

# **Purchase of the ‘Leppington Triangle’ Land for the Future Development of Western Sydney Airport**

Department of Infrastructure, Transport, Regional Development and Communications

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ISSN 1036–7632 (Print)

ISSN 2203–0352 (Online)

ISBN 978-1-76033-583-0 (Print)

ISBN 978-1-76033-584-7 (Online)

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Canberra ACT  
21 September 2020

Dear Mr President  
Dear Mr Speaker

In accordance with the authority contained in the *Auditor-General Act 1997*, I have undertaken an independent performance audit in the Department of Infrastructure, Transport, Regional Development and Communications. The report is titled *Purchase of the 'Leppington Triangle' Land for the Future Development of Western Sydney Airport*. Pursuant to Senate Standing Order 166 relating to the presentation of documents when the Senate is not sitting, I present the report of this audit to the Parliament.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website — <http://www.anao.gov.au>.

Yours sincerely



Grant Hehir  
Auditor-General

The Honourable the President of the Senate  
The Honourable the Speaker of the House of Representatives  
Parliament House  
Canberra ACT

## **AUDITING FOR AUSTRALIA**

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# Audit snapshot

## Auditor-General Report No.9 2020–21

### *Purchase of the 'Leppington Triangle' land for the future development of Western Sydney Airport*



#### Why did we do this audit?

- ▶ The Department of Infrastructure's 2018–19 financial statements valued the Leppington Triangle land at \$3,065,000 - a tenth of the price it had paid eleven months earlier. While the ANAO undertook further audit procedures as part of the financial statement audit it was unable to conclude on key aspects of the transaction.



#### Key facts

- ▶ The Leppington Triangle land is expected to be needed in about 30 years should a second runway be constructed in a future stage of the Western Sydney Airport's development.
- ▶ On 31 July 2018, the Australian Government purchased a 12.26 hectare triangular parcel of land for \$29,839,026. On the date of purchase, the land was leased back to the seller for 10 years with options to renew totalling a further 10 years. The land was valued at \$920,000 for lease-back purposes.
- ▶ The land is being used for agricultural purposes. Airport development controls limit alternative uses.
- ▶ Nine valuations of the Leppington Triangle land were in the department's records.



#### What did we find?

- ▶ The Department of Infrastructure did not exercise appropriate due diligence in its acquisition of the Leppington Triangle land. Aspects of the operations of the department fell short of ethical standards.
- ▶ An appropriate acquisition strategy was not developed.
- ▶ The valuation approach inflated the value of the land, which in turn led to the Australian Government paying more than was proper in the circumstances.
- ▶ Decision-makers were not appropriately advised on the land acquisition. Formal briefings omitted relevant information, such as: the purchase price; that the price exceeded all known market valuations of the land; and the method of acquisition.



#### What did we recommend?

- ▶ The Auditor-General made three recommendations addressing the analysis that informs spending decisions, managing probity risks and the approach to obtaining land valuations.
- ▶ The Department of Infrastructure agreed to each of the recommendations.

4 times

higher land valuation used by the Department of Infrastructure to arrive at the purchase price than the next highest valuation.

22 times

higher price per hectare paid by the Department of Infrastructure than paid by the NSW government for its portion of the Leppington Triangle.

\$26.7m

was the difference between the purchase price and the 'fair value' reported in the department's financial statements.

# Summary and recommendations

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## Background

1. On 31 July 2018, the Australian Government purchased a 12.26 hectare triangular parcel of land for \$29,839,026 (GST exclusive) in Bringelly NSW. The land is referred to as the 'Leppington Triangle' and it sits adjacent to the Western Sydney International (Nancy-Bird Walton) Airport site (the 'Western Sydney Airport'). The land acquisition process was undertaken by the undertaken by the Western Sydney Unit within the Department of Infrastructure, Transport, Regional Development and Communications ('Department of Infrastructure' or 'the department').

## Rationale for undertaking the audit

2. For financial reporting purposes at 30 June 2019, the Department of Infrastructure valued the Leppington Triangle land at \$3,065,000 - a tenth of the price it had paid eleven months earlier. As required by the Australian Auditing Standards, the ANAO raised this with the department as a significant and unusual transaction. While the ANAO undertook further audit procedures as part of the financial statement audit, it was unable to conclude on key aspects of the transaction based on the information provided to it by the department. In this context a performance audit of the transaction was considered warranted.

3. An examination of the purchase of the Leppington Triangle land would also provide a case study of the extent of the due diligence exercised by the Western Sydney Unit in the department when performing its responsibilities. The Unit's responsibilities include administering the Australian Government's investments of \$5.3 billion in the Western Sydney Airport and \$2.9 billion in the Western Sydney Infrastructure Plan.

## Audit objective and criteria

4. The objective of the audit was to examine whether the Department of Infrastructure exercised appropriate due diligence in its acquisition of the Leppington Triangle land for the future development of the Western Sydney Airport.

5. To form a conclusion against this objective, the following high-level criteria were applied:

- Was an appropriate acquisition strategy developed?
- Was an appropriate approach taken to valuing the land?
- Were decision-makers appropriately advised?

## Conclusion

6. The Department of Infrastructure did not exercise appropriate due diligence in its acquisition of the Leppington Triangle land for the future development of the Western Sydney Airport. In the course of this audit it became clear that aspects of the operations of the department, both during and after the acquisition, fell short of ethical standards.

7. An appropriate acquisition strategy was not developed. While a strategy was documented and approved:

- it was focussed on incentivising an unwilling seller to dispose of their land some 32 years in advance of when it was anticipated to be needed for the airport expansion, an approach at odds with the department asserting that early purchase allowed it to capitalise on 'goodwill' from the landowner;
- the underlying analysis overstated the identified benefits, did not quantify costs and did not address risks; and
- the acquisition approach eventually employed departed from the approved strategy.

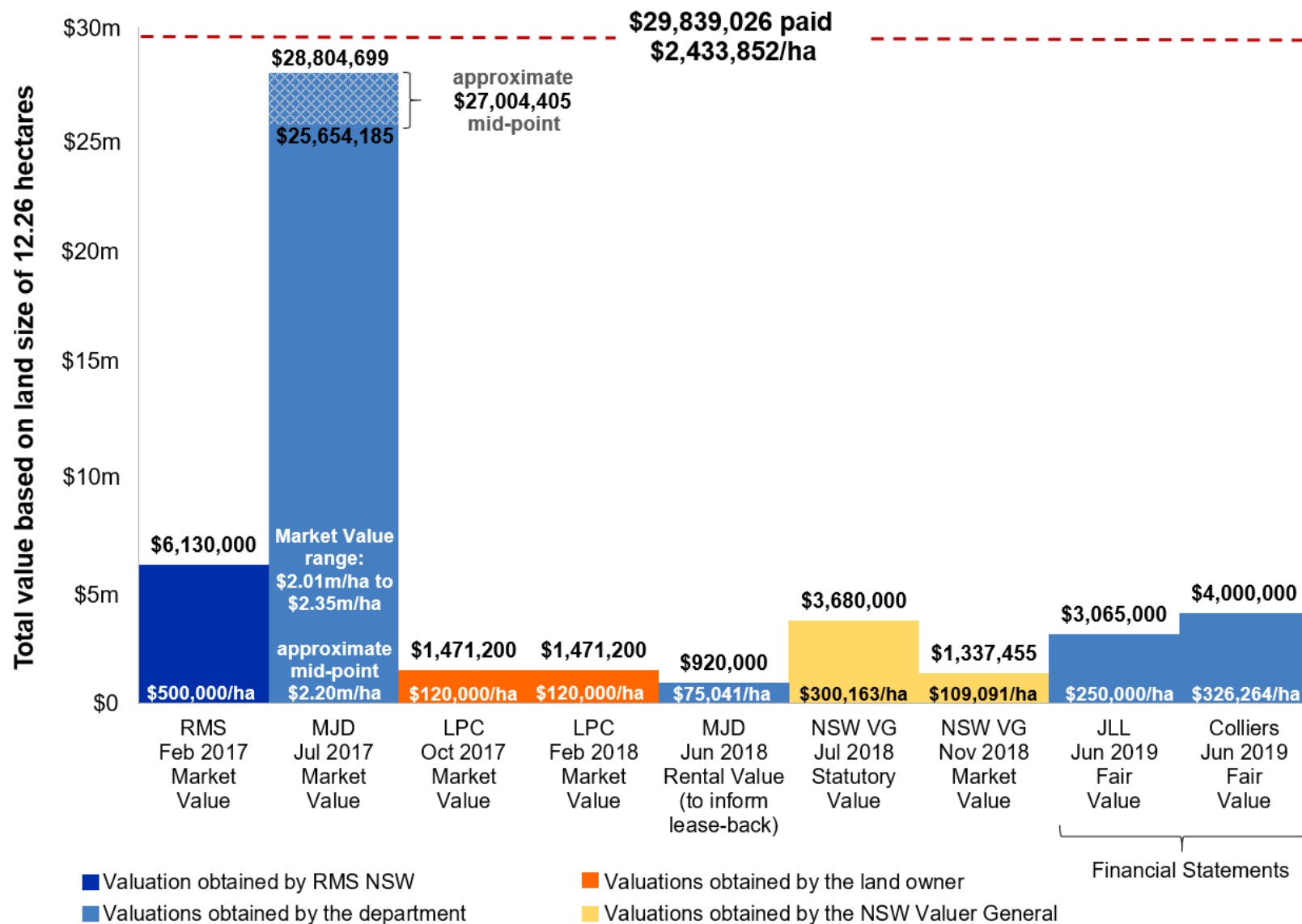
8. The approach taken by the Department of Infrastructure to valuing the Leppington Triangle was not appropriate. The approach inflated the value of the land, which in turn led to the Australian Government paying more than was proper in the circumstances.

9. Decision-makers were not appropriately advised on the land acquisition. Formal briefings omitted relevant information, such as: the purchase price; that the price exceeded all known market valuations of the land (see Figure S.1); and the method of acquisition. Advice from the department on value for money was inadequate and unreliable. Decision-maker approval was not evident for some of the actions taken. A subsequent departmental review of the acquisition process lacked rigour and did not provide a reasonable basis for concluding that the transaction was settled for an appropriate value.

10. The incomplete advice provided to decision-makers, and the inadequate response by the department when questions were raised by the ANAO, was inconsistent with effective and ethical stewardship of public resources.



Figure S.1: Comparison of the price paid against nine valuations of the land



Source: ANAO analysis of Department of Infrastructure records.

## Supporting findings

### Land acquisition strategy

11. The Australian Government expected that it would need the Leppington Triangle when a second runway is constructed at a future stage of the Western Sydney Airport's development. It estimated that a second runway would be required from around 2050.
12. The Australian Government had sought to acquire the Leppington Triangle in 1989 as part of a larger parcel of land. During a 10-year dispute with the landowner the Australian Government agreed to exclude it from that acquisition process.
13. The key impetus for starting work in 2016 on acquiring the Leppington Triangle was to capitalise on goodwill the department considered had been created by concessions made to the landowner on the route for the realignment of The Northern Road. The route was adjusted so as to run on mostly Australian Government land along the airport boundary rather than through the farm of the landowner. Due diligence and value for money was not demonstrated in the department's advice supporting the route adjustment.
14. Appropriate consideration was not given to costs and benefits when deciding to acquire the land early. The benefits identified by the department in its advice are questionable and there was no documented consideration of costs. The department did not demonstrate that the benefits of acquiring, and paying for, the land some decades in advance of need outweighed the cost to the Australian Government.
15. The strategy for acquiring the land contained a package of transactions intended to incentivise an unwilling seller, which was at odds with the department's advice that the early purchase was being pursued so as to capitalise on perceived goodwill from the landowner. Cost estimates were not included in the documented acquisition strategy. After approval was given within the department to progress an acquisition by compulsory process, the approach was changed, without further documented approval, to be an acquisition by agreement with the owner so as to achieve a target date of 31 July 2018.
16. There were shortcomings in the department's management of probity with its staff. A key requirement was for all Western Sydney Unit officers and advisors to declare conflicts of interest. While the declaration requirement was largely met, a senior officer did not appropriately action probity instructions in relation to a declared conflict. Probity risks were also increased by the approach taken by some staff when engaging directly with landowners.

### Land valuation

17. A single valuation of the market value of the land was obtained jointly with the landowner. No valuation of the other types of compensation that may be payable under a compulsory acquisition was obtained.
18. The land valuation was procured by approaching one supplier. The supplier was one of those suggested by the landowner and was then agreed to by the department on the basis that there were no conflicts of interest between the parties. The approach taken was not sufficiently robust in light of the procurement risks. While the cost of the valuation was low (less than \$4,000)

the importance of the valuation to informing a multi-million dollar purchase meant that an openly competitive procurement approach was warranted.

19. The department gave the valuer inappropriate instructions on the valuation approach to be used and the basis on which the current market value of the land was to be assessed. Specific instructions not to carry out the usual enquiries and investigations associated with a market valuation resulted in a 'Restricted Assessment' being obtained, which provides a lower level of assurance than was appropriate for the Australian Government's purpose. The department did not provide the ANAO with accurate answers when questions were first asked about the valuation approach, which was not ethical behaviour.

20. A sales comparison method was used that, by instruction from the department, assumed a highest and best use reflected in speculative industrial re-zoning potential that was highly unlikely to occur given existing legal restrictions and the requirements associated with the future development of the airport. Negative impacts on land value (for example, airport noise) and restrictions associated with development controls affecting land around airports were not reflected in the valuation.

21. The resulting 'restricted valuation' was that the value of the land would likely fall within the range of \$28.5 million – \$32 million, should a fully researched valuation be undertaken (which did not happen). Overall, the valuation approach required of the valuer by the department increased the cost of the purchase to the Australian Government.

22. The recorded basis for the department accepting the draft valuation report, without edit, was confirmation from the landowner that the report could be finalised. The department did not take up the suggestions offered by the NSW government on the draft valuation report nor take action in response to advice that the NSW government had valued the land substantially lower.

### **Advice to decision-makers**

23. The departmental decision-maker was appropriately advised in 2016 when giving approval to pursue the acquisition of the Leppington Triangle by compulsory process. Thereafter, decision-makers were not advised as to the method of acquisition, which had changed. The land was acquired in July 2018 by way of agreement with the owner.

24. The approach taken by the department of omitting key information in the briefings to decision-makers and Ministers was inappropriate and inconsistent with acting ethically. Decision-makers were not appropriately advised as to the amount to be paid to the landowner. While some briefings outlined the basis on which the market value of the land would be calculated, all omitted to state that value. It was not made evident that the department intended to pay a per hectare rate some 20 times higher than that proposed by the NSW government for its portion of the Leppington Triangle.

25. Decision-makers were not appropriately advised as to the value for money of the terms of the land acquisition. Briefings lacked balance in that, while they presented confirming evidence as to the reasonableness of the proposed land price, they omitted evidence that the price was too high including reference to other valuations of the land. This approach was misleading and did not support informed decision-making. Overall, the lack of transparency evident in briefings concerning the basis for valuations and the price being paid was inconsistent with an ethical approach to public administration.

26. The ANAO identified the revaluation of the acquisition in the department's financial statements as a significant and unusual transaction and recommended a review be undertaken to determine if integrity and probity were maintained during the process. The ANAO also drew the attention of the department's Audit and Risk Committee to the issue.

27. A departmental review of the acquisition process did not adequately account for the difference between the purchase price of \$29.8 million and the land asset value of \$3.1 million. The review process lacked rigour in its approach and in terms of being conducted by officers directly involved with the transaction. The department's Audit and Risk Committee did not take any action in response to the matters raised by the ANAO.

## Recommendations

**Recommendation no.1**  
**Paragraph 2.46** The Department of Infrastructure, Transport, Regional Development and Communications prepare comprehensive and balanced written analysis on the benefits, costs and risks of proposals to spend public money.

**Department of Infrastructure, Transport, Regional Development and Communications response:** *Agreed.*

**Recommendation no.2**  
**Paragraph 2.98** The Department of Infrastructure, Transport, Regional Development and Communications put in place meeting and communication protocols for when staff engage directly with individual landowners, developers or similar parties with heightened probity risks. The protocols should: include guidelines regarding suitable venues; require the presence of at least two departmental representatives; and require properly recorded minutes of meetings and conversations.

**Department of Infrastructure, Transport, Regional Development and Communications response:** *Agreed.*

**Recommendation no.3**  
**Paragraph 3.84** The Department of Infrastructure, Transport, Regional Development and Communications develop policies and procedures to govern its approach to obtaining purchase valuations.

**Department of Infrastructure, Transport, Regional Development and Communications response:** *Agreed.*

## Summary of entities' responses

28. The proposed audit report was provided to the Department of Infrastructure, Transport, Regional Development and Communications. The department's summary response is provided below and its full response is at Appendix 1.

29. Extracts of the proposed audit report were provided to the Department of Finance, Transport for NSW, the Leppington Pastoral Company, Landrum & Brown, M J Davis Valuations Pty Ltd and the former Secretary of the then Department of Infrastructure, Transport, Cities and

Regional Development. Formal responses to the extracts were provided by the Department of Finance, Transport for NSW and Landrum & Brown and are at Appendix 1.

## **Department of Infrastructure, Transport, Regional Development and Communications**

The Department of Infrastructure, Transport, Regional Development and Communications (the Department) notes the ANAO report and agrees with the recommendations.

The Department is concerned by the findings of the report, and is taking actions to address any shortcomings in the processes and decision making arrangements identified in relation to the Leppington Triangle acquisition.

The Department has a long track record of operating consistent with expected standards of integrity and ethics. In light of the allegation of individual breaches of integrity, the matters raised by the ANAO in the report are being investigated to ensure all such matters are fully understood and appropriate action can be taken.

The Department has established an independent review of the transaction arrangements to ensure the findings of the audit are addressed. The Department has also commenced management reviews into matters of staff conduct identified by the ANAO, and will ensure the concerns raised are specifically addressed.

An external probity advisor will be appointed to support ongoing functions related to major projects and land acquisitions, and will assist with the development of guidance materials on obtaining purchase valuations in consultation with the Department of Finance, to ensure that protocols are in line with operations of the Lands Acquisition Act 1989.

