

# AUSTRALIAN GOVERNMENT PROCUREMENT SERIES 2023

## PART 4: KEY LEARNINGS FROM THE ANAO REPORTS

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## **Acknowledgement of Country**

HWL Ebsworth would like to acknowledge the Traditional Custodians of the land on which we are today. We would also like to pay our respects to Elders past and present.

# THE 2023 PROCUREMENT SEMINAR SERIES

Part 1: Planning for a Perfect Procurement... Setting Up For Success – Wednesday, 09 August 2023

Part 2: Probity in Procurement – Wednesday, 23 August 2023

Part 3: Current Issues and Updates in procurement – NACC, Unsolicited Proposals and ECI Processes– Wednesday 6 September 2023

Part 4: Key Learnings from the ANAO Reports – Tuesday 19 September 2023

Part 5: Legal Issues and Updates in Procurement – GPJR and the Process Contract – Wednesday 4 October 2023

Part 6: The Art of Tender Assessment and Achieving VFM – 17 October 2023

Part 7: Managing your Procurement – 1 November 2023

Part 8: Prickly Issues in Procurement – 15 November 2023

Part 9: The Cth Contracting Suite and Cth Procurement Policies – 29 November 2023

To find out more about the additional seminars in our Procurement Seminar Series, and to register to attend, please contact Katarina Szivek on [kszivek@hwle.com.au](mailto:kszivek@hwle.com.au)

# OVERVIEW

History of the ANAO

Where are we now?

ANAO - Lessons

How might things start to change?

# INTRODUCTORY COMMENTS

Australian National Audit Office  
**(ANAO)**

Common issues

Reports referred to  
are anonymised



# THE ANAO

## History

- 4<sup>th</sup> Act passed by Australia's first Cth Parliament – created the office of the Auditor-General
- AG – independent Officer of Parliament – responsibilities under the *Auditor-General Act 1997*
- AG is supported by the ANAO
- AG is a 10-year statutory appointment made by the Governor General (on advice from the PM and approved by the Joint Committee of Public Accounts and Audit)
- The current AG is Grant Hehir

# THE ANAO

## Functions

- Auditing the financial statements of Commonwealth entities, Commonwealth Companies and their subsidiaries
- Auditing annual performance statements of Commonwealth entities
- Conducting performance audits, assurance reviews, and audits of the performance measures of Cth entities and Cth companies and their subsidiaries
- Providing other audit services as required by other legislation or allowed under s20 of the Act
- Reporting directly to the Parliament on any matter or to a minister on any important matter

# THE ANAO

## Functions (cont)

- In exercising its functions and powers, the Auditor-General is not subject to direction from anyone in relation to:
  - Whether a particular audit is to be conducted;
  - The way a particular audit is to be conducted; or
  - The priority to be given to any particular matter.



# THE ANAO

## Purpose of the ANAO

- Support accountability and transparency in the Aus Govt sector through independent reporting to the Parliament
- The ANAO delivers this through the *AG Act 1997* and the *Public Governance, Performance and Accountability Act 2013* and the *Public Service Act 1999*

# THE ANAO

## **Powers of the ANAO**

- Extensive powers of access to documents and information to support functions
- These powers are balanced by confidentiality provisions in the *Auditor-General Act 1997*

# THE ANAO

## The Audit Process

- Wide access and information gathering powers granted to the Auditor-General
- The ANAO treats all audit-related information as 'in-confidence'. Sensitive information that, in the Auditor-General's opinion, is not in the public interest will not be included in public reports. This may include:
  - National security
  - International relations
  - Cabinet deliberations
  - Commonwealth-State relations; and / or
  - Unfair prejudice to commercial interests

# THE ANAO

## The Audit Process

- The Auditor-General is exempt from the application of the *Freedom of Information Act 1982* (however as appropriate the ANAO provides information on request in the spirit of the FOI Act)
- Each performance audit has a specific objective approved by Auditor-General
- The ANAO provides preliminary audit findings and the final proposed report to key stakeholders. The entity the subject of the audit has the opportunity to provide comments

