

Submission
No 18

**INQUIRY INTO PROCUREMENT PRACTICES OF
GOVERNMENT AGENCIES IN NEW SOUTH WALES AND
ITS IMPACT ON THE SOCIAL DEVELOPMENT OF THE
PEOPLE OF NEW SOUTH WALES**

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INDEPENDENT COMMISSION
AGAINST CORRUPTION

NEW SOUTH WALES

SUBMISSION

TO THE LEGISLATIVE COUNCIL INQUIRY INTO

PROCUREMENT PRACTICES OF GOVERNMENT AGENCIES IN NEW SOUTH WALES AND ITS

IMPACT ON THE SOCIAL DEVELOPMENT OF THE PEOPLE OF NEW SOUTH WALES

STANDING COMMITTEE ON SOCIAL ISSUES

January 2024

Introduction

The Independent Commission Against Corruption (“the Commission”) welcomes the opportunity to make a submission to the Standing Committee’s inquiry.

The Commission is an independent body established to investigate and prevent corruption in and affecting the NSW public sector.

Corrupt conduct is defined in ss 7-9 of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”). In the context of a public official undertaking procurement activities, conduct such as fraud, theft or obtaining or soliciting secret commissions is corrupt. Further, any conduct by a person other than a public official that could impair public confidence in the administration of public procurement, including collusive tendering or submitting inflated invoices is corrupt.

The Commission’s principal functions are set out in s 13 of the ICAC Act. They provide for the Commission to:

- as part of an investigation process, consider whether laws, methods of work, practices or procedures should be changed to reduce the likelihood of the occurrence of corrupt conduct
- examine laws, practices and procedures of public authorities to facilitate the discovery of corrupt conduct
- instruct, advise, and assist public authorities on ways in which corrupt conduct may be eliminated, the likelihood of corrupt conduct reduced, and the integrity and good repute of public administration promoted
- enlist and foster public support in combating corrupt conduct and in promoting the integrity and good repute of public administration.

Consistent with these functions, the Commission makes this submission to the Committee.

Corrupt conduct and procurement

Corrupt conduct in procurement remains a perennial issue for the Commission. Many of the Commission’s investigation reports have uncovered schemes where public officials buy goods or services from businesses with which they have an undisclosed interest, or where they or others improperly benefit from procurement transactions.

These include:

- *Investigation into the awarding of Roads and Traffic Authority and Roads and Maritime Services contracts* (Operation Paragon, 2023)

The Commission made corrupt conduct findings against two RTA/RMS officials who obtained more than \$7 million worth of corrupt benefits over nine years by awarding contracts to associates. The Commission found the situation was indicative of “widespread failures in the fundamentals of procurement and management”.

RTA/RMS did not conduct adequate due diligence checks on suppliers and failed to identify order splitting, 'dummy' bidding, inflated prices and undeclared conflicts of interest. The Commission identified insufficient procurement competence, including with respect to project planning, as well as limited assurance and accountability, inadequate records management, limited staff management, chaotic budget management and insufficient support for suppliers making complaints.

- *Investigation into the awarding of contracts by employees of the former NSW Roads and Maritime Services (Operation Ember, 2022)*

The Commission made corrupt conduct findings against a former RMS manager who awarded over \$12.2 million in work to two companies owned by his friends and manipulated processes to benefit those businesses and himself.

The manager manipulated tender specifications by adding and removing requirements he knew would favour his friends. In some situations, the RMS paid for work that was not completed. The Commission concluded that the manager's conduct was "*not opportunistic – it was planned, and he manipulated controls with strategic intent*".¹ His ability to control or manage the relevant procurement processes was, in part, facilitated by substantially inadequate procurement governance, which also resulted in opportunities to stop his corrupt activity being missed.

Among other things, the RMS manager also caused the two companies to be included on internal panels of preferred suppliers.

- *Investigation into the sourcing of software systems for the Western Sydney Institute of TAFE (Operation Lancer, 2021)*

The Commission made corrupt conduct findings against a former Western Sydney Institute of TAFE (WSI TAFE) manager who received close to \$450,000 as an inducement for favouring a company when sourcing software systems on behalf of the TAFE.

Findings were also made in relation to resume fraud. The Commission was satisfied that the corrupt conduct found in this investigation could have been prevented or at least identified earlier had more robust governance and complaint management processes been in place.