The Department notes the ANAO view that the purchase could have been made at a much later date, and considers that consistent with earlier approaches at Badgerys Creek, and with other airports, acquisition of the land as early as practicable has benefits. The acquisition of the Triangle represented the final parcel of land that needed to be acquired for the airport site, creating a complex market situation.

The acquisition of the Triangle came about alongside the establishment of the Western Sydney Airport Company and the public release of the Government's Airport Plan which committed to a two runway airport.

Early acquisition provided certainty to stakeholders for long term planning, has allowed Western Sydney Airport Company to plan effectively for the entire development of the Airport as identified in the Airport Plan, and has reduced the risk of future challenges on the Airport development.

The Department agrees that the valuation strategy was unorthodox. However, we note that the strategy was developed in consultation with the Department of Finance and the Australian Government Solicitor and was designed to mitigate the risk of costly and lengthy legal challenges.

As the report notes, the land-holding company had previously challenged land acquisitions at the airport site with the Department spending over ten years in legal proceedings.

The Department's Audit and Risk Committee has been consulted on the audit. They advised the Financial Statements Sub Committee were made aware prior to the Audit and Risk Committee recommending the financial statements be signed by the Secretary, that the accounting treatment of the transaction and its inclusion in the Department's financial statements, had been accepted by the ANAO and that an unmodified audit opinion would be issued.

The Committee was further advised that the ANAO intended to undertake further audit procedures of the purchase, internal reviews on probity and integrity were being undertaken by the Department, and that the ANAO may conduct a performance audit on the matter at a later stage.

## Key messages from this audit for all Australian Government entities

30. Below is a summary of key messages, which have been identified in this audit and may be relevant for the operations of other Australian Government entities.

### Procurement

- Considerable benefits, including effective management of risks, can follow from employing an open approach to the market for low-value procurements where the procured advice will have a high-value impact.
- The *Lands Acquisition Act 1989* (LAA) applies to most Australian Government acquisitions of interests in relation to land. The LAA contains prescribed principles for assessing the amount of compensation payable for land that is compulsorily acquired but not for land that is acquired via an agreement with the landowner. Where the land was listed for sale in the open market, then it may be reasonable that the agreed amount not extend beyond the market price. Where the land was not listed for sale, then the general principles of compensation set out in the LAA for compulsory acquisitions offer entities a guide to transparently and ethically agreeing an amount of compensation that is just.

### Governance and risk management

- Balanced advice to decision makers includes identifying the costs and risks associated with a recommended course of action, not just the benefits.
- Good governance involves entity leaders developing a culture requiring and supporting actions which are not only in compliance with rule frameworks but also with the intent of those frameworks, including those which set standards for ethical practices.
- Effective stewardship of public resources requires that concerns expressed by integrity agencies be taken seriously, including by entities acting to identify and address poor practices.

## **Audit findings**

# 1. Background

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## Introduction

1.1 On 31 July 2018, the Australian Government purchased a 12.26 hectare triangular parcel of land for \$29,839,026 (GST exclusive). The land is lot 105, Deposited Plan 1236319, in Bringelly NSW and is referred to as the 'Leppington Triangle'. The land sits adjacent to the Western Sydney International (Nancy-Bird Walton) Airport site (the 'Western Sydney Airport'). The land acquisition process was undertaken by the Western Sydney Unit within the Department of Infrastructure, Transport, Regional Development and Communications ('Department of Infrastructure' or 'the department').<sup>1</sup>

## Rationale for undertaking the audit

1.2 For financial reporting purposes at 30 June 2019, the Department of Infrastructure valued the Leppington Triangle land at \$3,065,000 - a tenth of the price it had paid eleven months earlier. As required by the Australian Auditing Standards, the ANAO raised this with the department as a significant and unusual transaction. While the ANAO undertook further audit procedures as part of the financial statement audit, it was unable to conclude on key aspects of the transaction based on the information provided to it by the department. In this context a performance audit of the transaction was considered warranted.

1.3 An examination of the purchase of the Leppington Triangle land would also provide a case study of the extent of the due diligence exercised by the Western Sydney Unit in the department when performing its responsibilities. The Unit's responsibilities include administering the Australian Government's investments of \$5.3 billion in the Western Sydney Airport and \$2.9 billion in the Western Sydney Infrastructure Plan.

## Audit approach

### Audit objective, criteria and scope

1.4 The objective of the audit was to examine whether the Department of Infrastructure exercised appropriate due diligence in its acquisition of the Leppington Triangle land for the future development of the Western Sydney Airport.

1.5 To form a conclusion against this objective, the following high-level criteria were applied:

- Was an appropriate acquisition strategy developed?
- Was an appropriate approach taken to valuing the land?
- Were decision-makers appropriately advised?

1.6 The audit scope extended from identifying the need for the land through to the department's recording of the transaction in its 2018–19 financial statements. The scope also included examination of the subsequent departmental review of the purchase.

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1 Under the department's 'COVID-19 Response Structure' introduced in April 2020, the Western Sydney Unit and Inland Rail Operations were combined to form the Major Transport & Infrastructure group.



## Audit methodology

1.7 The audit involved the collection and examination of Department of Infrastructure records and liaison with key staff. This included consideration of responses to ANAO requests for information, documents maintained in electronic filing systems, advice to government and the departmental email accounts of 14 officers.

1.8 The audit also involved ANAO engagement with the firm the Department of Infrastructure had engaged to value the Leppington Triangle to inform the purchase price, as well as Transport for NSW within the New South Wales Government. NSW Roads and Maritime Services (RMS) is the agency name referred to in this document, as it was in place at the time the Leppington Triangle land was acquired. RMS was dissolved on 1 December 2019 and its functions were assumed by Transport for NSW.

1.9 In considering issues with respect to ethics the ANAO has referenced the *Public Governance, Performance and Accountability Act 2013* (PGPA), including the Department of Finance PGPA Glossary, and the *Public Service Act 1999*, including the Australian Public Service Commissioner's Directions 2016 (as amended in July 2019).

1.10 The audit was conducted in accordance with ANAO Auditing Standards at a cost to the ANAO of approximately \$333,000.

1.11 The team members for this audit were Tracey Bremner, Chérie Simpson, Tiffany Tang, Bradley Medina and Brian Boyd.

## 2. Land acquisition strategy

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### Areas examined

The ANAO examined whether an appropriate strategy for acquiring the land was developed.

### Conclusion

An appropriate acquisition strategy was not developed. While a strategy was documented and approved:

- it was focussed on incentivising an unwilling seller to dispose of their land some 32 years in advance of when it was anticipated to be needed for the airport expansion, an approach at odds with the department asserting that early purchase allowed it to capitalise on 'goodwill' from the landowner;
- the underlying analysis overstated the identified benefits, did not quantify costs and did not address risks; and
- the acquisition approach eventually employed departed from the approved strategy.

### Areas for improvement

The ANAO made two recommendations, relating to the department preparing:

- comprehensive and balanced written analysis on the benefits, costs and risks of proposals to spend public money; and
- meeting and communication protocols for when staff engage directly with individual landowners, developers or similar parties with heightened probity risks.

2.1 The acquisition of the Leppington Triangle by the Department of Infrastructure, Transport, Regional Development and Communications ('Department of Infrastructure' or 'the department') was subject to the *Lands Acquisition Act 1989* (LAA). The LAA provides a mechanism for the Australian Government to acquire land for essential public infrastructure (such as for roads, Defence facilities and airports), while respecting the rights of landowners. In addition, the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) contains rules governing how departmental officials are to use public resources, including those relevant to the acquisition or management of land as a public resource. As a land acquisition is a type of procurement, the *Commonwealth Procurement Rules* also apply.

2.2 The ANAO examined whether the Department of Infrastructure's strategy for acquiring the Leppington Triangle was appropriate in the context of the LAA, the PGPA Act and the *Commonwealth Procurement Rules*. An appropriate strategy will strike a balance between the rights of the landowner on the one hand and the interests of the Australian Government on the other, including its need for land for public purposes and its need to achieve value with public money. An appropriate strategy will therefore reflect the principles of equity, fairness and transparency and will ensure that public resources are used in an efficient, effective, economic and ethical manner.

## Why and when is the land needed?

The Australian Government expected that it would need the Leppington Triangle when a second runway is constructed at a future stage of the Western Sydney Airport's development. It estimated that a second runway would be required from around 2050.

2.3 Under the LAA, interests in land can only be acquired 'for a public purpose', which is a purpose for which the Federal Parliament has power to make laws. The Australian Government's stated public purpose for acquiring the Leppington Triangle land was 'trade and commerce with other countries, and among the States'. The stated proposed use for the land was 'for the purposes of facilitating the development and future expansion of Western Sydney Airport as envisaged by the Airport Plan for Western Sydney Airport, determined on 5 December 2016'.<sup>2</sup>

2.4 The airport is being developed in stages to match demand. The Airport Plan set out, and provided authorisation for, the stage 1 development. Scheduled to begin operations in December 2026, it will be a single-runway airport.

2.5 The Leppington Triangle is not needed for stage 1. The Leppington Triangle has not been declared part of the airport site and it is not part of the airport lease granted to WSA Co Limited for the purpose of constructing and operating the new airport.<sup>3</sup> Subsequent stages have not been designed or approved.

### Expected future need for the land

2.6 The stage 1 airport layout was designed to accommodate future expansion, including the future construction of a second runway to meet growth in demand. The Airport Plan contained indicative long-term layouts for reference purposes only, in which the western end of the second runway lies close to the Leppington Triangle (as per Figure 2.1). The Airport Plan identified that this land would therefore need to be acquired for the development and operation of a second runway, also known as the 'southern runway'.

<sup>2</sup> Commonwealth Government Gazette notice C2018G00092, published 12 February 2018, and available at <https://www.legislation.gov.au/Details/C2018G00092>. The Western Sydney Airport Plan is available from <https://www.westernsydneyairport.gov.au/about/airport-plan> [accessed 15 September 2020].

<sup>3</sup> WSA Co Limited is a Government Business Enterprise incorporated under the *Corporations Act 2001 (Cth)* and established by the Australian Government in August 2017.

**Figure 2.1: Location of the Leppington Triangle relative to the expected location of a second runway**



Source: An extract of 'Figure 17: Indicative Airport Site Land Use Plan (Long Term)' from the Airport Plan, with two labels added by the ANAO.

2.7 The Australian Government's 'Western Sydney Airport Business Case: Updated Business Case for Public Interest Decision' of December 2016 also outlined the likely need to acquire the Leppington Triangle when a second runway is constructed. The Updated Business Case noted that:

Even if the [southern] runway was shortened or 'displaced thresholds' were used to avoid placing runway infrastructure on this land, the noise impacts, on the area directly off the end of the runway, would make the acquisition for mitigations purposes highly likely. The Leppington Triangle is also "land locked" and its value outside of use as part of an airport would be marginal. The shape and scale of the site, and noise mitigation requirements ensure that without the acquisition of the triangle, the potential options for designing the southern runway would be compromised and the width of the midfield terminal area would be limited.

## Expected timeframe

2.8 The date the Leppington Triangle is likely to be needed can be estimated by the date a second runway is likely to be needed. The need for a second runway will be triggered when the operational capacity of the airport approaches 37 million passengers per year, which is forecast to occur around 2050.<sup>4</sup> To place this level of demand in context:

- 37.1 million passengers used the Melbourne (Tullamarine) airport in 2019; and
- 44.4 million passengers used the Sydney (Kingsford Smith) Airport in 2019.<sup>5</sup>

<sup>4</sup> As outlined in the *Western Sydney Airport Environmental Impact Statement*, Commonwealth of Australia, September 2016 and in the *Airport Plan – Western Sydney Airport*, Commonwealth of Australia, December 2016.

<sup>5</sup> Bureau of Infrastructure, Transport and Regional Economics, *Airport Traffic Data 1985 to 2019*, release date 22 May 2020, Commonwealth of Australia, 2020.

## Why didn't the Australian Government already own the land?

The Australian Government had sought to acquire the Leppington Triangle in 1989 as part of a larger parcel of land. During a 10-year dispute with the landowner the Australian Government agreed to exclude it from that acquisition process.

2.9 The Australian Government announced in February 1986 that Badgerys Creek in Western Sydney had been chosen as the location for a second major airport for Sydney. The Australian Government then undertook a series of land acquisitions for the airport site, primarily during the period 1986 to 1991. The resulting site totalled 1,780 hectares.

2.10 In July 1989, the Australian Government published pre-acquisition declarations to acquire 80 hectares of land from the Leppington Pastoral Company Pty Ltd ('LPC') for the airport. This land included the Leppington Triangle. The 80 hectares were part of LPC's base farm in Bringelly, which was then an area of nearly 580 hectares principally used for dairy farming operations.

2.11 LPC challenged the acquisition. Key events in the resulting 10-year dispute included:

- July 1989, LPC requested a reconsideration of the pre-acquisition declarations but the Minister confirmed the declarations as published;
- December 1989, a review by the Administrative Appeals Tribunal;<sup>6</sup>
- June 1990, a Federal Court of Australia decision;<sup>7</sup>
- August 1991, agreement to a variation of the pre-acquisition declarations on the terms and conditions set out in a Deed that, among other things, removed the Leppington Triangle from the acquisition and reduced the parcel of land to be acquired to 38.14 hectares;
- December 1991, the acquisition of 38.14 hectares of land from LPC by compulsory process was effected but then there was disagreement on the amount of compensation payable;
- May 1994 to April 1997, Federal Court proceedings;<sup>8</sup> and
- December 1999, compensation for the 38.14 hectares was settled out of court.

2.12 The acquisition process was managed by the former Department of Administrative Services.

2.13 One consequence of the acquisition process was that the Leppington Triangle became separated from the rest of LPC's base farm by a strip of the acquired land, known as the 'axe handle' (see Figure 2.2). The acquired land was leased back to LPC.

<sup>6</sup> *Re Leppington Pastoral Co Pty Ltd and Department of Administrative Services* (1989) 11 AAR 138.

<sup>7</sup> *Leppington Pastoral Co Pty Ltd v Department of Administrative Services* (1990) 23 FCR 148.

<sup>8</sup> *Commonwealth of Australia v Leppington Pastoral Company Pty Ltd* [1995] FCA 547 and *Leppington Pastoral Co Pty Ltd v Commonwealth* (1997) 76 FCR 318.



**Figure 2.2: Land compulsorily acquired in 1991 from LPC's base farm**



Source: *Submission to Liverpool City Council – Planning Proposal*, September 2015, accessed 21 May 2020 from the Liverpool City Council website.

## What was the impetus for starting work in 2016 on acquiring the land?

The key impetus for starting work in 2016 on acquiring the Leppington Triangle was to capitalise on goodwill the department considered had been created by concessions made to the landowner on the route for the realignment of The Northern Road. The route was adjusted so as to run on mostly Australian Government land along the airport boundary rather than through the farm of the landowner. Due diligence and value for money was not demonstrated in the department's advice supporting the route adjustment.

2.14 In 2016, the Department of Infrastructure developed a strategy for acquiring the Leppington Triangle. Events of 2014 through to early 2016 provided a trigger for the acquisition planning to commence. Key events included:

- the Australian Government confirmed in April 2014 that the site for the new airport would be in Badgerys Creek and stated, 'It is critical that we act now to finalise the necessary planning, including critical road network upgrades'. The upgrades included a realignment

- of The Northern Road corridor because it bisected the airport site and needed to be closed and available for airport construction;
- a 2014–15 Budget measure provided \$77.8 million over four years to establish the Western Sydney Unit to progress the development of the new airport, including related road initiatives;
- a 2014–15 Budget measure provided \$2.9 billion over 10 years to deliver a Western Sydney Infrastructure Plan in partnership with the NSW government, which included the realignment of The Northern Road; and
- as outlined below, the department agreed to adjust the proposed road route so as to reduce the impact on LPC and considered an early purchase of the Leppington Triangle would allow the Australian Government to capitalise on the goodwill this concession may have created.

## Realignment of The Northern Road

2.15 The Leppington Triangle is located on The Northern Road, which is a key north-south arterial link between Narellan and the M4 Motorway. The road is being upgraded in stages. Stage four included realigning the road to divert it around the Western Sydney Airport site. During July and August 2015, the NSW government undertook public consultation on shortlisted route options for the stage four works. The Northern Road upgrade project was managed by the then NSW Roads and Maritimes Services (RMS).

2.16 The road route needed to be compliant with any required airport operational clearances, 'such as proposed glide slope restricted areas and obstacle limitation surfaces'.<sup>9</sup> According to the published Options Identification Report, 'This will ensure the airspace around the airport is appropriately protected in the interests of the safety, efficiency or regularity of future air transport operations'.<sup>10</sup> The Department of Infrastructure had advised the RMS that compliance was a particular consideration 'for the proposed southern runway where these clearances are expected to extend beyond the airport boundary.'

2.17 In September 2015, the department advised the Minister for Infrastructure and Regional Development that 'none of the alignments proposed would adversely impact on future use of the site for aviation purposes'. Further, that, 'of the proposed options, the eastern alignment is the most favourable in terms of the airport development'.

