

Submission to the Inquiry into the planning, construction and management of the Western Sydney Airport project Limited

1. Australians have a significant interest in their government ensuring value for money in the procurement of services and goods - indeed, as the Foreword to the Commonwealth Procurement Rules acknowledges, “Achieving value for money [...] is critical to ensuring that public resources are used in the most efficient, effective, ethical and economic manner”.¹
2. The Australian National Audit Office’s *Purchase of the ‘Leppington Triangle’ Land for the Future Development of Western Sydney Airport* Report establishes that the acquisition of the Leppington Triangle failed to use public resources in such a manner, insofar as it saw the Commonwealth pay \$29.8 million for a parcel of land valued a year later at \$3 million.²
3. The Leppington Triangle acquisition is a case study in the weakness of existing accountability mechanisms in respect of Commonwealth procurement - and land procurement, in particular - and this Inquiry provides a valuable opportunity to consider how these mechanisms can be bolstered so that they may be fit for purpose.
4. The Centre for Public Integrity considers that these mechanisms could be strengthened by:
 - addressing the weaknesses identified throughout this submission in respect of the enforcement of the Commonwealth Procurement Rules;
 - expanding the powers and resources of the Auditor-General and ANAO to enable them to have a greater role in ongoing monitoring of procurement processes; and
 - establishing a fit-for-purpose National Integrity Commission, which would be best-placed to tackle substantial and/or systemic breaches of procurement processes.

The Leppington Triangle acquisition

5. The Australian National Audit Office (*ANAO*) has reported that on 31 July 2018, the Australian Government purchased a parcel of land referred to as the ‘Leppington Triangle’ for \$29,839,026 (GST exclusive); one year later, the same land was valued at \$3 million.³
6. The Western Sydney Unit within the Department of Infrastructure, Transport, Regional Development and Communications oversaw this purchase. We note that

¹ Foreword to the Commonwealth Procurement Rules 20 April 2019

<<https://www.legislation.gov.au/Details/F2019L00536/Html/Text>> accessed 24 September 2020.

² Australian National Audit Office, “*Purchase of the ‘Leppington Triangle’ Land for the Future Development of Western Sydney Airport*” 21 September 2020 < <https://www.anao.gov.au/work/performance-audit/purchase-the-leppington-triangle-land-the-future-development-western-sydney-airport>> accessed 28 September 2020, at 1-2.

³ Ibid.

the same Unit is responsible for administering Commonwealth investments of over \$8 billion: \$5.3 billion in the Western Sydney Airport, and \$2.9 billion in the Western Sydney Infrastructure Plan.

7. In its audit of the purchase, the ANAO found that the Department failed to exercise due diligence,⁴ failed to develop an appropriate acquisition strategy,⁵ took an inappropriate approach to valuing the land (inflating its price), and inappropriately managed probity with its staff.⁶ It also found that decision-makers were not advised appropriately in respect of the acquisition (with details such as the purchase price omitted).⁷
8. The ANAO further concluded that “*The incomplete advice provided to decision-makers, and the inadequate response by the department when questions were raised by the ANAO, was inconsistent with effective and ethical stewardship of public resources*”, and that “*the lack of transparency evident in briefings concerning the basis for valuations and the price being paid was inconsistent with an ethical approach to public administration*”.

Accountability mechanisms in respect of Commonwealth procurement

9. The Leppington Triangle land acquisition is a case study in the weakness of accountability mechanisms in respect of Commonwealth procurement - land procurement, in particular.
10. The Commonwealth Procurement Rules (**CPRs**), which govern procurements by non-corporate Commonwealth entities as well as some procurements by prescribed corporate Commonwealth entities,⁸ are issued by the Minister for Finance under s105B(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth).
11. Rule 7.1 of the CPRs acknowledges the importance of accountability in the procurements process, and recognises that accountability requires officials to be responsible for their actions and decisions - as well as the resulting outcomes:

The Australian Government is committed to ensuring accountability and transparency in its procurement activities. Accountability means that officials are responsible for the actions and decisions that they take in relation to procurement and for the resulting outcomes. Transparency involves relevant entities taking steps to enable appropriate scrutiny of their procurement activity. The fundamental elements of accountability and transparency in procurement are outlined in this section.