- *Investigation into the over-payment of public funds by the University of Sydney for security services (Operation Gerda, 2020)*

The Commission found that employees of companies that supplied security services to the University of Sydney engaged in serious corrupt conduct through dishonestly obtaining hundreds of thousands of dollars by submitting false timesheets.

The CEO of one company and an employee of the other also engaged in serious corrupt conduct by providing benefits to the University's security operations manager as an inducement for him using his position at the University to favour their interests.

The Commission was satisfied that the University's tender process for the provision of security services and its lack of a robust contract management framework may have contributed to the occurrence of corrupt conduct found in this investigation.

¹ p. 157.

- *Investigation into the alleged corrupt practices of a headlease contractor at the NSW Department of Family and Community Services (Operation Cygnet, 2020)*

The Commission found that an officer of the then Department of Family and Community Services (FACS) engaged in corrupt conduct by causing over \$1.6 million of maintenance and repair work to be awarded to his own company. He also authorised payment of two false invoices in order to obtain approximately \$17,000 for his company.

The investigation found that while FACS had a number of relevant policies and procedures in place, the officer was able to engage in his conduct by ignoring requirements or claiming he had not been told he had a limited financial delegation. The autonomous nature of the role and the amount of time spent in the field also meant the officer was not required to account for his whereabouts.

- *Investigation into the conduct of a Department of Finance, Services and Innovation ICT project manager (Operation Yarrow, 2019)*

The Commission found that a contracted project manager engaged in an elaborate corruption scheme that involved “hijacking” the name of his friend’s company to deceive the department into making over \$500,000 in payments that were ultimately used to dishonestly benefit himself.

The conduct also involved charging inflated daily rates, underpaying contractors, creating a false justification to engage in sole source procurement and falsely representing that the company had the necessary ability, expertise and personnel.

- *Operation Hector (ongoing)*

In 2023, the Commission held a public inquiry into procurement-related allegations concerning the conduct of officers at Inner West Council and Transport for NSW. This investigation is known as Operation Hector. The Commission’s investigation report is yet to be furnished to the Parliament but a copy will be made available to the Committee as soon as possible.

Aspects of these investigations are referenced below but four key themes stand out:

1. As a general rule, the public officials who engage in corrupt procurement practices are not members of a dedicated procurement unit. They are more likely to be operational staff or managers who carry out procurement activities as part of their delegated responsibilities.
2. The transactions that the Commission finds to be corrupt tend to be relatively small. It is unusual to identify an individual transaction of more than \$1 million that involves corrupt conduct. The corrupt conduct more often involves numerous smaller transactions, which corrupt individuals know are less likely to attract the attention of management or be subject to more robust control.
3. Most agencies have adequate, documented policies and procedures that align with the NSW Procurement Policy Framework (April 2022, “the Procurement Framework”), or equivalent requirements in local government and the university sector. However, the corrupt conduct results from failures to monitor compliance with and enforce these policies and procedures.
4. Suppliers that are involved in corrupt activities tend to be relatively small and owned and operated by the same individual(s). They also often operate in industries that have relatively low barriers to entry such as maintenance and consulting. Sometimes the supplier has been recently

registered² and may rely heavily on its public sector customer for business. This is not to say that large, established suppliers do not pose risks but on balance, smaller suppliers are more likely to figure in a Commission investigation.

Devolved responsibility

The central NSW Procurement unit based in NSW Treasury and the NSW Procurement Board are small when compared with the number of officials in NSW government agencies who procure billions of dollars of public goods and services each year. NSW Procurement focuses on procurement policy and supporting architecture. As such, it has to operate at the top of a devolved structure where each agency is responsible for its own procurement procedures and for its own compliance with the overarching Procurement Framework, legislation, and Procurement Board Directions. The same model exists in local government whereby the central Office of Local Government sets a framework that individual local councils should follow.

Nature of procurement under a devolved model

Most public sector agencies or clusters have a procurement unit, which might be led by a Chief Procurement Officer (CPO) or person with a similar title. While the CPO or procurement unit will often be directly involved in large or complex tenders, most lower value procurement is led by operational managers with financial delegations and carried out by their staff. That is, responsibility is devolved in the first instance from the Procurement Board and NSW Procurement to agency procurement units and subsequently to frontline staff.

