted no evidence of probity support or control in operation. These are discussed below.

6.2.2.1 Probity plan required for high risk procurements

The first exception was in relation to ensuring compliance with the AAIs, which required the development of separate probity plans for all procurements over \$500k or for those that are considered sensitive or carry a high level of risk – all these criteria applied to the acquisition.⁸⁸

The development and implementation of a probity plan specifically tailored to the acquisition would provide an opportunity to establish specific processes, guidance, expectations on processes and controls to support good management of probity for the transaction. This could include controls in relation to:

- how to engage with LPC in a manner that supported good management of probity risk;
- how to demonstrate fair and arms-length dealing in the engagement with LPC;
- how to demonstrate value for money in settling an agreement with LPC; and
- specific expectations for the documentation of meetings with stakeholders.

Such specific guidance would have provided better support to the acquisition and better mitigation of associated probity risks.⁸⁹ However, a separate probity plan, as required, was not specifically developed for the acquisition. This both reduced the opportunity to consider the specific complexities and sensitivities associated with the environment in which the acquisition was occurring – and to design appropriately tailored interventions, as well as to manage the interrelations between probity and risk at the project level.

⁸⁸ The relevant AAI requires that a separate probity plan must be prepared for all open tender activities over \$80,000; all procurement over \$500,000; all grants processes; and decision-making activities considered to be high risk or particularly sensitive.

⁸⁹ The Probity Plan issued in 2018, again described the role of probity adviser as being responsible for advising and guiding the WSU, and its advisers, in respect of probity arrangements for the Western Sydney projects, including the requirement to monitor compliance with the Plan and report as required.

Finding: The absence of a dedicated Probity Plan for the acquisition, as was required by the AAIs and the Probity Framework, likely diminished controls against a range of poor behaviours, decisions and actions in the conduct of the Acquisition.

6.2.2.2 Limited compliance function

The second area wherein the WSU probity arrangements were not operational with, was in relation to checking compliance with the Framework itself. In consultations conducted as part of the Review, it was confirmed that the Probity Adviser had a limited compliance role in relation to probity, particularly in relation to checking whether the Probity Framework was being complied with.

In correspondence associated with the development of the Framework in 2014, the Review noted that the provision of probity advice was designed to be a subset of the provision of legal advice.⁹⁰

In addition to the Probity Adviser, the WSU had access to an EL1 officer for advice on procurement matters. However, the Review was advised that this role focused on procurement and contract process-related matters, such as using the correct templates, and recording information of the system, than anything specifically relating to probity. The Review was advised that this EL1 officer had no role in the acquisition.

Further, while the Department had a corporate procurement area, there was no requirement for WSU to consult with that function, unless AusTender was to be used. Consultations conducted as part of the Review indicated that the Department's corporate procurement area had no involvement in the acquisition.

Therefore, while the WSU Probity Framework contained key features typically found in such documents, there was no broad assurance or conformance function to ensure that it was operating effectively. It was noted that the absence of a probity plan for the acquisition meant that there was no trigger to establish a conformance function with that plan. The Review was advised that this is how compliance management for probity within the WSU operated.

Finding: The absence of a conformance monitoring role for management of probity throughout the transaction increased the risk of poor probity controls in the Leppington Triangle acquisition.

6.2.3 Were the Probity Behaviours, Actions and Decisions consistent with Reasonable Expectations of an Acquisition of this Size and Nature?

The *Public Service Act 1999*⁹¹ (Public Service Act) and its Values and Code of Conduct are designed to support the requirement for ethical decision-making. The PGPA and CPRs also require the use of efficient, effective, ethical and economical practices in the use of public funds.

The Review examined whether an appropriate ethical framework, and usual probity behaviours and controls for a transaction of this size, had been applied to support decision-making in respect of the acquisition and its core transactions.

There were several examples of poor probity behaviour during the acquisition that are inconsistent with expectations for procurements in the Australian Government, irrespective of their nature and complexity. Examples include:

⁹⁰ Comments to the WSU, *Draft Probity Framework (Version 1.0)*, 5 September 2014).

⁹¹ *Public Service Act 1999* (Cth) ('Public Service Act').

- one-on-one meetings with the LPC;
- discussions that were not documented;
- decisions were made that could be argued as having high advantage to LPC without commensurate advantage to the Department;
- some conflict of interest controls that were not complied with;⁹² and
- limited probity assurances or 'sign-offs' provided by an independent probity adviser.

6.2.3.1 Interactions with interested parties

The Review noted instances where it appears a single WSU officer met or spoke with LPC representatives without another Departmental officer being present. This included a meeting with LPC on 20 September 2017 where the draft valuation report was discussed among other matters unrelated to the Leppington Triangle. The Review also noted a reference to a meeting that was held with LPC on 12 October 2017, but no documentation was available to the Review that detailed the content or outcomes of the discussion. In the Review's consultation with Departmental officers involved in the transaction, it was represented that it was not uncommon for LPC to engage with the Department directly through one officer.

The Review acknowledges that having one-on-one discussions in certain mediums, such as phone calls, is inevitable in the conduct of usual business. However, such one-on-one discussions or lone attendance at meetings with private parties may not be appropriate where it is to negotiate outcomes of key processes for a high-value Commonwealth transaction. This was particularly the case given the lack of a formalised negotiation approach in relation to the Department's position on the acquisition and the absence of protocols for dealing with interested parties at the time of these discussions.

In these circumstances it would have been appropriate for a second officer to have been present, as was recognised in the *Meeting with Interested Parties Protocol* issued by the WSU in June 2018. Further, the Review noted that some conversations with LPC had occurred without notes being taken. This is a probity matter, and more robust notetaking and records of meetings with interested parties would be expected to demonstrate transparent and ethical decision-making.

6.2.3.2 Applying a probity management and risk management lens

There were several actions or decisions that may have been more appropriately considered through more targeted and integrated probity and risk management. Such actions that would have benefitted from a greater focus on probity and risk included:

- selecting an acquisition method that was not different from that stated in the approved LPC Strategy;
- jointly commissioning valuation work (including the degree to which the landowner and supplier would co-design the scope of work or specifications);
- operating within a culture and operations that was heavily focused around performance and delivery.

In consultations with relevant staff involved in the acquisition, it was conveyed to the Review that the Probity Framework was well understood and regularly reinforced. However, the absence of tailored planning for the Leppington Triangle acquisition (for example, the lack of an acquisition-specific probity plan as discussed above in sub-Chapter 6.2.2.1), and the absence of any compliance assurance with probity controls (as discussed in sub-Chapter 6.2.2.2), meant that the management of probity could have operated more effectively.

⁹² Conflict of interest matters are discussed in the ANAO performance audit report on the Leppington Triangle acquisition, and are not repeated here. It is noted that the identified matters were isolated instances from across the WSU.

6.2.3.3 Independent probity assurance and sign-off

While there was a Probity Framework and Probity Plan in place to support WSU's activities (described above), the Review could not identify a single instance where executive decisions for the Leppington Triangle had been supported by associated probity sign-offs to provide assurances that probity matters had been satisfactorily addressed.

Although, the Review would not expect these to have occurred for every single request for a delegate decision, these would be expected to support key decisions on the acquisition's critical path.

The key decision-making documentation typically consisted of an attempt to frame the issue at hand, to present available options, used information and analysis to support the proposed action, and agreement on a commitment to a path forward. These are appropriate and expected steps to take in making quality decisions.

That said, the Review is aware that time critical, delivery-focused situations, and the pressure to deliver are common across most working environments.⁹³ Resolving these is more challenging for the public sector because of the use of public funds and the impact on multiple stakeholders. This is an area where decision support through effective probity and risk management becomes critical, especially in circumstances where there is a heavy reliance on the available base of evidence or information to support a decision.

For example, in their current form both the Probity Framework and Probity Plan would have been a useful basis on which to provide signoffs to delegates about assurances over probity.

An independent probity perspective on key decisions may have provided additional support to delegates on considerations over whether enough of the facts were known, which groups or individuals have an important stake in the outcome, whether choices were about what is legal or what is most efficient or represents best value for money⁹⁴. These types of issues might have been canvassed and addressed with more precision, especially given the environment and quantum of funds involved.

Consideration from an independent probity adviser would have also provided additional emphasis on the need for greater transparency and fuller and more accessible documentation, both of which would have been useful for assurance purposes, more clearly being able to demonstrate the rationale for decisions, and providing a more robust and reliable audit trail for the ANAO.

An example is in the context of the documentation and recording of 'contemporaneous notes.' These are the notes that are typically expected to have been made at the time, to reflect the circumstances and the importance of decisions, including those that affect individuals or individual businesses that may be subject to administrative review.⁹⁵

In a broader context, the Review noted that the vast majority of documents and information available to the Review have been emails, email attachments, or written briefings. In practice, however, it would be atypical to provide a written briefing or request without providing an opportunity to discuss the issue with the internal stakeholders in the first instance. In these circumstances, contemporaneous notes should have been taken, and would have formed part of the evidence base on which sign-offs would have been made. This would have improved the ethical framework supporting the transaction.

⁹³ Australian Public Service Commissioner, 2009.

⁹⁴ Noting the strong link between probity and integrity with value for money.

⁹⁵ *APS Values and Conduct*, Section 4: Managing Information (specifically at section 4.7.5).

Finding: Senior leaders received no assurance regarding probity risk management, and the existence of such assurance mechanisms may have prompted earlier improvement or different decision making.

Finding: This Review has seen no evidence of ethical or integrity breaches or criminality in the conduct of the Acquisition.

7 Briefings to Decision Makers

The purpose of this Chapter is to explore what advice and information was provided to decision makers in the context of the acquisition, and assess whether that advice and information effectively supported good decision making, consistent with legislative obligations and public sector accountabilities.

7.1 Context – What Briefs were Developed for the Acquisition

As noted in the Context Chapter of this Report, the leadership of the WSU experienced significant turnover during the acquisition process.

7.1.1 Documented Briefings Provided Related to the Acquisition

The following documented briefings have been identified from Departmental records that related specifically to the acquisition.⁹⁶

Figure 20: Summary of briefs relevant to acquisition of Leppington Triangle, considered by the Review.

Date	Recipient	Stated Subject
30 November 2015	Executive Director, WSU (responsible FAS) Through: General Manager, Communications, Environmental and Legal (responsible AS) Copied to: General Manager, Financial, Commercial and Operations (another AS in the WSU)	Acquisitions and disposals of land and other interests for the proposed Western Sydney Airport
3 February 2016	Executive Director, WSU (responsible FAS)	Strategy to guide the acquisition and disposal process to facilitate the development of WSA and your agreement to pursue valuations of certain interests prior to the issue of the Notice of Intention (NOI)
12 October 2016	Executive Director, WSU (responsible FAS)	Leppington Pastoral Company (LPC) land acquisition and disposal strategy
29 January 2018	Minister The Hon Paul Fletcher MP Copied to: Minister The Hon Barnaby Joyce MP, Secretary, Deputy Secretary	Western Sydney Airport – Leppington Triangle acquisition update (MS18-000261)
6 March 2018	Responsible Deputy Secretary CFO Through: Executive Director, WSU (responsible FAS), General Manager, Communications, Environmental and Legal (responsible AS), Business Manager, WSU Copied to: COO	Western Sydney Airport – financial approval for acquisition of land
4 July 2018	Executive Director, WSU (responsible FAS) Through: General Manager, Communications, Environment and Legal (responsible AS)	Western Sydney Airport – Leppington Triangle acquisition update

⁹⁶ This listing excludes briefings related to The Northern Road alignment to the extent that they did not explicitly relate to the acquisition of the Leppington Triangle.

