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Report 431

Review of Auditor-General's Reports Nos. 24 to 32 (2011–12)

Joint Committee of Public Accounts and Audit

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Foreword

The Joint Committee of Public Accounts and Audit, as prescribed by its Act, examines all reports of the Auditor-General, and reports the results of the Committee's deliberations to the Parliament. This report details the findings of the Committee's examination of two performance audits selected for further scrutiny from nine audit reports presented to Parliament by the Auditor-General between February and May 2012.

The Committee focused its inquiry on government procurement, an area of public spending which has been of ongoing interest to the Committee.

In 2010–11, Australian Government agencies entered into over 79 000 contracts for property and services valued in excess of \$32.6 billion. Under the financial framework, agencies must ensure each procurement delivers the best value for money, using public resources in a way that is efficient, effective, economical and ethical.

Last year the Committee reviewed the Auditor-General's report on direct source procurement, making a range of recommendations how value for money procurement could be better supported within government. The Committee has now looked at two other areas of government procurement:

1. Tender processes – specifically examining the tender used to procure the Australia Network broadcasting service; and
2. The establishment and use of procurement panels.

In reviewing the ANAO's audit of the administration of the Australia Network tender process, the high costs of this tender's failure has important lessons across all agencies that might be applied to future procurements.

A key lesson highlighted by the Auditor-General's report is that clarity around the decision-making processes for a tender is essential – particularly for tenders involving multiple ministers or departments. In the case of the Australia Network,

it took almost five months for issues around the approval process to be resolved. If the decision maker had been documented at the start of the process, the lengthy delays and associated issues that affected the tender might have been avoided. On this point, we suggest that public documentation of tender approval processes could be a way of avoiding similar problems in the future.

Other key issues discussed in the Auditor-General's report on the Australia Network tender process concerned the handling of confidential tender information. The Committee heard that standard practices for handling and distributing sensitive information were not followed, leading to a wider distribution of information than was desirable. The Committee believes there may be benefits from further guidance being provided to staff involved in future tenders about when and how tender information should be disclosed to ministers, ministerial staff, and other departmental staff.

While the responsibility for the problems found in the audit report rests with the parties involved, the Committee considered that lessons from the Australia Network tender process could be shared more broadly and has therefore made a range of suggestions for improvement to future training materials.

The Committee also examined the practice of government agencies using panel arrangements to obtain efficiencies in procurement. Procurement panels involve agencies conducting an initial procurement process to establish a panel of suppliers, and then undertaking individual procurements from the panel on an as-needed basis. The Auditor-General's report found that while agencies generally had sound practices for initially establishing panels, the performance was less satisfactory when it came to selecting suppliers from the panel to undertake work. In particular, the Auditor-General noted that agencies needed to improve their documentation of value for money assessments.

The Committee was disappointed to learn that many of the issues that came up in this audit report had previously been identified in internal audits by agencies, suggesting these findings had not been adequately followed up.

We were, however, pleased to hear that the Finance Department is taking a more active role in helping agencies to improve their compliance with financial management obligations. The Committee also supports the role of Central Procurement Units within agencies, which can serve as the link with Finance and take a proactive role in assisting procurers.

Another point made in the Auditor-General's report is that agencies should be performing evaluations of the use and effectiveness of their procurement panels at appropriate stages of their lifecycle. The Committee supports this point, and has asked the audited agencies for an update on how they are implementing the

Auditor-General's recommendation, including the timelines in which evaluations will be undertaken.

Finally, the Committee examined the cooperative use of single panels by multiple agencies, a practice known as 'clustering' or 'piggybacking'. These arrangements are becoming increasingly popular as agencies seek efficiencies in procurement. At one of our hearings we learned that while clustered panels can lower costs, particularly for small agencies, care is needed to make sure the services being supplied are actually appropriate for the needs of each agency. Government also needs to be aware of the perspective of suppliers, as there is a perception that large, multi-agency panels may disadvantage small and medium enterprises (SMEs). The number of SMEs on panels is not currently being monitored by departments, so this is an area that warrants additional attention in future.

The Committee will continue to keep a close eye on government procurement activities to ensure that public money is being spent in a way that ensures value for money and compliance with the government's financial framework regulations.

Rob Oakeshott MP
Chair

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Membership of the Committee

Chair Mr Robert Oakeshott MP

Deputy Chair Ms Yvette D'Ath MP

Members Hon Dick Adams MP

Mr Jamie Briggs MP

Ms Gai Brodtmann MP

Mr Darren Cheeseman MP

Mr Josh Frydenberg MP

Ms Deborah O'Neill MP

Ms Laura Smyth MP

Hon Alex Somlyay MP

Senator Mark Bishop

Senator Helen Kroger

Senator Louise Pratt (from 27/06/12)

Senator Nick Sherry (8/02/12 – 1/06/12)

Senator Dean Smith (from 9/05/12)

Senator Matt Thistlethwaite

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List of abbreviations

ABC	Australian Broadcasting Corporation
AGS	Australian Government Solicitor
ANAO	Australian National Audit Office
AFP	Australian Federal Police
ANC	Australian News Channel Pty Ltd
ASIC	Australian Securities and Investments Commission
CEIs	Chief Executive Instructions
CPGs	Commonwealth Procurement Guidelines
CPU	Central Procurement Unit
DBCDE	Department of Broadband, Communications and the Digital Economy
DFAT	Department of Foreign Affairs and Trade
FMA Act	<i>Financial Management and Accountability Act 1997</i>
RFT	Request For Tender
PM&C	Department of the Prime Minister and Cabinet
SMEs	Small and medium enterprises
TEB	Tender Evaluation Board



List of recommendations

3 Establishment and Use of Procurement Panels

Recommendation 1

That the Department of Foreign Affairs and Trade, the Department of Broadband, Communications and the Digital Economy, and the Australian Securities and Investments Commission determine and report to the Committee how they are implementing ANAO Recommendation 3, including the timelines for procurement panel evaluations.

Recommendation 2

That the Department of Foreign Affairs and Trade report to the Committee no later than six months after the tabling of this report on the specific role its Central Procurement Unit plays in procurement across the agency, and how the Central Procurement Unit is interacting with departmental officers who engage in procurement to improve compliance and procurement outcomes.

Introduction

Background to the review

- 1.1 The Joint Committee of Public Accounts and Audit (JCPAA) has a statutory duty to examine all reports of the Auditor-General that are presented to the Australian Parliament, and report the results of its deliberations to both Houses of Parliament. In selecting audit reports for review, the Committee considers:
- the significance of the program or issues raised in audit reports;
 - the significance of the audit findings;
 - the arguments advanced by the audited agencies; and
 - the public interest of the report.
- 1.2 Upon consideration of the nine audit reports presented to Parliament by the Auditor-General between February and May 2012, the Committee selected two reports for further scrutiny at public hearings.
- 1.3 The audit reports reviewed by the JCPAA are listed below:
- Audit Report No.29 2011-12, *Administration of the Australia Network Tender Process*
 - Audit Report No.31 2011-12, *Establishment and Use of Procurement Panels*

- 1.4 The public hearings for the reports were held on:
- 20 June 2012 (Audit Report No.31)
 - 27 June 2012 (Audit Reports No.29 and No.31)
- 1.5 A list of witnesses who appeared at the public hearings is at Appendix A.

The Committee's report

- 1.6 This report of the Committee's examination draws attention to the main issues raised at the respective public hearings. Where appropriate, the Committee has commented on unresolved or contentious issues, and has made recommendations.
- 1.7 The Committee's report is structured as follows:
- Chapter 2 – Audit Report No.29 2011-12, Administration of the Australia Network Tender Process
 - Chapter 3 – Audit Report No.31 2011-12, Establishment and Use of Procurement Panels
- 1.8 The following appendices provide additional information:
- Appendix A – List of public hearings and witnesses
 - Appendix B – List of submissions
 - Appendix C – Decision-making arrangements for the Australia Network tender process
- 1.9 A copy of this report, transcripts of hearings and submissions are available on the Committee's website: www.aph.gov.au/jcpaa.

Audit Report No.29 2011–12

Administration of the Australia Network Tender Process

Introduction

- 2.1 The Australia Network is an overseas television broadcasting service designed to ‘promote Australia's image in the Asia-Pacific region’ and ‘provide consular information to Australians living abroad, particularly in times of crisis’.¹ The service broadcasts in more than 44 countries across Asia, the Pacific and the Indian subcontinent, and includes a range of programs including regional news, English language programs, international documentaries, lifestyle programs, drama, sports and children's programs.²
- 2.2 Since 2001, the Australian Broadcasting Corporation (ABC) has delivered the Australia Network service under two sequential contracts with the Government, administered by the Department of Foreign Affairs and Trade (DFAT). The most recent of these contracts was won by the ABC through a 2005–06 competitive tender process.³

1 Australian Government, *Budget Measures: Budget Paper No. 2 2011–12*, p. 202.

2 Australia Network, ABC, ‘About Us’, < <http://australiannetwork.com/about/> > viewed 18 July 2012.

3 Australian National Audit Office (ANAO) Audit Report No.29 2011–12, *Administration of the Australia Network Tender Process*, pp. 33, 35.

Initiation of the tender process

- 2.3 In November 2010, the Government decided that a competitive tender process would be used to award a new 10 year contract for the continued delivery of the Australia Network. This decision followed an industry consultation process, a review of the ABC's past performance, and a range of departmental advice.⁴ The decision was also in the context of a Government submission sponsored by the Communications Minister (Senator the Hon. Stephen Conroy) proposing that the ABC provide the service on a permanent basis.⁵
- 2.4 Initial advice from DFAT to the then Foreign Minister (the Hon. Kevin Rudd MP) was that the existing ABC contract should be extended by another five years, during which time options for either a longer-term contractual arrangement or further development of the Communications Minister's submission would be explored.⁶ However, through the budget process the Department of Finance and Deregulation (Finance) and the Treasury had indicated that if the service were to continue, a tender process would be the preferred option in order to ensure value for money. Additional advice from DFAT indicated that a new tender would enable the development of more quantifiable KPIs, establish a longer contract period, increase programming flexibility and give the Government greater scope to use the service as a public diplomacy tool.⁷
- 2.5 In early 2011, a Tender Evaluation Board (TEB) was formed consisting of senior officials from DFAT, the Department of the Prime Minister and Cabinet (PM&C), the Department of Broadband, Communications and the Digital Economy (DBCDE), Treasury, and Finance.⁸ A Request For Tender (RFT) was released by DFAT on 4 February 2011, attracting tenders from the ABC and the Australian News Channel Pty Ltd (ANC) – a joint venture of Nine Digital, Seven Media Group and British Sky Broadcasting.⁹ ANC is also the owner and operator of Sky News Australia.¹⁰

4 ANAO Audit Report No.29 2011-12, pp. 37-41.

5 ANAO Audit Report No.29 2011-12, p. 36.

6 ANAO Audit Report No.29 2011-12, p. 40.

7 ANAO Audit Report No.29 2011-12, pp. 40-41.

8 ANAO Audit Report No.29 2011-12, p. 53.

9 ANAO Audit Report No.29 2011-12, pp. 14-15.

10 ANC, 'About Sky News', <<http://www.skynews.com.au/common/corporate/anc.aspx>> viewed 18 July 2012.

Amendment and termination of the tender process

- 2.6 While DFAT had originally planned a six month tender process, in June 2011 significant changes were made to the tender process including: adding a new evaluation criterion to the RFT; replacing the Secretary of DFAT with the Communications Minister as the approver for the tender; and allowing the Communications Minister to make a decision that did not reflect the recommendations of the TEB. The ABC's contract was extended by six months to 8 February 2012 to enable the service to continue while the amended process was completed.¹¹
- 2.7 The Australia Network tender process attracted a high degree of media interest over the course of 2011. Most significantly, a newspaper article on 17 October 2011 contained specific references to the TEB's August 2011 supplementary tender evaluation,¹² and a further newspaper article on 24 October 2011 referred to the ABC's 2010 Performance Review,¹³ which had not been publicly released.¹⁴
- 2.8 On 7 November 2011, the Communications Minister announced that the Government had decided to terminate the tender process on public interest grounds 'due to significant leaks of confidential information to the media'.¹⁵ The Government also announced that it had asked the Australian Federal Police (AFP) to investigate the leaks, and the ABC's contract was extended by another six months (to August 2012) while a decision was made on the long term arrangements for the service.¹⁶ On 5 December 2011, the Government announced that the Australia Network service would be removed from further contestability and be provided by the ABC on a permanent basis.¹⁷
- 2.9 **Table 2.1** below summarises the key sequence of events in the tender process.