12. For this to be more than mere rhetoric, there must be in place an appropriate framework through which responsibility and accountability can be pursued. Currently, this framework is limited to an internal complaints mechanism and action under the *Government Procurement (Judicial Review) Act 2018* (Cth).

Internal complaints mechanism

⁴ At 6.

⁵ At 7.

⁶ At 8.

⁷ At 9.

⁸ As listed in s 30 of the *Public Governance, Performance and Accountability Rule 2014* (Cth).

13. Rule 6.8 contains the CPRs' sole reference to complaints, and requires only that:

If a complaint about procurement is received, relevant entities must apply timely, equitable and non-discriminatory complaint-handling procedures, including providing acknowledgement soon after the complaint has been received. Relevant entities should aim to manage the complaint process internally, when possible, through communication and conciliation [emphasis in original].

14. The Complaints Handling Charter of the Department of Finance enables affected parties to complain to the Department's Procurement Coordinator about aspects of the CPRs, and sets out the limited circumstances in which complaints will be considered.⁹ Parties dissatisfied with the outcome of the complaints process may have recourse to the Commonwealth Ombudsman.

Judicial Review

15. The *Government Procurement (Judicial Review) Act 2018* (Cth) (*the Act*) was the legislative response to recommendation 11 of the Senate Finance and Public Administration References Committee's July 2014 report into Commonwealth procurement procedures, which recommended that the Department of Finance establish an independent and effective complaints mechanism for procurement processes.¹⁰

16. The effectiveness of the Act as a complaints mechanism is potentially curtailed by the following considerations:

- a procurement is only covered by the Act if the Rules in Divisions 1 and 2 of the CPRs apply to it. Notably, *procurement* (including leasing) of land is therefore excluded from the Act's operation;
- a procurement is not covered if the Minister has made a determination that it is not a covered procurement.¹¹ The Addendum to the Bill's Explanatory Memorandum explains that this provision is intended to allow the Government of the day "flexibility to exempt additional procurements [...] in a manner that reflects the Government's particular circumstances and requirements";¹²
- an injunction can only be granted if the applicant has previously made a complaint under section 18 of the Act¹³ and, if the court considers that it would

⁹ Complaints about current tenders will only be considered where the Procurement Coordinator determines that the issue is sufficiently material and relevant to warrant the matter being referred to the relevant entity, and there is sufficient time to adequately deal with the complaint before the tender closes: Department of Finance, "Complaints Handling Charter" <https://www.finance.gov.au/business/procurement/complaints-handling-charter> accessed 24 September 2020.

¹⁰ Explanatory Memorandum to the *Government Procurement (Judicial Review) Act 2017* (Cth) https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5871_ems_d7afe84f-618f-4e54-9c29-1b81c59dc375/upload_pdf/633147a.pdf;fileType=application%2Fpdf accessed 24 September 2020.

¹¹ *Government Procurement (Judicial Review) Act 2018* (Cth) s 5.

¹² Addendum to the Explanatory Memorandum to the *Government Procurement (Judicial Review) Act 2017* (Cth) <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5871_ems_fad27402-6d98-45b7-851b-55747be4c7a6/upload_pdf/685179.pdf;fileType=application%2Fpdf> accessed 24 September 2020.