2.18 On 12 November 2015, the Australian and NSW governments jointly announced that the 'eastern option' had been selected as the preferred route. This option had been adjusted since the public consultation period, as illustrated in Figure 2.3. The Preferred Route Option Report, prepared in October and published in November 2015, outlined that:

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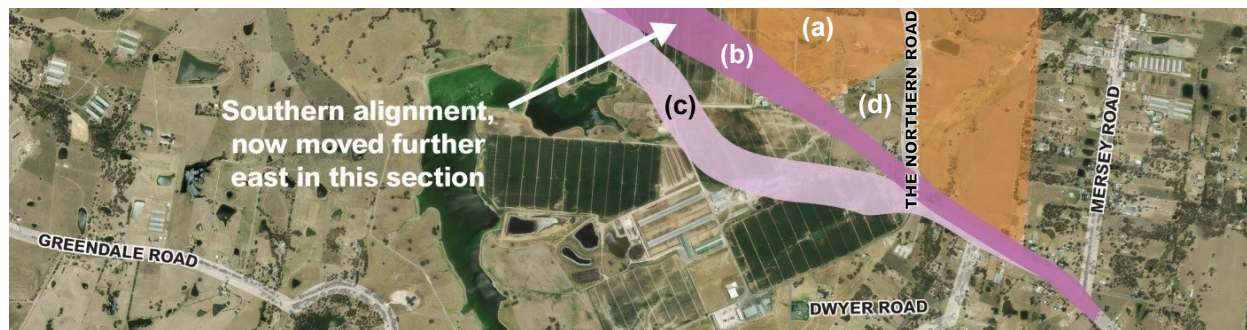
9 An obstacle limitation surface (or 'OLS') is a series of surfaces that define the limits to which structures or objects may project into the airspace to ensure the safety of aircraft in visual flight conditions. Glide slopes or glide paths are part of an Instrument Landing System, which is a precision navigation aid. Beams emanate from the antennas to provide vertical guidance (the glide path) and horizontal guidance (the localiser) to aircraft. Restricted areas, or protection zones, place restrictions on building types, building heights and certain activities in order to avoid interference with the navigational aid.

10 New South Wales Roads and Maritime Services, *The Northern Road Upgrade Stage 4: Options Identification Report*, July 2015, section 2.3.4 'Airport Operational Clearances'.

The alignment for the proposed preferred route between Mersey Road and Willowdene Avenue has changed. The previous alignment was located further to the west to avoid airport operational requirements associated with the southern runway as advised by DIRD [the Department of Infrastructure].

DIRD has now advised that a route closer to the boundary of the airport is possible. This allows a more direct route to be adopted which is preferable to the previous alignment.<sup>11</sup>

**Figure 2.3: Adjustment to the route for the realignment of The Northern Road, bringing it closer to the airport boundary**



Note a: The orange-coloured area is part of the airport site.

Note b: The dark-purple area is the subsequently adjusted route.

Note c: The light-purple area is the short-listed route.

Note d: The triangular parcel of land located between the airport site and the adjusted route is the Leppington Triangle.

Source: Extract from Figure ES1-2 'Adjusted Eastern Option', *The Northern Road Upgrade Stage 4: Preferred Route Option Report*, Parsons Brinckerhoff Australia Pty Limited 2015.

2.19 The Department of Infrastructure had sought the adjustment because it minimised the impact of the road on LPC's base farm. Moving the route towards the airport reduced the amount of LPC land that needed to be acquired by the NSW government and increased the amount of Australian Government land to be disposed of to the NSW government. The adjusted route ran along the axe-handle land previously acquired from LPC and, due to the road's width, along one side of LPC's Leppington Triangle. According to departmental records, LPC had advised in October 2015 that this route was preferable to the shortlisted route options and was more consistent with expectations set during the 1991 land acquisition process.

2.20 The Department of Infrastructure advised the ANAO in September 2020 that:

the relocation of The Northern Road also provided less risk to the commencement of airport earthworks. The previous alignment across LPC land did give rise to a risk that if RMS were unable to acquire the required land earthworks on the airport would be delayed putting at risk the 2026 delivery. The alignment on land held by the government reduced this risk.

### *Risk that the road may compromise airport operational clearances*

2.21 The adjustment placed the road adjacent to the end of the proposed southern runway (see 'The Northern Road realignment' in Figure 2.1). On 12 November 2015 — the day the route was announced — the department received preliminary advice on the adjusted route from aviation planning and development firm, Landrum & Brown (L&B). The preliminary advice included that

<sup>11</sup> N Reedy, *The Northern Road Upgrade Stage 4: Preferred Route Option Report*, Parsons Brinckerhoff Australia Pty Limited, published by NSW Roads and Maritime Services, November 2015, p. 55.



‘there are serious issues with the proposed Northern road alignment ... and I see there is a clear case for a NO GO for the proposed road due to many issues’.

2.22 The next day, the department received detailed advice with supporting documentation from L&B. The advice concluded, ‘In the interest of a Strategic Greenfield Airport Site with unforeseen site conditions, it is recommended to propose the northern road layout ... away from the airport boundary toward the southern runway side’.

2.23 The firm had planned to send the detailed advice to RMS that afternoon but was instructed by the Department of Infrastructure to ‘please **do not** send to any third parties’ [*emphasis as per original*]. An email from the department to L&B on 17 November stated, ‘I’ll redraft your advice to RMS and copy you in on what I send on ... I will tone down the notes to be consistent with what we’ve previously advised’. The firm instead reworded its own advice, including by removing the above quoted recommendation, and provided it to the department in the evening of 17 November. The department provided the reworded advice to RMS on 20 November (this advice is in part quoted in paragraph 2.27 below).

2.24 The Department of Infrastructure, RMS and three advisory firms (including L&B) met on 25 November 2015 to discuss the issues raised in the reworded advice. The record of that meeting includes:

RMS advised the original alignment missed all clearance areas. However subsequent discussion between DIRD [being the Department of Infrastructure] and adjacent property owner Leppington Pastoral Company meant DIRD advised RMS on aligning the road in the location proposed. DIRD has made the decision to proceed knowing the impacts on the public safety zone and the HIAL [high intensity approach lighting]. RMS is following DIRD’s advice as these are airport safety issue [*sic*].

It is noted that the road will be in place well before runway [*sic*] is built and so constraints and issues being raised are not an issue for airport opening. The issues are for when second runway is built and operational in some 30 years in the future. It was acknowledged that in this period regulations, airport operations and requirements may change.

2.25 A briefing on, among other things, The Northern Road realignment was submitted to the head of the Western Sydney Unit on 30 November 2015. The briefing did not mention the advice from L&B. While it raised two of the matters that had been of concern to the firm in relation to the impact of the route on the southern runway, the briefing did not afford these the same significance. The briefing advised:

The Northern Road realignment is expected to encroach on the HIAL area required for the western end of the southern runway. The Aviation Infrastructure team [in the department] advises that it should be possible to run the HIAL across the realigned The Northern Road ... early indications are that it will cross through the PSZ [Public Safety Zone] proposed at the western end of the southern runway. The Aviation Infrastructure team advises that roads can be aligned through a PSZ without necessarily impacting the purpose of the PSZ.

2.26 A public safety zone or area (PSZ or PSA) is a designated area of land at the end of an airport runway within which development may be restricted in order to control the number of people on the ground at risk of injury or death in the event of an aircraft accident on take-off or landing. The *National Airports Safeguarding Framework: Guideline 1* states, ‘The planning of new transport infrastructure within PSAs should also be carefully considered ... The density of occupation of a main

road or railway line averaged over a day is comparable to that of residential development ... Low intensity transport infrastructure such as minor or local roads could be considered acceptable within PSAs.' The relevant section of The Northern Road was a four-lane road with allowance for six lanes to meet the projected increase to daily traffic volumes.

2.27 The RMS wrote to the Department of Infrastructure in December 2015 about the risks of not accommodating the clearances that L&B had advised should be provided. The RMS wrote again in March 2016 seeking urgent confirmation from the department that it had reviewed and accepted those risks and that it wanted the RMS to proceed. The letter included:

In light of the recent updated advice from AirServices,<sup>12</sup> RMS is seeking confirmation of the alignment in the area of Leppington Pastoral Company. As the current alignment for the road has been justified based on advice from DIRD, RMS would request that DIRD reconfirm that the current alignment proposed for The Northern Road upgrade is the alignment the Commonwealth Government would like progressed.

As outlined in my correspondence of 14 December 2015, RMS is of the understanding that DIRD in directing the alignment of the road in the area of LPC Land has reviewed the risks associated with the alignment as advised to DIRD by their aviation consultant ... in the email of 20 November 2015. The specific issues where RMS is of the understanding DIRD has reviewed and accepted the risks and has responsibility for further assessments are:

- The proposed road alignment runs through the HIAL system for Runway 05R.<sup>13</sup> L&B has advised that this has the potential to cause serious disruptions to operation on Runway 05R.
- The proposed road alignment runs through the PSZ for Runway 05R. L&B recommends a detailed risk assessment.
- The proposed alignment is clear of the OLS [Obstacle Limitation Surface]. However, DIRD has advised that the road may interfere with "One Engineer Inoperative (OEI) procedures defined for Runway 23L. L&B has suggested further assessment by aviation safety authority.

As RMS is about to commence the Detailed Design of the project and setting boundaries for acquisition the confirmation by DIRD of the alignment required through the Leppington Pastoral Company owned land is requested as a matter of urgency.

2.28 The department replied to the RMS in April 2016, stating: 'In relation to the [road] alignment and any impact it may have on the HIAL location, the public safety zone and airspace protection ... I can confirm the Commonwealth is still comfortable in managing these impacts.'

2.29 In response to the advice to proceed, RMS submitted a request to the Department of Infrastructure for a four-month extension to the project so as to accommodate the change in alignment and associated additional investigations. The department 'agreed to RMS extending the timeframe for completion of [The Northern Road] works from December 2019 to April 2020 on the

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12 In February 2016, the department sought and received confirmation from Airservices Australia that the glide path critical area at the end of the northern runway could be reduced in length and in width from that indicated in the draft Airport Plan. There was no reference to the proposed southern runway in this exchange.

13 The references to 'Runway 05R' and 'Runway 23L' in the letter are to either end of the proposed southern runway. 'Runway 05R' is the end near the realigned The Northern Road and the Leppington Triangle.

basis of concessions the Commonwealth made around the use of Commonwealth land for the realignment to help manage sensitivities with the Leppington Pastoral Company.’

### *Demonstrating due diligence and value for money*

2.30 As part of the consultation phase of major infrastructure projects, concerns expressed by affected landowners and other key stakeholders need to be genuinely considered.

2.31 What was not sufficiently evident in the records examined was: the timely exercise of due diligence when advising that the road could run close to the airport boundary; and the consideration of whole-of-life costs when assessing the value for money of adjusting the route.

2.32 Subsequent briefings prepared by the department indicated to decision-makers that the approach taken provided value for money. Those statements were not quantified or supported by analysis. It was not demonstrated that the benefits to the Australian Government outweighed the costs and risks, which included the:

- additional design and engineering costs;
- four-month delay to project completion;
- disposal of Australian Government land and associated reduction in the airport site; and
- impacts/risks to the future planning and operations of the airport of a major road running adjacent to the southern runway.

2.33 Further, there were no briefings found that documented an informed acceptance of those impacts/risks by a decision-maker. The risks were also not included in a risk register with related mitigation strategies identified.

### **Capitalising on goodwill**

2.34 The land the NSW government was to acquire from LPC for the road realignment included a 1.36 hectare portion of the Leppington Triangle.<sup>14</sup> In May 2016, the Department of Infrastructure emailed the Department of Finance (which administers the LAA) seeking advice on acquiring the other 12.26 ha. The email outlined that:

Our plans to settle an acquisition strategy have accelerated over the last week or so due to a related issue about the route for the realigned Northern Road ... Following discussions with LPC, and internal policy review, we have decided to shift the alignment of the road off LPC’s main property and onto the airport site and a portion of the triangle ... Given the Commonwealth’s significant concession on this issue, we have formed the view that it would be in the Commonwealth’s interests to utilise the leverage it may have gained from this concession and commence negotiations with LPC about acquisition [*sic*] what would be the remaining part of the triangle.

2.35 The land acquisition strategy was finalised in October 2016. The brief seeking approval of the strategy stated in reference to the adjustment to The Northern Road (TNR) route, ‘We have supported this realignment as it would minimise the impact on LPC’s dairy operations without

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14 A notice of compulsory acquisition of land for the purposes of the NSW *Roads Act 1993*, published in the NSW Government Gazette No 23 of 23 February 2018, included the following land said to be in the possession of the Leppington Pastoral Company: Lot 12 Deposited Plan 1232438 and Lots 109 and 110 Deposited Plan 1236319, being part of the land in Certificates of Title 92/27550, 11/1092165 and 102/812653 respectively. Lot 110 was the portion of the Leppington Triangle.

comprising [*sic*] airport project and TNR requirements, and help build goodwill for the acquisition of the LPC Triangle'. The strategy then stated that 'an early purchase would allow the Commonwealth to capitalise on any goodwill created by the Commonwealth's concession to LPC regarding the re-design of TNR onto the axe-handle'.

2.36 Similar references to 'goodwill' were contained in four of the seven briefings on the land acquisition subsequently provided to decision-makers, including in both of the briefings sent to the Minister. The departmental records did not evidence that goodwill of tangible benefit to the Australian Government had been generated with the landowner.

### Was appropriate consideration given to the costs and benefits of acquiring the land early?

Appropriate consideration was not given to costs and benefits when deciding to acquire the land early. The benefits identified by the department in its advice are questionable and there was no documented consideration of costs. The department did not demonstrate that the benefits of acquiring, and paying for, the land some decades in advance of need outweighed the cost to the Australian Government.

2.37 Advice to government in April 2016 included that the Leppington Triangle was not an immediate priority, as the airport would operate in the northern part of the site until a second runway was required post-2050, and so its acquisition could be deferred. The land was legislatively protected from developments that may adversely impact the future design or operation of the airport, making deferral a viable option.<sup>15</sup>

2.38 As per the email of May 2016 (quoted in paragraph 2.34 above) plans to settle an acquisition strategy were then accelerated so as to utilise the perceived goodwill gained from the Department of Infrastructure's concessions on The Northern Road route. The department ultimately acquired the Leppington Triangle on 31 July 2018, some 32 years in advance of expected need for the land. On the date of purchase, the land was leased back to the seller for 10 years with options to renew totalling a further 10 years.

2.39 The ANAO examined whether appropriate consideration was given to costs and benefits when deciding to acquire the land early.

### The costs and benefits considered

2.40 A 'Leppington Pastoral Company land acquisition and disposal strategy' (referred to as the 'LPC Strategy') was approved by the department in October 2016. It outlined, among other things, the intention to acquire the Leppington Triangle 'within the next few years but ideally **by 2019**' [*emphasis as per original*]. The LPC Strategy stated that, 'While the LPC Triangle is not required for stage one of the airport development and it is LPC's preference to retain ownership of the parcel of

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15 On 1 July 2009, Ministerial direction 5.8 under the then Section 117(2) of the *Environmental Planning and Assessment Act 1979 (NSW)* was issued to avoid incompatible development in the vicinity of any future second Sydney Airport at Badgerys Creek. Direction 5.8 was updated and reissued on 14 April 2016, and was then revoked on 20 August 2018 when Ministerial direction 7.8 under Section 9.1(2) of the Act took effect. The objective of direction 7.8 was to ensure development was consistent with the Western Sydney Aerotropolis Interim Land Use and Infrastructure Implementation Plan. The planning prohibitions of direction 5.8, and then direction 7.8, applied to the Leppington Triangle land.

land for as long as possible, there are a number of reasons to support an earlier acquisition by the Commonwealth of the LPC Triangle’.

2.41 The LPC Strategy set out a ‘case for earlier acquisition’ that focussed on the benefits of this option. Subsequent advice to decision-makers similarly identified the benefits and supported an early acquisition. For example, the department advised the Minister in January 2018 of its intention to move ahead with the acquisition of the Leppington Triangle ‘due to the strong arguments in favour of acquiring this piece of land in the short term’.

2.42 The ANAO examined the six benefits of acquiring the land early that were presented in advice to decision-makers and Ministers from October 2016 to November 2019. An overview of the benefits presented, and of ANAO’s analysis of each, is at Table 2.1.

**Table 2.1: Claimed benefits of acquiring the land early and ANAO analysis of each**

Claimed benefit	ANAO analysis
‘A small window of opportunity for the acquisition exists because of mutual goodwill with the landowner ...	<p>The records do not demonstrate that there was goodwill generated as a result of the realignment of The Northern Road.</p> <p>The department’s claims as to goodwill are incompatible with other documented statements by the department that the landowner was an unwilling seller, and with its associated strategy of offering a package of transactions to incentivise the landowner to sell (see paragraphs 2.49–2.51 below).</p> <p>Further, it was not evident that any goodwill would be lost, rather than built on, if the purchase was deferred until the land was needed for the second runway as per the landowner’s preference.</p>
and funds for the purchase are available.’	<p>The reason is inconsistent with section 15 of the <i>Public Governance, Performance and Accountability Act 2013</i> as spending public money just because it is available to be spent does not represent the proper use and management of public resources.</p>
‘the scarcity of land on or around the airport site would result in further increases in property values, with future announcements about the airport and broader land use planning also expected to result in upwards price movements of airport land and surrounding properties’	<p>The reason was negated by the department’s approach of requiring that the land be valued as ‘industrial’ instead of ‘agricultural’ so that ‘the future value of any re-zoning of the land could be assessed in the present’. This approach to valuation was not outlined in the LPC Strategy nor elsewhere approved by a decision-maker.</p> <p>The department was consulted on draft land use plans and was aware in advance of purchase that a future announcement about land use planning would place the Leppington Triangle in the ‘Agriculture and Agribusiness’ precinct of the Western Sydney Aerotropolis, rather than in the more commercial ‘Aerotropolis Core’. Also that the land use planning would introduce more stringent land development controls around the airport.</p> <p>The May and June 2016 drafts of the LPC Strategy stated that ‘because of the location of the Triangle very close to the eastern end of the southern runway any development of the Triangle will be very constrained thereby reducing significantly any potential increase in land value as a result of the airport development’. This statement did not appear in the finalised October 2016 LPC Strategy.</p>

Claimed benefit	ANAO analysis
'LPC is entitled to compensation costs from the Commonwealth for business disruption ... Any delays in acquisition will arguably result in higher disruption costs'	The department did not pay LPC compensation for business disruption costs nor did it estimate such costs. The LPC strategy stated, 'No duplication of payments for disturbance costs, to the extent disturbance costs were paid by the Commonwealth as part of the acquisition of the adjoining land in the 1990's'. The nature and value of other components of business disruption costs were not outlined.
'so that any future decision on the second runway is not held captive to a protracted negotiation or dispute ... to help de-risk the development of the second runway'	While the reason supports a timely commencement of the acquisition process, it does not support an allowance of some 32 years. In reliance on the LAA, the Australian Government is able to compulsorily acquire land anywhere in Australia for public purposes. Compulsory acquisition can be used whether or not an owner is willing to sell their land. An owner can claim compensation as soon as the land has been acquired. If an owner exercises their rights of appeal on the amount of compensation payable then the time associated with the appeals process occurs post-acquisition and does not hold the Australian Government 'captive' in the way suggested. (See Appendix 2.)
'To achieve the best possible outcome for the Commonwealth, it would assist if the implementation of the Commonwealth's LPC acquisition strategy is as closely coordinated with RMS' process as possible'	<p>The potential benefits of coordination were not realised. The RMS provided a February 2017 valuation of the land, which was not then used as a benchmark by the department. The RMS also provided comments on the valuation procured by the department, and suggested that the respective valuers meet to understand the differences in approach. The department did not take up the comments or suggestion.</p> <p>The department underwrote the difference in valuations, with the NSW government paying \$148,691 for its 1.363 hectares and the department paying the landowner a further \$2,834,623 to align the per hectare price with the department's valuation. (See further at paragraphs 4.21–4.32 and 4.81.)</p> <p>The result was that the department paid 22 times more per hectare than was paid by the NSW government for its portion of the Leppington Triangle.</p>

Source: ANAO analysis of Department of Infrastructure records.