Date	Recipient	Stated Subject
	Copied to: Responsible Deputy Secretary, COO	
17 July 2018	COO Through: Acting Executive Director, WSU (responsible FAS), whose substantive position was General Manager, Communications, Environment and Legal (responsible AS) Copied to: Acting Responsible Deputy Secretary	Leppington Triangle acquisition – Lease Area Plan
25 July 2018	COO Through: Acting Executive Director, WSU (responsible FAS), whose substantive position was General Manager, Communications, Environment and Legal (responsible AS) Copied to: Acting Responsible Deputy Secretary	Leppington Triangle acquisition – Execution
31 July 2018	Minister The Hon Paul Fletcher MP Copied to Secretary, Deputy Secretary	Western Sydney Airport – Leppington Triangle acquisition update (MS18-002099)
8 November 2019 (noted as ‘previously submitted October)	Responsible Deputy Secretary Through: General Manager Regulatory, Environment and Stakeholder Engagement Branch, Executive Director, WSU (responsible FAS)	Leppington Triangle – consolidated account of acquisition activities

In addition, a number of Ministerial Briefings were provided in connection with visits to the Western Sydney Airport site and meetings that may have involved LPC. This includes:

- MS14-001712, to Minister the Hon Warren Truss MP, “Western Sydney Airport – Tenancy Transition Plan Update” (December 2014)
- MB16-000530, to Minister the Hon Paul Fletcher MP, “Meeting with Minister Frydenberg and environmental and other stakeholders on Western Sydney Airport – 17 October” (13 October 2016)
- MB17-000288, to Minister the Hon Paul Fletcher MP, “Western Sydney Aerotropolis Coordination Forum” (9 June 2017)
- MB18-000500, to Minister the Hon Paul Fletcher MP, “23 April 2018: Meeting with the Greenfields Development Company” (20 April 2018).

Following an extensive review of formal briefing to Ministers, and with confirmation from representatives of the WSU, none of these additional briefings related specifically to the acquisition, and there were no other formal briefings related to the acquisition.

In addition to the documented briefings noted above, for the period from April 2014 to October 2018, the WSU maintained a discipline of weekly documented ‘briefings’ which consisted of lists of activities and issues being managed by the various sections and branches within the Unit. The Review is aware that from time to time, matters related to LPC, the Leppington Triangle, land acquisitions and disposals, and engagement with the Department of Finance were noted in these ‘briefings’.

Further, it is understood that regular meetings took place between the WSU leadership and the Secretary and the responsible Deputy Secretary (as often as weekly at times) and the Minister for Urban Infrastructure (as required, but understood to be often) at which relevant matters were discussed. Relevant officers could not recall whether the Leppington Triangle was ever included in those discussions, but did note that the meetings were wide-ranging in their content.

Further, in the nature of the management of complex bodies of work and the structure of Divisions and Branches in the Australian Public Service, it is inevitable that discussions occurred from time-to-time between senior Department leaders and their teams in connection with matters that arose. This is particularly true in the context of changes in personnel in leadership positions, where incoming briefings and discussions typically occur as leaders develop necessary knowledge and obtain background in order to undertake their roles. These discussions are typically not documented, but nonetheless are an important part of management of bodies of work undertaken in the Australian Public Service.

7.2 Better Practice in Advice and Briefing to Decision Makers and Ministers

There is no definitive better practice guidance for provision of advice and briefing to decision makers and Ministers in the Australian Public Service or more generally, in business or corporate settings in Australia.

A primary driver of this absence of guidance, is that the approach to advice and briefing is necessarily dependent on the preferences and ways of working of different organisations and leaders. This in turn can be dependent on management styles which are highly individualistic. Typically, strong leaders establish with their teams what they expect in terms of briefing, including content, timing, structure, detail and circumstances. Some organisations supplement this with guidance on organisation-wide norms and expectations on briefing within the Department or agency.

However, the Review has drawn on principles from the Public Service Act, the APSC and the PGPA Act to derive the following criteria or indicators of effective and quality briefing and advice to senior leaders, decision makers and Ministers.

Figure 21: Summary of the Review's criteria for effective and quality briefing.

Ref	Criterion
1	Clarity on authorities, roles and responsibilities of individual officers, leaders and Ministers.
2	Clarity of purpose of an individual briefing.
3	Helpful to the decision maker or recipient.
4	Accurate and complete.
5	Timely
6	Use of plain English and avoidance of jargon.
7	Explain key risks and how they are mitigated.
8	Accompanied by in-person engagement.

Further detail on the better practice principles referred to, and the quality requirements expected under each criterion identified in Figure 21, are at **Appendix C: Better Practice and Criterion for Effective Briefing**.

7.3 Assessment of Briefing to Senior Leaders, Decision Makers and Ministers

The Review assessed the quality and effectiveness of briefings to decision makers against each of the criterion established in the preceding sub-Chapter.

7.3.1 Clarity on Authorities, Roles and Responsibilities of Individual Officers, Leaders and Ministers

This Review has seen no evidence that the Department or the Western Sydney Unit overtly established specific roles and responsibilities for strategic decision making, operational management and decision making or oversight for the acquisition transaction. Briefing variously is directed to:

- The responsible First Assistant Secretary
- The responsible Deputy Secretary
- The COO
- The CFO
- The responsible Minister

While the roles and responsibilities were not defined, the recipients of the briefings were selected based on officers consideration of any relevant delegations and intuition on which Senior Executive member or position would be the most suitable to provide approval on certain matters. For all briefs relating to the Leppington Triangle, the Review can understand the logic behind the choice of recipient. In the cases of briefing for the responsible Deputy Secretary, COO and CFO, consultations conducted as part of the Review indicate they had limited visibility of the context, the strategy and the early work in the lead up to the acquisition and their role in it.

The Review notes that the Infrastructure Minister exercised no decision-making role in the transaction, but was briefed for the purpose of providing information and updates.

In the early stages of the transaction (2015-2016), it appears that the Executive Director of the WSU was responsible for strategic decision making. However, from 2018 onwards, the briefings are directed at a broader range of senior leaders.

It is likely that the clarity on responsibilities for the transaction was challenged by the relatively high turnover of the occupants of the roles of responsible Deputy Secretary, the responsible First Assistant Secretary and the responsible Assistant Secretary during the period of the acquisition. Each of these position changes would have brought with it a change in management style, as well as a diminution of experience and understanding of the acquisition, its context and its issues for the senior accountable officers for the acquisition.

It is further likely that the clarity on responsibilities for the acquisition was challenged by the expanse of issues that were being managed as part of the WSU's responsibilities. As noted earlier in this Report, the WSU was responsible for the development of an airport, the implementation of the Western Sydney City Deal, and the establishment of a range of transportation infrastructure initiatives and other matters in the Western Sydney area. In connection with the airport alone, the acquisition was described as "one of hundreds of issues to be managed". In this context, it is perhaps not surprising that there was not a dedicated discussion on the specific roles and responsibilities within the hierarchy – which would have been useful in ensuring all relevant senior leaders were briefed appropriately to support their roles.

This lack of clarity on roles and responsibilities is reinforced by discussions that this Review had with all occupants of the Secretary, responsible Deputy Secretary and responsible First Assistant Secretary positions for the duration of the transaction. All officers advised that they had very little visibility or recollection of the acquisition during their periods in the role. Further, none were able to recall a discussion that specifically defined the authorities, roles and responsibilities of various levels of the Senior Executive in connection with the acquisition.

Finding: There was a lack of definition of roles, responsibilities and authorities as it related to the acquisition of the Leppington Triangle, that likely contributed to inconsistency and poor decision making on what information to include in briefing to senior leaders and decision makers within the Department.

7.3.2 Clarity of Purpose of an Individual Briefing

The structure of the Department's Ministerial Briefing Template and Executive Briefing Template both cater for the specific definition of a subject and a purpose, which allows the recipient to immediately understand what they are considering.

The leaders responsible for the acquisition did not define when, and for what purpose, relevant briefing would be required. This absence of agreed triggers for briefing are likely a contributor to a number of observations about the nature and timing of briefings that were (and were not) provided in connection with the acquisition:

1. Some briefings appear to have limited purpose beyond telling the recipient that next steps remain consistent with earlier briefing and will occur in due course (including the 4 July 2018 briefing to the Executive Director of the WSU).
2. There is a significant gap in any briefing to the Department Senior Executive of almost 18 months (from October 2016 to March 2018), in which the majority of the activity for the acquisition transaction took place, and within which there were a number of significant developments in the transaction.
3. Events occurred in the lifecycle of the acquisition that are significant, strategic and ultimately influential on the transaction's outcome, for which there was no briefing, and for which senior visibility (and potentially challenge) may have been beneficial. These include:
 - a. The decision to take a cooperative approach with LPC on the acquisition (including in particular the decision to commission a joint valuation and then use this as the primary source of evidence for setting the consideration for the acquisition);
 - b. The decision to establish valuation instructions that did not include consideration of costs required under the LAA heads of compensation (including business disruption costs and legal expenses), and was therefore inconsistent with the approved LPC Strategy;
 - c. The receipt of a valuation of \$30 million for the Leppington Triangle, how this was perceived as a suitable value to underpin the transaction, and the decision to undertake no other work to underpin a basis for agreed consideration for the acquisition;
 - d. The decision to pivot the acquisition approach from compulsory acquisition to acquisition by agreement (reflecting a deviation from the LPC Strategy); and
 - e. The receipt of detail from the NSW Government of their valuation of the Leppington Triangle land, given it was significantly lower than the value that the Department had arrived at for the acquisition.

It is possible that there were discussions between the Branch responsible for the acquisition and relevant senior leadership, including the responsible First Assistant Secretary and responsible Deputy Secretary, as these various events and decisions took place. However, as noted above, all discussions with those Executives identified that they had limited visibility or recollection of the Leppington Triangle Acquisition during their periods in the roles.

Finding: Significant, strategic and influential events or decisions in the context of the acquisition of the Leppington Triangle acquisition transpired, which should have triggered formal requests for decision from a Senior Executive decision-makers, or at least formal briefing of the decision-maker, that were not communicated in any formal sense, reducing both transparency and accountability around the acquisition.

7.3.3 Helpful to the Decision Maker or Recipient

The Review spoke to the Department leaders who received the briefings listed earlier in this Chapter and all indicated that the briefings were helpful to them in completing the purpose defined by the briefing. However, with the publicity that the transaction has received since the release of the ANAO performance audit report, several have noted that there are facts that have been identified that they believe would have been helpful in making relevant decisions.⁹⁷ This has specifically referenced:

- More information about the valuation instructions, how they were developed, and their content; and
- Information related to the rationale for, implications of, and approval of, a change in strategy from compulsory acquisition to an acquisition by agreement.

One of the challenges in providing information that is helpful to the recipient of a briefing, is achieving a balance between adequately explaining complexity, while being concise. The operation of the LAA is complex, as is the discipline of valuation of land in different contexts. Additional complexity comes from the interaction between various aspects of the activities of the Australian Government in Western Sydney at the time of the acquisition.

When key decisions were made in 2018 in connection with the acquisition, it is likely that the decision makers did not have the benefit of some of this detail, and it is further likely that some of that detail may have been helpful in informing decision making.

Finding: Given the turnover in senior executives overseeing the transaction, it is likely that briefing in the final stages of the transaction would have benefited from more detail and context to assist senior executives and decision makers to exercise their oversight roles.