The “dual devolution” has a number of consequences:

- Officers working in an agency’s procurement unit should be familiar with the Procurement Framework and Procurement Board Directions. But most operational managers exercising financial delegations are unlikely to be across the important detail. Among other things, many of these managers will have little understanding of the supplier schemes and standing offer contracts established by NSW Procurement.
- Furthermore, while the CPO usually sets their agency’s policies and procedures, they may have little formal authority to direct frontline staff to perform procurement activities in a certain way. Similarly, the CPO is unlikely to have authority to discipline or even reproach an agency employee who breaches procurement policies. That is to say, decision-making power tends to lie more with the budget-holding manager than the procurement unit. This may contribute to a lack of consequences when procurement policies are breached. The Australian National Audit Office has found that “Probity arrangements are strengthened when there are clear arrangements for following up instances of non-compliance and when consequences are clear. The severity of consequences should be proportional to the severity of misconduct, risk and impact”.³

² A simple, free ABN check can identify when a company was created but agencies do not necessarily conduct checks on newly-created companies.

³ Australian National Audit Office, *Probity Management: Lessons from Audits of Financial Regulators*, 16 October 2023, <https://www.anao.gov.au/work/insights/probity-management-lessons-audits-financial-regulators>.

- In some larger agencies, responsibility for the procurement of goods and services, construction and IT may lie with separate functions, which can add a further level of complexity to the devolved model.
- Knowing that specialist procurement staff have limited resources and usually work only on larger or more complex tenders, corrupt officials may split or structure procurement to avoid the scrutiny of their procurement unit. This is discussed in more detail below.

To give an example of how procurement advice can be bypassed, in Operation Lancer, a public official (later found to be corrupt by the Commission) sought approval from his agency's CPO to engage in direct negotiations with a supplier. The request was denied. Owing to a machinery of government change, the request was then put to a different procurement team, which advised that direct negotiations could not proceed without a procurement strategy and CPO approval.

However, shortly thereafter the public official made his case for direct negotiations to his agency's executive group, which was approved. No procurement specialist was present at the executive group meeting and the official simply omitted the earlier procurement advice that did not suit his corrupt scheme.

Accreditation

As noted above, compared with the range and volume of procurement activities taking place across the public sector, the Procurement Board and NSW Procurement are small organisations. This means that:

- the system of accreditation relies to a significant extent on information and undertakings provided by individual agencies and clusters
- there is little scope to conduct assessments or audits of compliance with the Procurement Framework and Procurement Board Directions
- should one or more public sector agencies fail to retain their accreditation, it is probably not practical for NSW Procurement (or any other organisation) to step in and either perform or supervise relevant procurement activities.

The Commission is not necessarily advocating for a significant expansion in staffing at NSW Procurement but the existing system of accreditation should not be seen as a robust mechanism for ensuring that agencies comply with the Procurement Framework.

Contractors involved in procurement activity

In the modern public service, many tasks are contracted to non-government employees. This can include aspects of the procurement process itself. This includes situations where a contractor/supplier:

- holds actual or de facto financial delegations
- serves on or advises a tender evaluation committee
- prepares business cases and scopes of work
- manages agency projects
- is required to apply the agency's procurement policies to its own subcontracting activity.

While there is no expectation that all of these tasks be performed by a government employee, corruption risks arise when contractors are involved in procurement.

First, a contractor will have a conflict of interest if they, or their company stands to benefit from government procurement activities that they can influence. Operations Ember, Cygnet and Yarrow are examples. Conflicts can also arise when employees of the government agency resign to work for a supplier, or vice versa.

Second, merely being privy to an agency's procurement plans and confidential business records can provide a contractor with an unfair advantage.

Third, contractors are less likely to be aware of, trained in and bound by, an agency's relevant policies and code of conduct. They are also less likely to be familiar with public sector concepts in relation to conflicts of interest, gift-giving, record keeping as well as important legislation such as the *Public Interest Disclosures Act 2022*, *Government Information (Public Access) Act 2009* and *State Records Act 1998*. As noted above, in Operation Gerda, the Commission found that a supplier provided a public official with gifts including travel, accommodation and meals. These were found to be corrupt inducements or rewards.