2.43 On the whole, the ANAO analysis was that the benefits of early acquisition were overstated.

2.44 There was no consideration of the costs associated with acquiring the land early outlined in the LPC Strategy or in other advice to decision-makers or Ministers.

2.45 The departmental records did not demonstrate that the benefits outweighed the costs to the Australian Government. Accordingly, it was not demonstrated that the strategy of acquiring the land early represented value for money or the economic management of public resources. Property should only be held by the Australian Government where it demonstrably contributes to government outcomes and ownership represents value for money.<sup>16</sup>

<sup>16</sup> Department of Finance, *Resource Management Guide No. 500: Commonwealth Property Management Framework*, February 2020, p. 18.

## Recommendation no.1

2.46 The Department of Infrastructure, Transport, Regional Development and Communications prepare comprehensive and balanced written analysis on the benefits, costs and risks of proposals to spend public money.

**Department of Infrastructure, Transport, Regional Development and Communication's response:** *Agreed.*

2.47 *The Department has existing frameworks and guidance on the requirements associated with developing proposals to spend public money in accordance with the Public Governance, Performance and Accountability Act 2013.*

2.48 *The Department will review and update existing material to ensure there is a clear requirement for comprehensive and balanced written analysis on the benefits, costs and risks to support proposals to spend public money, and particularly in regard to valuations and land acquisitions. All staff will be reminded of their responsibilities and updated guidance material will be made available to all staff and appropriate training provided.*

## What acquisition strategy was selected and why?

The strategy for acquiring the land contained a package of transactions intended to incentivise an unwilling seller, which was at odds with the department's advice that the early purchase was being pursued so as to capitalise on perceived goodwill from the landowner. Cost estimates were not included in the documented acquisition strategy. After approval was given within the department to progress an acquisition by compulsory process, the approach was changed, without further documented approval, to be an acquisition by agreement with the owner so as to achieve a target date of 31 July 2018.

### Package of transactions to incentivise the seller

2.49 The departmental records on the planning and selection of an acquisition strategy regularly refer to LPC's expressed preference to retain the Leppington Triangle for as long as possible, until it was actually required for a second runway. For example, the October 2016 briefing seeking approval of the LPC Strategy stated, 'LPC would not stand in the way of the second runway development and would consider selling the Triangle to the Commonwealth but nearer to when it is really needed'. The department intended to acquire the land substantially earlier than this — 'ideally by 2019'.

2.50 In light of LPC being an unwilling seller, the LPC Strategy contained a package of transactions 'that the Commonwealth could offer to incentivise the LPC's cooperation to dispose the balance of the LPC Triangle (i.e. the part not required for [The Northern Road realignment]) to the Commonwealth'. It also outlined 'further inducements ... the package could be supplemented with'. Neither the LPC Strategy nor related briefings explained:

- the disconnect between advising that the land should be acquired early to capitalise on goodwill, while also advising that the department should incentivise LPC's cooperation; and

- why the department considered the legislation that provides the Australian Government with powers to compulsorily acquire land, and that entitles the landowner to compensation on 'just terms', was inadequate for the purposes of the Leppington Triangle.

2.51 The key elements of the package of transactions presented 'to secure the near-term acquisition' of the 12.26 hectares of the Leppington Triangle, which were then implemented, were to:

- lease the 12.26 hectares of the Leppington Triangle back to LPC for up to 20 years;
- dispose 6.02 hectares of the Australian Government owned 'axe-handle' land to the NSW government for The Northern Road realignment;
- lease the other 32.12 hectares of the land to LPC for up to 20 years (that is, the 38.14 hectares of land acquired from LPC in 1991 minus the 6.02 hectares disposed); and
- extinguish a High Intensity Approach Lighting (HIAL) easement that had burdened one of LPC's properties since 1997, and establish a new HIAL and access easement, as more recent airport planning had shifted the proposed location.

#### *Continuation of the lease for the 'axe-handle' land*

2.52 Continuing to lease the 32.12 hectares of 'axe-handle' land to LPC until 2038 was a substantial concession.

2.53 In October 2014, the Minister had agreed a tenancy transition plan for the Western Sydney Airport. The plan outlined that formal termination notices would be sent to 'inform the occupants that they have a six month period to vacate.' Termination notices were sent to the 139 residential tenants and 16 agricultural tenants in November 2014, while the various commercial and major agricultural tenants were consulted 'to gain an understanding of the issues that may be involved with moving their facilities'.

2.54 In March 2015 the Minister approved termination strategies for each of the four major commercial tenants on the airport site, which included LPC's tenancy of the axe-handle land. The related advice to the Minister with respect to LPC was to offer an extended 12 months' notice, so as to maintain goodwill for the potential purchase of the Leppington Triangle:

The potential need to acquire the triangular parcel of land in the future as part of the airport development remains unresolved. While LPC is currently supportive of the airport project and may be open to the idea of selling this land, it would be in project's interest to maintain goodwill with the tenant.

In summary, we recommend that we provide LPC with 12 months' notice, which means a likely termination date of around March/April 2016 ...

2.55 Notices dated 8 May 2015 were served. The termination of LPC's lease was to take effect on 16 May 2016. The termination notices for the other three major commercial tenants stated that they would take effect on 16 November 2015.

2.56 LPC's tenancy on the axe-handle land was later extended from 17 May 2016 to 31 July 2018 via a series of five short-term leases. The leases commenced: 17 May 2016, 17 November 2016, 17 May 2017, 17 November 2017 and 1 March 2018.



2.57 The axe-handle land was part of the airport site. The airport site was leased to WSA Co Limited from 17 May 2018 for the purposes of building and operating the Western Sydney Airport. The department required WSA Co Limited to sublease the axe-handle land to LPC for up to 20 years from 1 August 2018 on the terms the department had negotiated with LPC.<sup>17</sup>

2.58 In July 2020, the Department of Infrastructure advised the ANAO that:

Both the axe handle lease and the triangle lease provide a mechanism to bring the lease to an end over any areas required for airport development.

2.59 The ANAO's analysis of the terms of the lease arrangements do not support this advice. Should part of the axe-handle land be required for airport development then it can be released if at least 12 months' notice is given to LPC and the earliest date it can be released is August 2024. There is no equivalent provision in the Leppington Triangle lease-back arrangement for the land to be made available for airport development. Subsequent advice from the department in July 2020 confirmed that the Leppington Triangle lease did not have a specific mechanism to bring the lease to an end and advised that it was deemed at the time that other clauses in the lease 'do not preclude the earlier than planned development of the second runway at the airport should it be required'.

### *Construction of an underpass*

2.60 A consequence of the department's decision to lease the Leppington Triangle back to LPC upon acquisition, was that a road underpass needed to be constructed to allow LPC passage between its base farm and the Leppington Triangle.

2.61 The Australian Government and LPC had entered a Deed in August 1991 in relation to the earlier land acquisition process (as outlined in paragraph 2.11). The Australian Government had agreed through the Deed that, if The Northern Road was re-routed along the axe-handle land, then it would construct a tunnel or other carriageway to enable farm vehicles and animals to pass under the road to the Leppington Triangle.

2.62 In late 2015, the Department of Infrastructure directed RMS to re-route The Northern Road along the axe-handle land. A briefing to the Executive Director of the Western Sydney Unit in November 2015 advised:

If LPC continues to occupy the triangle after the Northern Road realignment has occurred, an access tunnel will need to be provided under the realigned The Northern Road. We understand this will have cost implications for the Commonwealth.

2.63 As the package of incentives allowed LPC to remain on the Leppington Triangle via a lease-back arrangement, the department instructed the RMS in mid-2017 to include an underpass in the design of The Northern Road for LPC's use. The estimated cost was not included in the briefing materials. According to departmental records of early 2016, it was expected that the underpass would cost around \$10 million to construct. The ANAO requested details of the actual cost of the underpass and the Department of Infrastructure advised in June 2020 that, 'The costing breakdown

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17 A Project Deed between the Australian Government and WSA Co Limited of October 2017, which set out the company's obligations, provided that the Australian Government may require the company to grant a sub-lease to LPC.

does not go down to the level of detail requested (i.e. doesn't have separate figures for the underpass).'<sup>18</sup>

## **Cost estimates**

2.64 There were no estimates of costs or rental returns provided in the LPC Strategy or in associated briefing material. This makes it difficult to assess the cost-benefit to the Australian Government of the proposed package of transactions. Of particular note was that, while the LPC Strategy stated that the Australian Government would pay relevant land value and compensation costs for the Leppington Triangle, it did not estimate these costs. This was a significant shortcoming.

2.65 In November 2015, the department had proposed to develop an overarching strategy to guide the land acquisition process for the airport project. The decision-maker noted 'with cost estimates' when agreeing to this proposal. In February 2016 the department obtained decision-maker approval of the overarching acquisition strategy and approval to 'pursue valuations of certain interests' including of the Leppington Triangle. The related briefing advised that:

The acquisition of the Leppington Triangle will likely form a significant part of the overall land acquisition budget and a valuation over this land, supported by indicative values elsewhere, should provide a general indicator of total potential transaction costs (noting however that other costs, such as business disruption costs, will ultimately need to be factored into final value estimates following more detailed consideration).

2.66 Planning to obtain a market valuation of the Leppington Triangle commenced but that procurement did not then proceed. The covering brief to the LPC Strategy of October 2016 stated that immediate priorities to progress in the coming months included 'procuring the services of a valuer'. A valuer was engaged in June 2017. The approach then taken to valuing the land to inform the purchase price is examined in Chapter 3.

2.67 It eventuated that the:

- \$29,839,026 price paid by the department to acquire 12.26 hectares of the land was based on the highest valuation<sup>19</sup> of the Leppington Triangle obtained (being \$30 million for all 13.62 hectares); and the
- \$34,344 per annum rent<sup>20</sup> paid by LPC to lease the 12.26 hectares back was based on a valuation of \$920,000 for the 12.26 hectares continuing to be used for the existing dairy operations.

## **Method of acquisition selected**

2.68 Two methods of acquisition were available for selection under the LAA, being to acquire the Leppington Triangle by compulsory process or to acquire it by agreement. Differences between the methods include the procedures that must be followed by the acquiring agency, the provisions for

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18 The underpass was funded under the Western Sydney Infrastructure Plan. The Australian government's investment in the Plan accounts for around 80 percent of the total funds, with the NSW government contributing the other 20 percent.

19 See Figure 4.1.

20 The first year's rent was set at \$34,344 plus GST, payable by monthly instalments, with the rent then reviewed annually based on CPI movements.

compensation and the landowner's rights. Compulsory acquisitions do not need the agreement of the landowner and occur by the Minister for Finance using his or her powers under the LAA, based on the advice of the acquiring agency. Most acquisitions occur by agreement with the landowner, as these are usually simpler and faster and are the Australian Government's preferred approach.<sup>21</sup> (A flowchart setting out the different acquisition processes under the LAA is at Appendix 2.)

2.69 The February 2016 briefing on the overarching acquisition strategy for the airport advised that, 'Consistent with views expressed by [the Department of Finance], it is proposed that any transactions pursued be sought to be achieved by voluntary agreement in the first instance'. In reference to the Leppington Triangle specifically, it noted that the landowner's stated objection to the land being purchased until a second runway is required 'may make voluntary agreement on an early acquisition of the triangle difficult'.

2.70 The LPC Strategy of October 2016 outlined that the method of acquisition for the Leppington Triangle 'would be by agreement but by way of compulsory acquisition'. That is, the department would seek to reach agreement with the owner that the land be acquired via the compulsory process set out in the LAA.

#### *Target date of 31 July 2018 set*

2.71 During November 2017, the department developed a set of 'commercial principles' for the acquisition package in consultation with the landowner. The commercial principles included, among other things:

- 'Acquisition to be with Leppington's agreement but via compulsory process under the LAA';
- 'the acquisition would occur and the compensation payment would be made on or before 31 July 2018 (both parties using best endeavours to meet this timeline)'; and
- 'In the event that completion is not achieved by 31 July 2018 (through no fault of the Vendor) then interest will be payable at the rate of 8% per annum'.

2.72 Acquiring the land by 31 July 2018 remained the department's target date thereafter. There was no record of decision-maker approval to agree that interest would be payable if the target date was not achieved (see further at paragraphs 4.44–4.47). The ANAO calculated that the interest payable if the department missed the target date by a single month would be around \$218,820, under the terms of the commercial principles and using the GST inclusive purchase price. It was not demonstrated that, if triggered, this commercial principle would have delivered value for money to the Australian Government. Further, the absence of a cap on the total amount payable did not adequately protect public money.

2.73 While the Department of Infrastructure advised the ANAO in July 2020 that the 8 per cent interest had been 'suggested by LPC but not agreed to by the department', briefings from the department to Ministers and senior departmental officials had stated that the interest provision had been agreed to by the department. The department advised the ANAO that:

The commercial principles were not intended to be legally binding and this was made clear to LPC; once the technical change from a compulsory acquisition to an acquisition by agreement was

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21 Department of Finance, *Review of the Lands Acquisition Act 1989—Discussion Paper*, Commonwealth of Australia, 2020, p.5.

made, the 8% interest issue was not pushed by LPC and it did not feature as a term of the final transaction.

### *Change to the method of acquisition*

2.74 The department identified a risk that an acquisition by compulsory process would not be achieved by 31 July 2018. The steps in the process, as outlined by the Department of Finance, were included in the October 2016 briefing to the approver of the LPC Strategy. The department had not completed any of the pre-acquisition steps by November 2017.

2.75 In late November 2017, the department suggested to the landowner that the Leppington Triangle instead be acquired by agreement under the LAA. The reasons given were that ‘the process would be less complex; we may be able to reach a binding agreement on the acquisition considerably earlier, giving both parties certainty at an earlier point; and we could be more confident of completing an approved acquisition by 31 July 2018.’ The landowner indicated it was ‘in general agreeance’ to the suggestion.

2.76 There was no record of a departmental decision-maker approving the change in the acquisition method employed (see paragraphs 4.6–4.8).

2.77 The Leppington Triangle was ultimately acquired on the target date of 31 July 2018 using the acquisition by agreement provisions of the LAA (the acquisition process used was as marked with dashed red lines on the flowchart in Appendix 2).

### **Equity and fairness**

2.78 The Department of Infrastructure’s response of July 2020 to the preliminary findings of this audit included, ‘Given the historical legal relationship with LPC and therefore the sensitivity of the relationship with them, the risk of legal challenge and subsequent delay was a key concern which we think has been understated in the [audit’s report preparation papers]’. The department’s claimed concern is supported by its decision-making records (including its two briefings to the Minister on the acquisition) listing as a ‘sensitivity’ that the landowner was ‘a sophisticated and well-resourced entity’ with ‘access to substantial resources including legal and property advisors’.

2.79 The principles of equity and fairness in land acquisitions involves ensuring affected interest holders are treated fairly on ‘just terms’. An overarching issue with the department’s strategy for acquiring the Leppington Triangle is that it was designed to offer a particular landowner a package of incentives (see paragraphs 2.50–2.51) in excess of the provisions of the LAA. It would be inappropriate for the Australian Government to offer ‘sophisticated and well-resourced’ entities greater inducements to sell than it offers those without ‘access to substantial resources’. If the department expected legal action in response to its acquisition of the Leppington Triangle, then the appropriate strategy would be to rely on the LAA provisions, to maintain sound records, to make transparent decisions and to procure an independent valuation of the landowner’s entitlement to compensation that is robust and defensible.

## Did the department employ an appropriate approach to managing probity with its staff, including any conflicts of interest?

There were shortcomings in the department's management of probity with its staff. A key requirement was for all Western Sydney Unit officers and advisors to declare conflicts of interest. While the declaration requirement was largely met, a senior officer did not appropriately action probity instructions in relation to a declared conflict. Probity risks were also increased by the approach taken by some staff when engaging directly with landowners.

2.80 Accountable authorities of Australian Government entities must govern their entities in a way that promotes, among other things, the ethical use and management of public resources.<sup>22</sup> Probity is the evidence of ethical behaviour, and can be defined as complete and confirmed integrity, uprightness and honesty in a particular process. Ethical behaviour includes recognising and dealing with conflicts of interest.

2.81 The ANAO examined the approach taken by the Department of Infrastructure to managing probity with its Western Sydney Unit staff. Given this audit is of a land acquisition, the ANAO focussed on the management of conflicts of interest and of direct engagements with landowners.