7.3.4 Accurate and Complete

In the briefs reviewed, there are instances where the information provided could be seen as misleading due to being incomplete or insufficient. Specifically, in some instances, the briefings do not include detail that would inevitably have been helpful for decision makers.

An example of this is in connection with the reliance on a joint valuation. Consultations by this Review with a former responsible Deputy Secretary and a former COO reinforced that this was not clear to them at the time of the transaction and receiving briefings requesting approvals to proceed. In retrospect, both officers suggested that if they had known this detail they may have been more reticent to provide approvals for the transaction.

Another example of briefings lacking relevant information relates to the evidence that underpinned whether the Department was paying an “appropriate” and fair value for the acquisition. In

⁹⁷ All advice received by the Review noted that these assessments have only been made with the benefit of hindsight, and following the results of the ANAO performance audit report.

connection with the purchase figure, the relevant briefings reference the valuation and comments that: “We consider this figure reasonable and consistent with our own estimations, albeit reflecting the recent sharp increase in property prices in the area”.

In spending \$30 million of Commonwealth funds, it is reasonable to expect that the evidence for decision makers to underpin that decision include detail of the evidence on “why” an amount is appropriate. Further, while the Department did not agree to an 8% interest rate to be applied to the compensation, it erroneously featured in some briefs to decision-makers as a term of the acquisition, without an explanation as to why that was agreed or how it represented a value for money commitment of funds.

The Review considered what a decision maker receives for a more “traditional” procurement involving an Approach to Market and an evaluation of submissions from the market. In such instances, there is presentation of a body of evidence related to the structured evaluation of options and a detailed explanation of why the expenditure represents value for money. However, for the acquisition, there was no evidence provided beyond reference to a valuation and a single sentence that it was consistent with “estimations” (with no detail of those estimations).

In providing information to the financial delegate for the approval for the acquisition, despite the matters above, the briefing concludes that: “WSU is satisfied that, after these reasonable enquiries, this procurement achieves a value for money outcome.” The Review has found (as discussed elsewhere in this Report) that the Department did not undertake reasonable enquiries to assure itself that the expenditure was value for money. It is possible that, had the Department included more detail about the evidence that underpinned the WSU’s belief that the purchase consideration did achieve “a value for money outcome”, it may have prompted the briefing recipient to enquire further about the underpinning evidence, or more clearly demonstrated value for money in the contemporaneous documentation.

As regards completeness, many of the observations made above in connection with clarity of purpose of briefing, and briefing that is helpful to the decision maker or recipient, can equally be applied.

Finding: Briefings to decision makers to approve the spending of over \$30 million on the Leppington Triangle were lacking in detail on why the expenditure represented value for money. Equally, decision makers did not request sufficient information to satisfy themselves that the expenditure did represent an efficient, effective, economical and ethical expenditure of public money.

7.3.5 Timely

This Review has identified no specific findings with regard to timeliness of briefings that were provided to senior leaders, decision makers or Ministers.

7.3.6 Use of Plain English and Avoiding Jargon

In general, the briefings that were provided to senior leaders, decision makers or Ministers were understandable and avoided the use of jargon.

It is likely that, had the briefings broached certain topics (that as noted above, were absent in the provided briefings), there may have been greater need to deal with more complex and technical issues related to the operation of the LAA or the application of valuation methodologies and techniques. However, this issue did not arise. In this regard, the authors of the majority of the briefings have advised that the content of the briefings was not influenced by a desire to avoid

complexity or technical issues, other than in a general sense to make language simple and easy to understand.

7.3.7 Explain Key Risks and how they are Mitigated

The Ministerial Briefing Template and the Executive Briefing Template used by the Department through this Acquisition does not have a section for risks. However, both templates include a section for “sensitivities” or “stakeholder implications”.

Most of the briefings, with the exception of the November 2019 briefing which was provided as a reaction to enquiries from the ANAO, focused this section (when used) of the briefing on the background of LPC and the relationship with LPC. In some instances there is also reference to managing relationships with other stakeholders in Western Sydney.

None of the briefings explored risks associated with the transaction (and the subject matter of the individual briefing), or provided advice to the senior leaders and decision makers on how those risks were managed.

With the benefit of hindsight, there were material risks associated with the acquisition that have subsequently been identified in the ANAO’s performance audit report that senior leaders and decision makers would (or should) have been interested in ensuring were appropriately managed in the acquisition. These would have included the following (at a minimum):

- The risk of not achieving an agreement with the seller of the Leppington Triangle that represented value for money to the Australian Government.
- The risk of not complying with the requirements of the LAA and associated policy obligations imposed by the Australian Government.
- The risk of breaching reasonable expectations for probity and integrity in the conduct of the acquisition transaction.

The presentation of relevant risks and mitigations would only provide risks relevant to the subject matter of the briefing. However, it is likely that each of the risks above would have been highly relevant to certain briefings provided to senior leaders and decision makers from the list present earlier in this Chapter.⁹⁸

The Department’s Executive Briefing Template, which includes a section for sensitivities, but not for risks, guides authors of briefs to provide some focus and analysis towards stakeholder risks, but not broader risks that should be considered as part of significant decisions. As discussed elsewhere in this Report, the Review has found that the project team was disproportionately focused on risks associated with the relationship with LPC, to the detriment of structured focus on other risks associated with the acquisition.

Finding: Briefing to senior leaders, decision makers and Ministers did not adequately explain key risks that may impact the acquisition of the Leppington Triangle, and how those risks were being managed. Had such material been included, it is possible that some of the issues that have subsequently been identified by integrity authorities and in Parliamentary Committee enquiries, may have been better managed or avoided.

⁹⁸ This provision of key risks and mitigations in briefings does not replace the need for strong risk and probity management disciplines throughout the management of the acquisition. This is discussed further in Chapter 6.

7.3.8 Accompanied by In-Person Engagement

This Review found that the responsible Executive Director, Deputy Secretaries and COO were provided with the opportunity for engagement with relevant officers prior to the briefings requesting their sign-off of key steps to progress the acquisition. In most cases, the recipients represented to the Review that the discussions were useful, enlightening and assisted the recipients or decision makers in their oversight roles.

8 Engagement with the ANAO

This Chapter explores the effectiveness of the Department's engagement with the ANAO.

The Chapter first describes the context of the engagement with the ANAO, which is primarily focused around the 2018-19 financial statements reporting process. This is followed by a description of the role of the Audit and Risk Committee (ARC), including its Financial Statements Sub-committee (FSSC), in monitoring and supporting financial statements reporting. Finally, the Chapter analyses whether the ANAO's expectations were met in relation to their recommendation for the Department to undertake a probity and integrity review of the acquisition, the associated management representations, and the role of the ARC.

8.1 What Occurred in the Context of Engagement with the ANAO

8.1.1 The 2018-19 Financial Statements Audit

The Department's 2018-19 financial statement reporting process led to revaluations of the land acquired. This was a programmed annual practice pursuant to the *Department's Asset (non-financial) Accounting Policy Instructions*, which requires that all assets (except for computer software) be reported at their fair value each year. This policy programmed regular re-valuations to confirm the fair value of Departmental assets, as part of the financial statements preparation process.

It is important to reinforce that the re-valuation of the Leppington Triangle property was not isolated, and that all land assets were re-valued as part of the financial statements preparation. This was in part driven by a cycle of re-valuations, and in part, a response to recognised volatility in property prices in areas in which the Department had significant land holdings, including in Western Sydney.

The revaluations must be conducted by an independent professional valuer and meet the valuation requirements of *AASB 13 Fair Value Measurement*.

The Department engaged a valuation firm, and their valuation of the Leppington Triangle (conducted on 5 July 2019) valued the land at \$3.1 million, representing a 90% reduction in value when compared to the amount paid on acquisition just a few months earlier. Due to the significance of the reduction, the financial statements team commissioned a second valuation, using a different firm. The second valuation (conducted on 15 July 2019) broadly confirmed the first revaluation (reaching a conclusion of \$4 million).

Following analysis of the two valuations as well as the MJD valuation, the Department's financial statements team determined that an adjustment in the financial statements to re-value the land at the lower (July) valuation was required. The Department's detailed Position Paper on Asset Valuations, including valuation of the Leppington Triangle, was provided to the ANAO on 19 July 2019 and the FSSC ahead of its meeting on 30 July 2019. The paper was supported by the ANAO and the FSSC.

A chronology of events relating to the engagement with the ANAO on the preparation of the 2018-19 financial statements is provided at **Appendix D: Chronology of the Department's Engagement with ANAO**.

The explanation for the difference between the acquisition price and the asset's value outlined in the Department's Financial Statements was stated as follows:

The difference has been attributed to a substantial premium paid to purchase the land based on an unwilling seller who had previously successfully challenged a compulsory acquisition declaration.⁹⁹

The ANAO agreed with the Department's position and concluded that the accounting treatment of the value of the land was consistent with accounting standards. However, the ANAO remained concerned about the potential control weaknesses that the matter raised, with acquisitions of property occurring that were higher than a "fair value." This also raised concerns about probity and integrity, which is very much within the scope of interest of the Auditor-General.

Consequently, the ANAO's concerns at that time were not about the financial reporting treatment, but about the underlying control procedures in relation to the decision and process to purchase Leppington Triangle, and whether this raised any probity or integrity concerns.

The ANAO's closing letter¹⁰⁰ was tabled at the ARC meeting of 29 August 2019, and concluded (among other things) that:

...the transaction was recorded appropriately in the financial statements but the ANAO was not in a position to conclude on aspects of the transaction relating to value for money, risk management and compliance with certain procurement policies.

On 30 August 2019, an unqualified audit opinion was issued on the 2018-19 financial statements. However, the ANAO identified the Leppington Triangle transaction as 'significant and unusual' in its August Closing Letter to the Department, and noted that it would be undertaking further audit procedures in connection with the acquisition:

Whilst we have concluded that the transactions are appropriately recorded in the financial statements at 30 June 2019, and will allow us to conclude on this basis, we have not yet finalised our audit procedures in respect of value for money and procurement processes adopted in the purchase transaction. We intend to perform additional audit procedures in respect of this matter. We will work to progress our testing in September 2019. We will report in relation to this procurement to Infrastructure in a final management letter or through correspondence from the Auditor-General.

The Closing Letter also referenced a previous recommendation from the ANAO for the department to undertake a review of the acquisition process to determine if integrity and probity were maintained. Specifically:

We recommended that Infrastructure undertake a review of the acquisition process to determine if integrity and probity were maintained during the process, particularly in light of the later valuations obtained for the preparation of the financial statements noting a significant price differential. At the time of this report, Infrastructure had not yet written to us on the results of this review which is expected in the near future.

The recommendation noted above appears to refer to a request on 8 August 2019 from the ANAO to officers of the WSU to provide a written statement on whether, on becoming aware on the difference in valuation, any enquires had been conducted to determine the difference and whether the transaction had been settled appropriately.

The WSU advised the ANAO on 18 October 2019 that it had conducted a follow-up review of the transaction and that it was satisfied that the transaction was managed appropriately. The scope of

⁹⁹ The Department's *Accounting Position Paper on Asset Valuations*, 18 July 2019.

¹⁰⁰ The ANAO provided a draft closing report to the CFO on 19 August 2019, a draft closing letter to the CFO on 27 August 2019, and their final closing letter was tabled at the Audit Committee meeting of 29 August 2019. Detail relating to the Leppington Triangle differed in each of these versions of the closing report.

the follow-up review conducted by the Department was not in the nature of a probity and integrity review, although it does appear to broadly address the request of 8 August 2019.