11 ANAO Audit Report No.29 2011-12, pp. 43-44.

12 Mark Day and Dennis Shanahan, 'Sky backed for Australia Network: Second tender process calls for move away from Aunty', *The Australian*, 17 October 2011, p. 32.

13 Daniel Flitton, 'Rudd forced tender on Asia service: Ruling overdue on \$223m TV deal', *The Age*, 24 October 2011, p. 4.

14 ANAO Audit Report No.29 2011-12, pp. 104-105.

15 Senator the Hon Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, 'Government terminates Australia Network tender process', *Media Release*, 7 November 2011; ANAO Audit Report No.29 2011-12, p. 109.

16 Senator Conroy, 'Government terminates Australia Network tender process', *Media Release*, 7 November 2011.

17 ANAO Audit Report No.29 2011-12, p. 113; Senator Conroy, 'Government decides future for Australia Network', *Media Release*, 5 December 2011.

Table 2.1 Key events in the 2011 Australia Network tender process¹⁸

Date	Event
4 February 2011	Request for Tender announced on AusTender (DFAT11-CPD-02).
25 March 2011	Tender closed.
4 May 2011	Tender Evaluation Board submitted its recommendation to the Secretary of DFAT as the decision-maker for the tender.
6 July 2011	The Government requested tender participants to submit amended tender documentation relating to an additional evaluation criterion, and changed the approver from the Secretary of DFAT to the Communications Minister.
27 July 2011	Closing date for amended tenders.
27 October 2011	The Australian Federal Police requested to investigate the leaking of tender information (not announced until 7 November 2011).
7 November 2011	The Government announced that the tender process had been terminated and that the Australian Federal Police was conducting an investigation into alleged leaks.
5 December 2011	The Government announced that the ABC would provide the Australia Network service on a permanent basis.

Source Australian National Audit Office

Procurement framework

2.10 Expenditure of public money by Australian Government departments is subject to provisions of the *Financial Management and Accountability Act 1997* (FMA Act).¹⁹ Under the associated FMA Regulations, proposals to spend public money must be considered and approved by an appropriately authorised party before contracts can be entered into. An approver must be satisfied that a spending proposal is 'an efficient, effective, economical and ethical' use of Commonwealth resources that is 'not inconsistent with the policies of the Commonwealth'.²⁰

2.11 The Commonwealth Procurement Guidelines (CPGs) – which were recently revised and renamed as the Commonwealth Procurement Rules – provide the core procurement policy framework for departments operating under the FMA Act. The CPGs are issued under the authority of the FMA Regulations, and must be taken into account by Ministers and their agency officials when performing duties related to procurement.²¹ However, the ANAO notes that 'the CPGs are not exhaustive and it is the responsibility of agencies to manage procurement processes in a way that

18 Extracted from ANAO Audit Report No.29 2011–12, p. 45.

19 ANAO Audit Report No.29 2011–12, p. 41.

20 FMA Regulations 1997, Regulation 9.

21 ANAO Audit Report No.29 2011–12, p. 42. See FMA Regulations 1997, Regulation 7.

is proportional to the risk and sensitivity of the various procurements in which they are involved'.²²

Developments taking place since the tender's termination

- 2.12 The Australia Network tender process attracted considerable parliamentary interest. The Auditor-General received two requests to examine the tender process from the Deputy Leader of the Opposition; and one request from the Communications Minister.²³ The Communications Minister indicated in his request that the ANAO's comments on aspects of the tender process may help future tender processes to be as robust as possible.²⁴ These requests, and the broader parliamentary and public interest, resulted in the Auditor-General's performance audit being announced on 24 November 2011.²⁵
- 2.13 On 2 April 2012, the AFP finalised its investigation into the leaks to the media. The AFP informed a Senate committee in May 2012 that the investigation 'did not identify the person or persons responsible for disclosing the material'.²⁶

The ANAO Audit

Audit objective and scope

- 2.14 The objective of the audit was to report on the administration of the Australia Network tender process and to identify lessons learned from the conduct of the process to inform future procurement activities.²⁷
- 2.15 The audit examined the administration of the tender process, and also considered the advice provided to government and the manner in which government decisions were implemented, including compliance with procurement requirements. As the Government played a key role in tender decision-making, and took into account advice from several

22 ANAO Audit Report No.29 2011-12, p. 50.

23 ANAO Audit Report No.29 2011-12, p. 16.

24 ANAO, *Submission 2*, p. [1].

25 ANAO Audit Report No.29 2011-12, p. 16.

26 Andrew Colvin, Deputy Commissioner, Operations, Australian Federal Police, *Committee Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, Estimates, 24 May 2012, p. 54.

27 ANAO Audit Report No.29 2011-12, p. 16.

departments and advisors engaged by them, the audit report included references to the advice received in several areas.²⁸

- 2.16 The Auditor-General also took the 'extraordinary step' of including in the report references to briefings and submissions provided to Cabinet; Cabinet decisions; the deliberations and recommendations of the TEB; and complaints about the tender process.²⁹ These references were considered to be 'central to understanding the issues involved in the tender process and to provide context for the audit findings, conclusions and lessons learned', and their inclusion was considered to be not contrary to the public interest.³⁰
- 2.17 At the time of the audit, the AFP's investigation into the possible unauthorised disclosure of confidential tender information was underway. The ANAO considered these matters to be outside the scope of its audit, although DFAT's arrangements for the handling of tender information were examined.³¹

Overall audit conclusion

- 2.18 Although the audit found that the administrative arrangements for the tender were 'in the main, effective' and in line with the CPGs,³² the ANAO concluded that the 'manner and circumstances' in which the tender process was conducted 'brought into question the Government's ability to deliver such a sensitive process fairly and effectively'.³³
- 2.19 The following factors contributed to this conclusion:³⁴
- The differing views within government, including at the ministerial and departmental levels, about the decision-making process for the tender. The report noted that 'there was no formal documented decision of government in relation to the approval process in the early stages of the tender. Rather, there were clear indicators of different views being held'.³⁵

28 ANAO Audit Report No.29 2011-12, pp. 16-17.

29 ANAO Audit Report No.29 2011-12, p. 17.

30 ANAO Audit Report No.29 2011-12, p. 17.

31 ANAO Audit Report No.29 2011-12, p. 17.

32 ANAO Audit Report No.29 2011-12, pp. 19, 56, 60, 102, 112.

33 ANAO Audit Report No.29 2011-12, p. 24.

34 These key points were identified by the Auditor-General in his opening statement to the Committee, which was tabled at the public hearing and accepted by the Committee as *Submission 2*.

35 ANAO Audit Report No.29 2011-12, p. 29.

- Issues raised as a result of the Government's changes to the tender process while it was in progress, including changing the nominated approver and including an additional evaluation criterion.³⁶
- Handling of information in briefings prepared for Ministers, which 'should have had greater regard to the confidentiality and sensitivity of the information being provided for what was still a "live" tender process'. Information was therefore 'not as tightly controlled as it should have been'.³⁷ Compliance with the tender's probity arrangements and restriction of confidential tender information to only those who 'have a demonstrable need for such specific information' would have achieved better control of confidential information.³⁸

2.20 The ANAO further noted that the Australia Network tender process 'presented the Australian Government in a poor light and cost the two tenderers – the ANC and the ABC – time and money'.³⁹

'Lessons learned' for future procurements

2.21 In light of the tender process's termination, the audit report did not make any specific recommendations.⁴⁰ However, in fulfilling its objective to identify 'lessons learned' from the conduct of the tender process, the report raised the following three issues:

- Firstly, it is important that, where it is intended that Ministers or Cabinet have a formal role in a tender process, that this be made clear; departments have a role in assisting government to be explicit about this.
- Secondly, information security is critically important to effective tender arrangements and there are accepted ways within government of managing this, namely, by not circulating confidential tender information to any departmental officers, Ministers or their staff, unless they are part of the tender decision-making process or have a demonstrable need for such specific information.
- Finally, all parties involved in the management of a tender process should have regard to the importance of adhering to conventional procurement arrangements and effectively

36 These issues are discussed at ANAO Audit Report No.29 2011-12, pp. 20-21.

37 ANAO Audit Report No.29 2011-12, p. 21.

38 ANAO Audit Report No.29 2011-12, pp. 19, 24.

39 ANAO Audit Report No.29 2011-12, p. 23.

40 ANAO, *Submission 2*, p. [3].

managing the range of risks involved, given they can change significantly over time.⁴¹

- 2.22 In addition, the report suggested that mitigation of perceptions of conflict of interest should be considered when Ministers are performing the role of tender approvers.⁴² Several other suggestions for improvements in the tender process were also noted in various sections throughout the report.

The Committee's review

- 2.23 The Committee held a public hearing on Wednesday 27 June 2012 with the following witnesses:

- Australian National Audit Office
- Department of Broadband, Communications and the Digital Economy
- Department of Foreign Affairs and Trade
- Department of the Prime Minister and Cabinet

- 2.24 The Committee took evidence on the following issues:

- The decision to go to tender
- The clarity of the tender process
- The transparency of the evaluation criteria
- The handling of confidential information
- Conflict of interest perceptions
- Complaint handling processes
- Permanent arrangements for the service

The decision to go to tender

- 2.25 In November 2010, Cabinet decided that the Australia Network service would be put to a competitive open tender process 'to ensure the best possible service in return for its investment'.⁴³ As part of the audit report's

41 ANAO Audit Report No.29 2011-12, p. 24. Bullet points added.

42 ANAO Audit Report No.29 2011-12, p. 24.

43 The Hon Kevin Rudd MP, Minister for Foreign Affairs, 'Australia Network for the Future', *Media Release*, 23 November 2010.

background and context, the ANAO included a record of events leading up to this decision.⁴⁴

- 2.26 The audit report noted that the majority of submissions received during a June–July 2010 industry consultation process did not support an open tender for the service, and considered that ‘if the purpose of the Australia Network was to act as a tool for public diplomacy, the service should remain with the ABC as the national broadcaster’.⁴⁵ As noted above, in a briefing to the then incoming Foreign Minister on 1 October 2010 on the outcomes of the consultation process, DFAT recommended that the ABC’s existing contract to deliver the Australia Network service be extended for a further five years, rather than being put out to tender. The intention would be to then explore options to either move to a longer-term contractual arrangement, or to further develop the submission sponsored by the Communications Minister to permanently transition the service to the ABC.⁴⁶
- 2.27 In December 2011, after the Australia Network tender had been terminated and the future of the service was under consideration, the audit report notes that DFAT (and several other departments) did not support a submission from the Communications Minister that the service should become an ongoing function of the ABC, and instead favoured a competitive open tender process.⁴⁷
- 2.28 The Committee sought to clarify the reasons for this apparent shift in DFAT’s advice towards support for a tender process. DFAT informed the Committee that, in 2010, it had favoured a rollover of the ABC’s contract by a further five years in order to ‘save time and money’.⁴⁸ This position was supported by a performance evaluation which had found that the ABC had met or exceeded most of the contract’s Key Performance Indicators over the previous five years.⁴⁹ DFAT explained that it had never recommended a permanent transition of the Australia Network to the ABC, but had only supported a five-year contract rollover. DFAT argued that a tender process would be ‘the best way of getting value for money’