# THE ANAO

Table 3.3: Number of performance audit reports, 2016–17 to 2022–23

Number of performance audit reports		
	Target	Result
2022–23	42	40
2021–22	40	40
2020–21	42	42
2019–20	48	42
2018–19	48	48
2017–18	48	47
2016–17 <sup>(a)</sup>	48	58

# THE ANAO

Table C.3: Ongoing, non-ongoing and casual staff, by attendance type, at 30 June 2023 and 30 June 2022

Employment type	Attendance type							
	Full-time		Part-time		Casual		Total	
	2023	2022	2023	2022	2023	2022	2023	2022
Ongoing	338	321	39	34	0	0	374	355
Non-ongoing	21	11	2	0	0	0	23	11
Casual	0	0	0	0	8	10	8	10
<b>Total</b>	<b>359</b>	<b>332</b>	<b>41</b>	<b>34</b>	<b>8</b>	<b>10</b>	<b>408</b>	<b>376</b>

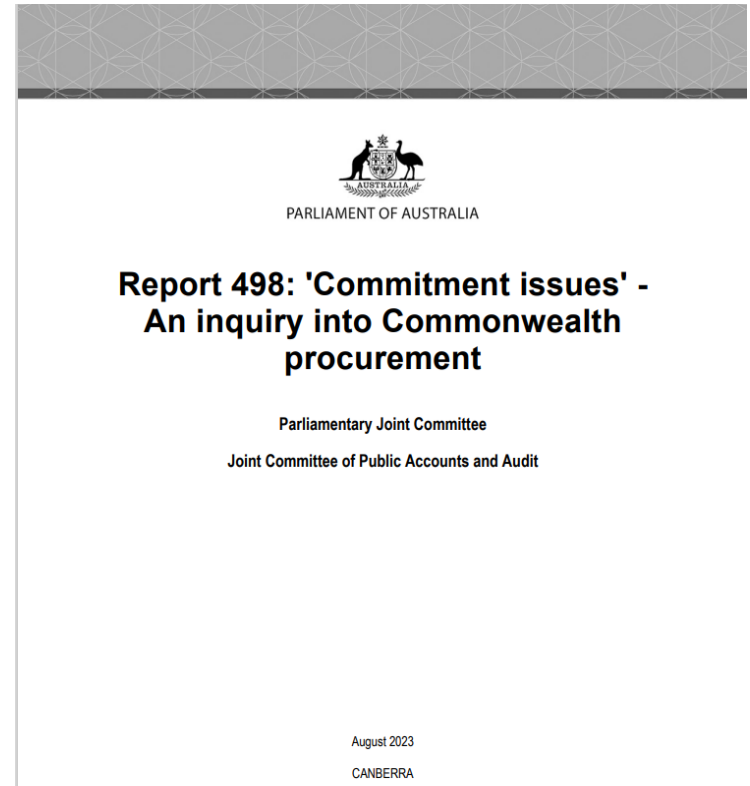
Note: Includes all operative and inoperative staff. At 30 June 2023, three full-time ongoing staff identify as Indigenous. All ANAO positions are Canberra-based.