¹³ Which permits a supplier to make a written complaint if they have reason to believe that a relevant Commonwealth entity or official has engaged, is engaging or is proposing to engage, in any conduct in contravention of the relevant CPRs (so far as those rules relate to a covered procurement), and the supplier's interests are affected. If a complaint is made, section 19 requires that the accountable authority must investigate the conduct the subject of the complaint, and prepare a report (subject to section 19(2)).

have been reasonable for the applicant to have attempted to resolve the complaint, the court is satisfied that the applicant has made a reasonable attempt to resolve it;¹⁴

- an injunction can only be granted if it has been applied for within 10 days after the contravention, or when the applicant became aware - or ought reasonably to have become aware - of the contravention (whichever is later). The Court can allow a longer period only where it is satisfied that the delay is due to the applicant's reasonable attempt to resolve the complaint, or where there are special circumstances warranting a longer period;¹⁵
- compensation for contravention is significantly circumscribed and includes only reasonable expenditure incurred by the supplier in preparing a tender, making a complaint under section 18, and making a reasonable attempt to resolve the complaint;¹⁶
- even where a complaint under section 18 is being investigated or an application for an injunction considered, the accountable authority of a Commonwealth entity can issue a public interest certificate stating that it is not in the public interest for a specified procurement to be suspended.¹⁷ The Department of Finance has issued guidance on when it is appropriate to issue a public interest certificate; in essence this involves the weighing of a number of factors, some of which include the purpose, scope and criticality of timing of the relevant procurement and the scale of the alleged contravention;¹⁸ and
- most significantly, contravention of the CPRs does not affect the validity of a contract.¹⁹

17. Of particular concern are the exclusion of many kinds of procurement from the operation of the Act, the Minister's ability to exempt procurements from the operation of the Act, and the fact that the issuing of a public interest certificate appears not to be subject to independent oversight. The latter is particularly important in light of the fact that contravention of the CPRs does not affect a contract's validity, because it means that even where there is a dispute and the relevant entity is on notice that the process may contravene the CPRs, it may proceed with and even conclude a procurement process.

Recommendations

18. While the internal complaints mechanism and the Act establish avenues via which contravention of the CPRs can be pursued, in addition to the limitations set out above their remit is further circumscribed by the fact that they are able to be pursued only by suppliers. Neither the Complaints Handling Charter nor the Act permits, for example, an interested tax-payer to pursue an action for contravention of the CPRs. Furthermore, insofar as both mechanisms facilitate the *private* enforcement of the CPRs, they are insufficient as oversight mechanisms.

¹⁴ *Government Procurement (Judicial Review) Act 2018* (Cth) s 11(1).

¹⁵ *Government Procurement (Judicial Review) Act 2018* (Cth) ss 11(2)-(5).

¹⁶ *Government Procurement (Judicial Review) Act 2018* (Cth) s 16.

¹⁷ *Government Procurement (Judicial Review) Act 2018* (Cth) s 22.

¹⁸ Department of Finance, "Handling complaints under the Government Procurement (Judicial Review) Act 2018", August 2019 <https://www.finance.gov.au/sites/default/files/2019-11/RMG422-handling-complaints_0.pdf> accessed 24 September 2020.

¹⁹ *Government Procurement (Judicial Review) Act 2018* (Cth) s 23.

19. In view of the importance of appropriate enforcement and the current lack of adequate mechanisms, there is a manifest need to reinforce the accountability mechanisms relating to contravention of the CPRs. It is the view of the Centre for Public Integrity that this can be best achieved by:

- addressing the weaknesses identified in respect of the Act;
- expanding the powers and resources of the Auditor-General and ANAO to enable them to have a greater role in ongoing monitoring of procurement processes; and
- establishing a fit-for-purpose National Integrity Commission, which would be best-placed to tackle substantial and/or systemic breaches of procurement processes.

About The Centre for Public Integrity

The Centre for Public Integrity is an independent think tank dedicated to preventing corruption, protecting the integrity of our accountability institutions, and eliminating undue influence of money in politics in Australia. Board members of the Centre are the Hon Tony Fitzgerald AC QC, the Hon Stephen Charles AO QC, the Hon Anthony Whealy QC, Professor George Williams AO, Professor Joo Cheong Tham and Geoffrey Watson SC. More information at www.publicintegrity.org.au.