44 ANAO Audit Report No.29 2011–12, pp. 35–41.

45 ANAO Audit Report No.29 2011–12, p. 38.

46 ANAO Audit Report No.29 2011–12, p. 40.

47 ANAO Audit Report No.29 2011–12, p. 113.

48 Mr Dennis Richardson, Secretary, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 27 June 2012, p. 10.

49 Mr Dennis Richardson, Secretary, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 27 June 2012, p. 10.

from the service, rather than the proposed permanent transition to the ABC.⁵⁰

Clarity of the tender approval process

2.29 The ANAO found that, over the first five months of the Australia Network tender process, there were unresolved issues concerning the approval arrangements.⁵¹ The report noted that 'key Government Ministers did not hold a common view of the approval processes including any role for government in being consulted on, agreeing to, or making the decision in relation to the preferred tenderer'. This situation eventually led to an amended RFT being issued, which extended the tender process a further five months – adding to costs – before it was finally terminated due to leaks of confidential information to the media.⁵²

2.30 In its response to the draft audit report, PM&C disputed the Auditor-General's finding that there was a 'climate of uncertainty' around the tender approval process:

The Department of the Prime Minister and Cabinet considers that the report inaccurately describes the tender as being conducted in a climate of uncertainty as to the decision-making process. The Prime Minister had advised on 25 January 2011, before the tender was released, that the tender be brought back to Cabinet for decision. Any delays to the tender in order to implement that decision did not arise from uncertainty or lack of clarity.⁵³

2.31 At the public hearing, PM&C stood by these comments, reiterating the department's view that there was no uncertainty about the tender approval process because 'the Prime Minister had made clear – and as the report indicates ministers had agreed in October – that it was to come back to Cabinet'.⁵⁴

2.32 DFAT, on the other hand, indicated that it agreed with the Auditor-General's findings rather than PM&C's assessment of the situation.⁵⁵

50 Mr Richardson, *Committee Hansard*, Canberra, 27 June 2012, p. 10.

51 ANAO Audit Report No.29 2011–12, p. 19.

52 ANAO Audit Report No.29 2011–12, p. 23–24.

53 ANAO Audit Report No.29 2011–12, p. 28.

54 Ms Renée Leon, Deputy Secretary, Governance, PM&C, *Committee Hansard*, Canberra, 27 June 2012, p. 8.

55 Mr Richardson, *Committee Hansard*, Canberra, 27 June 2012, p. 8.

- 2.33 Later in the hearing, PM&C acknowledged that there was ‘a divergence between what had been in correspondence between the Prime Minister and the Foreign Minister and what was occurring in the tender process’.⁵⁶
- 2.34 To assist the Committee’s inquiry, the ANAO provided a table summarising the report’s findings concerning the decision-making arrangements for the tender process.⁵⁷ A copy of this table can be found in Appendix C.
- 2.35 One of the three key lessons that the audit report identified in relation to the Australia Network tender process was that ‘it is important that, where it is intended that Ministers or Cabinet have a formal role in a tender process, that this be made clear’ and that ‘departments have a role in assisting government to be explicit about this’.⁵⁸
- 2.36 At the hearing, the Auditor-General expanded on this point, explaining that in this instance it would have been ‘very helpful’ and may have avoided some of the subsequent difficulties if the departments involved had insisted on the Government making a clear decision about the tender approval process.⁵⁹ The Auditor-General noted that it is now ‘not that common for a complex policy challenge to be handled by one agency’, and that better documentation of approval processes is one way in which management of such challenges ‘across borders’ could be improved:
- I am just trying to make the point that if, as part of our submissions to government, we can be quite clear that we would wish them to take a decision about the approval process and document that, minute that, so there is clarity amongst ministers and clarity amongst departments, that would be a good thing.⁶⁰
- 2.37 When asked whether DFAT had made changes to any guidelines or processes in response to the audit findings, DFAT indicated that it had done everything possible to clarify the tender approval process. DFAT’s Secretary stated:
- There is nothing more humanly possible that I or anyone in the department could have done to assist the government in clarifying what was not clarified. And there is nothing that I have learnt

56 Ms Leon, *Committee Hansard*, Canberra, 27 June 2012, p. 13.

57 ANAO, *Submission 3*.

58 ANAO Audit Report No.29 2011–12, p. 24.

59 Mr McPhee, *Committee Hansard*, Canberra, 27 June 2012, p. 8.

60 Mr McPhee, *Committee Hansard*, Canberra, 27 June 2012, p. 13.

from this exercise that I did not know before, in terms of that particular issue.⁶¹

- 2.38 PM&C indicated that it shared the Auditor-General's view of it being desirable and important that government decisions are well documented, and that one of the department's core ongoing functions was to assist ministers and the cabinet secretary to ensure that cabinet minutes are comprehensive and well documented.⁶²

Transparency of evaluation criteria weightings

- 2.39 The audit report noted that the throughout both the initial and amended Australia Network tender process, tenderers were not given any guidance about the relative importance given to the evaluation criteria that were used to assess the tenders.⁶³ The order of importance given to the evaluation criteria for the initial tender was agreed as part of the Tender Evaluation Plan, approved after the RFT had been released.⁶⁴ The ANAO suggested that 'clearly articulating the order of importance of the evaluation criteria would have assisted tenderers in preparing their tenders'.⁶⁵
- 2.40 At the hearing, the Auditor-General advised the Committee that there was no current guidance for departments about notifying potential tenderers of the relative importance of tender evaluation criteria. He indicated that while it was up to agencies to determine whether or not more weighting would be given to certain criteria than others, in instances where this does occur, its disclosure would enable tenderers to shape their submissions accordingly and 'improve the clarity of communication between departments and tenderers'.⁶⁶
- 2.41 The Auditor-General noted that this issue has been raised previously in other audits, in which tenderers have been sometimes surprised by the amount of weight given to particular evaluation criteria without any public documentation. He agreed with the Committee's suggestion that it could be useful for procurement guidelines to address this issue, and

61 Mr Richardson, *Committee Hansard*, Canberra, 27 June 2012, p. 8.

62 Ms Leon, *Committee Hansard*, Canberra, 27 June 2012, p. 13.

63 ANAO Audit Report No.29 2011-12, p. 63.

64 ANAO Audit Report No.29 2011-12, p. 62.

65 ANAO Audit Report No.29 2011-12, p. 65.

66 Mr Ian McPhee, Auditor-General, *Committee Hansard*, Canberra, 27 June 2012, p. 10.

expressed a willingness to discuss the point further with the relevant departments.⁶⁷

Handling of confidential tender information

- 2.42 As noted earlier, the Australia Network tender was terminated in November 2011 on the basis of leaks of confidential tender information to the media, which were judged to have compromised the tender process.⁶⁸ An investigation by the AFP into the leaks, which was finalised on 2 April 2012, 'did not identify the person or persons responsible for disclosing the material'.⁶⁹
- 2.43 The audit report makes clear that the audit did not directly examine the possible unauthorised disclosure of information that was being investigated by the AFP.⁷⁰ However, the audit did consider the arrangements for handling information by departments, and the report noted several breaches of protocols which had resulted in 'unwise' distributions of confidential tender information to a wide range of ministerial and departmental officers.⁷¹
- 2.44 One particular breach of information security protocols documented by the ANAO concerned the distribution of a draft cabinet submission prepared by DFAT, which included the recommendations and deliberations of the Tender Evaluation Board (TEB). At the time, DFAT officers had understood that it would be Cabinet that would be selecting the preferred tenderer, meaning the provision of this information in the draft submission to Cabinet was necessary.⁷² The draft submission was circulated to at least two DFAT officials and two advisors in the Foreign Minister's office. The draft submission was also transmitted (over the secure CABNET network) to 30 PM&C officers on a group email inbox. The audit report notes that although the PM&C officers who received the email were appropriately cleared to handle Cabinet material, 'there was not a demonstrable need for them to be informed about the deliberations and recommendations of a "live" tender process', and DFAT should

67 Mr Ian McPhee, Auditor-General, *Committee Hansard*, Canberra, 27 June 2012, p. 10.

68 Senator Conroy, 'Government terminates Australia Network tender process', *Media Release*, 7 November 2011.

69 Andrew Colvin, Deputy Commissioner, Operations, Australian Federal Police, *Committee Hansard*, Senate Legal and Constitutional Affairs Legislation Committee – Estimates, 24 May 2012, p. 54.

70 ANAO Audit Report No.29 2011–12, p. 17.

71 ANAO Audit Report No.29 2011–12, p. 88.

72 ANAO Audit Report No.29 2011–12, p. 77. This point was reiterated by DFAT at the public hearing – see Mr Richardson, *Committee Hansard*, Canberra, 27 June 2012, p. 11.

instead have used PM&C's established protocol of uploading documents onto the dedicated CABNET database.⁷³

- 2.45 At the public hearing, the Auditor-General repeated his view that given the sensitivity of the information, 'standard practice' was that there should always be a demonstrable 'need to know' before material is shared,⁷⁴ and in that the case of the 30 PM&C officers who received the draft submission from DFAT this need was not apparent.⁷⁵
- 2.46 Early in the hearing, PM&C firmly pointed out to the Committee that, although it was outside the usual protocols, there was no established link between this circulation of confidential tender material to departmental officers – who are regularly trusted to handle cabinet-in-confidence material – and the unauthorised leaking of information to the media.⁷⁶
- 2.47 PM&C informed the Committee that its protocols for the protection and circulation of Cabinet materials were 'long standing', and that it conducted regular training and information sharing activities with other departments in relation to the protocols.⁷⁷ PM&C further explained that DFAT's method of distributing the draft submission was only a 'slight departure from standard practice' and the only significant difference was that by emailing the document, rather than adding it to the secure database, there was no audit trail as to which of the 30 officers had actually viewed the document. It was emphasised that distributing confidential material via the CABNET email system, while not compliant with PM&C processes, did not amount to treating it with a lack of security, and it was 'still quite a secure way to transmit information in the sense that it is via the secure Cabinet network and it is only going to people who have the clearances to see material over that network'.⁷⁸
- 2.48 DFAT acknowledged to the Committee that in retrospect, distribution of the material could have been 'tighter', and in light of the audit's findings, the department had reinforced the need to follow the PM&C guidelines.⁷⁹ However, DFAT also pointed out that 'the most highly and sensitive material', including tender material, is put on the CABNET network 'all

73 ANAO Audit Report No.29 2011–12, pp. 78–79.

74 Mr McPhee, *Committee Hansard*, Canberra, 27 June 2012, p. 8.

75 Mr McPhee, *Committee Hansard*, Canberra, 27 June 2012, p. 11.

76 Ms Leon, *Committee Hansard*, Canberra, 27 June 2012, p. 6.

77 Ms Leon, *Committee Hansard*, Canberra, 27 June 2012, p. 6.

78 Ms Leon, *Committee Hansard*, Canberra, 27 June 2012, p. 12.

79 Mr Richardson, *Committee Hansard*, Canberra, 27 June 2012, p. 6.

the time', and that given DFAT's understanding at that time the distribution of the material was 'not unreasonable'.⁸⁰