### Declaration and management of conflicts of interests

2.82 Under the *Public Service Act 1999*, officials are to take reasonable steps to avoid any conflict of interest in connection with their employment and to disclose details of any material personal interest. Agency heads and Senior Executive Service (SES) employees are subject to a specific regime that requires them to submit, at least annually, a written declaration of their own and their immediate family's financial and other material personal interests. Agencies may choose to require similar regular written declarations of other officials at particular risk of conflict of interest.<sup>23</sup>

#### *Corporate policy*

2.83 The Department of Infrastructure's corporate policies include the requirement that all SES and Executive Level 2 (EL2) employees submit declarations of personal interests. To test implementation of the policy, the ANAO requested the declarations submitted by five SES and EL2 officers currently employed in the Western Sydney Unit.<sup>24</sup> The officers were specified by the ANAO. The declarations had been provided and they complied with the policy.

#### *Western Sydney Unit-specific policy*

2.84 The Western Sydney Unit's probity policies include that all staff and contracted advisors are to complete a conflict of interest declaration on commencing with the Unit. Staff and advisors are also to regularly review and update their declarations if circumstances change. To test implementation of the policy, the ANAO requested the declarations submitted by:

22 Section 15 of the *Public Governance, Performance and Accountability Act 2013* outlines the duty of the accountable authority to govern the entity in a way that promotes the proper use and management of public resources. 'Proper' is defined in the Act as efficient, effective, economical and ethical.

23 Australian Public Service Commission, *APS Values and Code of Conduct in Practice*, August 2017, p. 42.

24 The test was limited to existing employees because the department advised that the declarations of former employees had been transferred to the receiving agencies in their personnel files.

- 13 officers who were past or present staff of the Western Sydney Unit, ranging in level from an officer on the department's graduate program through to SES Band 2;
- two contracted advisors who had provided advice on the Leppington Triangle acquisition; and
- any other officer or contracted advisor who had declared a conflict of interest that was of relevance to the acquisition — the department identified one such contracted advisor.

2.85 Declarations completed on commencement with the Unit were provided to the ANAO for 15 of the 16 individuals. There was no record of a former SES Band 2 officer having completed a declaration. One of the declarations provided had been completed incorrectly, as the SES Band 1 officer had recorded that a potential conflict of interest existed without then outlining the nature of that conflict in the field provided. A probity register noted that this matter had been discussed with the officer and that the officer 'does not have any interests of significance that need to be recorded'.

2.86 Updated declarations had been completed by five of the officers. In addition, an SES officer (who was the internal probity advisor for the Western Sydney Unit) had declared a potential conflict of interest via email and, in response, had been instructed to complete an updated declaration and to excuse themselves from any work involving the matter until their declaration had been considered by the department's Ethics team. The officer did not then complete the declaration and they continued to work on the matter (which was unrelated to the land acquisition).

2.87 Six individuals had identified potential conflicts of interest on their declaration forms. All six potential conflicts were recorded in a probity register, along with associated probity advice. The ANAO noted that:

- a contracted probity advisor had requested additional information from one EL2 officer about their declared conflict but the officer did not then provide the information. A follow-up request for the information was emailed seven months later, by which time the officer had left the department; and
- a contracted advisor had declared a conflict of interest with the landowner company, LPC. The associated probity advice was that the advisor would not be involved 'in any property related work that may relate to or be connected with LPC'. From the records examined by the ANAO, it did not appear that the advisor was involved in the land acquisition. They were involved in matters relating to the realignment of The Northern Road impacting LPC property. In the circumstances, the ANAO considers a more prudent course would have been to avoid the conflict by not having the contracted adviser involved in any of the work.

### **Maintaining probity when engaging with individual landowners**

2.88 The Department of Infrastructure consults with landowners and other stakeholders in Western Sydney on the Australian Government activities that impact them. Open community consultation is inherently transparent, while direct engagement with individual landowners brings probity challenges that require active management.

2.89 The department's Western Sydney Unit staff have access to Australian, NSW and local government information that is not publicly available and that may be of value to landowners or developers. Sensitive information the ANAO observed in the departmental records (but did not

examine) included NSW government documents, planning for the flight paths design for the Western Sydney Airport, and planning of rail and road routes for Western Sydney.

2.90 Western Sydney Unit staff also provide input to land planning and input to the consideration of land development and foreign investment applications — the outcomes of which may financially impact landowners and developers.

2.91 The importance of ensuring probity is demonstrably maintained in this context was highlighted in the 'Inquiry into Badgerys Creek Land Dealings and Planning Decisions' undertaken in 2009 by a Committee of the NSW Parliament Legislative Council. Badgerys Creek is where the Western Sydney Airport is located. The Inquiry came about for reasons including, but not limited to, allegations that property developers exert undue influence on planning decisions through having special access to government officials.

### *Meetings and communications*

2.92 During the conduct of this audit, the ANAO identified probity risks in the manner in which some direct engagements with landowners had been conducted by Department of Infrastructure staff. The considerations and recommendations of the NSW Parliamentary Committee, relating to meetings and communications between government officials and land developers, contain useful advice for the Department of Infrastructure in managing its probity risks.<sup>25</sup>

2.93 The ANAO identified instances where meetings with landowners were held in coffee shops, with only one departmental officer present and where there was no record of the discussion. The NSW Parliamentary Committee had noted that 'coffee shop meetings ... raises concerns regarding due process, with informal meetings providing an opening for special access to be granted to certain individuals.' It recommended that, at a minimum, 'meeting protocols should contain guidelines regarding venues, properly recorded minutes and the requirement for the third party presence of at least two Departmental officers'.

2.94 The NSW Parliamentary Committee was also of the view that maintaining proper records of telephone calls was important and had recommended that record-keeping guidelines be applied to all conversations between officers and development proponents.

2.95 The ANAO had noted that telephone conversations between Department of Infrastructure officers and LPC were recorded in an ad hoc manner, primarily by being mentioned in a subsequent email exchange. In reaction to a May 2016 email from an SES officer outlining their intention to telephone LPC while 'on the road in Sydney' the next day, the department's legal and probity advisor stated:

I just have a small sensitivity to arrangements with Leppington not continuing for any significant period without them being formally recorded – but I acknowledge likely to be less of a risk with Leppington given their circumstances and the comms [*sic*] we have had with them to date.

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25 See Chapter 3, and recommendations 3 and 4, of the NSW Parliament Legislative Council, General Purpose Standing Committee No. 4, *Inquiry into Badgerys Creek Land Dealings and Planning Decisions*, 20 November 2009. Available at <https://www.parliament.nsw.gov.au/lcdocs/inquiries/1955/091120%20Report%20Badgerys%20Creek.pdf> [accessed 21 June 2020].

2.96 Overall, there was room for improvement in the logging of important telephone conversations and for ensuring email exchanges are saved into the departmental files. Sound record-keeping practices should also apply to direct engagements via other media.

2.97 Notwithstanding the experience at State government level and that work on the Leppington Triangle acquisition had commenced in 2016, it was not until March 2018 that the department developed a protocol for 'meeting with interested parties' tailored to its activities in Western Sydney. The protocol was not accessible to Western Sydney Unit staff from November 2019 to September 2020, which undermined its potential benefit during that period. The department's corporate guidance on probity does not extend to the meeting and communication protocols recommended by the NSW Parliamentary Committee.

## **Recommendation no.2**

2.98 The Department of Infrastructure, Transport, Regional Development and Communications put in place meeting and communication protocols for when staff engage directly with individual landowners, developers or similar parties with heightened probity risks. The protocols should: include guidelines regarding suitable venues; require the presence of at least two departmental representatives; and require properly recorded minutes of meetings and conversations.

**Department of Infrastructure, Transport, Regional Development and Communication's response:** *Agreed.*

2.99 *The Department has established protocols on meeting with interested parties developed specifically for the Western Sydney Unit. The guidance is available to all staff. The Department will review the protocols to expand coverage to other areas of the Department.*

2.100 *These will include, at a minimum, guidelines regarding suitable venues; require the presence of at least two departmental representatives; and properly recorded minutes of meetings and conversations. Staff will be reminded of their responsibilities and appropriate training provided.*



### 3. Land valuation

#### Areas examined

The ANAO examined whether an appropriate approach was taken to valuing the Leppington Triangle land.

#### Conclusion

The approach taken by the Department of Infrastructure to valuing the Leppington Triangle was not appropriate. The approach inflated the value of the land, which in turn led to the Australian Government paying more than was proper in the circumstances.

#### Areas for improvement

The ANAO has made one recommendation relating to the department developing policies and procedures to govern its approach to obtaining purchase valuations.

3.1 In October 2016, the Western Sydney Unit obtained approval to progress a compulsory acquisition of the Leppington Triangle. The related LPC Strategy stated, 'Compensation to be agreed upfront, at market value to LPC for the land value and all costs required under the *Lands Acquisition Act 1989* (LAA)'. While compensation claims usually start after the land has been compulsorily acquired, a pre-acquisition agreement between the Minister for Finance and the landowner on the amount payable is supported under section 78 of the LAA.

3.2 The approver (the Executive Director of the Western Sydney Unit) was advised in October 2016 that, in order to implement the LPC Strategy, the immediate priorities included 'procuring the services of a valuer (preferably with sufficient experience with the requirements under the LAA).' The valuation then procured was used as the basis for calculating the amount paid to the landowner in July 2018.

3.3 The ANAO examined whether an appropriate approach was taken by the Department of Infrastructure, Transport, Regional Development and Communications ('Department of Infrastructure' or 'the department') to valuing the land for the purpose of informing the amount to be paid by the Australian Government. This included examination of the procurement process, the instructions to the valuer, the valuation report and the acceptance of the valuation report. 'Appropriateness' was assessed in the context of the compensation for compulsory acquisition provisions of the LAA<sup>26</sup>, the *Commonwealth Procurement Rules*, professional standards for property valuations and whether the resulting valuation was fit for the Australian Government's purpose. The Australian Property Institute defines a valuation as 'an established, ethical and evidence based process for assessing the monetary value of an asset at a specified date, that is legally defensible and undertaken by a qualified, professional Valuer.'

#### What valuations were obtained to inform the amount to be paid?

A single valuation of the market value of the land was obtained jointly with the landowner. No valuation of the other types of compensation that may be payable under a compulsory acquisition was obtained.

26 While the land was ultimately acquired by way of agreement, at the time the valuation report was procured and accepted the land was to be acquired by compulsory process under the LAA.

3.4 The approver was advised in October 2016 that the scope of work for the valuation services would 'include land valuation and assessment of any other compensation payments payable by the Cth under the LAA'. Where land is acquired by compulsory process, the LAA states that the amount of compensation the owner is entitled to be paid 'is such amount as, having regard to all relevant matters, will justly compensate the person for the acquisition'. The types of compensation that may apply include: market value, special value, severance loss, injurious affection, disturbance loss, disadvantage payment, and reasonable legal and professional costs.

3.5 The department obtained one valuation of the market value of the Leppington Triangle. The valuation was of the whole 13.62 hectare parcel of land because the size of the portion to be acquired by the NSW government for The Northern Road realignment had not yet been determined.

3.6 The department did not obtain a valuation of other types of compensation that may be payable under the LAA nor did it otherwise assess these. The approach taken was not fit for the purpose of informing the Minister for Finance or other decision-makers of the full amount of compensation to which the landowner may be entitled under the LAA.

3.7 A total of \$3,850 (GST inclusive) was spent on valuing the Leppington Triangle.

### **Joint valuation**

3.8 The department proposed that the valuation be jointly obtained with the landowner. The department would procure and pay for the valuation. The selection of the valuer would be jointly agreed, the instructions jointly agreed and the draft valuation report considered by each party prior to finalisation. The department explained to the landowner that, 'The purpose of doing these things is to be as transparent as possible with you about the valuation.' The department subsequently qualified that the joint valuation was 'not intended to be binding on either of us, nor is it intended to affect our respective rights to obtain additional valuation advice, nor compel either of us to take any further action.'

3.9 It is not standard practice for government to jointly procure the land valuation. An October 2019 departmental review of the acquisition of the Leppington Triangle recorded 'In our opinion we do not think discussions would have progressed if the valuation was not undertaken on this basis'. There was no evidence on file in support of this view, noting that this review lacked objectivity (see paragraphs 4.74–4.75).

3.10 By way of contrast, the approach taken by the NSW government provides the acquiring agency an independent valuation report while still being transparent and collaborative. The approach involves:

- the acquiring agency instructing a valuer to inspect the property on behalf of the NSW government to determine its market value and any other entitlements to compensation;
- recommending that the landowner has their own valuation carried out by an independent valuer and then reimbursing them for the valuation fees when the acquisition is settled; and
- arranging an exchange of valuation reports to try to reach an agreement between the valuers and the parties on the amount payable.

3.11 The department did not document any consideration of the merits of employing the approach used by the NSW government.

## How was the valuation procured and conflicts of interest managed?

The land valuation was procured by approaching one supplier. The supplier was one of those suggested by the landowner and was then agreed to by the department on the basis that there were no conflicts of interest between the parties. The approach taken was not sufficiently robust in light of the procurement risks. While the cost of the valuation was low (less than \$4,000) the importance of the valuation to informing a multi-million dollar purchase meant that an openly competitive procurement approach was warranted.

3.12 The Department of Infrastructure entered into a contract with M J Davis Valuations Pty Ltd ('MJD') on 5 June 2017 for the provision of the land valuation services.

### Procurement method

3.13 The land valuation was procured by limited tender by requesting a quote from one supplier (also known as 'sole sourcing' or 'direct sourcing'). The recorded basis for the procurement method placed emphasis on the valuation needing 'to be pursued as an urgent priority' in the context of 'maintaining the momentum of LPC interactions'. The recorded basis included:

A limited tender for a valuation over the Leppington Triangle is, considering all the circumstances, both urgent and practical. The Department will need to act quickly to take advantage of the rapport developed with LPC, as delaying this valuation may risk stalling the momentum that exists. Delaying a valuation could affect the relationship developed with LPC.

As LPC is a significant stakeholder in the Sydney West airport project, it is important that the Department maintain a positive and productive relationship with LPC. There are several sensitivities that affect the relationship, and the Leppington Triangle valuation has the potential to improve the interactions between the Department and LPC. This opportunity will need to be managed cooperatively and without unnecessary delay to ensure LPC continues to cooperate with the Department ...

### Selecting the supplier

3.14 The sequence of events to select the supplier went as follows on 7 February 2017:

- 10:40am: the landowner<sup>27</sup> emailed to the department a list of four valuation firms, in order of preference, that it would be prepared to instruct and asked the department to advise if any of these would be acceptable. The list included MJD;
- 12:37pm: the department responded that it 'can work with any valuer that we and LPC have no conflict or perceived conflict with' and suggested four different valuation firms;
- 2:34pm: the landowner advised that its preference was to use one of the valuers it had listed, that a related entity had previously conducted business with three of the four listed and that 'Presumably this means that we would need to proceed on the basis of obtaining separate valuations';

<sup>27</sup> For ease of reference, the term 'landowner' is inclusive of authorised representatives of the landowner.

- 3:05pm: an email sent within the department recorded that an officer had just spoken with the landowner and that it seemed that one firm on the landowner's list 'has no commercial relationship and would be acceptable';
- 3:31pm: the landowner emailed a record of its understanding from the telephone discussion, being:
  - DIRD [the department] are in a position to investigate appointing MJ Davis Valuations Pty Ltd ('MJD') on the basis that LPC has no conflict or perceived conflict of interest with this Valuer.
  - DIRD would consult with LPC in preparing the instructions for a joint valuation by MJD.
  - Whilst DIRD would issue the instructions and make the appointment, it would be open to LPC to contact MJD.
- 4:43pm: the department responded: 'Thanks very much, this is a good record of our discussion. I'll have some valuer instructions drafted and to you by the end of this week.'

3.15 The procurement records did not contain a capability assessment of the selected supplier. The Department of Infrastructure advised the ANAO (in the context of the audit of the department's 2018–19 financial statements – see paragraph 1.2) in August 2019 that, 'In coming to a view that it was suitable to obtain the market valuation sought from MJD, the department reviewed publically available information about the valuer and sought further information directly from the valuer by phone'. In its October 2019 review (see section starting at paragraph 4.74), the department identified 'Documenting the investigations we undertook to satisfy ourselves that MJD appeared a suitably qualified valuer' as being one of only two areas 'in which processes could be refined for future acquisition activities'.<sup>28</sup>

### **Managing conflicts of interest**

3.16 As part of the approach to market, the department asked the valuation firm to complete a conflict of interest declaration form. The form had been customised appropriately for the purposes of the Leppington Triangle valuation services.

3.17 The form was returned, completed in full, and the only potential conflict identified related to the provision of valuation services to the NSW government. The department sought advice on the completed declaration from its probity advisor, who replied 'We do not think that it raises any probity concerns or any conflict of interest or that there is a need to take any further steps'.

### **Managing procurement risk**

3.18 The Commonwealth Procurement Rules outline that promoting the proper use and management of public resources 'includes the selection of a procurement method that is the most appropriate for the procurement activity, given the scale, scope and risk of the procurement'. In deciding upon a sole source procurement, the department focused on the low expected cost.

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28 The other area was 'Undertaking our own analysis to confirm whether the respective comparison sales in the MJD report that were flagged at the higher range subsequently settled for those amounts given the gap in time between the valuation and sale'.

3.19 The sole sourcing approach taken was not sufficiently robust given the level of procurement risk. While the services themselves were of low cost, the resulting valuation report was to inform a high cost purchase. The valuation report assessed the market value of the land as having an approximate mid-point of \$30 million<sup>29</sup> and so even a one per cent adjustment to this figure would equate to \$300,000. The risk of the assessed market value being incorrect due to error or undue influence should have been better managed in the design and implementation of the procurement process.

3.20 The ANAO's findings on probity management throughout this report are directed at the Department of Infrastructure.

### Was the valuer given appropriate instructions?

The department gave the valuer inappropriate instructions on the valuation approach to be used and the basis on which the current market value of the land was to be assessed. Specific instructions not to carry out the usual enquiries and investigations associated with a market valuation resulted in a 'Restricted Assessment' being obtained, which provides a lower level of assurance than was appropriate for the Australian Government's purpose. The department did not provide the ANAO with accurate answers when questions were first asked about the valuation approach, which was not ethical behaviour.