Fourth, if agencies come to rely on contractors to plan and carry out their key procurement activities, they risk sacrificing the in-house capability to manage an important, high-risk function. Among other things, this can lead to management rubber-stamping the advice of contractors.

Order splitting and direct negotiations

As the value of a transaction increases, agencies apply more rigorous controls and supervision. For obvious reasons, a billion-dollar construction contract will be controlled more tightly than the regular office stationery order.

Corrupt individuals are obviously aware of this and the Commission's investigations and information holdings indicate that corrupt schemes often involve deliberate order splitting. That is, structuring transactions so that they fall below thresholds requiring:

- multiple quotes or competitive tenders
- a formal procurement strategy
- approval from a more senior officer or committee (which might allow a corrupt officer to keep transactions within their own financial delegation)
- input or concurrence from the agency's procurement unit
- input or concurrence from a central government agency such as NSW Treasury or the Office of Local Government
- involvement of a probity advisor or auditor.

Order splitting was a key feature of the conduct in Operation Paragon. The Commission's report states:

Typically, if the contract was slightly greater than \$250,000 (inclusive of GST), which would ordinarily require the job be put to public tender, [the corrupt official] would "contract split" the work, dividing the project into smaller jobs each amounting to between \$50,001 and \$249,999 (inclusive of GST).⁴

⁴ p. 29.

A common hallmark of order splitting is evidence of contract variations. To avoid competition or scrutiny, an officer may deliberately underestimate the cost of the work but then seek to vary the contract once a supplier has been appointed. For example, the ICT project investigated by the Commission in Operation Yarrow, ultimately cost approximately 3.8 times its original budget.

On a related point, corrupt officers/suppliers generally prefer to avoid legitimate competition. Consequently, there is a correlation between corruption and direct negotiations (also known as sole source or non-competed procurement).

While order splitting and direct negotiation are red flags for corruption, it is not the case that *all* such activity is corrupt. In practice, procurement policy breaches more often arise from time pressure, resource limitations or inadequate planning. Unfortunately, this means that corrupt transactions are harder to detect because they are nested within a larger pool of non-compliant procurement activity.

Supplier due diligence

Numerous Commission investigations have found that failures in due diligence have contributed to corrupt conduct. For example, the Operation Ember investigation found that two suppliers (that were involved in corrupt conduct) were added to an agency's vendor master file even though they:

- had been recently registered and had no customers
- were essentially one-person companies with no employees
- had no business address or website.

To help address deficient due diligent practices, in June 2020, the Commission released its publication *Supplier due diligence: a guide for NSW public sector agencies*.

Despite this, the Commission still sees examples of inadequate due diligence.

In December 2023, Procurement Board Direction 2023-04 *Mandated registration of all NSW government suppliers on the buy.nsw Supplier Hub* was issued. Its title is self-explanatory and the direction notes that:

Centralising supplier registration creates a single source of truth for supplier information and connects procurement to downstream activities, such as finance, accounts payable and spend analytics.

buy NSW collects and verifies numerous data points as part of supplier registration. It also enhances this data with information that is already held or can be obtained from third party sources. All mandatory information is available programmatically via the buy NSW Supplier Master Data API that can be accessed by agencies for integration with related or downstream systems.

Although this direction is new and involves a six-month transition period, the Commission hopes that in time, it will allow agencies to enhance their supplier due diligence activities.⁵

⁵ Agencies should understand, however, that engaging a supplier that is registered on the Supplier Hub may not eliminate the need for further due diligence procedures.

In addition, at the present time, if an agency wishes to verify certain supplier details, including its directors and owners, it must acquire and pay for the data from the ASIC or a private sector provider of corporate information. There would be value in assessing whether NSW Procurement could, perhaps in conjunction with its enhanced Supplier Hub, streamline access to relevant ASIC data so that agencies could improve their due diligence efforts.

Supplier panels

In its October 2023 publication, *Corruption risks associated with supplier panels*, the Commission notes that supplier panels need to be established and managed carefully to enhance corruption prevention.

Recent investigations by the Commission (in particular, Operation Ember) demonstrate that agency-created panels can be manipulated where:

- off-panel spend is easily justified (or no justification is required)
- panel formation requirements are too lax and favoured suppliers can be appointed without merit or appropriate due diligence having been undertaken
- tender evaluation criteria are included/excluded or weighted in such a way to favour a particular supplier
- insufficient due diligence is undertaken on listed suppliers, including investigating potential conflicts of interest with relevant public officials
- there are unclear procedures for how work will be allocated to panel members.