- 2.49 The Auditor-General's report suggests that it is the responsibility of agencies to manage procurement processes in a way that is 'proportional to the risk and sensitivity' of each procurement.⁸¹ This point was reiterated by the Auditor-General at the hearing, adding that 'anything in Australia tending to deal with the media tends to increase the risk quite significantly and reinforces the importance of having fairly sound and tight processes around any tender of that kind'.⁸² In his closing remarks, the Auditor-General added that in the case of the Australia–Network, the risk of confidential information being leaked became higher as the length of the tender process was extended well beyond the time that was originally anticipated.⁸³

Conflict of interest perceptions

- 2.50 As noted earlier, on 24 June 2011 the Government announced several amendments to the Australia Network tender process,⁸⁴ which included, amongst other changes, that the Communications Minister would become the nominated approver for the tender outcome.⁸⁵
- 2.51 The audit report documents a range of advice that was provided by PM&C and DBCDE in the lead up to this decision, including advice concerning the possibility of a perceived conflict of interest arising from the Communications Minister being the tender approver at the same time as holding portfolio responsibility for the ABC.⁸⁶ The Committee took the opportunity to further question the two departments about this issue at its public hearing.
- 2.52 DBCDE told the Committee that its advice to the Communications Minister was that there would be a *perception* of a conflict of interest in his

80 Mr Richardson, *Committee Hansard*, Canberra, 27 June 2012, p. 11.

81 ANAO Audit Report No.29 2011–12, p. 27.

82 Mr McPhee, *Committee Hansard*, Canberra, 27 June 2012, p. 8.

83 Mr McPhee, *Committee Hansard*, Canberra, 27 June 2012, pp. 13–14.

84 The Hon Julia Gillard, Prime Minister; The Hon Kevin Rudd, Minister for Foreign Affairs; The Hon Stephen Conroy, Minister for Communications, 'Amendment to the Australia Network tender', *Media Release*, 24 June 2011.

85 The audit report notes that the Communications Minister was first identified as the nominated approver in a newspaper article published on 27 June 2011. This was confirmed by Ministers in later media statements and in the Addendum to the RFT published on 5 July 2011. See ANAO Audit Report No.29 2011–12, p. 87.

86 ANAO Audit Report No.29 2011–12, pp. 84–86.

appointment as the approver of the tender. DBCDE further clarified that the purpose of this advice was not to suggest that DBCDE itself perceived a conflict of interest, but rather to inform the Minister that it was likely that other third parties, such as the media, might perceive a conflict.⁸⁷ The department explained:

In the circumstances, our advice to the Minister was as is characterised in the Auditor's report, that regardless of the legal position that there may be no conflict – which is what I call the reality of conflict – the perception would still be an issue.⁸⁸

- 2.53 PM&C told the Committee that it had advised government that the Minister did not have a personal conflict of interest in being appointed as the tender approver, but that it did not provide advice about possible perceptions.⁸⁹
- 2.54 The audit report noted some lack of clarity at the time of the decision about whether or not PM&C's advice that there would be no apprehended bias in the Communications Minister being appointed as the tender approver had been cleared by the Australian Government Solicitor (AGS).⁹⁰ After initially telling the Committee this advice had come from the AGS, PM&C clarified that the additional text concerning the possibility of a conflict of interest had actually been added *after* the document had been cleared by the AGS. However, it was pointed out to the Committee that although the AGS did not provide the advice, it had been made aware of the proposal under consideration and had not raised any concerns or objections about it with PM&C.⁹¹
- 2.55 The Auditor-General agreed with PM&C's view that it was not necessary for agencies to obtain a legal opinion on every piece of advice provided to government.⁹² The Auditor-General also took the opportunity to reiterate the audit report's suggestion that, in relation to ministers being appointed as approvers for tender processes in which their own portfolio agencies may be submitting tenders, 'any perception of a conflict of interest could be mitigated by the Government agreeing to another Minister, or more than one Minister, approving the tender outcome'.⁹³

87 Mr Peter Harris, Secretary, Department of Broadband, Communications and the Digital Economy, *Committee Hansard*, 27 June 2012, pp. 8–9.

88 Mr Harris, *Committee Hansard*, 27 June 2012, pp. 8–9.

89 Ms Leon, *Committee Hansard*, 27 June 2012, p. 9.

90 ANAO Audit Report No.29 2011–12, p. 85.

91 Ms Leon, *Committee Hansard*, 27 June 2012, p. 9.

92 Mr McPhee, *Committee Hansard*, 27 June 2012, p. 10.

93 Mr McPhee, *Committee Hansard*, 27 June 2012, p. 9.

Complaint handling processes

- 2.56 DFAT received a range of complaints during the later stages of the Australia Network tender process, primarily from the ANC. The ANAO report identified deficiencies in DFAT's handling of these complaints, and noted that the complaints process consequently became a 'source of frustration' for the ANC:

While DFAT responded to the formal complaints in accordance with the procedures outlined in the RFT and Tender Evaluation Plan, the department did not, in all cases, fully appreciate the underlying issues or nature of concerns raised by the ANC ... A greater emphasis on understanding and clarifying with the tenderer, the nature of their concerns or formal complaints, would have better positioned DFAT to investigate and address the issues raised.⁹⁴

- 2.57 The report also suggested that DFAT could have provided additional information in the RFT that would have assisted tenderers at the beginning of the tender process to better understand the complaints procedure.⁹⁵

- 2.58 At the hearing, the Committee asked DFAT whether it agreed with the audit report's findings, and whether its complaint handling processes had been reviewed in light of the issues the report had highlighted. DFAT's response was as follows:

We believe that we handled complaints properly. The people who complained may be unhappy with the response they got, but we are satisfied that the way those complaints were handled was in fact proper.⁹⁶

Permanent arrangements for the service

- 2.59 As noted above, the Government announced on 5 December 2011 that the Australia Network service would be provided on a permanent basis by the ABC, as Australia's national broadcaster.⁹⁷ The Government had previously announced that the ABC's existing contract would be extended

94 ANAO Audit Report No.29 2011-12, p. 103.

95 ANAO Audit Report No.29 2011-12, p. 57.

96 Mr Richardson, *Committee Hansard*, Canberra, 27 June 2012, pp. 6-7.

97 Senator Conroy, 'Government decides future for Australia Network', *Media Release*, 5 December 2011.

by another six months – until August 2012 – while the long term contractual arrangements were being resolved.⁹⁸

- 2.60 The ANAO report indicated that the implementation model for the new operating arrangements was expected to be determined in 'early 2012'.⁹⁹ At the time of the hearing in June 2012, there had still been no announcement of this model. The Committee asked PM&C to provide an update on the progress that had been made in determining the ongoing administrative arrangements.
- 2.61 PM&C informed the Committee that it was coordinating whole-of-government advice on the options for implementing the ABC's permanent delivery of the service, and that this was being done in consultation with the ABC and with other departments, including DFAT and DBCDE. PM&C further advised that the matter is 'still under consideration by government', and no precise timeframe for its conclusion had yet been established.¹⁰⁰
- 2.62 The ANAO's report suggested that in order for the Commonwealth to preserve or incorporate powers previously contained in the Australia Network contract, changes to the Australian Broadcasting Corporation Act may necessary, or desirable.¹⁰¹ However, when asked about this suggestion, DBCDE advised the Committee that no changes to the legislation were anticipated.¹⁰²

Committee Comment

- 2.63 The Committee acknowledges that, in terms of administrative arrangements, the Australia Network tender process was, for the most part, handled in accordance with the relevant guidelines (the CPGs). It is clear that efforts were made by the departments involved to run a robust tender process and to clarify issues wherever possible, in the context of a difficult tender environment.

98 Senator Conroy, 'Government terminates Australia Network tender process', *Media Release*, 7 November 2011.

99 ANAO Audit Report No.29 2011-12, p. 115.

100 Ms Leon, *Committee Hansard*, Canberra, 27 June 2012, p. 12.

101 ANAO Audit Report No.29 2011-12, p. 115. See also p. 57 of the audit report for a brief background to this potential issue.

102 Mr Peter Harris, Secretary, DBCDE, *Committee Hansard*, Canberra, 27 June 2012, p. 12.

- 2.64 However, the costs of the eventual termination of the Australia Network tender process were substantial, both in dollar terms and in reputational terms. The ANAO report notes that over \$1 million of taxpayers' money was spent by DFAT in administering the tender process and by the ABC taking part in it.
- 2.65 Given these costs and impacts it is important that the lessons from this tender, as identified by the audit report and Committee's investigation, are taken on board to improve future outcomes. These lessons include:
- clarity of tender processes – including decision making;
 - handling of confidential information;
 - conflict of interest management; and
 - risk management in context.
- 2.66 It was unfortunate that it took nearly five months from the release of the RFT for final agreement to be reached between ministers and departments about who would be approving the outcome of the tender process. As documented in the audit report, the issue was only resolved after a media article in April 2011 indicated publicly, for the first time, that the tender would be approved by the Secretary of DFAT. Disagreement about the approver, and the amendments to the tender that resulted from it, contributed to lengthy delays in the process, which, as the Auditor-General noted in his evidence, increased the risk of the process being compromised. The Committee considers that these delays could have been avoided if the original decision for the tender to be approved by Cabinet had been documented and well communicated. Public disclosure of the approval process at the outset of a tender process would reduce the risk of uncertainty even further.
- 2.67 The Committee considers that clarity of the tender process would have also been improved if the order of importance of the tender evaluation criteria was disclosed. This would have improved the transparency of the tender evaluation process and allowed tenderers to supply appropriately targeted information. Despite this not being common practice, the Committee considers it to be good practice.
- 2.68 The Committee agrees with the ANAO's finding that it was 'unwise' for confidential tender information to be distributed as broadly as it was. Although there is no suggestion that the media leaks which led to the tender's termination were caused by this, it is clear not only that the risk of leakage increases the more information is distributed, but also that the investigation by the AFP into the possible source of the leaks would have

been hampered by the relatively wide distribution of confidential information. At a minimum, the standard procedures for distribution of draft cabinet information should have been followed.

- 2.69 The Committee also considered when, if ever, it is appropriate to share confidential tender information with departmental and ministerial staff who do not have a direct role in a tender process. The Probity Plan for the Australia Network tender forbade any such disclosure without consent from the Chair of the TEB.¹⁰³ The audit report notes the importance of live tender information being 'closely held' and any provision to others being made only on a 'demonstrable need to know' basis with appropriate authorisation from a senior departmental officer.¹⁰⁴ However, key departments put to the Committee that, in this case, the disclosure of tender details to a small number of departmental and ministerial staff was considered necessary, as it was in the process of briefing Cabinet Ministers who were at the time thought to be considering the tender outcome.¹⁰⁵
- 2.70 The problems with handling of sensitive information highlighted above may have been hard to avoid given the rapidly changing and indeed confusing environment. However, the Committee considers that there may still be benefits from further clarity and guidance about when and how tender information may be disclosed to ministers, ministerial staff, and departmental staff.
- 2.71 The perception of a conflict of interest in the Communications Minister being responsible for the final approval of a tender process involving the ABC was another issue considered in the audit report. The Committee agrees with the Auditor-General that when possible conflicts of interest – whether perceived or real – have been identified, it is important to manage the risks and consider ways to mitigate them.
- 2.72 In any procurement process, it is important that risks are managed in proportion to the sensitivity of their environment. It is important that departments monitor the environment in which they operate and amend, potentially strengthening, their management strategies as the level of risks increase. Additional effort by the relevant departments to go beyond the basic guidelines to, for example, require departmental officials to sign confidentiality undertakings, could have also been warranted in some circumstances.