8.1.2 The Role of the Audit and Risk Committee

The role of the ARC is to provide advice to the Secretary (as the accountable authority) and the Department on the appropriateness of financial and performance reporting, the system of risk oversight and management, and system of internal control.¹⁰¹ The Financial Statements Sub-Committee (FSSC) was established by the ARC to provide additional support in monitoring and facilitating the annual financial reporting process.

The ARC were involved in the engagement with the ANAO during the preparation of the 2018-19 financial statements at the following meetings:

- FSSC:
 - 27 February 2019
 - 30 May 2019
 - 30 July 2019
 - 22 August 2019 (attended by all members of the ARC)
- ARC:
 - 29 August 2019

Representatives from the ANAO attended these meetings.

The FSSC met on 22 August 2019 to consider the ANAO Financial Audit closing report¹⁰² and other related matters. The FSSC Minutes reflect that the ANAO provided advice that:

The paperwork provided did not adequately support the premium paid for the land and indicated that the amount was at market value. This is not a financial statement issue, rather a probity issue.

The Minutes also reflect that the ANAO advised that:

The Auditor-General will write to the new Secretary on this matter and it is likely that a reference will be made in the end of year report.

The ARC met on 29 August 2019 and considered the ANAO closing letter, which included a summary of the Leppington Triangle purchase under the heading 'Significant and Unusual Transactions' (referenced above).

The Minutes record that the ANAO advised the committee that:

There would be further enquiries in relation to the acquisition of the "Leppington Triangle" parcel of land for the development of the Western Sydney Airport.

Although the closing letter was noted by both the FSSC and ARC, there was no action item that was recorded to require follow-up of the ANAO's concern about their description of a 'significant and unusual' transaction.

The ARC meets four times a year, and it should be noted that the Committee met on 29 August 2019 to review the financial statements, and did not meet again until after the commencement of the Performance Audit in December 2019.

¹⁰¹ This is in accordance with Section 45 of the PGPA Act 2013, and section 17 of the *Public Governance, Performance and Accountability Rule 2014* (the PGPA Rule).

¹⁰² As noted in Footnote 102, the ANAO provided a draft closing report to the CFO on 19 August 2019, a draft closing letter to the CFO on 27 August 2019, and their final closing letter was tabled at the Audit Committee meeting of 29 August 2019.

8.2 Assessment of the Department's Engagement with ANAO

The Review assessed the appropriateness and effectiveness of the Department's interactions with ANAO, as discussed below.

8.2.1 Did the Department Support the 2018-19 Financial Statements Audit Effectively?

The Review considered whether the Department supported the 2018-19 financial statements audit effectively, as relevant to the enquiries about the transaction and the Management Representation Letter. A particular criticism by the ANAO was the view that some of the information in the Department's Management Representation Letter was misleading.

8.2.1.1 Processes for supporting the Management Representation Letter

Prior to the completion of a financial statement audit, there is a requirement for the Department Secretary and the CFO to provide a letter to the ANAO which is called a Management Representation Letter. The letter attests to the accuracy of the financial statements that the organisation has submitted to the auditors for their analysis. In essence, the letter states that all of the information submitted is accurate, and that all material information has been disclosed to the auditors. The auditors use this letter as part of their audit evidence.

The Department undertook procedures to assure itself for the purpose of signing the Management Representation Letter. This included consultation with relevant members of the financial statements team and with senior executives across the Department.

The approach taken will generally fail to identify instances of inaccuracy, inconsistency or incompleteness of advice to the ANAO when officers genuinely believe that they have responded to the ANAO's enquiries accurately and effectively. For this reason, having effective quality assurance processes in place with regards to information provided by business areas for the purposes of annual reporting, is important.

The ANAO concluded that the assertions in the Management Representation Letter were inaccurate due to inaccuracies in responses to the ANAO to enquiries related to the Leppington Triangle acquisition which were raised as part of the 2018-19 financial statements audit and as identified in the subsequent performance audit. The inaccuracies raised by the ANAO are discussed below.

8.2.1.2 Errors in advice regarding valuation instructions

The ANAO noted that an example of inaccurate information provided by the Department was in response to a question on whether any additional instructions to the valuer for the Leppington Triangle acquisition had been provided (i.e. in addition to those contained in the brief for the valuation services).¹⁰³ The Department had responded to the effect that there were no additional instructions provided to that valuer. However, in the performance audit, the ANAO noted that this information was incorrect.

As is discussed in Chapter 4 of this Report, there is evidence or indication that additional instruction was provided to the valuer, as discussed in the following table:

¹⁰³ This was in relation to the ANAO's follow-up of the significant and unusual transactions, which they had reported to the ARC in their closing letter on 29 August 2019.

Figure 22: Summary of instructions to valuer and commentary on whether Department’s representations to ANAO were misleading.

Additional Instructions to the Valuer	Commentary in Light of ANAO’s Concern Regarding Misleading	Additional Consultation Observations
Provision of revised instructions subsequent to the commencement of the valuation contract (refer sub-Chapter 4.4.4 of this Report).	While additional instructions were provided to the valuer in a proposed amendment to the contractual arrangements on 9 June 2017, these were subsequently revoked in mid-July 2017, and the valuer was advised to follow the original instructions provided with the request for quotation and contract.	Officers advise that they did not consider the 9 June 2017 proposed amendment to the instructions in responding to this question given that the amendment was subsequently revoked and was not considered by the Department to be influential on the valuation requirement.
The Valuation Report issued by MJD references additional specific instructions which were not included in the valuation instructions provided by the Department with the RFQ and contract ¹⁰⁴ (refer sub-Chapter 4.5 above).	<p>The Valuation Report indicates that there may have been additional instructions provided to the valuer. (This is discussed further in Chapter 4 of this Report.)</p> <p>Further, there is evidence of correspondence between the Department and the valuer in response to certain queries from the valuer. It is likely that this correspondence could be considered as instruction.</p>	Officers advised that their response to the ANAO’s query related to any additional instructions provided by the Department to the best of their knowledge. Officers had not considered the content of the Valuation Report or the possibility of alternative instructions as enquiries of the valuer were never made in that regard.

Additionally, the Department accepted that:

There could have been more information provided here when the NSW valuation came to hand.¹⁰⁵ However, we consider this as quite different to the suggestion that there was a lack of honesty or the provision of misleading information in response to a request.

8.2.1.3 Errors in advice regarding comparator sales information for the valuer

The ANAO reports another instance of information provided by the Department in the financial statements audit which was inaccurate. The ANAO enquired whether the Department had confirmed “that the selection of relevant properties (in the valuation report) was not selective, or that alternative properties may have provided a different result”. The Department’s response was that “[n]o; the department relied on the expertise of the valuer in selecting relevant properties”.

This response did not effectively take into account an email exchange with the valuer in June 2017 where the valuer seeks the Department’s advice or confirmation on certain types of comparator properties to consider in assessing the value of the Leppington Triangle, to which the Department

¹⁰⁴ The valuation report includes the following statement with regard to instructions: “We are specifically instructed to provide a market valuation of the land on an Englobo rate per square metre basis based upon existing planning parameters with highest and best use reflected in speculative industrial re-zoning potential within the Western Sydney Priority Growth Area (WSPGA) and Western Sydney Employment Area (WSEA).” This is significantly different to the valuation instructions included with the valuation contract.

¹⁰⁵ It is not clear to this Review that the NSW valuation was relevant to the matter of valuation instructions raised by the ANAO. This suggests a lack of understanding of the question posed by the ANAO at the time.

responded: “we consider that (your) interpretation and proposed approach for the valuation would be consistent with the terms of the brief”.

In this response, the Department did provide direction to the valuer regarding comparator sales properties to consider in its work, even if only confirming the approach that the valuer was intending to take. Consultation with the Department regarding this advice to the valuer indicates that the intent was nothing more than for the valuer to consider, as broadly as necessary, the evidence to allow them to draw their own conclusions.

8.2.1.4 Processes for supporting the ANAO’s financial statements audit

The main engagement with the ANAO financial audit team was with the Department’s corporate finance area, and in particular with the Chief Accountant and their section. The ANAO had also been provided with a primary point of contact in the WSU, to support their enquiries in respect of matters relating to the Leppington Triangle.

The Chief Accountant met regularly with the ANAO and was aware that they had raised many concerns about not obtaining enough information from the WSU. However, when the Chief Accountant followed up these concerns with the WSU liaison point, they were informed that the information had been provided to the ANAO as requested. Although, it was admitted that occasionally it took some time to provide a response due to the volume of requests made, but this was generally responded to in days or weeks, and not months.¹⁰⁶

The Review contends that the potential cause of the ANAO not receiving timely and complete responses from the WSU was largely attributable to inexperience in dealing with auditors and misunderstanding the expectations and implications of certain questions, rather than a lack of care being taken in providing responses. The Review has seen no evidence of deliberate intent to mislead the ANAO.

The Review recognises that the work of the Department is complex, with multiple functions involved in providing adequate and effective support to the ANAO. However, it is critical that their questions are answered as completely and as accurately as possible, as failure to do so impacts on the quality of the financial statements themselves, as well as the Department’s reputation. Involvement of senior and experienced officers and engagement other than through the trading of emails can support effective working with auditors.

It is clear that the ANAO perceived the Leppington Triangle acquisition as an area of significant risk. It is equally clear that the WSU had not recognised that heightened perception of risk. It is reasonable that the heightened risk perception of the ANAO suggested that more attention and control over the engagement with the ANAO was required. The issue is not just about whether the lines of enquiry being pursued by the ANAO impact on the financial reporting deadlines, but whether they contain broader risks that needed to be managed, as was the case in this instance.

Guidance from the Department of Finance recognises these challenges and suggests a range of mechanisms to deal with such issues. These extend from the development of protocols between agencies and the ANAO, through to assurances required by audit committees and in management representation letters.¹⁰⁷ It is up to each Department and agency to establish arrangements that ensure that risks associated with engagement with the ANAO and other accountability authorities are managed effectively. It is apparent that in this circumstance, the arrangements were not effective.

¹⁰⁶ This is contrary to the ANAO engagement letter which states that all requests for information must be actioned within a week of the request.

¹⁰⁷ Department of Finance, *Financial Statements Better Practice Guide* (while the guidance material has been updated to 2020, the fundamental principles were in place at the time of the 2018-19 financial statement reporting process).

8.2.1.5 Summary of whether the Department's engagement with ANAO was misleading

Due to the points raised above, in their final report, the ANAO concluded that the representations provided as part of the financial statements were inaccurate, which the Review can understand.

However, it appears that the basis for the inaccurate information provided to the ANAO was more so due to genuine misunderstanding or misinterpretation of the ANAO's questions, than any intent to mislead the ANAO. This is particularly the case with reference to advice regarding the valuation instructions and comparator sales (discussed in sections 8.2.1.2 and 8.2.1.3 of this Report).

Further, other shortcomings of the Department's provision of information to the Department were likely due to the inexperience of dealing with the ANAO and confusion around what information the ANAO were expecting or requesting. Further, the significant turnover of staff and confusion around responsibilities for the provision of information contributed to the incompleteness or sub-optimal nature of responses to the ANAO. All of these factors meant that while there may have been a genuine attempt to provide the required information, there were inconsistencies and inaccuracies in the information being provided to the ANAO.

Finding: The Department provided inaccurate responses to certain questions raised by the ANAO, and these were not identified as part of the Management Representation Letter process. These inaccuracies stemmed from lack of relevant experience of officers responding to ANAO queries, and poor quality assurance over the provision of that information. It is unlikely that any Management Representation Letter assurance process would have identified such issues without an improved quality assurance discipline.