In the Commission's investigations, pre-qualified schemes are most often misused in relatively small procurement activities (i.e. those below the tender threshold).

With respect to panels and schemes administered by NSW Procurement available on the buy.nsw website, the Commission makes two observations:

- As noted above, under the devolved model, buyers who are not procurement specialists may be unaware of NSW Procurement arrangements, including whether or not their use is mandatory. This potentially leads to off-panel spending, which can entail corrupt conduct.
- Some schemes/contracts involve extensive screening processes carried out by NSW Procurement. Others are designed to facilitate a more streamlined entry for new suppliers and do not entail as many detailed due diligence checks. Consequently, it may not be clear to agency buyers whether they should be applying their own due diligence checks when using certain NSW Procurement contracts and schemes. In particular, many agencies can procure directly from a supplier on an approved scheme. However, if gaining entry to the scheme does not involve rigorous due diligence, an obvious loophole emerges. For example, in Operation Lancer⁶, the Commission said:

When it was identified that [the supplier] did not have SCMO020 accreditation, [the corrupt official] acted quickly to advise [the supplier] this was required. However, the accreditation process was circular, in that it involved [the supplier] providing two references from TAFE institutes, including one from [the corrupt official]. In other words, the due diligence

⁶ p. 57

conducted ... in accrediting [the supplier] was partly based on references from TAFE NSW where:

- *TAFE NSW itself had done minimal due diligence on [the supplier]*
- *one of the references was provided by an individual involved in a corrupt scheme ...*

The fact that [the supplier] was subsequently accredited was then used as part of an inherently flawed argument to support direct negotiations.

Supplier debarment

In NSW, Procurement Board Direction 2017-07, *Conduct of Suppliers*, states that agencies are required “*To use their best endeavours to ensure that they are aware of any adverse findings against a supplier with whom they have an existing relationship, and report such findings to the Board when such findings become known to the agency. Findings of dishonest, unfair, unconscionable, corrupt or illegal conduct can have a range of consequences for individual suppliers, including as serious as exclusion from contracting opportunities with the Government*”.

The Commission does not know whether agencies comply with the requirement to report adverse findings to the Procurement Board or whether any suppliers have been excluded from contracting opportunities.

Western Australia has gone a step further. Its Procurement (Debarment of Suppliers) Regulations 2021 create a formal mechanism for debarring suppliers that have engaged in prescribed forms of misconduct.

In practice, it is unlikely that many suppliers will be debarred but importantly, the scheme establishes grounds, process and governance that allow the WA Department of Finance to work with suppliers to improve business practices to avoid debarment.

Similar debarment schemes operate in jurisdictions including the US, Canada and South Africa. The United Nations and World Bank also operate debarment schemes.

In addition, the relatively new UK *Procurement Act 2023* contains detailed provisions for debarring suppliers under a variety of circumstances.

In its publication, *Supplier Due Diligence: A guide for NSW public sector agencies* (June 2020), the Commission refers to:

- Watchlists – which can be used to identify any suppliers that the agency is prepared to engage but which require closer monitoring or control because of some risk.
- Do-not-engage lists – which identify suppliers with which the agency no longer wishes to do business.

The Commission’s publication notes that it supports the development of such lists by agencies, provided suppliers are treated fairly and proper records are kept.

Creating a debarment scheme in NSW would not be without cost but the Commission sees potential in a well-designed supplier debarment scheme aiding supplier due diligence efforts in NSW.

End of financial year procurement

Based on the Commission's investigations and complaint profile, it is apparent that some agencies or budget holders loosen their procurement controls if they face a projected underspend for the financial year.

This is based on a "spend it or lose it" mentality. That is, unspent recurrent funds cannot be rolled over and therefore must be spent by 30 June each year. In its Operation Ember report, the Commission found that a corrupt RMS manager was able to draw on unspent funds allocated to other business units and projects (i.e. funds that were not allocated to the manager). The Commission found that these other business units allowed the use of their unspent funds "to maintain the level of budget funding in future financial years" and had little incentive to scrutinise the expenditure. The Commission also noted "This desire to spend money before the end of the financial year, so as not to lose it, is a perennial budget management issue observed by the Commission".⁷

The practice could also encourage agencies to pay June-dated supplier invoices without properly verifying that the goods and services have been provided.