3.21 The valuation instructions were set out in a 'brief for valuation services'. The department drafted the brief with input from its legal advisor. A draft version was provided to the landowner for comment who, following an amendment to the instruction on the basis for assessing market value, confirmed it was 'fine'. The brief was given to the valuer as part of the approach to market and then included in the resulting contract for services. The brief contained sufficient information for a valuer to understand the purpose and scope of the assignment.

### Valuation approach

3.22 The instructions given on the valuation approach were, 'This work is to be undertaken via desktop valuation only.' Desktop valuations, or Desktop Assessments, are the lowest in the hierarchy of four common valuation approaches.

3.23 In a Desktop Assessment, the valuer relies on documentation, does not inspect the property and produces an 'Indicative Assessment' of its value. According to the Australian and New Zealand Valuation and Property Standards, an 'Indicative Assessment is not, and should not be construed to be, a representation as to the Market Value of the Subject Property'. Further that, due to 'aspects of the usual valuation process not being completed there are risks that the outcome of a Desktop Assessment may be inaccurate'.

3.24 It eventuated that the valuer viewed the Leppington Triangle land from the kerbside (they had not been given permission to walk onto the private property). This raised the level of assurance to the second lowest in the hierarchy, being a 'Restricted Assessment'. The inherent risks to the Australian Government of relying on a valuation derived from a kerbside inspection and limited enquiries were highlighted by the valuer, MJD, including its report stating that:

<sup>29</sup> All dollar values in this Auditor-General report are GST exclusive for ease of comparison, unless otherwise specified.

In providing the Restricted Assessment instruction both LPC and the Commonwealth are assumed to agree and accept the commercial risks inherent in relying upon a Restricted Assessment. In utilising this service, the client agrees to waive the requirement for many of the processes that a Valuer would undertake in carrying out a full valuation of a property.

A Restricted Assessment is a qualified opinion of value of a property provided in accordance with these instructions and critical assumptions, in response to a specific instruction by the client not to carry out the usual enquiries and investigations associated with a market valuation ...

3.25 A higher level of advice is obtained from a physical inspection and limited enquiries. At the top of the hierarchy is the 'Full Speaking Valuation', in which a detailed site inspection and all relevant enquiries are undertaken.

3.26 The department did not record why it instructed the supplier to use a valuation approach inappropriate for the purposes of obtaining a market value assessment that could be relied upon. As set out in Chapter 4 of this audit report, there was a lack of transparency in the briefing of senior departmental officials and Ministers about the instructions that had been issued to the valuer by officials within the department's Western Sydney Unit.

3.27 Given in the order of \$30 million of public money was at stake, and that the department had identified that the landowner may exercise its right of appeal, procuring a Full Speaking Valuation was warranted. Spending \$3,850 (GST inclusive) to obtain a Restricted Assessment was an underinvestment in this context.

## **Valuation basis**

3.28 The LAA provisions for compensation for compulsory acquisitions include that regard shall be had to the market value of the interest on the day of the acquisition. The LAA defines market value as 'the amount that would have been paid for the interest if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer'. This is an abbreviated form of the industry definition, as set out in the International and the Australian valuation standards, which is:

Market Value is the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.

3.29 In the context of the ANAO's audit of the department's 2018–19 financial statements (see paragraph 1.2), the department's Secretary and Chief Financial Officer represented to the ANAO that, 'to the best of our knowledge and belief, having made inquiries as we considered necessary for the purpose of appropriately informing themselves', all information relevant to the financial statements had been provided to the ANAO and that any additional information sought by the ANAO had been provided.

3.30 A key question raised by the ANAO on the evaluation of the Leppington Triangle land was whether any additional instructions, outside of those that were provided by the department in the brief for valuation services, had been issued. The department's response to the ANAO in full was:

No, instructions provided to MJD are as described in the brief for valuation services.

3.31 Through this performance audit the ANAO established that this advice was incorrect. The instructions as to the basis on which the valuer was to assess the market value of the land were subjected to important amendments, as outlined in Table 3.1. This means that the representations

provided by the Secretary and Chief Financial Officer as part of the financial statement audit were inaccurate.<sup>30</sup>

**Table 3.1: Sequence of amendments to the instructions for assessing market value**

Relevant date in 2017	Purpose of version or amendment	The valuer was instructed to ...
10 February	Draft instructions sent to the landowner for comment	assess the current market value of the Leppington Triangle sold by a willing but not anxious seller to a willing but not anxious buyer, having regard to the <b>highest and best use</b> that may be undertaken on the Leppington Triangle
21 March	Amended in response to the landowner's comments and then sent to the landowner for agreement	assess the current market value of the Leppington Triangle sold by a willing but not anxious seller to a willing but not anxious buyer, having regard to the <b>highest and best use, including industrial purposes</b> , that may be undertaken on the Leppington Triangle
10 May	Given to the valuer in the approach to market (also referred to as the 'original brief')	
5 June	Included in the contract for services	
9 June	Revised instructions given to the valuer	assess the current market value of the Leppington Triangle sold by a willing but not anxious seller to a willing but not anxious buyer, having regard to the Leppington Triangle <b>re-zoned for industrial purposes, adjacent to an operating airport</b>
7 July	Email to the valuer with subject: 'Updated valuation brief – Leppington Triangle'	value the triangle land as if: <ul style="list-style-type: none"> <li>• <b>The land was already rezoned industrial land;</b></li> <li>• The land is <b>adjacent to an operational airport;</b></li> <li>• The Seller is not a distressed seller and the buyer is not a distressed buyer.</li> </ul>
17 July	Reverted to the original brief in response to concerns expressed by the valuer	assess the current market value of the Leppington Triangle sold by a willing but not anxious seller to a willing but not anxious buyer, having regard to the <b>highest and best use, including industrial purposes</b> , that may be undertaken on the Leppington Triangle
2 August	Final instructions on which market value was assessed, as stated in the draft valuation report	provide a market valuation of the land <b>on an Englobo rate per square metre basis based upon existing planning parameters with highest and best use reflected in speculative industrial re-zoning potential within the Western Sydney Priority Growth Area (WSPGA) and Western Sydney Employment Area (WSEA)</b>
27 September	As stated in the finalised valuation report	

Note: Bolding had been added by the ANAO to aid the reader.

Source: ANAO analysis of Department of Infrastructure records.

30 Similarly, as outlined at paragraphs 3.65–3.67, the department's response to another ANAO question did not outline the role the department's instructions played in the selection of comparator properties for valuation purposes.

### *Concerns expressed by the valuer*

3.32 The inappropriateness of the revised instructions, in the context of the professional standards for property valuations and relevant legislation, was made evident in the valuer's responses. An email of 13 June 2017 from the valuer included that:

the revised instruction sits far outside typical valuation methodology given we are being instructed to assess what is essentially a Future Value that would be only available 10 years from now<sup>31</sup>, and does not reflect the typical IVSC Definition of Market Value nor current Acquisition principles either within Land Acquisition (Just Terms Compensation) Act 1991 or transactions undertaken outside of JTC Legislation ...

Notably we are also looking at a figure which would be *significantly* higher than current land prices being achieved for property with speculative industrial re-zoning ... *[emphasis as per original]*

3.33 On 21 June 2017 the department exercised an option to extend the contract for services by three months 'while the scope of the valuation is still being settled between the parties'.

3.34 An email to the valuer on 7 July 2017 contained instructions comparable to those of 9 June. The valuer's response of 10 July included:

It would appear given the past correspondence as regards the proposed acquisition of the "Leppington Triangle" by [the department], that the acquisition will not be undertaken within the Lands Acquisition Act 1989 (the Act) jurisdiction ...

As indicated previously, the revised valuation rationale/assumptions [do] not specifically conform with the IVSC Definition of Market Value, and essentially requires a Hypothetical Future Value that would only be available some 10 years from now subject to re-zoning and Practical Completion and subsequent operation of the Proposed Western Sydney Airport. ...

Notably, owing to Professional Indemnity Restrictions (which would be standard throughout the Valuation Industry presently) our Joint instructing party's in requesting such a Report will need to acknowledge the Report should not be construed as a "*valuation report*" ... *[emphasis as per original]*

3.35 An email of 17 July 2019 to the valuer advised, 'the Commonwealth and LPC have agreed to move forward with the Leppington Triangle valuation based on the original brief as sent through to ... your office on 10 May 2017'.

### *Final instructions*

3.36 The draft valuation report of 2 August 2017 stated the basis on which the firm had been 'specifically instructed to provide a market valuation of the land' being 'on an Englobo rate per square metre basis based upon existing planning parameters with highest and best use reflected in speculative industrial re-zoning potential within the Western Sydney Priority Growth Area (WSPGA) and Western Sydney Employment Area (WSEA)'. The wording of the stated basis differed from the original brief which had not contemplated 'speculative industrial re-zoning' of the land.

3.37 There was no departmental record of the valuer being issued instructions worded in the form of the draft valuation report. The wording was in part, however, consistent with an email

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31 The 10 year timeframe relates to 2027 being the first year in which the Western Sydney Airport will be fully operational (it is scheduled to open December 2026).



exchange of 13 June 2017 which referred to ‘speculative industrial re-zoning potential within the WSPGA and WSEA’.

3.38 Gaps in the record trail were a potential risk with the department’s approach of having two instructing parties allowed to separately and verbally discuss the proposed valuation process with the valuer.

3.39 The department accepted the draft valuation report without change and, consequently, accepted the valuation basis (which appeared prominently in two places within the report).

## What were the method and findings of the valuation report?

A sales comparison method was used that, by instruction from the department, assumed a highest and best use reflected in speculative industrial re-zoning potential that was highly unlikely to occur given existing legal restrictions and the requirements associated with the future development of the airport. Negative impacts on land value (for example, airport noise) and restrictions associated with development controls affecting land around airports were not reflected in the valuation.

The resulting ‘restricted valuation’ was that the value of the land would likely fall within the range of \$28.5 million – \$32 million, should a fully researched valuation be undertaken (which did not happen). Overall, the valuation approach required of the valuer by the department increased the cost of the purchase to the Australian Government.

3.40 In line with the instructions given, MJD submitted a draft valuation report ‘undertaken on a Restricted Assessment – Desktop review’ to the department on 2 August 2017.

## Highest and best use

3.41 An approach commonly adopted is to value land at its highest and best use, which may exceed its current use.<sup>32</sup> The industry definition of ‘highest and best use’ is: ‘The most probable use of a property which is physically possible, appropriately justified, legally permissible, financially feasible, and which results in the highest value of the property being valued’.

3.42 MJD had been instructed to provide ‘a market valuation of the land on an Englobo rate per square metre basis based upon existing planning parameters with highest and best use reflected in speculative industrial re-zoning potential within the Western Sydney Priority Growth Area (WSPGA) and Western Sydney Employment Area (WSEA)’.

## Land zoning

3.43 The reference to ‘legally permissible’ in the industry definition of ‘highest and best use’ excludes potential uses that are not, and are unlikely to become, permitted by land zoning and development controls. A use that is not legally permissible cannot be considered a highest and best use.<sup>33</sup>

32 The NSW Valuer General’s policy on the methods to use when determining compensation for the compulsory acquisition of land includes that ‘market value must assume the highest and best use of the land’.

33 As outlined in the Concepts Fundamental to Generally Accepted Valuation Principles section of the Australia and New Zealand Valuation and Property Standards.

### *Existing land zone*

3.44 The Leppington Triangle was zoned 'SP1 Special Activities' for the purpose of 'Commonwealth activities' under the *Liverpool Local Environmental Plan 2008*. The SP1 zoning restricted the land from development that may adversely impact the future operation of the airport.

3.45 In determining the amount of compensation for the Leppington Triangle, the LAA provides that the limitation imposed by the zoning is to be disregarded and it shall be assumed that the land was subject only to the limitations that would have been likely had it not been affected by the planning restriction.

3.46 In line with the requirements of the LAA, the valuer assessed that, if the Leppington Triangle had not been zoned SP1 then 'it would have been zoned *RU1 Primary Production* in line with surrounding lands'.

### *Speculative industrial rezoning potential*

3.47 The proposed establishment of a Western Sydney Priority Growth Area (WSPGA) was announced by the NSW government in November 2015. A land use and infrastructure plan was to be prepared. The area was intended to facilitate new homes, industry and jobs. Rural lots located in the WSPGA may attract land developers if they foresee the land use plan would result in a higher zoning.

3.48 The valuation report noted that the Leppington Triangle 'is within the Badgerys Creek Airport Precinct (BCAP) being bordered by that part of the Western Sydney Priority Growth Area (WSPGA) bounded by Elizabeth Drive, Badgerys Creek Airport and The Northern Road' and that 'This area is somewhat isolated from the greater part of the WSPGA'. It was therefore less likely to have been afforded a higher industrial land rezoning under the land use strategy.

3.49 It eventuated that the proposed WSPGA was replaced by the Western Sydney Aerotropolis. In the proposed land use and implementation plan released in August 2018, the Leppington Triangle was located in the 'Agriculture and Agribusiness' precinct.

3.50 The Western Sydney Employment Area (WSEA) was established by the NSW Government in August 2009 to provide businesses with land for employment purposes. The Leppington Triangle is not located in the WSEA as described by the original 2009 Land Application Map or the two subsequent revisions of 2015 and 2016. It is also somewhat more isolated from the WSEA than the WSPGA, and is therefore less likely to have been afforded a higher industrial rezoning under the land use strategy. MJD noted in this regard, in its subsequent market rental assessment of the Leppington Triangle in June 2018 procured by the department:

the market for land located outside of the WSEA and generally to the western side of the Northern Road alignment has been impacted by an absence of town planning information that would indicate limited future redevelopment potential other than retention of the present rural zoning philosophies within at least the medium term (2056).

### **Englobo basis**

3.51 The definition of 'englobo' given in the valuation report was 'land ripe for redevelopment'. The valuation report explained that the existing improvements on the site did not 'add to the overall value of the land given its englobo land status'. Land is regarded as a permanent asset, but improvements upon or to the land have a finite life. The unique characteristics of land determine

its optimal utility and existing improvements may not necessarily contribute to the land's total value.

3.52 The NSW Valuer General's policy on the valuation of englobo land states that the term 'usually refers to large parcels of land, consisting of one or more lots, which could be subdivided into at least five or more lots'. The *Liverpool Local Environmental Plan 2008* requires that 'the size of any lot resulting from a subdivision of land ... is not to be less than the minimum size shown on the Lot Size Map in relation to that land'. The minimum lot size for land zoned *RU1 Primary Production* is 40 hectares. The total land size of the Leppington Triangle, 13.62 hectares, is less than the minimum lot size and was therefore not suitable for subdivision based on existing planning parameters.

3.53 In the event that the Leppington Triangle was afforded a higher industrial land zoning, then its size might accommodate subdivision. For example, the minimum lot size decreases to 0.2 hectare for land that is zoned general, light or heavy industrial. The application of development controls would still need to be taken into account to determine what development is legally permissible.

3.54 The industry definition of Market Value includes that the buyer has 'acted knowledgeably, prudently and without compulsion'; such a buyer would be aware of the planning and development controls applicable to the Leppington Triangle.

## **Development controls around airports**

3.55 Development is controlled around airports through a combination of legislation and policy. This includes building height controls, environmental regulations and the management of noise impacts on surrounding communities. The Leppington Triangle's locality, adjacent to an end of the proposed southern runway, limits the 'highest and best use' that is, or is likely to be, permitted by the development controls.

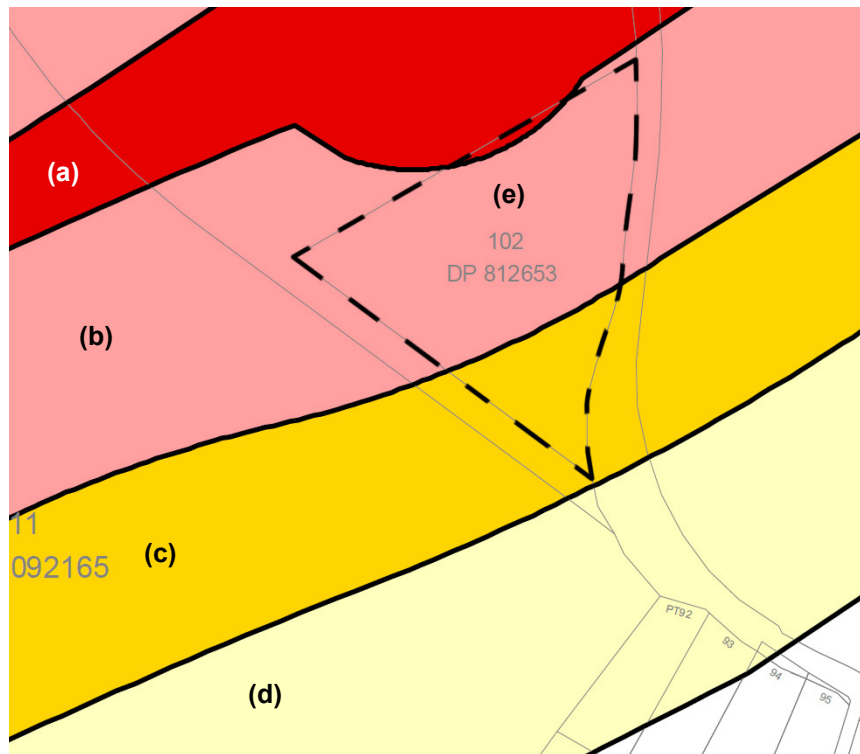
3.56 For example, airspace around an airport is protected and activities that may intrude into protected airspace require approval under the Airports (Protection of Airspace) Regulations 1996. This is because obstructions in the vicinity of an airport, such as tall buildings or air turbulence from vents, have the potential to create air safety hazards and to limit the scope of aviation operations. The most critical areas of concern are the immediate approach and take-off areas.

## **Noise Management**

3.57 On 1 July 2009, a Ministerial direction under subsection 117(2) of the *Environmental Planning and Assessment Act 1979 (NSW)* was issued for the potential second Sydney airport site at Badgerys Creek. The direction prohibits any development that could hinder the 'development of a potential Second Sydney Airport' and is based on the 1985 Kinhill Stearns ANEF contour chart which has provided the basis for the planning protections for the airport site for more than 30 years. Australian Noise Exposure Forecast (ANEF) charts are 'contour maps that show a forecast of aircraft noise levels that are expected to exist in the future' on an average annual day.