8.2.2 Was there Suitable Focus on the Control Issues raised by the ANAO regarding the Leppington Triangle?

The potential control issues stemming from the significant difference between the price paid for the Leppington Triangle and the financial statements assets valuations was first communicated to the FSSC by ANAO.

Senior officers of the Department and members of the ARC (present at the FSSC) advised us that they were surprised to first hear the issue from the ANAO auditors or in an Audit Committee context, and not from within the Department itself. Further, members of the Executive advised that they were not advised of the matter until it was being reported as an audit issue.

In the context of the finalisation of financial statements, the primary focus of the Department in August 2019 was the financial reporting issue and ensuring that the financial statements could be finalised and the ANAO's expectations met to support the financial statements audit opinion.

After the ANAO raised their concerns regarding the valuation, it appears that the WSU accumulated information about the difference in valuations, and sought to explain the cause of this. This was done both for the purpose of briefing of the Department's Executive, as well as to respond to the ANAO's inquiries.

It is clear that the responses did not effectively address concerns held by the ANAO, or give comfort to the ANAO that there was clarity on why the valuations were so different, and why the valuation used to support the Leppington Triangle acquisition was suitable. In fact, this Review has also not seen any documentation that provides such comfort and clarity.

Given the significance of the matter to the ANAO, it is likely that a better outcome may have been achieved if WSU and the Department's Finance Team jointly developed an explanation for the difference in valuations, what (if any) control issues this raised, and what (if any) actions the Department would take in response to those control issues.

Finding: The absence of effective collaboration across the Department to investigate and respond to the control issues raised by the ANAO, prevented the Department from responding effectively to the concerns regarding the transaction.

8.2.3 Did the Department Effectively Respond to the Matters raised in the Closing Report?

The concerns about a ‘significant and unusual transaction’, as expressed by the ANAO in their discussions and closing letters required due consideration by the Department. However, the concern was raised in an environment where the focus was on the finalisation of financial statements, in a situation where the ANAO was prepared to issue an unqualified opinion, and the ANAO were still indicating that they had not completed their own enquiries over the underlying control related issues for the acquisition.

The FSSC and the ARC did not make any specific formal recommendations at their meetings in August 2019 to address the ANAO’s concerns about the acquisition or define what the follow-up scope should be. Members of both Committees have asserted that given the Department had committed to undertake an internal review, and the ANAO had asserted that it was likely that the Auditor-General would commence a Performance Audit, that they thought it sensible to await the results of those pieces of work and then assess what control or risk issues were identified. This appears reasonable, and it is likely that further work that could have been commissioned by the ARC would be duplicative. The ARC did not perceive urgency that required additional work at the time by the ARC, which again is not unreasonable.

8.2.3.1 An integrity and probity review

From consultations conducted as part of the Review, it appears that there was a lack of clarity on what was actually expected from the ANAO’s recommendation for “a review of the acquisition process to determine if integrity and probity were maintained during the process” and a lack of direction on what the scope of the review should have been.

In part, this is likely due to inconsistent messages being received by the Department regarding the ANAO’s expectations. Earlier in August, the ANAO had requested the WSU to provide a written statement on whether any enquires had been conducted to determine the difference in the valuation outcomes and whether the transaction had been settled appropriately. The Department was working on the response to this enquiry at the time that the ANAO’s final closing report was delivered advising that it had “recommended a probity and integrity review”. This recommendation for a probity and integrity review was not received in the formal way that the Department was used to receiving from the ANAO in connection with its recommendations.

Further, in the days following the delivery of the closing report, the ANAO requested the WSU to provide the following information to the ANAO:

- *documentation or other items that would support the assessment that the purchase price valuation was within estimation of the department (the minutes’ provided earlier indicate that this is the case) – whether this be an internal assessment, briefing note etc*
- *documentation or other items that support the provision of probity advice on the selection of the valuer – we discussed yesterday this may be from AGS records or emails*
- *documentation or other items to outline the background to the purchase of the land and on the requirement for the timing – i.e. it was a CPA activity and was required to*

be undertaken by the department at that time – whether this be an extract of documents for CPA, or other records

- *any other documentation you think might be relevant for us, that we should see to assist with our enquiries.*

Officers within the WSU who were tasked with responding to the ANAO were focused on this request and the ANAO's request from 8 August 2019 for a written statement, and have advised that they were not aware of the request for a "probity and integrity review".

Consequently, the task assigned by the ANAO was seen as more in the nature of examining the difference between the valuations (i.e. around what was done by the WSU and how it should be accounted for in the financial statements) and not specifically a probity and integrity review.

This led to the conduct of a review of the transaction by the WSU that did not include a deep analysis of probity and integrity matters. The review of the transaction was also conducted by officers that were previously involved in the transaction, which is not an appropriate approach to a review where probity and integrity matters are being raised.

When responding to the recommendation to conduct a probity and integrity review, the Department should have adopted procedures necessary to provide a reasonable level of assurance to the Department and the ANAO. This should have included appropriate specificity over the reviews' scope and the use of an independent team (e.g. an internal audit).

The Department's response to the ANAO's recommendation for a "probity and integrity review" of the Leppington Triangle acquisition was not consistent with the ANAO's (or other reasonable) expectations for such a review. However, this in part was due to confusion between multiple requests from the ANAO for information and analysis in connection with the Leppington Triangle acquisition.

Finding: The Department's failure to adequately understand and internally communicate the ANAO's recommendation for a probity and integrity review of the transaction resulted in the conduct of a review that did not meet the standards or the level of assurance expected for that type of review, although it did respond to other requests from the ANAO. The absence of a written recommendation by either the Audit and Risk Committee or the Financial Statement Sub-Committee regarding the probity and integrity concern identified by the ANAO, also meant that there was limited oversight to ensure the response to the ANAO's concerns about the Leppington Triangle acquisition was satisfactory.

Appendix A: The Northern Road Stage 4 Realignment

This appendix provides additional context over the realignment of The Northern Road – Stage 4 (TNR4), including the rationale for adjustment options and choices, and who were responsible for the final decisions.

The Review considered the role of the Commonwealth and its engagement with stakeholders, such as the NSW Roads & Maritime Service (RMS), Airservices Australia, other government agencies, and with landowners. A chronology of key events is also provided to aid understanding of what occurred and why.

What Occurred in the Realignment of The Northern Road Stage 4?

The Western Sydney Infrastructure Plan (WSIP) was announced in the 2014-15 Federal Budget (with Commonwealth investment of \$2.9 billion). It is an initiative involving the Commonwealth and New South Wales Governments in the upgrade of major roads and infrastructure in the Western Sydney region, to address the expected population growth, as well as the operation of the Western Sydney Airport at Badgerys Creek. Specifically, it includes:

- upgrade of The Northern Road to a minimum of four lanes from Narellan to Jamison Road, Penrith;
- construction of a new east-west motorway to the airport between the M7 Motorway and The Northern Road (to be known as the M12 Motorway);
- upgrade of Bringelly Road to a minimum of four lanes between The Northern Road and Camden Valley Way;
- construction of the Werrington Arterial Road by upgrading Kent Road and Gipps Street to four lanes between the Great Western Highway and the M4 Motorway;
- upgrade of the intersection of Ross Street and the Great Western Highway; and
- a \$200 million package for local roads upgrades, to be delivered across four rounds over 10 years.

The Western Sydney Airport was projected to generate an additional 1,250 vehicle movements per day during its construction. Once operational, the airport is expected to lead to significant vehicle movements across the broader road network (for example, up to 47,000 passenger and employee trips and 42,000 freight trips per day during operation by 2031¹⁰⁸).

The Northern Road acts as a backbone of these growth areas, and is a key arterial road for the region, but was already operating at capacity in 2014. The upgrade of The Northern Road was therefore an important component of the broader program of works within the WSIP and will be a major arterial road providing entrance to the Western Sydney Airport.

The majority of the road upgrade replaces an existing two-lane road, with a four-lane dual carriageway and dedicated kerb-side bus lanes. The upgrade is being completed in six stages as illustrated in the table below.

¹⁰⁸ Infrastructure Australia, *Project Business Case Evaluation – Project Name: The Northern Road Upgrade*, February 2017.

Figure A1: Stages in the upgrade of The Northern Road.

Stage	Section ¹⁰⁹	Construction Dates
TNR Stage 1	Old Northern Road to Peter Brock Drive	Feb 2016 – Apr 2018
TNR Stage 2	Peter Brock Drive to Mersey Road	June 2017 – Dec 2020
TNR Stage 3	Glenmore Parkway to Jamieson Road	June 2017 – Mid 2021
TNR Stage 4 (TNR4)	Mersey Road to Eaton Road ¹¹⁰	Nov 2018 – Sep 2020
TNR Stage 5	Littlefields Road to Glenmore Parkway	Feb 2019 - 2022
TNR Stage 6	Eaton Road to Littlefields Road	Jul 2019 – March 2021 ¹¹¹

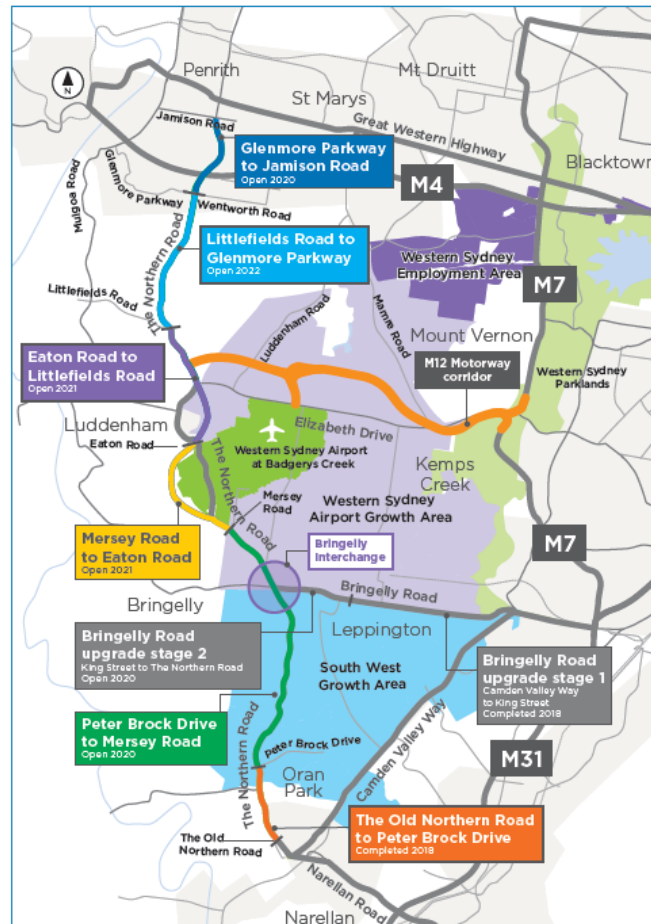
TNR4 involved upgrades to the road between Mersey Road at Bringelly, and Eaton Road at Luddenham. This stage diverts The Northern Road around the Western Sydney Airport site at Badgerys Creek, west of the existing road, and was completed in 2020. It is adjacent to holdings of the Leppington Pastoral Company (LPC) and other private landowners. The map below illustrates the various phases of The Northern Road upgrades within the context of the major roadworks being progressed in the region.

¹⁰⁹ During the TNR upgrades, the names of some of the stages changed.

¹¹⁰ Also referred to as TNRM2E in RMS documents.

¹¹¹ Some components of Stage 6 that were considered critical to the construction of the Western Sydney Airport were opened in late 2020.