A 2013 study⁸ using public procurement data from the USA found that "spending in the last week of the year is 4.9 times higher than the rest-of-the-year weekly average". The study also found that "... end-of-year spending is of lower quality" and that "permitting the rollover of spending into subsequent periods leads to higher quality".

There are sound reasons for not permitting agencies to rollover unspent recurrent funds and the Commission is not suggesting reforms that could allow agencies to store taxpayers' money in hollow logs. However, the Commission's submission is that the rush to procure goods and service by year end can contribute to waste and corruption.

NSW Treasury has commenced a shift towards outcome budgeting (see <https://www.treasury.nsw.gov.au/four-pillars/outcome-budgeting>), which may address some of the improper incentives to spend money.

A further useful step would be for NSW Treasury to quantify the extent of any "spend it or lose it" behaviour, perhaps by replicating the 2013 study referenced above.

Local content

The Inquiry's terms of reference mention the use and weightings of specific evaluation criteria to give consideration to local content.

⁷ p. 167.

⁸ J. Liebman and N. Mahoney, *Do Expiring Budgets Lead to Wasteful Year-End Spending? Evidence from Federal Procurement*, National Bureau of Economic Research Working Paper 19481, September 2013, <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/mrcbg.fwp.2013-12.Liebman.budgets.pdf>. Accessed on 10 January 2024.

For a variety of reasons, the Commission does not support selection criteria or weightings that give preference to local content or local suppliers. In particular, local content/supplier policies:

- potentially sacrifice value for money by limiting competition and may prevent access to new products and innovative solutions
- create unnecessary lobbying risks whereby parliamentarians or councillors are approached to support their local businesses
- struggle to adequately define the term “local”. For example, a supplier could be classified as local based on the location of its registered headquarters, ultimate owner(s), workforce, main operating premises or where it pays the most tax. In addition, a judgement needs to be made about exactly how close a supplier needs to be to its government customer in order to be regarded as “local”.
- generally lack a suitable methodology for determining when and how to apply the degree of preference
- could be used to mask a conflict of interest between a local supplier and an agency decision-maker.

These factors make the procurement process more subjective and cumbersome. They may also encourage suppliers to submit tendentious or false statements about the local nature of their business.

For many categories of goods and services, local suppliers already benefit from some natural advantages over their more remote competitors. For example, a local supplier may have lower transport costs and business overheads or may be more responsive to customer needs.

Consequently, the Commission sees little benefit in policies that favour local content or suppliers.

Other social or economic outcomes

Similar problems arise when government procurement is used to incentivise collateral economic or social outcomes, some of which are set out in part 1(g) of the terms of reference. Any time a supplier submits that it is, for example, small or medium-sized, environmentally-friendly, diverse, supports minorities or whose engagement will boost local employment, the procuring agency has to consider bearing the cost of verifying the claim.

Consequently, where the government or an agency wishes to use its spending power to achieve such outcomes, it would be preferable to apply objective, easily evaluated criteria to the procurement process.

Labour hire

A number of matters examined by the Commission involve alleged corruption in the provision of short-term labour, also known as contingent labour hire. The Commission’s observations are as follows:

- NSW Procurement operates the Contingent Workforce Scheme (SCM 0007), which is mandatory. Under the scheme, NSW Procurement releases detailed supplier-level data broken down by expenditure, hours, cluster and labour hire category. This is valuable data because it helps agencies to establish the experience and credentials of each supplier. The Commission

understands that in part, this data is available because the scheme operates through a whole-of-government supplier management system known as Contractor Central.