3.58 An extract of the Australian Noise Exposure Forecast (ANEF) Contour map applicable to the Western Sydney Airport is shown in Figure 3.1.

**Figure 3.1: Extract of the Australian Noise Exposure Forecast (ANEF) contours for the proposed Western Sydney Airport taken from the Liverpool Local Environmental Plan 2008**



Note a: Red shading indicates an ANEF exceeding 40.

Note b: Salmon shading indicates an ANEF between 30 and 40.

Note c: Dark yellow shading indicates an ANEF between 25 and 30.

Note d: Light yellow shading indicates an ANEF between 20 and 25.

Note e: Triangular area within dashed line is the Leppington Triangle.

Source: Extract of Airport Noise map — sheet NEF-004, *Liverpool Local Environmental Plan 2008*.

3.59 The majority of the Leppington Triangle has an ANEF contour greater than 30, with a smaller portion having an ANEF contour between 25 and 30. Development potential would therefore be constrained by the *Liverpool Local Environmental Plan 2008*. For example, under clause 7.18 in place at the time the valuation was undertaken:

The following development is prohibited—

- (a) educational establishments, hospitals and places of public worship on land where the ANEF exceeds 20,
- (b) dwellings on land where the ANEF exceeds 25 ...,
- (c) business premises, entertainment facilities, office premises, public administration buildings, retail premises and tourist and visitor accommodation on land where the ANEF exceeds 30.<sup>34</sup>

<sup>34</sup> On 10 May 2018, the Australian and NSW governments jointly announced that new residential development around the Western Sydney Airport would not be permitted where ANEF exceeds 20. The announcement stated, 'This is the most stringent ANEF control in the country'.

3.60 Some development may be permitted, on lands with an ANEF between 25 and 30, if it meets the Australian Standard with respect to interior noise levels.<sup>35</sup> Consideration would need to be given as to whether it remained ‘financially feasible’ in line with the definition of highest and best use, once the cost of compliance with the Australian Standard is factored in.

3.61 There was no reference in the valuation report to the impact of development controls on the Leppington Triangle.

3.62 The department was provided with feedback from RMS on MJD’s draft valuation report. Among other things, the feedback raised specifically that there was no mention of the ‘possible effect of Australian Noise Exposure Forecast (ANEF) contours in regard to development potential’. The department did not agree that it was appropriate for airport noise to be taken into consideration and the valuation was finalised without reference to the effect of airport noise on the future development potential of the Leppington Triangle.

3.63 By way of contrast, a valuation procured by RMS and provided to the department for information contained a detailed consideration of airport noise affectation on the development potential of the Leppington Triangle. The ANAO also examined five valuation reports that were procured by the department for the expansion of another airport. In these five reports, the effect of airport noise on the market value of each property was taken into account and the value adjusted downward where appropriate. The approach taken for the Leppington Triangle purchase was inconsistent both with the NSW government’s valuation approach for this land as well as with precedents within the Department of Infrastructure.

### **Sales comparison approach**

3.64 MJD employed a sales comparison approach to establish market value. In this approach, the subject property is compared with sales of similar or substitute properties that have been transacted in the market. In addition to recent sales, the valuation took into consideration speculative land purchases which included favourable purchase terms for the buyer in the way of options or delayed settlement. Properties that were currently listed on the market but which had not been sold were also considered.

3.65 As part of the financial statement audit (see paragraph 1.2) the ANAO asked the department in August 2019 whether it had confirmed ‘that the selection of relevant properties was not selective, or that alternative properties may have provided a different result’. The department replied ‘No; the department relied on the expertise of the valuer in selecting relevant properties’. This advice did not outline the role the department’s instructions had played in the selection of comparator properties.

3.66 According to evidence collected as part of this performance audit, the valuation firm had sought clarification from the department as to the nature of the properties it was to use as comparators. An email to the department of 6 June 2017 from MJD included:

From our brief initial review of sales and listings, several properties on the eastern side of The Northern Road appear to be advertised as having industrial rezoning potential and are being

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<sup>35</sup> Standards Australia, *Acoustics — Aircraft noise intrusion — Building siting and construction, AS 2021—2000*, Standards Australia International Ltd, Sydney, 2000.

marketed/purchased/Optioned on this speculative basis. Therefore prices for properties on the eastern side of The Northern Road may show a premium over other properties in the locality.

The 'Brief for Valuation Services' indicates the Highest & Best Use valuation, which may include uses for industrial purposes, is required. This presumably assumes a 'speculative' land value basis similar to those properties on the eastern side of The Northern Road, presumably due to the subject's main road frontage and position directly opposite the main airport site, rather than to those properties on the western side of The Northern Road (where the subject is actually located) which may not show such a premium.

We just want to confirm that this is correct, that both parties are on the same page and that we have a clear instruction as to the above.

3.67 The department's response to the valuation firm included: 'we consider that [your] interpretation and proposed approach for the valuation would be consistent with the terms of the brief'. The valuation was undertaken as instructed, with the result being that the properties used in the sales comparison did not reflect key characteristics of the Leppington Triangle land.

3.68 In relation to the sales evidence underpinning the draft valuation report, RMS provided the following comments to the department:

- The [sales] evidence considered, specifically, above \$200/m<sup>2</sup> have 'options' and are not completed transactions.
- In instances of purchasing a property subject to terms, a copy of the full sales contract/deed should be obtained to appropriately ascertain the terms and condition of the sale.

3.69 No actions were taken by the department to address these comments.

### **Indicative value range**

3.70 A Restricted Assessment provides for a Restricted Valuation, which is a qualified opinion of the value of a property provided in response to a specific instruction by the client not to carry out the usual enquiries and investigations associated with a market valuation.

3.71 The draft valuation report contained the applicable qualifying statement, being that it was providing 'an indication of the value range that the market value of the property is likely to fall within should a fully researched valuation assessment of the property be undertaken within the definition of Market Value'. The indicative market value range for the Leppington Triangle was as follows:

For the purposes of this valuation we have assessed a Market Value range of circa \$28,500,000 – \$32,000,000 and assessed market value at \$30,000,000 or \$220 per square metre in line with our instructions.

3.72 Valuation assessments are time-specific as of a given date, because markets and market conditions may change. The date at which the indicative value range for the Leppington Triangle applied was 31 July 2017.

3.73 The risks of value variability would have been mitigated by the department obtaining a full valuation, with a detailed site inspection and all relevant enquiries being undertaken, so as to obtain a single point value in accordance with the definition of Market Value.

## Shortcomings of approach taken

3.74 The department, in deciding to spend up to \$31.78 million in public money on the acquisition of the Leppington Triangle, placed reliance on the approximate mid-point of an indicative value range that spanned \$3.5 million and was derived from a Restricted Assessment. Such an approach, when seeking a Full Speaking Valuation was a course of action the department could have pursued, was not prudent.

3.75 The risks associated with the indicative value range were heightened by the instructed use of a scenario for establishing value that was improbable and likely exceeded the 'highest and best use' that was legally permissible. The instructions were consistent with the department's acquisition strategy of compelling an unwilling seller. The instructions were inconsistent with the definition of market value which requires, among other things, that an exchange takes place between a 'willing buyer and a willing seller...wherein the parties had each acted knowledgeably, prudently, and without compulsion'. The department's approach was also inconsistent with its assertions that early purchase allowed it to capitalise on 'goodwill' from the landowner.

3.76 The ANAO notes in this context that the March 2017 departmental record of approval to procure the valuation services included:

We have identified a potential risk associated with this approach to valuations work. The potential for the valuation activities, including the instructions provided and the land value advised, to be disclosed publicly, which may invite scrutiny over the Department's activities. Should the terms on which the valuation is conducted become public, the Commonwealth may be criticised for its approach. However the result of any such scrutiny is unlikely to affect the Commonwealth's ongoing activities or reputation with respect to the Airport Site, since seeking a valuation in coordination with a significant landholder is an appropriate approach at this stage of airport planning. Further, to mitigate this risk, LPC and MJD will be required to sign deeds of confidentiality, in addition to the standard conflict of interest declaration.

3.77 If the department had instead chosen to procure a full valuation that accorded with industry standards, it would have received a single-point assessment of market value that was reasonable to rely upon, publically defensible and consistent with the LAA.

## What was the basis for the department accepting the valuation report?

The recorded basis for the department accepting the draft valuation report, without edit, was confirmation from the landowner that the report could be finalised. The department did not take up the suggestions offered by the NSW government on the draft valuation report nor take action in response to advice that the NSW government had valued the land substantially lower.

3.78 Consistent with the terms of the contract, the draft valuation report was submitted to the department by the valuer on 2 August 2017 to provide the opportunity for the department and LPC to provide comments.

3.79 Prior to finalising the draft valuation report, the department learned that RMS NSW had already undertaken a valuation of the Leppington Triangle. The department shared its draft valuation report with RMS NSW on 3 September 2017 on the basis that 'Given our common interests in this area, and to help reduce the possibility of LPC using WSU/RMS valuations as leverage in our respective acquisition negotiations'.

3.80 At 2:45pm on 20 September 2017, RMS NSW in turn shared their February 2017 valuation report of the Leppington Triangle with the department. The RMS NSW procured report valued the land at \$50 per square metre, which equates to 23 per cent of the \$220 per square metre indicated by the department's draft valuation. The RMS NSW also provided the following 'general comments' on the department's draft valuation report:

- The [sales] evidence considered, specifically, above \$200/m<sup>2</sup> have 'options' and are not completed transactions.
- In instances of purchasing a property subject to terms, a copy of the full sales contract/deed should be obtained to appropriately ascertain the terms and condition of the sale.
- No commentary in consideration of possible effect of Australian Noise Exposure Forecast (ANEF) contours in regard to development potential has been mentioned. ...
- To ensure consistency is maintained, it is suggested the respective valuers of DIRD and RMS meet to discuss the difference in assessments.

3.81 At 4:28pm on 20 September 2017, the department met with LPC. The departmental File Note of the meeting includes: 'Discussed methodology for valuation – no problems noted, will confirm it is ok to finalise the draft.'

3.82 An internal email, dated 21 September 2017, regarding RMS NSW comments reveal that the department considered:

the RMS comments on the ... valuation are sensible for most cases but are misconceived for the Leppington Triangle val [sic] because that block of land is proposed, if acquired, to be a part of an airport. There aren't any comparable sales for such a purpose and the ANEF is clearly not a consideration. Perhaps the purpose of the Leppington Triangle acquisition needs to be explained to RMS, which may obviate the need for the valuers to get together.

3.83 The department did not take up RMS NSW's suggestions. Further, no comments were provided to MJD on the draft valuation report nor amendments sought. On 26 September 2017 the department advised the valuer: 'We've now had confirmation from LPC that they are happy to finalise the report' and that 'as such, could you please finalise the valuation'. The final valuation report was emailed to the department on 27 September 2017.

### Recommendation no.3

3.84 The Department of Infrastructure, Transport, Regional Development and Communications develop policies and procedures to govern its approach to obtaining purchase valuations.

**Department of Infrastructure, Transport, Regional Development and Communication's response:** *Agreed.*

3.85 *The Department will develop specific guidance materials on obtaining purchase valuations in consultation with the Department of Finance, to ensure that protocols are in line with operations of the Lands Acquisition Act 1989. All guidance material will be made available to staff and appropriate training provided.*



## 4. Advice to decision-makers

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### Areas examined

The ANAO examined whether decision-makers were appropriately advised on the land acquisition.

### Conclusion

Decision-makers were not appropriately advised on the land acquisition. Formal briefings omitted relevant information, such as: the purchase price; that the price exceeded all known market valuations of the land; and the method of acquisition. Advice from the department on value for money was inadequate and unreliable. Decision-maker approval was not evident for some of the actions taken. A subsequent departmental review of the acquisition process lacked rigour and did not provide a reasonable basis for concluding that the transaction was settled for an appropriate value.

The incomplete advice provided to decision-makers, and the inadequate response by the department when questions were raised by the ANAO, was inconsistent with effective and ethical stewardship of public resources.

### Areas for improvement

Effective stewardship of public resources requires that concerns expressed by integrity agencies be taken seriously. The Department of Infrastructure's response when concerns about this acquisition were raised by the ANAO was inadequate.

4.1 The ANAO examined the 10 written briefings on the acquisition of the Leppington Triangle that were submitted to the head of the Western Sydney Unit, to senior officials elsewhere in the department (the 'decision-makers') and/or to portfolio Ministers.<sup>36</sup> The Department of Infrastructure, Transport, Regional Development and Communications ('Department of Infrastructure' or 'the department') confirmed to the ANAO that these constituted the total population of briefings on the topic. The briefings spanned a four-year period from November 2015 to November 2019.

4.2 The ANAO examined the extent to which the briefings demonstrated that decision-makers were appropriately advised on the land acquisition through the provision of sufficient, relevant and reliable information. Where the briefings did not address key matters, then the ANAO considered whether there was evidence elsewhere of decision-makers being appropriately advised.

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36 Other departmental officials within the Western Sydney Unit were not considered 'decision-makers' for the purpose of the ANAO analysis. Officials at General Manager level and below were 'action officers' who liaised with advisors and the landowner and who provided advice to decision-makers on the acquisition. There were no briefings on the acquisition submitted to officials at these levels. The segregation of duties in procurement is important for maintaining fairness and transparency and for managing risks to public money.

## Were decision-makers appropriately advised as to the method of acquisition?

The departmental decision-maker was appropriately advised in 2016 when giving approval to pursue the acquisition of the Leppington Triangle by compulsory process. Thereafter, decision-makers were not advised as to the method of acquisition, which had changed. The land was acquired in July 2018 by way of agreement with the owner.

4.3 The two methods of acquisition available to the Department of Infrastructure under the *Lands Acquisition Act 1989* (LAA) were to acquire the Leppington Triangle by compulsory process or by agreement. There are important differences between the two methods, including that the key powers of the Minister for Finance have not been delegated for acquisitions by compulsory process, whereas some powers have been delegated to facilitate acquisitions by agreement. It is therefore important that decision-makers are appropriately advised as to the method of acquisition adopted.

### Advice to decision-makers

4.4 The head of the Western Sydney Unit (SES Band 2) was provided appropriate advice on which to base their October 2016 decision to pursue an acquisition by compulsory process. The briefing package included an eight-page 'LPC Strategy' prepared by the Unit with input from its legal advisor. It also attached advice from the Department of Finance, which administers the LAA. The Department of Finance advice included comments on the LPC Strategy for consideration and it detailed the steps required to compulsorily acquire the Leppington Triangle. While elements of the LPC Strategy itself were not appropriate (see section starting at paragraph 2.49) the briefing package contained sufficient, relevant and reliable information on which to base a decision on the acquisition method to employ.

4.5 In late 2017, the department changed the method to instead pursue an acquisition by agreement. As a result, the Leppington Triangle was acquired on 31 July 2018 under the acquisition by agreement provisions of the LAA.

4.6 The October 2016 briefing package was the third in the series of 10 briefings to decision-makers and Ministers. None of the seven briefings that followed it appropriately advised the method of acquisition. Of these seven:

- a July 2018 briefing to the department's Chief Operating Officer, recommending that he execute the land purchase documents, incorrectly stated it was a 'compulsory acquisition by agreement' rather than an acquisition by agreement;<sup>37</sup>
- four briefings contained reference to it being an acquisition under the LAA but did not specify whether it was by compulsory process or by agreement; and
- two briefings referred to it as a 'purchase'.

4.7 None of the briefings mentioned that the acquisition method had changed from that set out in the approved acquisition strategy. There was no record of an approval by a Department of Infrastructure decision-maker to change the method, such as by way of approving an updated acquisition strategy.

4.8 The department advised the ANAO in July 2020 that 'In the context of the decision to change from compulsory process to voluntary process, the change in LAA pathway was seen as more of a technical change within the remit of the relevant SES B1'. The ANAO considers the change in pathway to be a more substantial decision, with implications that included shifting the decision-making authority from the Minister for Finance to a departmental delegate. There was no documented approval of the change by the 'SES B1' officer.

### Were decision-makers appropriately advised as to the amount to be paid to the landowner?

The approach taken by the department of omitting key information in the briefings to decision-makers and Ministers was inappropriate and inconsistent with acting ethically. Decision-makers were not appropriately advised as to the amount to be paid to the landowner. While some briefings outlined the basis on which the market value of the land would be calculated, all omitted to state that value. It was not made evident that the department intended to pay a per hectare rate some 20 times higher than that proposed by the NSW government for its portion of the Leppington Triangle.

37 The Department of Infrastructure's land transaction table recorded that the 'legal approach' taken to acquire the Leppington Triangle was a 'compulsory acquisition by agreement'.

In July 2018, the department referred to the 'compulsory acquisition of the Triangle' in advice to WSA Co Limited. In subsequent email exchanges, the company queried why the department was compulsorily acquiring the land when the landowner had agreed to the sale. The department advised it was 'acquiring the Triangle in agreement'. The company then asked 'So it would be wrong to call it a "compulsory acquisition" then?' The department responded 'That is how we refer to it — compulsory acquisition by agreement — but [legal advisor] from the AGS tells me that's not technically correct'.

The department had verbally advised the ANAO in September 2019 and in November 2019 that it was a 'compulsory acquisition by agreement', explaining the term as their having sought agreement with the landowner first and then used the compulsory acquisition powers under the LAA to extinguish rights to the land.

The department advised the ANAO in July 2020, in response to the ANAO's report preparation papers for this audit, that the reference in the July 2018 briefing to the acquisition being a compulsory acquisition by agreement 'is incorrect, likely an error in carrying over information from earlier briefings'.

4.9 The Leppington Triangle was originally 13.62 hectares in size. The NSW government was to acquire a 1.36 hectare portion for The Northern Road realignment project. Its assessment and offer of compensation to the Leppington Pastoral Company (LPC) for the 1.36 hectare portion was undertaken independent of the Department of Infrastructure and was governed by State legislation.