Figure A2: Map illustrating the stages of The Northern Road upgrades.



When was the Decision to Realign Made and Who Made it?

The Commonwealth had a role in The Northern Road project, providing funding to the initiative and as the principal decision-maker on airport safety issues. The NSW Government, led by the RMS makes the final decisions concerning roads within its jurisdiction.¹¹² The TNR4 realignment also had to be coordinated with the Western Sydney Airport program of work, because the road, pre-alignment, transected the proposed airport site.

The following is a summary of the processes involved and the dates on which key decisions were made.

Summary of Events

Preliminary consultation between the Department and RMS on the TNR4 commenced in February 2015. This centred on the development of a TNR4 Options Identification Report that was prepared by RMS and intended for public consultation later that year. The RMS requested feedback from the Department on the draft options report, including consideration of possible land transfer arrangements around the airport site and through land owned by LPC.

¹¹² Pursuant to the *Roads Act 1993 No.33* (NSW). It should also be noted that the RMS operated from November 2011 and was dissolved on 1 December 2019, with its functions, including building and maintaining road infrastructure, transferred to Transport for NSW.

The Department provided its feedback to the draft options report on 23 June 2015, requiring appropriate operational clearances for the airport, and the need for the RMS to work with the Commonwealth on a mutually acceptable approach to land being available for the realignment.

The TNR4 Options Identification Report¹¹³ was provided for public consultation on 13 July 2015, with responses due by 14 August 2015. The report included four route options for the realignment of the road. These were known as the Central Option, Campbell Street Option, Eastern Option and Western Option. All of the options involved realignment around the proposed airport site, and variously involved land owned by Commonwealth, the LPC, and other landowners.

The results of the public consultation showed that the Western and Eastern options were preferred and received similar levels of support. The main comments in favour of the Western Option was that it involved a straighter and more direct road alignment. The main comments in favour of the Eastern Option was that it provided a connection to the Luddenham town centre, creating greater opportunities for the village and its businesses.¹¹⁴ The community advised that it did not support either the Central and Campbell Street options due to land acquisition, heritage and noise considerations, and their impact on the Luddenham Town Centre.

A formal submission in response to the Options Report was also provided by LPC. While they generally supported the upgrade, they objected to the Eastern Option which passed through their land and increased impacts on their property and business.¹¹⁵ The LPC submission noted that they had altered their farming operations as a result of their previous agreement with the Commonwealth on earlier land acquisitions. The RMS had anticipated that the route options would be strongly opposed by LPC, and this could lead to significant delays and increased costs in completing the project.¹¹⁶

During August and September 2015, the RMS and the Department consulted on a range of possible options to address the risks arising from LPC's opposition to the realignment options. This involved consideration of the use of more Commonwealth owned land (including the so-called "axe handle" land that was previously acquired from the LPC in the 1990s and earmarked for realignment of The Northern Road, and less LPC-owned land, to realign the road.

RMS held a workshop on 23 September 2015 to select a preferred option for TNR4. The workshop was attended by representatives from the Department, local government and RMS. The participants decided not to proceed with further assessment of the Central and Campbell Street options.

Although, the assessment showed that for many criteria there was not a significant difference between the Western and Eastern options, the latter was preferred as it better supported:

- current development, maintaining and improving access through Luddenham;
- future development, providing links to the Western Sydney Priority Growth Area;
- airport connectivity, by offering additional opportunities to connect to the airport;
- future connection with the M12 motorway due to proximity of the eastern alignment; and
- airport construction programs, as it allows staging the road's construction and the closure of The Northern Road existing alignment through the proposed airport at the earliest opportunity.¹¹⁷

It was also noted that there would be a need for some modification to the route alignment for the Eastern Option that was presented to the community in July 2015. This included the possibility of

¹¹³ RMS, *The Northern Road Upgrade Stage 4: Options Identification Report*, 2015.

¹¹⁴ RMS, *The Northern Road Upgrade Stage 4, Preferred Route Option Report*, November 2015.

¹¹⁵ LPC submission responding to *The Northern Road Upgrade Stage 4: Options Identification Report*, dated 14 August 2015.

¹¹⁶ RMS advice to the Department and request for feedback on the draft TNR4 Options Report (meeting of 27 May 2015).

¹¹⁷ RMS, *The Northern Road Upgrade Stage 4*, November 2015, which was published by RMS in their community newsletter, and through advertisement in the press (both on 9 November 2015).

moving the Eastern Corridor for TNR4 closer to Commonwealth land, but that a range of operational clearances around the airport would still be required.

In October 2015, the Department and RMS considered road alignments through LPC land, with the RMS presenting a revised option to the LPC on 23 October 2015. The LPC were pleased that the proposed road alignment required less of their land, but sought further concessions. The Department also advised that it would need to confirm whether the modified alignment presented by RMS was technically feasible without compromising airport operations.

On 3 November 2015, the RMS provided the Department with an 'Option Q' that reflected feedback from LPC to move the alignment closer to the airport boundary and minimise impact on their land. On 6 November 2015 the Department sought advice from its consultants, who were assisting on airport safety matters, on the feasibility of Option Q. The Department then advised the RMS on 10 November 2015 that it was willing to consider alignment Option Q, subject to confirmation of a number of technical and design requirements, including access arrangements for the LPC.

The Commonwealth and NSW Government then issued a joint media statement on 12 November 2015, announcing the preferred route for TNR4 (the Eastern Option) and noting that further analysis, investigation and refinement would be required.¹¹⁸

On 25 November 2015, the Department, RMS and their respective engineering consultants met to discuss the impact of Option Q on the indicative location for a future second runway. This resulted in some further alignment adjustments that were to be known as 'Option S,' which meant that the alignment of the road was now to be on the boundary of LPC land.

During December 2015 to February 2016, RMS subjected the alignment Option S to a concept design and an environmental impact statement process. This included placing the option on public display and calling for public feedback by 11 March 2016.

Around this time, the Department had also consulted with Airservices Australia and the Civil Aviation Safety Authority (CASA),¹¹⁹ on the implications of the preferred alignment option, and subsequently advised RMS on 19 May 2016 that it was comfortable in proceeding with Option S, as it 'achieves the most appropriate balance between value for money considerations, views of LPC, and broader project timeframes.'¹²⁰

The RMS met with the LPC on 22 June 2016, on the specifics of adjustments that were required to be made to irrigation, utilities and internal roads due to impacts of The Northern Road upgrade on existing infrastructure. LPC advised RMS that they were pleased with the new design and did not require any further modifications to the road alignment.

The Department advised the LPC on 17 August 2016, that the TNR4 alignment proposed by RMS on 9 June 2016 (Option S), had its in-principle support, subject to meeting contingencies associated with the disposal of Commonwealth land to NSW government.

I understand RMS has since written to you on 9 July 2016 with a re-designed route for TNR4 that Utilises Commonwealth-owned axe handle land as outlined above, noting that the Commonwealth has advised RMS that LPCs preferred realignment option could be considered.

While the Department supports in principle, the proposed new design of TNR4 as preferred by LPC, please be aware that confirmation of the new alignment is contingent on Australian

¹¹⁸ Joint Media Statement by the Minister for Major Projects, Territories and Local Government (Federal) & the NSW Minister for Roads, Maritime and Freight, dated 12 November 2015.

¹¹⁹ Airservices Australia operates pursuant to the *Air Services Act 1995* to provide facilities for the safety, regularity and efficiency of air navigation within Australian administered airspace. This includes the provision of air traffic services, aviation rescue firefighting services, aeronautical information, radio navigation and telecommunication services. CASA is responsible for the regulation of civil aviation in Australia, including the enforcement of safety requirements.

¹²⁰ Letter from the Department to RMS dated 15 May 2016.

*Government agreement to dispose relevant land parcels, including the axe handle, to facilitate the realignment.*¹²¹

On 15 October 2016, the Department approved the disposal strategy, including the transfer of the Commonwealth owned 'axe handle' land, that was previously acquired from the LPC, to RMS for the TNR4 realignment. RMS then proceeded on its process for acquiring land, including issuing notices to the affected landowners.

Decision-making on the Realignment

While it is important to note that the decision on the alignment of TNR4 was a decision of the NSW Government, it was made in consideration of the extensive consultation with the Department. Both the RMS and the Department were keen to progress the road realignment and upgrade issues, and to select the most appropriate option that reflected the needs of the community and the airport.

This was determined through an extensive consultation process¹²² that included consideration of:

- community and socio-economic impacts (including community profiling and community consultation);¹²³
- land use and property (including potential land use and impacts);
- the Western Sydney Airport (including construction requirements and operational clearances);
- traffic and access (including road user safety, traffic speeds, local access and connectivity);
- road safety and road design (including compliance with design and construction standards);
- road operating principles (including nominal corridors to cater for road services and to remove constraints);
- utilities (including impact on existing and planned major utilities);
- topographical constraints (consideration of creek lines, gullies and required earthworks);
- land use and planning (consideration of the impact on land zoning on private, commercial and public facilities);
- the environment (consideration of biodiversity, heritage and potential for flooding);
- urban design and visual impacts (consideration of legibility and access for motorists);
- town centre and expansion (consideration of the impacts on the Luddenham town centre);
- noise impacts (consideration of impacts on churches, schools and other sensitive receivers);
- contamination (consideration of toxicity and contaminants);
- constructability and staging (consideration of greenfield construction advantages and timeframes); and
- cost comparisons (consideration of overall and relative cost estimates).

The RMS and the Department were concerned that LPC, based on past experience, would actively resist any attempt to acquire its land, which would increase the risks of significant additional costs and delays to the project.¹²⁴

An important outcome for TNR4 was that the final alignment and the use of the 'axe handle' meant that less land would have been required from LPC, and that this formed a significant 'concession' on the part of the Commonwealth.¹²⁵ However, it was deemed that this 'concession' was worthy of

¹²¹ Department letter to LPC dated 17 August 2016.

¹²² RMS, *The Northern Road Upgrade Stage 4*, November 2015.

¹²³ RMS, *The Northern Road Stage 4 Options Analysis Community Feedback Report*, 2015.

¹²⁴ As noted in the RMS advice to the Department and request for feedback on the draft TNR4 Options Report (meeting of 27 May 2015). This included concerns by RMS over the potential for LPC to oppose the land acquisition, which could result in significant delays and increased costs.

¹²⁵ As discussed in meetings: RMS & Department (27 May 2015, 31 July 2015, 10 & 26 August 2015, 23 September 2015, 28 October 2015, 6 November 2015, 25 November 2015, 25 February 2016, 18 & 28 April 2016, 27 July 2016); RMS & LPC

being undertaken, as the realignment could still be achieved in a way that benefitted the community and met requirements, while taking into account a key stakeholder's concerns (LPC's) and mitigating the risk of disputes, including increased cost and delays, to the project.