- As noted above, public officials who are not procurement specialists may not know about schemes such as SCM 0007 or systems such as Contractor Central. Under a devolved model, short term labour hire is precisely the type of procurement that is often left to the discretion of an individual manager. Furthermore, whether an engagement is classified as labour hire, consulting or some other form of supply can sometimes be open to interpretation. This means that despite the requirements of SCM 0007, agencies may find it difficult to obtain accurate data about their labour hire spending.
- In some agencies, it is not clear whether short term labour hire is treated as a procurement activity or as a recruitment activity. This confusion can lead to a loose or disjointed application of procedures. Short term labour hire can also be used to circumvent the recruitment processes set by the human resources department.
- A public official wishing to hire a close friend or relative, can conceal their conflict of interest by arranging for them to register with a labour hire company. The labour hire company is then asked to put forward that friend/relative for placement at the official's agency. Under this arrangement, the official can more easily hide their conflict because:
 - on paper, it appears that the worker (i.e. the friend/relative) has been identified by the labour hire company, not the public official
 - the worker's name will not be recorded in either the payroll system or the vendor master file (the payee is the labour hire company).⁹
- The Commission understands that labour hire companies apply a variety of screening practices. Individual agencies would need to verify whether their chosen labour hire company fact-checks the information contained in CVs or provides procedures such as criminal record or working with children checks. This was an issue in Operation Yarrow where the corrupt official was engaged via a labour hire company despite having a relevant history of misconduct that should have been discovered.
- Typically, short term labour hire is billed at hourly or daily rates, charged to the agency via a regular invoice submitted by the labour hire company. Those invoices should itemise the individual staff, the completed days/hours of work and the agreed rates. But even where this information is provided, the agency does not necessarily have visibility over the actual rate received by the worker. For example, the labour hire company might charge out a worker at \$250 per hour but the worker might only receive \$80. While it is normal for the labour hire company to cover its overheads and make a profit, if the mark-ups become unreasonable, the agency potentially becomes a party to exploitation of low-paid labour.¹⁰
- Some suppliers provide a mix of short-term labour hire and conventional consulting services. In addition, independent contractors who own their own small company, might offer ad hoc labour hire activities as a sideline business activity. In these situations, the worker(s) may have additional incentives to expand the range of services offered by their firm.
- It is not unusual for short term engagements to develop into long term contracts. This is not necessarily corrupt or even undesirable. It is good practice for agencies to try and retain high performing staff, whether they are employees or contractors. However, the practice can be contrary to the public interest in certain circumstances:

⁹ Proper use of Contractor Central should overcome this lack of transparency.

¹⁰ It should be noted that under SCM 0007, supplier margins are fixed, but this does not necessarily prevent breaches of the scheme rules. Underpayment of contractors was a feature of Operation Yarrow, but SCM 0007 was not used in that case.

- Temporary workers usually cost more per hour than permanent employees performing equivalent work. In part, this is to compensate for the relative lack of job security that temporary contractors face, as well as the fees charged by the labour hire company. But if a “temporary” worker is engaged for an extended period of time, these additional costs are difficult to justify.
- Temporary workers are not usually engaged on the basis of a rigorous, merit-based recruitment process, nor are they subjected to the same screening procedures as employees. Again, this is difficult to justify if the arrangement develops into a long-term engagement.
- Similarly, ad hoc short term labour hire does not normally require detailed workforce planning but lengthier engagements or widespread reliance on labour hire should be planned activities. Options such as identifying or developing in-house capability (at lower cost) would normally form part of an agency’s workforce planning.
- In effect, a “long-term-temp” may become a de facto employee but without many of the relevant controls such as induction, training and performance management. In addition, if the agency eventually decides to fill the position via a proper, merit -based process, the outcome may be a foregone conclusion if the temporary worker has been in the role for years.
- Anecdotally, the Commission understands that some agencies use temporary labour hire, and contracting more generally, as a way to work around caps on employee expenditure. The Commission does not have firm evidence that this is the case but suggests that some further investigation by the Committee or NSW Procurement might be a worthwhile exercise.

Conclusion

Based on the foregoing comments, the Committee should consider making observations or recommendations along these lines:

1. Urging or requiring agencies to monitor order splitting and other examples of non-compliant or high-risk procurement activity. Because Procurement NSW and the Procurement Board are not resourced to conduct extensive monitoring and enforcement activities, this could be best achieved by making more use advanced data analytics (which in time, could involve the use of artificial intelligence).
2. Improving due diligence, including by streamlining agencies’ access to ASIC data.
3. Considering models that might give Chief Procurement Officers additional organisational power to monitor and enforce the Procurement Framework.
4. Consideration of a debarment scheme or other enhancements to existing supplier conduct procedures.
5. Discouraging the use of local content or supplier preference schemes.
6. Examining methods for measuring and deterring wasteful end-of-financial-year spending.