

**Malkara
Consulting**

Submission in Relation to:

**Commonwealth Parliamentary Inquiry
into Auditor-General Reports 6, 15, 30,
42 (2021-22) and 5 (2022-23)**

Money in the wrong hands is a weapon

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Background

The Joint Committee of Public Accounts and Audit is conducting an inquiry into Commonwealth procurement, with a view to improving the culture of how procurement rules and guidelines are implemented across the Australian Public Service. The inquiry will have a particular focus on the matters contained in and associated with the following Auditor-General Reports:

- No. 6 (2021-22) Management of the Civil Maritime Surveillance Services Contract
- No. 15 (2021-22) Department of Defence's Procurement of Six Evolved Cape Class Patrol Boats
- No. 30 (2021-22) Procurement of the National Capital Authority
- No. 42 (2021-22) Procurement of Delivery Partners for the Entrepreneurs' Programme
- No. 5 (2022-23) Digital Transformation Agency's Procurement of ICT Related Services.

In this submission, Malkara Consulting Pty Ltd ("Malkara Consulting") comments on the absence of an Anti-Bribery and Corruption Compliance Programme (ABC Compliance Programme) involving the purchase of the Six Evolved Cape Class Patrol boats (No.15). The absence of an ABC Compliance Programme could have increased the corruption risk to the project, and which might have resulted in other risks, not associated with corruption, but potentially damaging to the project, being overlooked.

Other procurement programmes not covered by the inquiry, namely the cancelled Attack Class Submarine acquisition and the Offshore Processing Facility on Nauru are mentioned in this submission to highlight that the absence of anti-bribery and corruption compliance programmes might be common in Commonwealth procurement projects.

Anti-Bribery & Corruption Compliance Programme

There are many definitions of an Anti-Bribery and Corruption Compliance Programme. According to the United Nations Office on Drugs and Crime, an anti-corruption compliance programme consists of policies and procedures that address the risk of corruption¹. There are also many different variations in the components of an ABC Compliance Programme. This submission does not intend to discuss the merits and disadvantages of the various programme components, but the Anti-Bribery and Corruption (ABC) Compliance Programme Guidance published by the Wolfsberg Group provides a useful reference².

Significant amongst the ABC Compliance Programme components identified by the Wolfsberg Group is the need for an organisation to conduct a risk assessment to identify the various risks that organisation is exposed to. The risk assessment should then drive the development of the bribery and corruption policy, procedures, internal controls, and training. For a government department, agency or state owned enterprise, adoption of anti-bribery corruption procedures, controls and training for procurement projects is essential.

An ABC Compliance Programme normally operates at the organisational level, and filters down throughout the organisation, extending to external organisations and individuals³. However, for an organisation, involved in or with high risk jurisdictions, high risk industries or high risk activities, it would be prudent to enact an ABC Compliance Programme, for major projects, including procurement projects. Defence acquisitions by the nature of the industry, are high risk activities and each defence procurement project should have an anti-bribery and corruption compliance programme.

¹ UNODC. 2013. An Anti-Corruption and Ethics Compliance Programme for Business. A Practical Guide. https://www.unodc.org/documents/corruption/Publications/2013/13-84498_Ebook.pdf. Accessed 11 November 2022.

² <https://www.wolfsberg-principles.com/sites/default/files/wb/pdfs/wolfsberg-standards/3.%20Wolfsberg-Group-ABC-Guidance-June-2017.pdf>.

³ Due diligence on third parties, contractors etc.

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An anti-bribery and corruption risk assessment conducted on a major defence acquisition (for example the Cape Class Patrol Boats) would involve the identification of corruption risks pertaining to all aspects of a project, including the ship building company involved, its managers and employees, suppliers, contractors and sub-contractors, IT systems, and management culture. Professionally undertaken, the ABC Compliance Programme and the risk assessment, would critically examine all components in a procurement process and could identify areas that might result in problems with the project that could result in time and cost overruns. The risk assessment and subsequent policy and procedures developed following it, would compliment and perhaps enhance existing defence security systems, for example personnel security vetting and information technology security systems.

FOI Request & Result – Cape Class Vessels

On 4 November 2020, Malkara Consulting submitted to the Department of Defence, a Freedom of Information (“FOI”) request seeking the following:

I request the following information and documents be released to me under the FOI Act, namely:

- Anti-bribery and corruption compliance programme pertaining to the acquisition of 6 Cape class vessels acquired from Australian ship builder Austal Ltd, which was announced in April/May 2020;
- Anti-bribery and corruption due diligence undertaken by the Department of Defence in relation to Austal Ltd relating to the Cape Class vessels, and
- Anti-bribery and corruption compliance programme (or similar programme) obtained from Austal Ltd by the Department of Defence prior to or at the time the contract for the supply of the Cape Class vessels was signed.