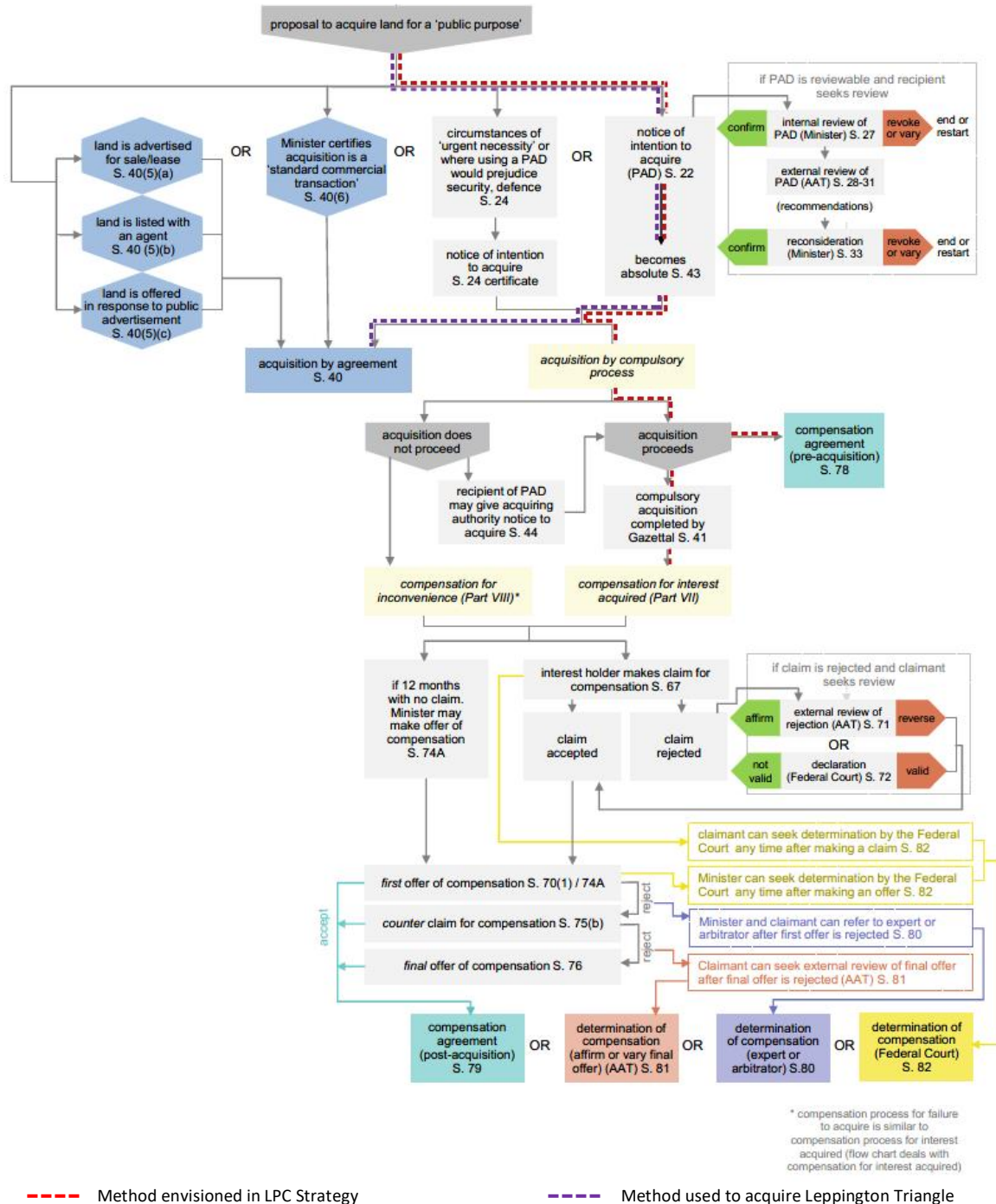
Through the process undertaken to derive the final TNR4 realignment design, the Department considered that it had improved its relationship with the LPC, and this subsequently became part of the rationale and basis for proceeding with an acquisition of the Leppington Triangle in the short-term (as described in Chapter 2: The Strategy for the Acquisition).

(22 June 2016). RMS, Department & LPC 23 October 2015. Correspondence: RMS & Department (16 February 2015, 26 March 2015, 11 May 2015, 23 June 2015, 18 August 2015, 16 & 21 September 2015, 9 & 22 October 2015, 3, 6, 10 & 20 November 2015, 14 December 2015; 10, 16 & 31 March 2016, 6 & 13 April 2016, 19 May 2016, 3 August 2016); RMS & LPC (9 June 2016). Department & LPC (17 August 2016).

Appendix B: Lands Acquisition Act Pathway

The flowchart below sets out the acquisition process contained in the LAA. The flowchart has been sourced from the Department of Finance *Review of the Lands Acquisition Act 1989: Discussion Paper*.¹²⁶ The red dotted line has been added by the Review to show the acquisition process envisioned in the LPC Strategy. The purple dotted line has been added by the Review to show the acquisition process ultimately used by the Department to acquire the Leppington Triangle.

Figure B1: Acquisition process and pathways described in LAA.



¹²⁶ Department of Finance, *Review of the Lands Acquisition Act 1989: Discussion Paper*, 2020, page 15.

Appendix C: Better Practice and Criterion for Effective Briefing

As noted in Chapter 7 (Briefings to Decision Makers), there is no definitive better practice guidance for provision of advice and briefing to decision makers and Ministers in the Australian Public Service or more generally, in business or corporate settings in Australia.

A primary driver of this absence of guidance is that the approach to advice and briefing is necessarily dependent on the preferences and ways of working of different organisations and leaders. This in turn can be dependent on management styles which are highly individualistic. Typically, strong leaders establish with their teams what they expect in terms of briefing, including content, timing, structure, detail and circumstances. Some organisations supplement this with guidance on organisation-wide norms and expectations on briefing within the Department or agency.

Public Service Act 1999 Requirements

Despite this, there are some minimum requirements for briefing across the Australian Public Service (APS). There is an explicit expectation from the Australian *Public Service Act 1999* in the *APS Values* (section 10 of the *Public Service Act 1999*) for the values of public servants in the conduct of their duties, including in making decisions. These requirements are noted below:

- (1) *Committed to service*: The APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government.
- (2) *Ethical*: The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.
- (3) *Respectful*: The APS respects all people, including their rights and their heritage.
- (4) *Accountable*: The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility.
- (5) *Impartial*: The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence.

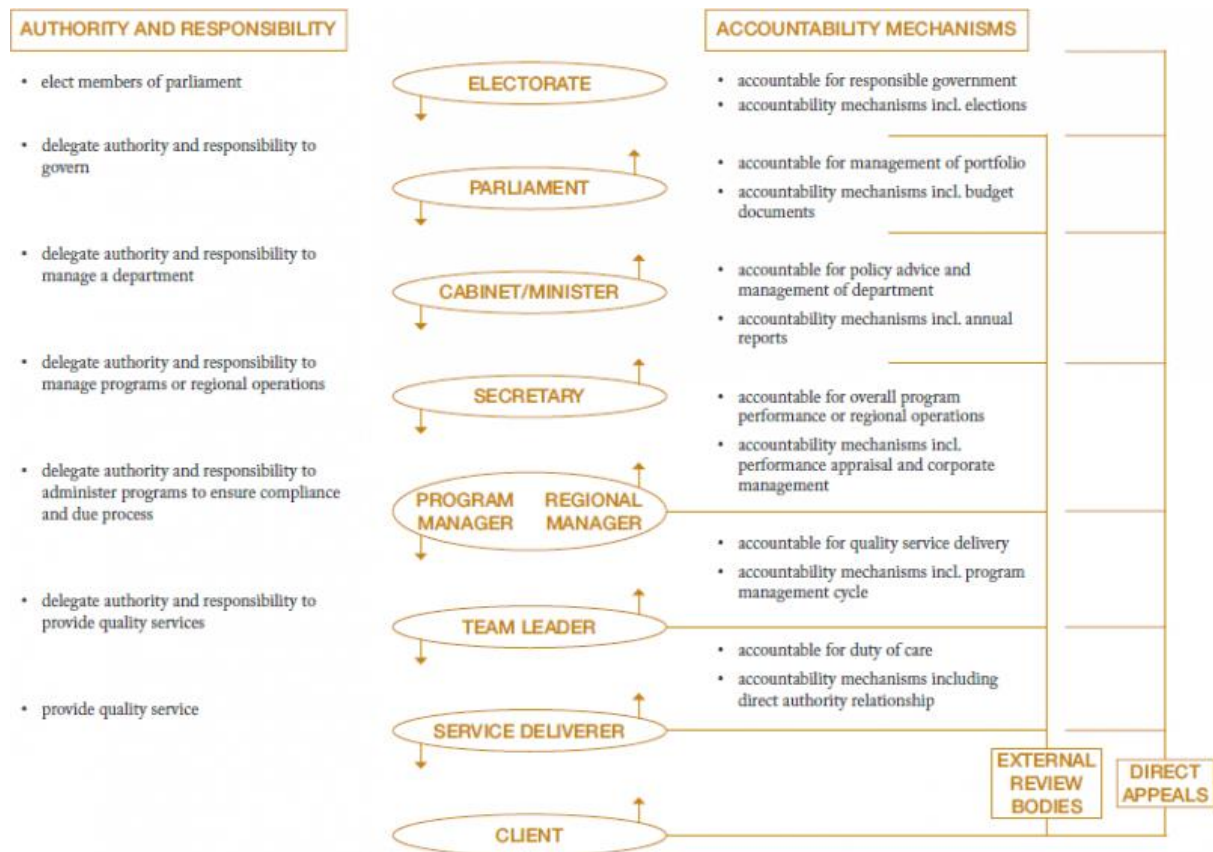
All of these engage with the expectations of public servants and agencies in their provision of information to decision makers and senior leaders in their work.

The obligations around transparency are less obvious in the constructs underpinning the APS, however for the purpose of this Review, we have interpreted the value of “accountability” to the Australian community to include an inherent requirement for transparency.

Although now archived, the Australian Public Service Commission (APSC) published a paper titled *Delivering Performance and Accountability* (which had been last reviewed in 2018) which included the following diagram¹²⁷ explaining accountability in the APS.

¹²⁷ The original basis for this diagram was a Management Advisory Board/Management Improvement Advisory Committee report from 1993, *Accountability in the Commonwealth Public Sector*.

Figure C1: APSC diagram explaining the accountability framework.



The principles underpinning this are reasonably accurate in describing responsibility and accountability mechanisms that are in place across the APS, and the mechanisms relevant to the Department while the acquisition was being transacted. This shows the responsibilities of officers to support senior executives and in turn to Secretaries and Ministers. The principles focus on delegated authority and responsibility and accountability to support proper exercise of a duty of care and quality service delivery.

Other Obligations

Other aspects of the legislative construct for the APS impose obligations in connection with accountability and transparency. Regarding obligations imposed in connection with procurement by the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), the Department of Finance notes:

*The Australian Government is committed to ensuring accountability and transparency in its procurement activities. Transparency involves relevant entities taking steps to enable appropriate scrutiny of their procurement activity.*¹²⁸

This is pertinent for the acquisition as it was a procurement bound by the requirements of the PGPA Act.

¹²⁸ Department of Finance, *Transparency in Commonwealth Government Procurement*, last updated June 2020, (available at: <https://www.finance.gov.au/government/procurement/buying-australian-government/transparency-commonwealth-government-procurement>).

This Review's Construct for Better Practice in Briefing to Senior Leaders, Decision Makers and Ministers

In light of the above obligations and drivers for quality in briefing and advice for senior leaders, decision makers and Ministers, this Review has established the following as guidance or criteria for effective briefing and information.

i) Clarity on authorities, roles and responsibilities of individual officers, leaders and Ministers.

It is arguably impossible to be clear on what and how to brief senior leaders, decision makers and Ministers if there is no clarity on the roles, authorities and accountabilities of officers at different levels or positions in connection with a project, matter or transaction. Early definition on these is essential to guide quality, targeted and relevant briefing.

ii) Clarity of purpose of an individual briefing.