103 ANAO Audit Report No.29 2011-12, p. 59.

104 ANAO Audit Report No.29 2011-12, p. 88.

105 Mr Richardson, *Committee Hansard*, Canberra, 27 June 2012, p. 11; Ms Leon, *Committee Hansard*, Canberra, 27 June 2012, p. 12.

- 2.73 Finally, it is concerning that some of the audit's key findings have not been well received by the departments. The audit report provides an important resource for identifying lessons to prevent similar problems from occurring in the future, and the Committee fully supports the Auditor-General's findings.
- 2.74 Responsibility for the problems found in the audit report squarely rests with the parties involved. However, the Committee considers that lessons from this tender process could also be disseminated more broadly.
- 2.75 The Committee suggests that the Government, through the Department of Finance and Deregulation, consider how the identified lessons from the Australia Network tender process might be disseminated more broadly and potentially included in future enhancements to whole-of-government guidelines. Particular issues to consider include:
- Publicly disclosing the approval process at the start of a tender;
 - Disclosing in Requests For Tender any rankings of evaluation criteria;
 - Improving the clarity of when and how tender information may be disclosed to ministers, ministerial staff, and departmental staff;
 - Appropriately handling perceived conflicts of interest; and
 - Improving the transparency of complaint handling processes.

Audit Report No.31 2011–12

Establishment and Use of Procurement Panels

Introduction

- 3.1 In the 2010–11 financial year, Australian Government agencies entered into more than 79 000 contracts for property and services valued at more than \$32.6 billion, ranging from simple short-term procurement to more complex and longer-term purchases. Agencies purchased a wide variety of property and services including buildings, information and communications technology, and services such as recruitment assistance and legal advice.¹

Procurement Panels

- 3.2 Where agencies need to make regular purchases of property and services, procurement panels are one approach used to achieve efficiencies in procurement practice. A procurement panel is an arrangement whereby specific suppliers, usually selected through a single procurement process, may supply property or services to an agency.
- 3.3 To establish a procurement panel, an agency enters into contracts or deeds of standing offer (known as panel arrangements) with each supplier,

1 ANAO Audit Report No.31 2011–12, p. 33.

setting out the type of property or services a supplier will provide, a set or indicative price for the property or services, and the manner in which the agency will obtain the property or services from the supplier, including any process of competition between panel members where appropriate.

- 3.4 Services obtained via the use of procurement panels include legal, accountancy, human resources, information technology, building and maintenance, publishing, library, and graphic design.²

The legislative and policy framework

- 3.5 At the time of the audit, the Department of Finance and Deregulation (Finance) published the Commonwealth Procurement Guidelines (CPGs), which contained the majority of guidance available to agencies concerning procurement, including the use of procurement panels. Under the Financial Management and Accountability Regulations 1997 (FMA Regulations), agencies are required to act in accordance with the CPGs when undertaking procurement activities.³
- 3.6 On 1 July 2012, revised guidance, now titled Commonwealth Procurement Rules, came into force. The Rules did not include any major policy changes, but 'repositioned and streamlined' the guidelines, clarified terminology, and redefined procurement methods.⁴ This report makes reference to both the old guidelines and the new rules, but as the audit took place while the guidelines were still in effect, refers more frequently to the CPGs.
- 3.7 The CPGs stated that a value for money assessment involves a comparative analysis of all relevant costs and benefits throughout the procurement cycle, including:
- Fitness for purpose;
 - The performance history of each prospective supplier;
 - The relative risk of each proposal;
 - Flexibility to adapt to possible change over the lifecycle of the purchase;
 - Financial considerations; and
 - The evaluation of contract options.⁵

2 ANAO Audit Report No.31 2011-12, pp. 33-34.

3 FMA Regulation 7

4 Finance, *Quick guide to the Commonwealth Procurement Rules*, 2012.

5 ANAO Audit Report No.31 2011-12, p. 36.

- 3.8 Panel procurements require consideration of value for money at two stages: firstly, when selecting suppliers as part of the initial panel establishment process; and secondly, every time an individual panel supplier is chosen to undertake work under the panel arrangement.⁶

The ANAO Audit

Audit objective and scope⁷

- 3.9 The objective of the audit was to assess the extent to which *Financial Management and Accountability Act 1997* (FMA Act) agencies' establishment and use of procurement panels supported value for money, efficiency and effectiveness in procurement.
- 3.10 Three high level criteria were used to assess the performance of agencies' panel procurement. The criteria examined whether selected agencies had:
- established a sound procurement framework that supported panel procurement, including by communicating the existence of panels and providing guidance on procuring from them;
 - adhered to the requirements of relevant FMA Regulations (including application of the CPGs) and applied sound practices when establishing and procuring using a panel; and
 - established effective procurement monitoring and review arrangements to inform panel procurement.
- 3.11 The ANAO also considered the current impetus towards greater use of coordinated and cooperative procurement, and the implications for Finance and agencies of this trend.
- 3.12 Three FMA Act agencies were selected for the audit as, based on available data, they were identified as large users of panels (both in terms of number of procurements using panels and panel procurements as a proportion of their total contracts). The agencies selected were:
- Australian Securities and Investments Commission (ASIC);
 - Department of Broadband, Communications and the Digital Economy (DBCDE); and

6 ANAO Audit Report No.31 2011-12, p. 36.

7 ANAO Audit Report No.31 2011-12, p. 18.

- Department of Foreign Affairs and Trade (DFAT).

- 3.13 The audit involved analysis of a selection of the audited agencies' procurement processes and supporting records. The ANAO examined procurement processes used to establish 13 panels and to access three panels of other agencies, and then examined processes for a sample of procurements made using each of the selected panels. A total of 139 procurements under the panels were selected for examination across the three agencies.
- 3.14 ANAO also consulted representatives of panel suppliers to obtain their feedback on the operation of Australian Government procurement panels. This included a number of representatives of SMEs.

Overall audit conclusion

- 3.15 The ANAO concluded that while the audited agencies had generally established panels through sound open tender processes, once they moved to select preferred suppliers to undertake work, there was a lack of competitive arrangements and agencies did not adequately demonstrate value for money in their selection processes in a way consistent with the CPGs.⁸
- 3.16 It found that agencies should have more often sought multiple quotes when selecting a supplier, especially for procurements over \$100 000 in value. The audit found that for procurements over this value, two of the agencies (ASIC and DFAT) only sought multiple quotes in around one third of procurements in the audit sample.⁹
- 3.17 Agencies also needed to improve their evaluation activities once panels were established. The audit found that none of the audited agencies evaluated the efficiency, effectiveness or value for money provided by their panel arrangements.¹⁰
- 3.18 Finally, the ANAO noted that while the increase in coordinated and cooperative procurement arrangements across agencies had benefits in terms of finding efficiencies, there was the potential for small and medium enterprises (SMEs) to become sidelined through the procurement panel process. The audit suggested there would be benefit in Finance monitoring

8 ANAO Audit Report No.31 2011–12, p. 20.

9 ANAO Audit Report No.31 2011–12, p. 21.

10 ANAO Audit Report No.31 2011–12, p. 21.

developments to ensure SMEs have appropriate opportunities to compete with larger companies.¹¹

ANAO recommendations

3.19 The ANAO made three recommendations to the audited agencies. A portion of one recommendation related to Finance's reporting requirements.

Table 3.1 ANAO recommendations, Audit Report No.31 2011–12

1.	To provide for accountability and transparency in procurement decision-making when utilising a procurement panel, the ANAO recommends agencies succinctly document the basis for selecting a particular supplier to evidence value for money in the circumstances. Agencies' responses: <i>Agreed.</i>
2.	To improve the transparency of Australian Government procurement and enable analysis of the supply of property and services under panel arrangements, the ANAO recommends: • Finance require agencies to make references on AusTender to the relevant standing offer when reporting contracts resulting from a panel arrangement; and • agencies review their guidance and practices to document the relevant standing offer for these contracts. Agencies' responses: <i>Agreed.</i>
3.	To assess whether procurement panels are providing the anticipated business benefits and to inform prospective procurement arrangements, the ANAO recommends agencies evaluate the use and effectiveness of panels at an appropriate time during their lifecycle. Agencies' responses: <i>Agreed.</i>

The Committee's review

3.20 The Committee held public hearings on 20 and 27 June 2012 with the following witnesses:

- Australian National Audit Office
- Australian Securities and Investments Commission
- Department of Broadband, Communications and the Digital Economy
- Department of Finance and Deregulation
- Department of Foreign Affairs and Trade

3.21 The Committee took evidence on the following issues:

11 ANAO Audit Report No.31 2011–12, p. 22.

- Guidance by the Department of Finance and Deregulation
- Documentation of value for money considerations
- Internal audit findings
- Central Procurement Units
- Approvals under Regulation 9 of the FMA Act
- Small and medium enterprises (SMEs)
- Multi-agency access to panels
- Reporting on AusTender
- Evaluation of procurement panel effectiveness

Guidance by the Department of Finance and Deregulation

- 3.22 Finance updated the Committee on improvements to the guidance and training on procurement that it provides to agencies.
- 3.23 Finance noted that procurement generally took place infrequently and in a devolved environment, and advised there were regular opportunities for training or discussion of procurement across agencies, including:
- Introductory courses to procurement conducted four times a year;
 - Meetings of the Procurement Discussion Forum every six weeks to inform procurers about current issues; and
 - Convening a Senior Procurement Officers Reference Group to encourage collaboration.¹²
- 3.24 Finance also advised that it had developed standard contract templates, had improved the CPGs and retitled them the Commonwealth Procurement Rules, and was also working on further guidance surrounding procurement panels.¹³ Further, Finance indicated that it would take the findings of the audit and incorporate them into guidance material provided to agencies.¹⁴
- 3.25 Finance reported that it had reviewed some of these mechanisms and had been working over time to improve them, noting of the Procurement Discussion Forum:

12 Mr John Grant, First Assistant Secretary, Procurement Division, Finance, *Committee Hansard*, Canberra, 20 June 2012, p. 5.

13 Mr Grant, *Committee Hansard*, Canberra, 20 June 2012, p. 5.

14 Department of Finance and Deregulation, *Submission 4*, Answers to Questions on Notice, p. 5.

Four or five years ago we were lucky to get 20 or 30 people to turn up to it, so about four years ago we sat back and we said 'How do we actually improve the information flow?' We really wanted to consult on what are the areas that agencies find most difficult. So it is really over the last four years, and we have been slowly ramping it up, because you need to engage and bring people with you.¹⁵

- 3.26 The Committee was informed that this process had been successful, evidenced by a larger turnout of around 200 participants for each meeting of the Procurement Discussion Forum.¹⁶
- 3.27 In answers to questions on notice, Finance advised that it had developed Model Chief Executive Instructions (CEIs) on Procurement which had taken into account the recommendations of the audit report, and that 65 of 69 agencies that had responded to Finance had advised they would use the Model CEIs. Finance anticipated the Model CEIs would be issued in August 2012.¹⁷

Documentation of value for money considerations

- 3.28 As noted earlier, panel procurements are required to assess value for money at two stages – the first when selecting suppliers as part of the initial establishment of the panel, and then when an individual panel supplier is chosen to undertake work under the panel arrangements.¹⁸
- 3.29 One of the guiding principles of procurement is considering value for money, and one of the guiding principles of reporting on procurement activities is the documentation of that consideration. The audit report found deficiencies in all audited agencies documenting that value for money considerations had been made during the procurement process. As the ANAO noted, such documentation does not need to be onerous, and only needs to briefly address factors such as a supplier's fitness for purpose, their performance history, and their ability to deliver services in accordance with deadlines.¹⁹
- 3.30 The ANAO indicated at the hearing that the lack of documentation of value for money assessments when selecting procurement panel members was the central issue of the audit report.²⁰