On 12 November 2020, a response was received from the Department of Defence which contained the following advice:

“I note that your request is very broad and will likely attract refusal under section 24AA of the FOI Act because, with few exceptions, it would simply not be possible for the decision maker to certify that he or she has identified every copy of every document in the Department's possession. To do so would require a search of every hard copy file and the electronic communication and records management systems used by Defence. It is considered that the workload involved in conscientiously attempting to do so would involve a substantial and unreasonable diversion of the resources of the agency.

Taking the above into consideration, under section 24AA of the FOI Act and for the purposes of section 24 of the FOI Act, Defence considers that a 'practical refusal reason' exists in relation to your FOI request. Specifically, Defence considers that the work involved in processing the request in its current form would substantially and unreasonably divert the resources of the Defence from its other operations. In particular, a very significant amount of resources would have to be diverted to arrange for the required searches to be undertaken, to then review any documents that were identified as being possibly relevant to your request. And finally, to undertake the decision making process on any documents that did meet the parameters of your request”.

Malkara Consulting responded to the advice from the Department of Defence the same day. That response included the following argument in support of continuing with the FOI request:

Thankyou for your email today advising that my FOI Request could be rejected on the basis of practical refusal. I do not agree with the departments assessment that my FOI request is very broad and would require the “decision maker to certify that he or she has identified every copy of every document in the Department's possession. To do so would require a search of every hard copy file and the electronic communication and records management systems used by Defence”. That statement

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indicates that the Department of Defence does not understand what an Anti-Bribery & Corruption Compliance Programme is.

I have copied the scope of my FOI request as re-sent to me by you on 10 November 20:

1. “Anti-bribery and corruption compliance programme pertaining to the acquisition of 6 Cape class vessels acquired from Australian ship builder Austal Ltd, which was announced in April/May 2020
2. Anti-bribery and corruption due diligence undertaken by the Department of Defence in relation to Austal Ltd relating to the Cape Class vessels
3. Anti-bribery and corruption compliance programme (or similar programme) obtained from Austal Ltd by the Department of Defence prior to or at the time the contract for the supply of the Cape Class vessels was signed.” [emphasis added].

It is quite clear that my request is very specific. In that, I am referring to:

1. The Anti-Bribery and Corruption Compliance Programme. This should be a specific document or one document which refers to (in quit clear terms to enable people responsible for implementing it to quickly and easily find) other supporting documents. For each acquisition project undertaken by the Department of Defence an ABC Compliance Programme should be prepared identifying the specific risks pertaining to the project and how those bribery and corruption risks have been or will be mitigated. (The author, if the document exists, may have allocated it another name, but it should refer as a minimum to anti-bribery and corruption risks pertaining specifically to the Cape Class vessels).
2. A specific project namely: 6 Cape Class vessels
3. A specific builder namely: Austal Ltd
4. Specific dates: Announced April/May 2020 – though I don’t know when the contract was signed and the ABC Compliance Programme should be linked or referred to it so the dates will vary.

If the document (or documents if other documents are referred to in the main document) should be very easy to locate. Because they should form a major part of the risk management systems designed in relation to the Cape Class vessel acquisition project. And the person who managed that project (or any person at a senior level associated with that project) should know exactly what I am talking about. And to clarify the existence or non-existence of the ABC Compliance Programme could be done by a phone call. Because it is or should be a significant component of the project planning.

To suggest that to meet my request would require a search of every hard copy file, every electronic communication and records management system is rather extreme and does not reflect well on the Department of Defence’s record keeping system. A document of the class I am referring to would be (or should be) available electronically and stored for all managers and employees associated with the Cape Class Vessel project to acquire when needed and updated if necessary, easily and quickly.

On 4 December 2020, the Department of Defence advised that no documents matching the description of the FOI request have been found. That is, no Anti-Bribery and Corruption Compliance Programme existed in relation to the acquisition of the Cape Class patrol boats.

A similar FOI request was submitted to the Department of Home Affairs by Malkara Consulting seeking documents in relation to the acquisition of Cape Class vessels from Austal. That department also advised that no Anti-Bribery and Corruption Compliance Programme existed in relation to the acquisition of the Cape Class patrol boats by that department.

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Cancelled Attack Class Submarine Project

In February 2020, Malkara Consulting submitted an FOI request to the Department of Defence seeking access to any Anti-bribery and Corruption Compliance Programme then in existence for the Attack Class Submarines being constructed for the RAN by the French company Naval Group. The text of that request appears below:

"a copy of the Anti-Bribery & Corruption (ABC) Programme pertaining to the Attack Class Submarines being constructed for the RAN by the French company Naval Group. I am not interested in broad based anti-bribery & corruption policies issued by the Dept. of Defence. I want the ABC programme specifically designed & implemented to guide the selection of Naval Group and currently in force for that specific project. It should be one document but if a separate ABC programme -was used during the selection process then I am seeking a copy of that programme and a copy of the current ABC programme as it applies to the Attack Class submarine project."