In the context of a progressing a transaction, there will be key points at which specific decisions are required, or leaders will require information to monitor the progress of a transaction. It can be helpful at the initiation of a transaction to establish what the triggers for briefing or decision will be, and then to provide relevant briefings accordingly. Then each briefing should make clear its purpose and where it fits within the context of the overall transaction or project.

iii) Helpful to the decision maker or recipient.

Ultimately, briefings need to provide the necessary information in a structure and form, and with the context and content that is helpful to the recipient or decision maker, in the context of the purpose of the individual briefing. This is heavily dependent on the preferences of the recipient, and the background knowledge that the recipient or decision maker has for the transaction or project. One feature that most recipients of briefing see as helpful is brevity and conciseness. However, this should not be delivered at the expense of other features of good briefing.

iv) Accurate and complete.

The content of briefings needs to be accurate and complete in the context of the purpose of the action required from the recipient. In terms of accuracy, briefings should avoid assumptions, generalisations, inaccuracies, errors and unsubstantiated facts. In terms of completeness, if there are gaps in relevant information or omissions of information which would be relevant to making important decisions or taking action (including omissions of explanation of weaknesses or risks associated with a particular action), then the briefing may be misleading to the recipient. The author of briefings should be aware that the recipient will be taking decisions or actions involving legislative powers or Commonwealth funds, and that poor decision making or actions can have material implications for the Department or agency and the Commonwealth.

v) Timely.

Briefing and information to senior leaders, decision makers and Ministers should be timely in order to support timely decision making and relevant awareness of a project or transaction's progress in the context of other responsibilities.

vi) Use of plain English and avoidance of jargon.

This can be a challenge especially when dealing with complex and technical matters. However, the author of briefing needs to be aware that recipients may not have the technical knowledge or experience that the author has. Accordingly, briefings need to be drafted using language that will be understood by the recipient, being aware of their experience and appreciation of technical aspects

of the subject matter. The challenge in this is to avoid over-simplifying to the extent that key information is not communicated by the briefing.

vii) Explain key risks and how they are mitigated.

Briefings are typically associated with significant transactions and/or expenditure of public funds. These inevitably come with risk. It is important that recipients are aware of the more significant risks associated with the decisions being taken, the implications of those risks, and how those risks are mitigated. This is essential for informed decision making by recipients of briefings.

viii) Accompanied by in-person engagement.

It can be helpful for recipients of briefings to have the opportunity to engage with the author and relevant experts to best understand that content and make informed decisions. This allows the recipient to ask questions and for the author and relevant experts to provide additional colour to the recipient or decision maker relevant to information decision making. While it should not be assumed that such an opportunity will exist as the recipient may not believe such engagement to be necessary (and so the author should not omit certain information on the basis that it will be communicated later), it is often helpful, especially for significant decisions or transactions.

Appendix D: Chronology of the Department's Engagement with ANAO

The following represents a high-level timeline of the Department's engagement with the ANAO as part of the 2018-19 financial statements audit related to the Leppington Triangle acquisition and reporting treatment.

Figure D1: Table summarising timeline of the Department's engagement with the ANAO for the 2018-19 financial statements audit, as relevant to Leppington Triangle.

Date	Communication	Nature/Summary
31 Jul 2018		Land purchased.
14 Aug 2018	Email to ANAO	Email advice to ANAO from the Department's Chief Accountant on a proposed subsequent event disclosure in the 2017-18 draft financial statements on the purchase of the Leppington Triangle, including additional information on the purchase and valuation arrangements.
21 Aug 2018	Financial Statements Subcommittee (FSSC) meeting	Draft 2017-18 financial statements considered by FSSC, including Audit and Risk Committee (ARC) members. The draft financial statements included a subsequent event disclosure on the land purchase.
31 Aug 2018	ARC meeting	ARC review of final draft 2017-18 financial statements with unchanged subsequent event disclosure.
27 Feb 2019	FSSC meeting	Chief Financial Officer (CFO) Report noted that land had been purchased and that JLL Public Sector Valuations (JLL) had been engaged to undertake a valuation of all administered assets in 2018-19.
30 May 2019	FSSC meeting	CFO Report provided advice on initial outcome of asset valuations. The valuation of land in Western Sydney had not been completed at this stage.
12 Jun 2019	Email to JLL	Email Request to JLL from Asset Accountant to request valuation of seven lots of land at Badgerys Creek (including Leppington Triangle).
5-6 Jul 2019	Emails to/from JLL	Draft valuation report provided by JLL indicated a valuation of \$3.065 million. Subsequent phone calls and emails were exchanged to clarify the difference between valuation and purchase price.
6 Jul 2019	Email to Colliers	Request for quote issued to Colliers from Chief Accountant to obtain second valuation opinion.
8 Jul 2019	Emails to / from Colliers	Quotation received and accepted from Colliers for second opinion.
9-11 Jul 2019	Emails to / from Colliers	Additional supporting information provided to Colliers by Chief Accountant based on supporting information from Western Sydney Unit (WSU).

Date	Communication	Nature/Summary
15 Jul 2019	Email from Colliers	Colliers valuation report received advising a valuation of \$4.0 million.
18 Jul 2019	Position paper	Position paper on asset valuations, including valuation of the Leppington Triangle, completed on 17 July 2019 and approved by CFO on 18 July 2019.
19 Jul 2019	Email to ANAO	Position paper on asset valuations provided to ANAO by Chief Accountant.
19 Jul 2019	Meeting	Difference in valuation discussed between Chief Accountant and ANAO. Outcomes of meeting recorded in a summary email from Chief Accountant to CFO.
19 Jul 2019	Email from ANAO	Request from ANAO to WSU for meeting to discuss purchase of Leppington Triangle.
24 Jul 2019	Meeting / email to ANAO	Meeting between WSU and ANAO on purchase of Leppington Triangle with documentation provided on acquisition strategy, ministerial submission, valuation, sign offs, lease, probity and Cabinet submission.
26 Jul 2019	Email from ANAO	Follow up questions from ANAO to Western Sydney Unit on final valuation report, recommendations to the delegate and conflicts of interest.
29 Jul 2019	Email to ANAO	Additional documentation on the final Valuation Report provided by WSU in response to follow up questions.
30 Jul 2019	FSSC meeting	FSSC reviewed the Accounting Position Paper on asset valuations. The CFO report noted the reduction in land valuation arising from the Leppington Triangle. The Minutes reflect '[The ANAO officer] advised the ANAO was comfortable with the accounting treatment but were looking into probity matters regarding the purchase'.
8 Aug 2019	Email from ANAO	Further questions from ANAO to WSU on process, valuer and Valuation Report. The email included a request for a formal response on whether the Department, on becoming aware of the financial statements valuation, conducted any enquiries to determine the reason for the difference and whether the transaction was settled appropriately.
19 Aug 2019	Email from ANAO	Draft closing audit report from ANAO to the CFO that indicated the ANAO were still waiting on further documentation with respect to the Leppington Triangle.
19 Aug 2019	Email to ANAO	Response to draft closing audit report from CFO noting the review of the Leppington Triangle was still to be finalised but no other concerns.
21 Aug 2019	Email to ANAO	Email from WSU providing answers to additional questions raised by ANAO on 8 August 2019.
22 Aug 2019	FSSC Meeting	CFO report noted difference in valuation consistent with the previous report on 30 July 2019. The Minutes reflect '[The ANAO officer] advised the paperwork provided did not adequately support the premium paid for the land and indicated the amount

Date	Communication	Nature/Summary
		was at market value. This is not a financial statement issue, rather a probity issue. [ANAO] advised that the Auditor General will write to the new Secretary on this matter and it is likely a reference will be made in the end of year report.'
22 Aug 2019	Email to ANAO	Email from WSU to ANAO seeking clarification on additional detail required.
23 Aug 2019	Email to ANAO	Email from WSU providing additional documentation and details on selection of the valuer.
27 Aug 2019	Email from ANAO	Draft closing letter to CFO indicating ANAO intention to undertake additional queries or procedures and they may issue a final management letter or Auditor-General may write to the Secretary.
29 Aug 2019	ARC meeting	<p>Review of closing audit report. The closing audit report included a summary of the Leppington Triangle purchase under the heading 'Significant and Unusual transactions' and stated:</p> <ul style="list-style-type: none"> ▪ the transaction was recorded appropriately in the financial statements but the ANAO was not in a position to conclude on aspects of the transaction relating to value for money, risk management and compliance with certain procurement policies; ▪ the ANAO recommended that the Department undertake a review of the acquisition process to determine if integrity and probity were maintained during the process, particularly in light of the significant price differential identified from later valuations obtained for the preparation of the financial statements. The Department had not yet written to the ANAO on the results of this review which is expected in the near future; ▪ the ANAO will with issue a final management letter for the Auditor-General will write to the Secretary on this matter. <p>The Minutes reflect '[ANAO] advised there would be further enquiries in relation to the acquisition of the "Leppington Triangle" parcel of land for the development of the Western Sydney Airport.'</p>
30 Aug 2019	Briefing to Secretary	2018-19 financial statements signed by the Secretary and CFO. The covering brief to the Secretary included a copy of the closing audit report and noted 'the purchase of land in Western Sydney in July 2018 (the Leppington Triangle) for a price that was substantially higher than its fair value. The ANAO are considering the probity arrangements for the purchase'.
30 Aug 2019	Email from ANAO	Unqualified audit opinion issued on 2018-19 financial statements.
10 Sep 2019	Email from ANAO	Email to WSU requesting additional information following a discussion on 9 September 2019 regarding documentation to support the assessment that the price was within estimation, providing detail on probity advice, and explaining the acquisition timing and any other relevant documentation.
27 Sep 2019	Email to ANAO	Additional information and documentation provided to ANAO by WSU.

Date	Communication	Nature/Summary
18 Oct 2019	Email to ANAO	Formal response provided on ANAO enquiries in letter signed by General Manager (SES Band 1), Regulatory, Environment and Stakeholder Engagement Branch, WSU.
6 Nov 2019		ANAO notified the Department that a performance audit will be conducted.
4 Dec 2019	ARC meeting	The ARC advised that a performance audit had commenced.

Glossary

Key acronyms and technical terms used throughout the Report.

Term	Meaning
AAI	Accountable Authority Instructions
AGS	The Australian Government Solicitor
ANAO	Australian National Audit Office
APS	Australian Public Service
APSC	The Australian Public Service Commission
ARC	Audit and Risk Committee
AS	Assistant Secretary – a SES Band 1 officer
CPRs	Commonwealth Procurement Rules
The Department	The Department of Infrastructure, Transport, Regional Development and Communications (at the time of report publication). Historically, ‘the Department of Infrastructure, Transport, Cities and Regional Development’, ‘the Department of Infrastructure and Regional Development’ and ‘the Department of Infrastructure and Regional Development’.
Deputy Secretary	SES Band 3 position
EL	Executive Level (officer)
Executive Director	SES Band 2 position within the Department (FAS)
FAS	First Assistant Secretary – a SES Band 2 officer
Finance	Department of Finance
FSSC	Financial Statements Sub-Committee
General Manager	SES Band 1 position within the Department (AS)
LAA	<i>Lands Acquisition Act 1989</i> (Cth)
LPC	The Leppington Pastoral Company
PGPA Act	<i>The Public Governance Performance and Accountability Act 2013</i> (Cth)
RMS	New South Wales (NSW) Government Roads and Maritime Services
SES	Senior Executive Service officer
TNR4	The Northern Road Realignment – Stage 4
WSIP	Western Sydney Infrastructure Plan
WSU	Western Sydney Unit