15 Mr Grant, *Committee Hansard*, Canberra, 20 June 2012, p. 5.

16 Mr Grant, *Committee Hansard*, Canberra, 20 June 2012, p. 5.

17 Finance, *Submission 4*, Answers to Questions on Notice, pp. 3–4.

18 ANAO Audit Report No.31 2011–12, p. 36.

19 ANAO Audit Report No.31 2011–12, pp. 82–83.

20 Mr McPhee, *Committee Hansard*, Canberra, 20 June 2012, p. 2.

- 3.31 The Committee asked why ASIC sought multiple quotations before selection in only one third of procurements in excess of \$100 000, and why the ANAO found that ASIC did not sufficiently document consideration of value for money in 41 per cent of cases.
- 3.32 ASIC replied that, in circumstances where services were very clear, and prices had little variation, some procurers did not seek multiple quotes because the value for money was evident, or the supplier had already been engaged before, using intellectual property or proprietary software that would again be used. Further, ASIC stated that it did not make sense to seek multiple quotes in the legal services panel to engage a different firm to work on an existing case that had been extended.²¹
- 3.33 When asked a similar question, DFAT replied that it had taken the audit finding on board, and had sent a circular to staff, reinforced its training program by developing e-learning programs, and begun to develop key performance indicators to monitor compliance.²²
- 3.34 The ANAO noted that when multiple quotes were not sought for high value procurements that it reinforced the need to document the rationale for selecting a particular supplier.²³
- 3.35 ASIC indicated that the primary problem was not that procurers were not considering value for money, it was that they were not documenting the reason for selecting a specific supplier:
- When you have these audit findings, you go and challenge people and you ask them, 'Was this value for money? What did you do?' They will explain it to you, and they will give you all the reasons why this represented value for money and why this was the right decision. But the fact is that they did not document it.²⁴
- 3.36 DFAT reported that there were various ways for people to document decisions, with 'formal paperwork' required for more complex and high risk procurement. DFAT identified education and understanding of process to be important in improving documentation of consideration of value for money.²⁵

21 Mr Iglesias, *Committee Hansard*, Canberra, 20 June 2012, p. 3.

22 Ms Thorpe, *Committee Hansard*, Canberra, 27 June 2012, p. 1.

23 Mr Turnbull, *Committee Hansard*, Canberra, 20 June 2012, p. 4.

24 Mr Iglesias, *Committee Hansard*, Canberra, 20 June 2012, p. 4.

25 Ms Thorpe, *Committee Hansard*, Canberra, 27 June 2012, p. 2.

Internal audit findings

- 3.37 The ANAO found the following internal agency audits had made findings generally consistent with those made in the ANAO Audit Report, in:
- at least one internal audit between 2007 and 2009 conducted by DBCDE;
 - at least one internal audit between 2007 and 2009 conducted by DFAT; and
 - eight internal ASIC audits on procurement conducted between 2007 and 2008 and one quality review on procurement in 2009.
- 3.38 These internal audits made recommendations to improve transparency and accountability by improving documentation of procurement processes; demonstrating consideration of risk management and conflict of interest; and timely reporting on AusTender.²⁶
- 3.39 The Committee asked the ANAO for further comment, with the ANAO reporting:
- We did see some instances where they had adjusted their guidance, but we had not seen holistic changes as a result of those internal audits. Our earlier audit on direct source procurement also made a similar finding in that what we were finding, internal audit areas were also finding. So I think we pointed out there that it just highlights the importance of the work undertaken by internal audit, and of the agency being responsive to that work. It does highlight that a lot of these issues are identified; but yes, it is a question of how they are responded to.²⁷
- 3.40 The Auditor-General noted the reason organisations had internal audit mechanisms was to provide organisations with a mechanism to conduct their own review processes and to report the findings of those reviews back.²⁸
- 3.41 ASIC advised that it believed it had taken on board the findings of its internal audits, which had taken place shortly after it had moved from working under the *Commonwealth Authorities and Companies Act 1997* to the FMA Act, and that it was substantially more compliant with the CPGs than in 2007, explaining:

26 ANAO Audit Report No.31 2011–12, p. 97.

27 Mr Turnbull, *Committee Hansard*, Canberra, 20 June 2012, p. 2.

28 Mr McPhee, *Committee Hansard*, Canberra, 20 June 2012, p. 3.

The reason we had eight internal audits over the period of 24 months was that we wanted to make sure that the organisation understood how to procure properly in accordance with the Commonwealth Procurement Guidelines. We also established a Central Procurement Unit. Through those audits and also through a quality review of our function, we looked not only at culture, but also controls.²⁹

- 3.42 ASIC reported that there had been a reduction in breaches of the FMA Act over the course of the last few years as reported through the Certificate of Compliance process, which ASIC attributed to working to improve processes.³⁰

Central Procurement Units

- 3.43 Central Procurement Units (CPUs) are located within government agencies, and provide specialist advice and support when procurement responsibilities are devolved within the agency. As procurement is potentially complex, and as delegates and staff may not engage in procurement activities on a regular basis, support through CPUs can be vital. In the audit report, the ANAO also indicated that the formal involvement of a CPU in higher value, more complex or higher risk procurements may be of assistance.³¹
- 3.44 The Auditor-General noted the importance of CPUs in assisting in compliance with the CPGs and supporting staff engaged in procurement:
- ... we find that agencies that have Central Procurement Units, who can inform other procurement areas in the department, tend to do better than those agencies where procurement is just a devolved process and there is no central policy area to guide procurement in the agency. So to the extent that agencies can support people who undertake procurement, that is a very positive thing, because in many organisations where procurement is devolved some people only procure items every few months, so they are not au fait necessarily with the detailed requirements. So agencies have got a role to make sure their people who have procurement responsibilities get the appropriate support and training.³²

29 Mr Iglesias, *Committee Hansard*, Canberra, 20 June 2012, p. 4.

30 Mr Iglesias, *Committee Hansard*, Canberra, 20 June 2012, p. 4.

31 ANAO Audit Report No.31 2011-12, pp. 47-48.

32 Mr McPhee, *Committee Hansard*, Canberra, 20 June 2012, p. 3.

- 3.45 DBCDE reported to the Committee that it had found it beneficial to actively encourage officers entering into high value procurements to seek advice and engagement from its CPU:

We almost give them one-on-one training as they go through that process. We have found that it is much easier to centralise it. Therefore we can get a consistency of practice across the organisation.³³

- 3.46 DBCDE reported it was working to put into place a 'procurement to payment process' which would guide procurers through the entire process via an internal workflow system designed to simplify the procurement process.³⁴

- 3.47 Looking at DFAT's CPU, the ANAO also found that as at September 2011 the DFAT Procurement Manual had not been updated for more than four years, and, as a result, the manual was based on obsolete CPGs. Further, the audit found that information on procurement was difficult to find on the DFAT intranet, and that DFAT had not clearly articulated the roles and responsibilities of staff involved in procurement, including its Central Procurement Unit.³⁵

- 3.48 Further, the ANAO reported DFAT had no specific planning requirements for procurement panels, and that there was comparable planning documentation for fewer than half of its higher value procurements.³⁶

- 3.49 In the audit report, the ANAO reported:

DFAT's CPU considered it had taken steps towards a more strategic approach to managing procurement, by better supporting delegates and staff to undertake procurement independently. DFAT's CPU envisaged it would consequently be able to apply more time to high level oversight of procurement (including data analysis), influencing strategic procurement directions, and promoting good procurement practice.³⁷

- 3.50 How this perspective fits with the audit report findings is considered further with the Committee's comments.

33 Mr Ash, *Committee Hansard*, Canberra, 27 June 2012, p. 3.

34 Mr Ash, *Committee Hansard*, Canberra, 27 June 2012, p. 3.

35 ANAO Audit Report No.31 2011-12, p. 46.

36 ANAO Audit Report No.31 2011-12, p. 78.

37 ANAO Audit Report No.31 2011-12, p. 49.

Approvals under Regulation 9 of the FMA Act

- 3.51 As per standard process, once agreement was reached on suppliers for each of the procurement panels examined in the audit, the agencies sought to enter into deeds of standing offer with the suppliers. This enables suppliers to provide their services in accordance with agreed terms and conditions.
- 3.52 Such an agreement requires an approval under Regulation 9 of the FMA Act before it is entered into.
- 3.53 For the thirteen panels examined in the audit report, the ANAO found only seven had approvals specifically referring to FMA Regulation 9; three had other evidence of approval that did not meet Regulation 9 requirements; one had an approval that referred to Section 44 of the FMA Act (the incorrect section of the Act); and DFAT was unable to provide an approval for two of the four panels examined by the ANAO.³⁸
- 3.54 The audit report noted there was variation amongst agencies with some performing better than others, and that the ANAO identified DFAT's Legal Services panel as an area responsible for approximately half of DFAT's identified 30 per cent non-compliance rate. The ANAO found:
- This panel had operated for some time on the basis that Regulation 9 approval was obtained at the time it was established and was therefore not required for each procurement under the panel. This was despite CPU guidance stating that Regulation 9 approval is required each time a work order is placed under a standing offer.³⁹
- 3.55 The ANAO reported that procurers were unsure as to whether Regulation 9 approval was required prior to entering into deeds of standing offer, despite guidance from Finance indicating this requirement clearly.⁴⁰
- 3.56 Finance guidance makes it clear approval must be obtained prior to entering into an arrangement with suppliers under which public money is, or may become, payable.⁴¹ This is because these agreements usually provide no opportunity for future decision makers to alter an agreement's terms and conditions.⁴²

38 ANAO Audit Report No.31 2011-12, pp. 68-69.

39 ANAO Audit Report No.31 2011-12, p. 85.

40 ANAO Audit Report No.31 2011-12, pp. 69-70.

41 Department of Finance and Deregulation, *Submission 4*, Answers to Questions on Notice, p. 6.

42 ANAO Audit Report No.31 2011-12, pp. 69-70.

- 3.57 DFAT reported that there was insufficient evidence made available to decision makers regarding Regulation 9 approvals:

People do not understand the process. It is a very process oriented approach, for good reason. People do not realise that they need to document everything. We have had quite a strong campaign to get that message out about the need to document everything and to get formal sign offs on reg 9s and 10s et cetera. I have noticed a marked improvement. People do not realise that there is a next step to take to formalise what they have done. I do not think that it is deliberate. We just need to get that message out and constantly repeat it. That is where the challenge is.⁴³

Small and medium enterprises (SMEs)

- 3.58 The Committee asked about the presence of small and medium enterprises (SMEs) on procurement panels, asking whether Finance was able to report on the percentage of SMEs represented on panels. Finance advised that while it analysed SME participation in Government procurement annually through the Australian Bureau of Statistics, information about SME participation on panels was not currently collated. Finance indicated it would investigate whether it was possible to collect this information.⁴⁴
- 3.59 In its appearance before the Committee, Finance noted that the CPGs were non-discriminatory, and required SMEs to be given due consideration. Further, it was noted that procurement panels were normally conducted through an open tender process, and that SMEs would need to satisfy the standard set of criteria.⁴⁵
- 3.60 DFAT advised the Committee that they did not specifically monitor what percentage of procurements were made from SMEs on panels, but that overall 49 per cent of DFAT procurement came from SMEs – well above the Australian Public Service average of 33.5 per cent, and the overall target of 10 per cent.⁴⁶
- 3.61 DBCDE indicated that it also did not monitor panel procurements, but that the number of SMEs engaged depended on what services the panel had been convened to procure. It reported that in panels convened to procure specialised services larger businesses tended to dominate.⁴⁷