# WHERE ARE WE NOW?

## JCPAA report

### Recommendations:

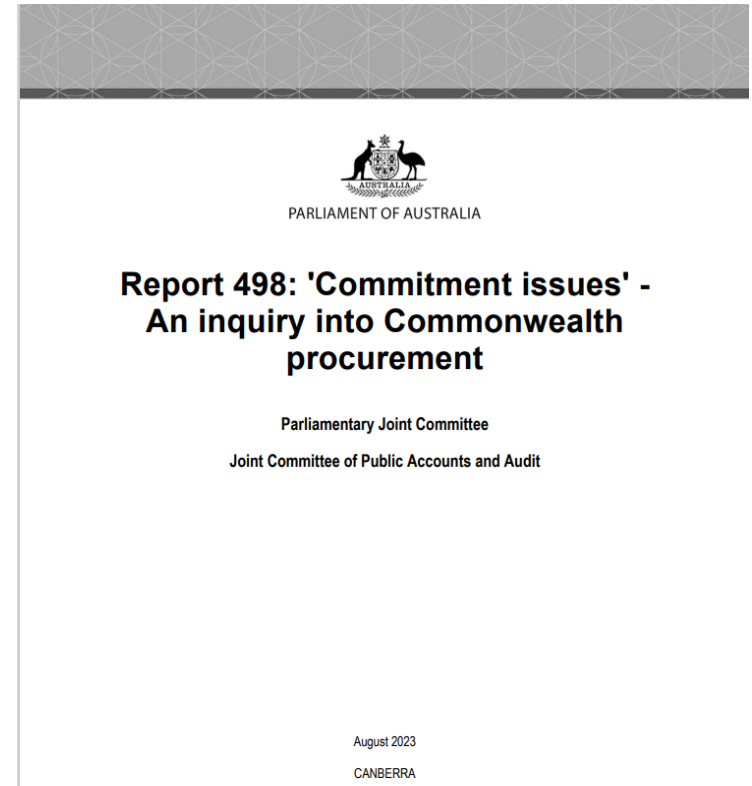
1. Development of APS procurement professionals
2. CPRs should apply to all corporate Cth entities by default
3. CPR 2.6 amended to reinforce VfM, fair, transparent and accountable principles still apply
4. Annual reporting by entities on CPR compliance and VfM achievement



# WHERE ARE WE NOW?

## Recommendations cont...

5. Audit committee engagement and assurance – based on scale and risk
6. Dept Finance guidance on how to use probity advisors
7. Improved Dept Finance guidance on the use of panels
8. Panels to be regularly refreshed and allow for new entrants
9. AusTender to capture number of suppliers invited to quote, and reasons for amendments to contracts





# APS PROCUREMENT CAPABILITY

## **Weaknesses often identified in Performance Audits**

- Procurement planning
- Approaches to market
- Tender evaluation
- Probity management
- Record keeping
- Contract management

# APS PROCUREMENT CAPABILITY

## **JCPAA report:**

*“Though procurement can be simple, they may frequently show a high degree of complexity, and when they do there is a significant risk that APS staff may not be negotiating with suppliers from a position of strength.”*

- Private vs Public – knowledge and experience
- Competitive processes only go so far
- Solution – more policies and more training?

# VALUE FOR MONEY

## Core Principle

- Of Commonwealth Procurement Framework (CPRs, RMGs, Policy notes and CCS)
- ANAO submission to JCPAA on open vs limited Approach to Market:

*“Evidence suggests that the decision to exempt procurements from open competition has often been based on it being a less costly and an easier process for the entity to undertake, rather than a focus on the overall value of the use of taxpayers’ funds.”*

# VALUE FOR MONEY

## **ANAO: Inadequate demonstrations of VFM**

- Competitive, open tender doesn't:
  - Automatically equate to VfM; nor
  - Explain VfM
- Unclear explanations
- Conditions of participation that restrict tenderers
- Needs to guide each step in the process – including initial stages and throughout the documentation

# PANELS

## **ANAO: problematic use of panels**

- Establishment of a panel is one procurement, and that purchase/contract under that panel is another procurement
- Evidence suggests the minority of suppliers are awarded the majority of contract value
- ANAO reported from 2012-13 to **2021-22** - value of procurement conducted through standing offers (including panels) increased from 12% to **34%**

# PANELS

**-Since July 2022: Note the CPRs only suggest that officials should approach multiple suppliers (r9.14)**

## Procurements from standing offers

- 9.12 *Procurements* from an existing *standing offer* are not subject to the rules in Division 2 of these CPRs. However, these procurements **must** comply with the rules in Division 1.
- 9.13 *Officials* should report the original *procurement* method used to establish the *standing offer* when they report procurements from *standing offers*.
- 9.14 To maximise competition, *officials* should, where possible, approach multiple *potential suppliers* on a *standing offer*.