The Department later advised that no document matching that request existed.

The absence of any ABC Compliance Programme associated with what was then the largest Australian naval procurement in history (estimated at the time of the request to be approximately \$70 billion) with a company with a notorious history of corruption in the sale of submarines, was alarming and beyond comprehension.

Offshore Processing Centre on Nauru

On 29 July 2021, Malkara Consulting submitted an FOI request in relation to the renewal of the contract by the Home Affairs Department to Canstruct International in relation to the offshore processing centre on Nauru. The text of that request appears below:

1. *any document which outlines the due diligence done by Home Affairs on Canstruct International before it was awarded the first contract to offshore processing centre on Nauru and any due diligence conducted before that contract was renewed in July 2021.*
2. *Information on whether or not, Home Affairs requested from Canstruct a copy of its anti-bribery and corruption programme, given it is operating in a high risk environment*
3. *Information on any reports of misconduct including fraud, corruption, misbehaviour involving any employee or contractor engaged by Canstruct received by the Department of Home Affairs.*

The Home Affairs Department later advised that it had located a document that in its opinion fell within the terms of points 1 and 2 of the FOI request but was unable to locate any document relating to point 3. The document provided by the Department did not relate to anti-bribery and corruption or to any form of compliance programme.

Commonwealth Government Has Double Standards

The Australian Government (via the Australian Trade and Investment Commission) offers Australian businesses that operate offshore advice on how to prevent foreign bribery. One of the measures the Australian Government recommends to businesses is that they "implement an anti-foreign bribery and corruption compliance program"⁴. The Government has issued various guides to enable an Australian business operating offshore to prevent it being caught in foreign bribery.

⁴ <https://www.austrade.gov.au/australian/how-austrade-can-help/bribery-of-foreign-public-officials>

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While it is morally and legally important to prevent Australian businesses from engaging in any form of bribery and corruption, it is more important to prevent the Australian Government from falling victim to bribery and corruption. The greater importance is due to the vastly significant damage that can be caused to the Government especially to the Department of Defence if an act of bribery or corruption results in the acquisition of equipment that is not needed; is dangerous or outdated, below expectations or the release of information that compromises the security of military operations resulting in the death or injury of military personnel.

The failure by the Australian Government to implement anti-bribery and corruption compliance programmes for acquisitions and defence procurement in particular, is hypocritical given its advice to Australian business and significantly increases the cost and risk to procurement programmes.

ANAO Performance Audit No.15 2021-22

The report by the ANAO into its performance audit of the Department of Defence's Procurement of Six Evolved Cape Class Patrol Boats makes no mention of an Anti-Bribery and Corruption Compliance Programme. It also makes no reference to corruption or fraud. The lack of reference to any ABC Compliance Programme or to corruption or fraud, indicates that the ANAO during its evaluation of the project to acquire the Cape Class Patrol Boats did not focus on whether detecting any act of corruption or fraud or if any negative issue that had arisen in relation to the procurement had involved an act of corruption or fraud.

The defence industry is one of the most corrupt industries in the world. And combined with the defence procurement process where corruption can occur during any phase of a project (planning, tender, selection, construction, and maintenance/upgrade) and involving at times multiple often unrelated actors, it is essential that during any audit conducted that the presence of fraud and corruption is actively sought out. Failure to do so, can have catastrophic consequences as outlined earlier.

Conclusion

An Anti-Bribery & Corruption Compliance Programme was not in place for the acquisition of the Cape Class Patrol boats. Consequently, no assessment of bribery and corruption risk was undertaken on the project, despite defence acquisitions being high risk for bribery and corruption.

It appears, based on the Attack Class submarine project and the contract awarded for the offshore detention facility on Nauru, that the Commonwealth Government does not assess bribery and corruption risk or puts in place anti-bribery and corruption programmes to prevent and detect bribery and corruption, especially when undertaking in procurement in high risk industries with high risk organisations.

Recommendations

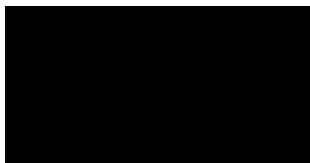
It is recommended that the Joint Committee of Public Accounts and Audit (JCPAA) when examining the reviews of procurement practices at Commonwealth agencies, and the review of the acquisition of the Cape Class patrol vessels in particular:

1. Examine if anti-bribery and corruption compliance programmes have been put in place by Commonwealth departments and agencies⁵.

⁵ During one FOI request Malkara Consulting was referred to the Defence Fraud and Corruption Control Plan. That is plan is not an Anti-Bribery & Corruption Compliance Programme is no substitute for the compliance programme.

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2. If anti-bribery and corruption compliance programmes have not been implemented either at the organisational level or the operational/project level, the inquire as to why they have not been adopted.
3. Recommend the implementation of Anti-Bribery and Corruption Compliance Programmes by every Commonwealth department and agency and for every major procurement programme.



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