43 Ms Thorpe, *Committee Hansard*, Canberra, 27 June 2012, p. 2.

44 Department of Finance and Deregulation, *Submission 4*, Answers to Questions on Notice, p. 3.

45 Mr Grant, *Committee Hansard*, Canberra, 20 June 2012, p. 1.

46 Ms Thorpe, *Committee Hansard*, Canberra, 27 June 2012, p. 1.

47 Mr Ash, *Committee Hansard*, Canberra, 27 June 2012, p. 2.

Multi-agency access to panels

- 3.62 Aside from an agency convening its own procurement panels, agencies are able to cooperatively procure through the panels of other agencies. This is formally known as Multi Agency Access, but is colloquially known as 'clustering' when agencies work together to establish panels, and 'piggybacking' when an agency uses another agency's panel.⁴⁸ Agencies engaging in clustering or piggybacking are still required to consider value for money and should still apply all risk management procedures relevant to procurement practices.
- 3.63 Piggybacking and clustering processes are increasing in popularity, and can present significant cost savings to agencies. However, they can also increase the administrative burden on agencies,⁴⁹ and may reduce opportunities for SMEs to secure government contacts.⁵⁰
- 3.64 DBCDE reported that it had been using its CPU to oversee agency access to panels created by other departments,⁵¹ but noted piggybacking on panels from larger agencies had ramifications for smaller agencies:
- ... departments that are big purchasers create panels and departments that are small or occasional purchasers try to piggyback on them. The big department that sets up the panel is not being asked to worry about the interests of the smaller departments—it is not their role.⁵²
- 3.65 The Committee was advised that while clustered and whole of government panels had value, these panels could also be inflexible, making it difficult for a participating agency to secure specialist advice. This also had the potential to upset suppliers selected to be on a panel but who were not selected to do business as they were not able to meet the specialist needs of the procurer.⁵³
- 3.66 DBCDE also noted:
- The more homogenous the goods or services are, the higher the likelihood of a central contract or a central panel working. I sat on a committee that was looking at trying to create a whole-of-government financial services panel. The more that we looked into

48 ANAO Audit Report No.31 2011–12, pp. 34–35.

49 ANAO Audit Report No.31 2011–12, p. 59.

50 ANAO Audit Report No.31 2011–12, p. 62.

51 Mr Ash, *Committee Hansard*, Canberra, 27 June 2012, p. 4.

52 Mr Harris, *Committee Hansard*, Canberra, 27 June 2012, p. 5.

53 Mr Harris, *Committee Hansard*, Canberra, 27 June 2012, p. 4.

it, the more we found that, while at certain levels you can get a homogenous product being delivered, each individual department was looking for either some specialised skills or skills in a specific geographic area. That is where those panels start having difficulties. The more specialised the need is, the less likelihood there is that a whole-of-government panel is going to work.⁵⁴

Reporting on AusTender

- 3.67 In its report, the ANAO noted the importance of publishing contract details on AusTender to promote accountability and transparency, noting Finance only encouraged, and did not mandate reporting of standing offers when procurement was made under a panel arrangement.
- 3.68 The ANAO believed there would be greater transparency of panel procurement if agencies reported the relevant standing offer when reporting contracts made under panel arrangements on AusTender. This would enable analysis by Finance and support understanding of supply changes, including implications for SMEs.
- 3.69 As a result, the ANAO recommended mandating reporting on relevant standing offers on AusTender when a contract was agreed through a panel arrangement.⁵⁵
- 3.70 Finance agreed to the ANAO's recommendation, and advised that this requirement would be incorporated into updated advice provided to agencies, and also in broader AusTender operational guidance.⁵⁶

Evaluation of procurement panel effectiveness

- 3.71 Recommendation 3 of the audit report related to measuring the effectiveness of procurement panels, requesting that agencies evaluate the use and effectiveness of procurement panels at an appropriate time in the panel's lifecycle.
- 3.72 The Committee asked about progress against this recommendation, with DBCDE advising it had begun to evaluate the effectiveness of procurement panels approximately a year before their expiry. As a small agency, DBCDE's evaluations examine whether it is economical to

54 Mr Ash, *Committee Hansard*, Canberra, 27 June 2012, p. 4.

55 ANAO Audit Report No.31 2011-12, pp. 94-95.

56 Department of Finance and Deregulation, *Submission 4*, Answers to Questions on Notice, p. 6.

reconstitute the panel or to find other suitable Commonwealth panels to piggyback on.⁵⁷

Committee comment

- 3.73 The conclusions of the ANAO audit suggest that there is still work to be done by all agencies to build on the recommendations of previous ANAO and JCPAA inquiries into procurement practices, especially in how advice is provided to areas responsible for procurement.
- 3.74 Also, given the Audit Report was only tabled in May of 2012, and the Committee held its inquiry into the Audit Report in June of 2012, the Committee understands that all audited departments will find it difficult to demonstrate changes in such a short period.

The role of the Department of Finance and Deregulation

- 3.75 The Committee is pleased to see Finance taking a proactive role in improving procurement practices through the updating of the Commonwealth Procurement Guidelines into the Commonwealth Procurement Rules, development of model Chief Executive Instructions and other associated training and information provision mechanisms. These were necessary and much needed initiatives, and the Committee hopes that over time they will result in better practice across the APS and consequently a reduction in adverse audit report findings.
- 3.76 The Committee notes that advice provided by Finance to agencies has evolved over time, and Finance has conducted reviews of its own mechanisms for information dissemination and training. The Committee was pleased to hear that improvements made to the Procurement Discussion Forum had led to a significant increase in participation from agencies.
- 3.77 Agencies now have an opportunity to consider the new rules – together with the findings of the various procurement related audits and committee inquiries – to conduct a comprehensive review of their procurement practices. Training opportunities and discussion forums provided by Finance will also be key in assisting agencies to improve their compliance with the rules.

57 Mr Ash, *Committee Hansard*, Canberra, 27 June 2012, p. 3.

- 3.78 The Committee was surprised to hear that no agency was able to report on the percentage of SMEs on procurement panels. The Committee believes this is a statistic that may be of use to both Finance and other agencies, notes the commitment of Finance to obtain these statistics, and looks forward to seeing these figures reported.

Documentation of value for money

- 3.79 The evidence reviewed by the Committee seems to suggest that decision makers do consider value for money in the vast majority of procurements, however, there are clear deficiencies in the recording of that consideration.
- 3.80 The Committee agrees with the ANAO that this was the central issue of the audit report.
- 3.81 Providing documentation of the decision making process is vitally important from the perspective of accountability and transparency. There should be a clear paper trail of how decisions were made to enable an outside observer to see how a decision was reached. The Committee, and the ANAO, emphasises that this documentation does not have to be onerous, but does have to be sufficient to demonstrate value for money was explicitly considered and the elements of that consideration.
- 3.82 It is clear to the Committee that cultural change in some agencies is required. To assist in such change, Finance appears to provide ample opportunities for agencies to consult if its written advice is unclear.
- 3.83 Agencies must integrate the findings of the ANAO audit into their own internal procurement processes. The Committee is cautiously optimistic, on the basis of the evidence given at public hearings that the audited agencies are seeking to review their own internal practices and to ensure that documentation and reporting meets the appropriate standards.

Evaluation of procurement panel effectiveness

- 3.84 ANAO Recommendation 3 requests that agencies evaluate the use and effectiveness of procurement panels at an appropriate time during the panel's lifecycle.
- 3.85 Notwithstanding the short time agencies have had to consider the audit report, the Committee still notes the importance of implementing this recommendation.
- 3.86 The Committee does not make any judgement as to the appropriate time for an agency to review a procurement panel, as appropriate times will

vary across agencies. However, agencies should consider this recommendation as quickly as possible, as new procurement panels will be established using the new rules, and evaluation is an important element of good public administration.

Recommendation 1

That the Department of Foreign Affairs and Trade, the Department of Broadband, Communications and the Digital Economy, and the Australian Securities and Investments Commission determine and report to the Committee how they are implementing ANAO Recommendation 3, including the timelines for procurement panel evaluations.

Internal audit findings

- 3.87 The Committee was concerned to hear that the ANAO had made findings that were consistent with findings of internal agency audits conducted between 2007 and 2009. That the ANAO made similar findings to these internal audits suggests to the Committee that agencies did not adequately follow up on the findings of their own internal audit processes, contributing to systemic problems.
- 3.88 Internal audits are a vital part of agency governance and review processes, and their findings should be taken seriously, investigated further if required, and acted upon. To see the ANAO making similar findings to those identified internally five years earlier is of great concern to the Committee.
- 3.89 Some agencies explained these findings better than others. ASIC explained that while it had conducted a large number of internal audits, it was seeking to measure improvements with compliance over time.⁵⁸ Further, the Committee notes that ASIC transitioned from operation under the *Commonwealth Authorities and Companies Act 1997* to operation under the FMA Act during the period examined by the ANAO, changing the way agency finances were managed and required to be reported.
- 3.90 Nonetheless, agencies should pay more attention to the findings of their own internal audit bodies, and to either act on their findings or document and be able to clearly explain why action has not been taken.

58 Mr Iglesias, *Committee Hansard*, Canberra, 20 June 2012, p. 4.

- 3.91 The Committee hopes the Auditor-General will monitor and report on this issue in future audits where relevant.

Regulation 9 approvals and the role of Central Procurement Units

- 3.92 The ANAO audit identified what the Committee considers to be significant instances of non-compliance with the CPGs. The ANAO found instances across all agencies of failure to obtain appropriate approval under Regulation 9 of the FMA Act.⁵⁹ Failure to obtain appropriate approval under Regulation 9 of the FMA Act constitutes a fundamental failure of simple public administration.
- 3.93 The audit's finding relating to Regulation 9 approvals in DFAT is of particular concern to the Committee, and raises broader questions about the specific roles played by CPUs across agencies. An area of DFAT failed to properly obtain approval for expenditure, contrary to advice provided by the agency's CPU,⁶⁰ and the CPU either did not notice this significant noncompliance, or failed to act upon it.
- 3.94 The findings in relation to procurement in DFAT lead the Committee to the conclusion that DFAT's CPU should be working closer with procurers to ensure they are compliant with the rules. Further, DFAT's CPU should be monitoring the compliance of procurers to prevent significant instances of noncompliance such as those identified by the ANAO in looking at DFAT's Legal Services panel, and that all material produced by the CPU is kept up to date and made readily available to procurers. This is doubly important given the recent release of the Commonwealth Procurement Rules.
- 3.95 In describing recent improvements to improve compliance with the Commonwealth Procurement Rules, DFAT reported:

We sent a special circular to all staff during their retention to the effect that they do need to get the quotes and everything else. We have also now reinforced our training program so that that message is very clearly stated. We are also now developing some e-learning which should reinforce that message as well. So we have taken it very seriously and we have put a whole lot of steps in place. We are also developing some key performance indicators

59 ANAO Audit Report No.31 2011-12, p. 85.

60 ANAO Audit Report No.31 2011-12, p. 85.

so that we can monitor to make sure that people are actually complying.⁶¹

- 3.96 Looking at CPUs more broadly, the Committee identified a large variation in the roles played by CPUs across agencies. As noted above, DFAT's CPU appeared to be less proactive in monitoring the actions and compliance of procurers, whereas DBCDE reported it had actually started to have its CPU work more closely with procurers to assist in ensuring compliance.
- 3.97 CPUs clearly have an important role in creating a positive compliance culture. They can serve as the link between Finance and agencies, and should take a proactive role in assisting procurers. They can play an important role in assisting inexperienced officers and officers conducting high value or high risk procurements, and should have close contact with officers in these situations. Further, they should be monitoring procurement activities across their departments to identify any noncompliance with the Commonwealth Procurement Rules and to ensure compliance as a matter of priority.
- 3.98 Noting the role CPUs play in ensuring compliance, and considering the deficiencies in DFAT's performance, the Committee believes that DFAT needs to consider a change in strategy to a more active and engaged posture, perhaps considering DBCDE's 'procure-to-pay' approach. CPUs need to work closely with procurers and to actively monitor and evaluate procurement across the department.