# PROBITY

## **ANAO: use of Probity Advisor**

- Same advisor was used during the previous iteration of the procurement a couple of years earlier
- Panel procurement
- Scope creep - \$76k → \$151k
- Probity advisor independence

## **ANAO: Conflict of Interest Declarations**

- One audit found repeated failures – officials not declaring
- Probity Advisor not declaring

# PROBITY

## **ANAO: failure to follow internal probity guidelines**

- Evaluator did not make activity-specific COI declaration
- Actual prior relationship with the tenderer
- Complaint made
- External consultants investigated
  - Fraud or corruption?
  - Found: no
- Internal Fraud and Corruption Control Plan wasn't followed



# PROBITY

## **ANAO: a technical and complex procurement**

- Entity engaged a former director of a company that tendered – expert advisory panel
- Same person became lead negotiator
- Then appointed to another independent committee
- Previous employer was providing services to keep the previous version of the equipment operational

# RECORD KEEPING

## **ANAO: (several audits) insufficient or defective records**

1. Records not being proportionate to the scale, scope and risk of the procurement
2. Justifications for limited tender over open ATM
3. Tender evaluation processes/plans not including a consideration of VfM
4. High level meetings with deliberations that form the basis of decision making - with no minutes taken
5. Procurement strategy / planning documents not being updated as the scope/size/risks change

# RECORD KEEPING

## **Insufficient or defective records, continued...**

6. Editing documents after decisions made.
7. Final or Draft versions?
  - Documents that form the basis of decisions (e.g. Attachment A – Requirement for procurement).
  - Often not signed.

# RECORD KEEPING

## **ANAO: records demonstrate VfM**

- VfM might be inherent in the conduct of the entity – but it needs to be recorded
- Policy objective ≠ VfM
  
- Suggestion:
  - Make it abundantly clear
  - Reference CPRs and PGPA Act ("efficient, effective, economical and ethical")
  - **'Proper'** is "efficient, effective, economical and ethical"

# NEGOTIATIONS

## **ANAO: negotiation considerations**

- Capability challenges - Negotiators need to be at their best
- Final contract should be traceable based on delegate approved negotiation positions
  - And reported against
  - With risks tracked
- Delegates should ensure negotiation positions are formed – not left to the negotiator's discretion

# CONTRACT MANAGEMENT

## **ANAO:**

- Even perfect procurements won't achieve VfM if the contract isn't managed properly
- Complex procurements need to be managed using a plan.
- Contract extensions and variations can be new procurements.
  
- Suggestion: Contract Managers:
  - Should be involved – evaluating tenders, negotiations, shaping their contracts

# HOW MIGHT THINGS START TO CHANGE?

## **Department of Finance – what is their role?**

- Stewardship or regulatory framework?
- Manages the CPRs, AusTender and CCS + “*policy stewardship of the Commonwealth Procurement Framework*”
- Devolved oversight – each entity responsible
- Finance helps, but doesn’t regulate compliance
- No reporting to Dept Finance on procurement performance
  
- **Expect the function of Finance to be clarified (or redefined)**

# HOW MIGHT THINGS START TO CHANGE?

## Panels

- Stricter rules?
- More detailed reporting via AusTender
- Restrictions on panel life – refreshed often and/or allowing entry anytime
- Restrictions on spread of value and number of contracts



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The background features a large, stylized 'HWT' logo graphic composed of overlapping geometric shapes in various shades of blue and green. The 'H' and 'W' are in a light green, while the 'T' is in a darker blue. The logo is centered on a white horizontal band.

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