Recommendation 2

That the Department of Foreign Affairs and Trade report to the Committee no later than six months after the tabling of this report on the specific role its Central Procurement Unit plays in procurement across the agency, and how the Central Procurement Unit is interacting with departmental officers who engage in procurement to improve compliance and procurement outcomes.

Multi-agency access and whole of government procurement

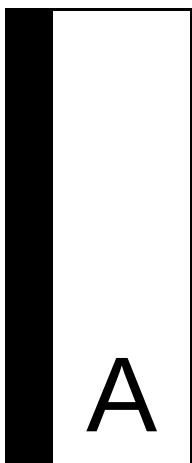
- 3.99 The Committee notes that there is clear value in similar agencies working together to source goods and services through clustering. Agencies seeking to cluster should work very closely together to identify their

61 Ms Thorpe, *Committee Hansard*, Canberra, 27 June 2012, p. 1.

individual needs, to find commonalities, and to convene panels that address those commonalities, but also to be prepared to not go ahead with convening a clustered panel if it does not meet an agency's specialist needs.

- 3.100 The Committee believes that piggybacking on larger agencies' panels is useful for smaller agencies and can provide clear value for money, but that agencies should ensure they maintain the balance between the cost effectiveness of piggybacking and securing services that are actually appropriate for agency needs, especially when they relate to specialist needs.
- 3.101 Further, agencies seeking to cluster or piggyback should consider the perspective of suppliers, as there is an expectation that being selected to be on a panel will result in offers to provide quotations for services.
- 3.102 Finally, both the ANAO and Finance agree that there should be mandated reporting of relevant standing offers on AusTender when a contract has been agreed through a panel arrangement. The Committee supports this initiative and looks forward to its full implementation.

Rob Oakeshott MP
Chair
August 2012



Appendix A — Public Hearings

Wednesday, 20 June 2012 – Canberra

Australian National Audit Office

Mr Ian McPhee, Auditor-General

Dr Andrew Pope, Group Executive Director, Performance Audit Services
Group

Mr Stuart Turnbull, Executive Director

Australian Securities and Investments Commission

Mr Carlos Iglesias, Chief of Operations

Ms Rachel Johnson-Kelly, Acting Chief Finance Officer

Department of Finance and Deregulation

Mr Stein Helgeby, Deputy Secretary, Financial Management Group

Mr John Grant, First Assistant Secretary, Procurement Division

Wednesday, 27 June 2012 – Canberra

Australian National Audit Office

Mr Ian McPhee, Auditor-General

Dr Andrew Pope, Group Executive Director, Performance Audit Services
Group

Mr Stuart Turnbull, Executive Director

Ms Barbara Cass, Group Executive Director, Performance Audit Services
Group

Mr Mark Simpson, Executive Director

Department of Broadband, Communications and the Digital Economy

Mr Peter Harris, Secretary

Mr Simon Ash, First Assistant Secretary

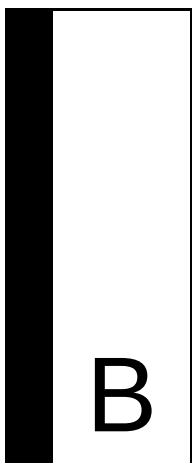
Department of Foreign Affairs and Trade

Mr Dennis Richardson, Secretary

Ms Ann Thorpe, Chief Financial Officer

Department of the Prime Minister and Cabinet

Ms Renée Leon, Deputy Secretary, Governance



Appendix B — Submissions

- 1 Australian National Audit Office
- 2 Australian National Audit Office
- 3 Australian Securities and Investments Commission
- 4 Department of Finance and Deregulation
- 5 Australian National Audit Office
- 6 Department of Broadband, Communications and the Digital Economy



Appendix C

Decision-making arrangements for the Australia Network tender process¹

Date	Events
26 Oct 2010	The future of the Australia Network was discussed at a Ministers-only meeting on 26 October 2010, as part of Budget processes. In a briefing to the Prime Minister (14 June 2011), the Cabinet Secretary advised that Ministers had agreed the Australia Network decision was to be made by Cabinet.
22 Nov 2010	Cabinet decided to put the Australia Network contract to tender. The record of the decision was silent on the decision-making process for the tender.
3 Dec 2010	In response to a DFAT brief (dated 3 December 2010), the then Foreign Minister appointed the Secretary of DFAT as the approver for the tender. (The Foreign Minister's response to the brief was undated.) The Foreign Minister wrote to the Prime Minister, Deputy Prime Minister, Finance Minister, and the Communications Minister seeking nominations from their departments for representation on the Tender Evaluation Board, the letters were undated. The letters referred to the TEB evaluating tenders and making recommendations to Ministers in April 2011.
19 Jan 2011	The Foreign Minister wrote to the Prime Minister, Treasurer and the Finance Minister, seeking agreement on aspects of the tender (the letter was undated, but other documents indicate that the letters were signed and hand delivered on 19 January 2011.) The letters made no explicit reference to the identity or role of the approver for the tender.
25 Jan 2011	The Prime Minister's response to the letter from the Foreign Minister noted that the 'outcomes of the tender would be subject to Cabinet consideration, with Cabinet to agree the successful tender bid.'
March 2011 onwards	As the tender process progressed, ongoing discussion occurred between DFAT, PM&C, the offices of the Prime Minister and the former Foreign Minister in relation to the Government's role in determining the tender outcome. From March 2011, discussions occurred between DFAT, PM&C, the Prime Minister's office and the former Foreign Minister's office, regarding how the position outlined in the Prime Minister's letter to the Foreign Minister could be implemented given the Minister's earlier decision that the Secretary of DFAT should be the decision-maker for the tender. These discussions did not, however, settle the differing views on the arrangements to be adopted to approve the tender outcome.

¹ Extracted from ANAO, *Submission 3*. Full report references for the events listed in the table are provided in the submission.

18 Apr 2011	The Prime Minister requested advice from PM&C on options available for the Government to consider the tender process. On 21 April 2011, PM&C provided the Prime Minister with a brief advising that the Secretary of DFAT had sole responsibility for deciding the preferred tenderer and that, under the current process, there was no scope for the Government to approve the preferred tenderer. This brief was returned to the department unsigned.
19 Apr 2011	The Foreign Minister's office provided a statement to the <i>Australian Financial Review</i> that 'the tender evaluation board is currently considering the tender bids. There is no set time-frame for the decision. The recommendation of the TEB will be considered by the approver, who is the secretary of DFAT. Cabinet and caucus are not part of the decision-making process.' This statement was cleared by a senior adviser in the Prime Minister's office, with an email to the Foreign Minister's office indicating that the Prime Minister had 'cleared these lines'. An article quoting the statement was published in the <i>Australian Financial Review</i> on 21 April 2011.
4 May 2011	TEB Report finalised and submitted to the Approver (Secretary of DFAT), through the Steering Committee.
Around 6 May 2011	The Secretary of DFAT informed the ANAO that, prior to taking a decision on the preferred tenderer, he was contacted by the then Secretary of PM&C (around 6 May 2011) and subsequently by other senior PM&C officials. During the course of those discussions it became evident that there was some unhappiness within government with the decision to put the Australia Network service to tender, and there was an expectation that the tender outcome would be brought back to government for further consideration or endorsement.
17 May 2011	From 17 May 2011, the Government, through PM&C, requested legal advice on three key issues to inform its deliberations: • whether the Secretary of DFAT could take into account the expressed views of government in making a decision on the preferred tenderer; • whether the former Foreign Minister could be substituted for the Secretary of DFAT as the approver; and • a number of possible scenarios under which a decision that differed from any recommendations of the TEB might be reached. The AGS advice was provided to PM&C, and subsequently the Cabinet Secretary and the Prime Minister's Office, on 17, 20 and 27 May.
25 May 2011	The Prime Minister and Foreign Minister met to discuss aspects of the Australia Network tender process.
26 May 2011	DFAT began drafting a submission to government on the Australia Network tender process. DFAT informed the ANAO that, at that time, officials in the department were of the view that Cabinet was to assume the role of approver and would select the preferred tenderer.
5 June 2011	The Foreign Minister wrote to the Prime Minister on 5 June 2011. The Minister's letter indicated that, in the earlier meeting, the Prime Minister had requested that the tender be considered by Cabinet, and asked the Minister to review the legal advice on the matter and advise her further. The letter noted the apparent inconsistency between the Government's decision on 22 November 2010, the Prime Minister's letter of 25 January 2011, which stated that the matter was to be referred back to government, and his decision that the Secretary of DFAT be the nominated approver. The Minister outlined the reasons for his decision and also stated that discussions had occurred between DFAT and PM&C and agreement had been reached between departmental officials and the two ministerial offices. This understanding was reflected in the statement provided to the <i>Australian Financial Review</i> on 19 April 2011.
6 June 2011	Cabinet decided that the Foreign Minister would bring forward a submission to Cabinet on 14 June on the tenders, with Cabinet to agree the successful bid. The decision taken was without submission. The Foreign Minister and Communications Minister did not attend this Cabinet meeting.
14 June 2011	The Foreign Minister brought forward a paper on the Australia Network for Cabinet consideration. The paper did not reveal the TEB recommendations or discuss the tenders. The paper canvassed several options for the tender process moving forward, but recommended leaving the approval process as it currently stood. In considering the former Foreign Minister's paper, the Cabinet requested PM&C to coordinate the development of further advice on amending the tender process, including: • changing the approver for the tender; and • the addition of a new evaluation criterion.

14 June 2011	In a brief provided to the Prime Minister on 14 June 2011, PM&C advised that it had a differing view to that stated in the former Foreign Minister's paper, on whether the decision-making process had been agreed. PM&C's briefing stated that officials had not reached an understanding about the decision-making arrangements, and further, the Secretary of PM&C had not been involved in the 'officials-level discussions'. The briefing added that PM&C had sought over the last month to bring the 'issue' to Cabinet for a decision. In a separate briefing (dated 14 June 2011) to the Prime Minister, the Cabinet Secretary (the Hon. Mark Dreyfus QC MP) also disagreed with some of the points raised in the former Foreign Minister's paper, namely, that the Prime Minister's and Foreign Minister's offices had agreed the approval process for the tender. The briefing also noted that the paper omitted reference to a Ministers' agreement in October 2010 that the decision was to be made by Cabinet, and that at the 22 November 2010 meeting the former Foreign Minister had agreed to bring a further submission on the Australia Network contract to Cabinet.
16 June 2011	Advice was prepared by PM&C in response to Cabinet's request. The key changes proposed for the tender process were: • the Communications Minister to be the approver, supported by DFAT; • the inclusion of an additional evaluation criterion relating to the tenderer's ability to meet the national interests of Australia in light of changed international circumstances since the RFT was issued; • clear guidance to be provided to the tenderers as to the information they were required to submit; • existing tenderers to be given the opportunity to amend their tenders in light of the new criterion; • the Communications Minister to bring the revised TEB report to Cabinet and consult Cabinet on the amended tenders; and • the Communications Minister to have discretion to make a decision that did not reflect the recommendations of the TEB report, noting the need for the reasons for any such divergence to be carefully documented and for the decision to be based solely on the evaluation framework and methodology as advised to tenderers.
20 June 2011	Cabinet amended the tender process largely in line with the approach suggested by PM&C.

Source Australian National Audit Office