4.10 The Department of Infrastructure managed the acquisition of the remaining 12.26 hectares. Section 51(xxxi) of the Constitution of Australia requires that the acquisition of land be on 'just terms'. Landowner entitlements to be paid compensation on 'just terms' are detailed in the LAA and differ according to whether the land is acquired by compulsory process or by agreement.

### **Compensation for an acquisition by compulsory process**

4.11 The LPC Strategy approved in October 2016 involved acquiring the Leppington Triangle by compulsory process. Under the LAA, where land is acquired by compulsory process, the amount of compensation the owner is entitled to be paid 'is such amount as, having regard to all relevant matters, will justly compensate the person for the acquisition'. The LAA steps out the compensation process and the types of compensation that might be payable. The types of compensation include: market value, special value, severance loss, injurious affection, disturbance loss, disadvantage payment, and reasonable legal and professional costs.

#### ***Approach taken to assessing compensation***

4.12 Neither the LPC Strategy nor the related briefing package provided the decision-maker with an estimate of the likely amount of compensation to be paid. The briefing advised that a valuation of the Leppington Triangle would be procured, which would 'include land valuation and assessment of any other compensation payments payable by the Cth under the LAA (e.g. business disruption costs)'. The scope of works then issued for the valuation, however, did not require an assessment of compensation beyond the market value component. Records indicate that the department did not assess or estimate the amount payable in respect of the other heads of compensation set out in the LAA for compulsory acquisitions.

4.13 The department procured a 'Restricted Assessment' of the Leppington Triangle, in which the valuer 'assessed a Market Value range of circa \$28,500,000 – \$32,000,000 and assessed market value at \$30,000,000'.<sup>38</sup> This assessment was of the full 13.62 hectare parcel of land. (The approach taken to valuing the land is the focus of Chapter 3 of this audit report.)

#### ***Proposed amount of compensation***

4.14 Departmental officers met with the landowner (LPC) in November 2017 to discuss the commercial principles for the acquisition. The department then confirmed in writing with LPC the details of the commercial principles it would take 'forward for further discussion within the Commonwealth'. These included:

1. Lump sum all-inclusive compensation payment including for all claims for compensation under the *Lands Acquisition Act 1989* (LAA) of an amount equal to \$30m less the amount of compensation paid/payable by RMS [the NSW government] to Leppington for RMS' acquisition ...

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38 All dollar values in this Auditor-General report are GST exclusive for ease of comparison, unless otherwise specified. The Department of Infrastructure paid a GST inclusive price for the land.

2. Acquisition to be with Leppington's agreement but via compulsory process under the LAA.

4.15 It was inappropriate for the department to have negotiated a commercial principle intended to restrict LPC's claims for compensation to the market value component only for a compulsory acquisition. That is, to the \$30 million valuation minus the amount to be paid by the NSW government for its 1.36 hectare portion. The Minister for Finance's power to accept or reject a claim for compensation for a compulsory acquisition has not been delegated to the Department of Infrastructure.

### **Compensation for an acquisition by agreement**

4.16 From late November 2017, the Department of Infrastructure changed its method to be one of acquisition by agreement. The recorded reason was so as to be more confident that the land would be acquired, and compensation paid, by 31 July 2018. The change in approach meant that the Finance Minister would not be involved as would have been necessary had the approved compulsory process been continued with.

4.17 None of the briefings examined advised a decision-maker of this change (see further at paragraphs 4.6–4.7) or sought approval for the change to the method previously approved.

4.18 The LAA does not specify heads of compensation for an acquisition by agreement. The amount of compensation payable was a matter for the Department of Infrastructure and LPC to reach agreement on. Nevertheless, the department was obliged to ensure that the acquisition was on 'just terms' and, as with any procurement, that it:

- achieved value for money;
- used public resources in an efficient, effective, economical and ethical manner; and was
- consistent with the principles of transparency, accountability, ethics and probity.

4.19 Where land is available for public sale then it may be reasonable that compensation not extend beyond the market price. Where land is not listed for sale on the open market — as was the case with the Leppington Triangle — then the general principles and types of compensation set out in the LAA for compulsory acquisitions offer agencies a guide to transparently and ethically agreeing an amount of compensation that is just. It is noted that the NSW government's *Land Acquisition (Just Terms Compensation) Act 1991 No 22* requires that, where land not available for public sale is acquired by agreement, the authority of the State is to take into account the same matters when determining the compensation payable as for an acquisition by compulsory process.

4.20 There was no indication in the records that the Department of Infrastructure gave due consideration to offering compensation for matters beyond market value. No related advice to decision-makers was in departmental records.

### **Purchase price agreed and paid**

4.21 In March 2018, the financial delegate (a Deputy Secretary in the Department of Infrastructure) approved the expenditure of up to \$31.78 million of administered funding to acquire a 12.26 hectare portion of the Leppington Triangle. The related advice to the financial delegate included that, 'the purchase price has been agreed in-principle between the department and LPC as \$30,000,000 minus the value of the 1.36 hectare portion of the parcel that RMS [the NSW government] will acquire'.

4.22 The Department of Infrastructure had agreed that LPC would receive \$30 million for the whole 13.62 hectares. If the NSW government paid at a lower per hectare rate for its portion — which eventuated — then the department would underwrite the difference by increasing the price of its 12.26 hectare portion. The briefing to the financial delegate did not explain that this was occurring, or set out the reasons why this was considered a proper use of public money.

4.23 The briefing to the financial delegate did not provide adequate advice on why the valuation was so high. Rather than outlining the steps the department had taken to require a valuation approach that would increase the cost of the purchase to the Australian Government (see section starting at paragraph 3.40), the briefing suggested the high valuation reflected increasing property prices:

We consider this figure [*the \$30 million*] reasonable and consistent with our own estimations, albeit reflecting the recent sharp increase in property prices in the area.

4.24 On 1 June 2018, the department emailed a draft contract for sale to LPC for comment. As the amount to be paid by the NSW government had not yet been settled, the department proposed to pay a pro rata amount for the 12.26 hectares with an adjustment mechanism included in the contract. Specifically, the draft contract:

- recorded the price to be paid by the Australian Government on settlement as \$27,004,405 (calculated using the formula:  $\$30 \text{ million} \div 13.62 \text{ hectares} \times 12.26 \text{ hectares}$ ); and
- outlined the method for adjusting the price should the amount later paid by the NSW government for the remaining 1.36 hectares be either more or less than \$2,995,595.

4.25 On 23 June 2018, LPC provided the department with evidence that the price likely to be paid by the NSW government for the 1.36 hectares was in the order of \$162,168. The Department of Infrastructure had overestimated the amount the NSW government would value the land at by 1,747 per cent. The significant difference in valuations of the Leppington Triangle land for purchase purposes was not included in any briefings to decision-makers.

4.26 On 29 June 2018, the department emailed LPC an amended draft contract and stated that 'The Commonwealth is agreeable to using the [NSW government] valuation figure as the basis for the proposed adjustment mechanism in the Leppington Triangle purchase contract.' No record of advice to a decision-maker seeking such agreement was identified.

4.27 The department had amended the draft contract to:

- increase the proposed price from \$27,004,405 to \$29,837,832; and
- outline the method for adjusting the price should the amount paid by the NSW government be either more or less than \$162,168.

4.28 The acquisition took effect on 31 July 2018 and the Australian Government made an initial payment of \$29,837,832.

4.29 In March 2019, LPC provided the department with the notice of compensation paid by the NSW government and the associated valuation report of November 2018 that underpinned it. This was to inform the calculation of the final price to be paid by the Australian Government as per the adjustment mechanism in the contract. That is, to calculate whether the amount actually paid by the NSW government was more or less than the expected \$162,168.

4.30 The valuation report of November 2018 outlined that the NSW government had acquired two other parcels of land in addition to the portion of the Leppington Triangle. The NSW government had paid:

- \$109,090 per hectare for the Leppington Triangle land specifically; and
- \$118,103 per hectare *on average* for all three parcels of land.

4.31 The approach then taken by the Department of Infrastructure was as follows:

- The department used the higher \$118,103 per hectare rate to calculate that the NSW government had paid \$160,974 for its 1.36 hectare portion of the Leppington Triangle. This was consistent with the terms of the contract, whereby the 'amount of compensation paid or payable by RMS to the vendor will be apportioned on an area basis' for the purposes of the adjustment mechanism.
- The department then paid LPC an additional \$1,194 as per the adjustment mechanism formula:  $\$162,168 - \$160,974 = \$1,194$ .

4.32 The price ultimately paid by the Australian Government for the 12.26 hectares was therefore \$29,839,026. The total GST inclusive price paid was \$32,822,929.

### **Advice to decision-makers on the price**

4.33 The first briefing submitted after the financial delegate's approval of March 2018 was dated 4 July 2018. That is, dated after the department had agreed with the landowner a price of some \$29.8 million.

4.34 The briefing of 4 July 2018 was to provide the head of the Western Sydney Unit with a 'Leppington Triangle acquisition update' and was copied to the relevant Deputy Secretary and the department's Chief Operating Officer. It contained no reference to price. It included (as an attachment) a copy of the March 2018 briefing, which outlined that the price would be calculated as \$30 million minus the value of the portion acquired by the NSW government.

4.35 The next briefing on the acquisition was dated 17 July 2018 and was submitted to the Chief Operating Officer and copied to the Deputy Secretary. It similarly contained no reference to price.

4.36 The next briefing was dated 25 July 2018. It recommended that the Chief Operating Officer sign the contract for sale and other documents on behalf of the Australian Government and it was copied to the Deputy Secretary. The three-page covering brief contained no reference to price. The purchase price was recorded within the 218-page package of documents attached to the brief (on the 13<sup>th</sup> and 46<sup>th</sup> page).

4.37 On 31 July 2018, a 'Leppington Triangle acquisition update' was sent to the Minister for Urban Infrastructure and Cities and was copied to the Secretary and the Deputy Secretary of the department. The ministerial briefing advised that the 'July 2017 report valued the land at \$30 million' and that the NSW government had commenced an acquisition process to acquire a 1.36 hectare portion. It further advised that:

The eventual Triangle purchase was, therefore, 12.26ha, with a reduction in price from [the July 2017] valuation commensurate with the amount [the NSW government] pays to LPC for its 1.36ha parcel. As the Valuer General has not yet determined the final price of the NSW [government] parcel, an adjustment will be made post-settlement in favour of either the Commonwealth or LPC to ensure that LPC receives no more and no less than \$30 million for the full 13.62ha.

4.38 The ministerial briefing did not state that \$29.84 million had been paid to LPC for the 12.26 hectares on the expectation that the NSW government would pay \$0.16 million for its 1.36 hectare portion. It was not evident in any of the July 2018 briefings that the Australian Government was intending to pay over 20 times more per hectare than the NSW government (and ultimately paid 22 times more).

4.39 The approach taken by the department of omitting key information in the briefings to decision-makers and Ministers was inappropriate and inconsistent with acting ethically.

### Were decision-makers appropriately advised as to value for money?

Decision-makers were not appropriately advised as to the value for money of the terms of the land acquisition. Briefings lacked balance in that, while they presented confirming evidence as to the reasonableness of the proposed land price, they omitted evidence that the price was too high including reference to other valuations of the land. This approach was misleading and did not support informed decision-making. Overall, the lack of transparency evident in briefings concerning the basis for valuations and the price being paid was inconsistent with an ethical approach to public administration.

4.40 A land acquisition is a procurement. Achieving value for money is the core rule of the *Commonwealth Procurement Rules*, as it is critical to ensuring that public resources are used in the most efficient, effective, economical and ethical manner. The Rules also outline that the documentation maintained on each procurement should provide accurate and concise information on how value for money was considered and achieved.

#### Advice to the financial delegate

4.41 Only one of the 10 briefings to decision-makers and Ministers contained a reference to value for money in the context of the Leppington Triangle acquisition.

4.42 The reference to value for money was in a March 2018 briefing to a Deputy Secretary obtaining their approval as financial delegate to expend up to \$31,780,000 to acquire the land. The briefing included:

The purchase price has been agreed in-principle between the department and LPC as \$30,000,000 minus the value of the 1.36 hectare portion of the parcel that RMS will acquire ..., with an 8 percent per annum interest rate payable should settlement not occur by 31 July 2018. These terms form part of a set of commercial principles agreed in-principle by the parties ...

The purchase figure is based on a July 2017 valuation report by MJD Realty Appraisals' (MJD), which valued the land (then 13.62 hectares) at \$30,000,000. We consider this figure reasonable and consistent with our own estimations, albeit reflecting the recent sharp increase in property prices in the area. WSU is satisfied that, after these reasonable enquiries, this procurement achieves a value for money outcome.

#### Basis for approving \$31.78 million

4.43 The March 2018 brief to the financial delegate did not advise the price expected to be paid for the land, beyond it being less than \$30 million. Calculated on a pro rata basis, the expectation was that the Australian Government's 12.26 hectare portion would cost in the order of \$27 million. The requested amount of \$31.78 million therefore exceeded the likely purchase price by between



\$1.78 million and \$4.78 million. It was not appropriate for departmental officials to have requested, or for the delegate to have approved, an excess of this magnitude in the absence of a clear record as to the purpose and value for money of the proposed expenditure.

### *Interest payable*

4.44 The only cost additional to the purchase price, which was mentioned in the briefing, was the '8 percent per annum interest rate payable should settlement not occur by 31 July 2018'. Reference to the interest payable had also appeared in a January 2018 briefing to the Minister. If triggered, the interest payable would be in excess of \$200,000 per month uncapped (see paragraphs 2.71–2.72).

4.45 The payment of interest was one of the commercial principles that departmental officials had developed with the landowner. Its intent was 'to provide an incentive to the Commonwealth to keep things moving to make the deadline'. The January 2018 briefing had advised the Minister that 'we consider the commercial principles developed reflect a reasonable position reached between parties with generally equal bargaining power negotiating on equal terms'.

4.46 While both the financial delegate and the Minister were told about the interest payable, there was no evidence that the arrangement had been presented to a decision-maker for approval. There was no record as to the basis on which the payment of interest, should the land not be acquired by 31 July 2018, would represent value for money to the Australian Government. Nor is a potential basis apparent, given the land was being purchased some decades in advance of need.

4.47 The commercial principle was not embodied in a signed contract. There was a risk that, if challenged, the exchanges of emails with the landowner developing the principle may have given rise to a legal or ethical obligation to pay. As the target date was achieved, the nature and terms of the agreement were not tested.

### **Basis for considering the figure reasonable**

4.48 The briefings to decision-makers omitted the purchase price (as outlined above in paragraphs 4.33–4.39). The price was instead presented as '\$30,000,000 minus the value of the 1.36 hectare portion of the parcel that RMS will acquire'. Advice that the department considered 'this figure reasonable' was provided to: the financial delegate in March 2018; the Chief Operating Officer in July 2018; and the Minister in January and July 2018. On each occasion, the given justification was that the figure was:

- based on the July 2017 valuation report by MJD; and
- 'consistent with our own estimations, albeit reflecting the recent increase in property prices in the area'.

### *Based on the valuation report*

4.49 Decision-makers were not advised, in any briefing or document examined, that:

- the valuer had been given specific instruction 'not to carry out the usual enquiries and investigations associated with a market valuation';
- the valuation report was 'a Restricted Assessment – Desktop review' and the department had accepted 'the commercial risks inherent in relying upon a Restricted Assessment';

- the valuer had been instructed by the department to assume a highest and best use reflected in 'speculative industrial re-zoning potential' that was highly unlikely to occur given existing legal restrictions and the requirements associated with the future development of the airport; and
- \$30 million was the approximate mid-point of an indicative 'value range that the market value of the property is likely to fall within should a fully researched valuation assessment of the property be undertaken'.

4.50 A copy of the valuation report was not attached to any briefing.

#### *Consistent with own estimations*

4.51 While decision-makers were advised that the 'figure' for the land was consistent with the department's own estimations, they were not provided any information about those estimations. In September 2019 the ANAO (in the context of the audit of the department's 2018–19 financial statements – see paragraph 1.2) requested 'documentation or other items that would support the assessment that the purchase price valuation was within estimation of the department'. In its reply, the department pointed to three items in particular:

- Research conducted by the department in early February 2016 from sales near the airport in 2014 and 2015 indicated that some properties had already achieved sale prices in excess of \$1 million per hectare ...
- In March 2016 we received draft advice ... from EY ... which included cost estimate assumptions ...
- A figure of \$31.78 million (as a p90 contingency) was adopted by our commercial advisors ... in October [2016] for the Leppington Triangle. Because of the considerations outlined in the EY advice, and our own understanding of the project, this budget envelope did not seem unreasonable.

4.52 The 'research conducted by the department' was a spreadsheet listing 28 property sales across seven suburbs near the airport site, of which:

- 18 sales were properties of between two and three hectares in size, with prices averaging \$1.09 million per hectare; and the other
- 10 sales were properties of over 10 hectares each in size, with prices averaging \$0.18 million per hectare.

4.53 The cost estimate that appeared in the March 2016 draft advice from EY (Ernst & Young) had been given to EY by the department, meaning it was not advice to the department. The estimate was \$23.80 million and had been derived by the department as follows:

- a per hectare rate of \$1,166,713 was calculated based on two property sales in the neighbouring suburb of Badgerys Creek, which were each two hectares in size (one included two dwellings, the other a single dwelling);
- the rate was increased by 50 per cent to produce a 'premium rate per hectare' of \$1,750,070; and
- the premium rate was then multiplied by 13.6 (being the approximate size of the Leppington Triangle) to produce the \$23.80 million estimate provided by the department to EY.

4.54 The cost estimate that was adopted in October 2016 by the commercial advisors (WT Partnership) had also been provided by the department. It was \$31.78 million and had been derived by the department as follows:

- the per hectare rate of \$1,166,713 (previously calculated from the two property sales) was increased by 100 per cent to produce a new 'premium rate per hectare' of \$2,333,426; and
- the new premium rate was then multiplied by 13.62 (being the actual size of the Leppington Triangle) to produce the \$31.78 million estimate provided by the department to the commercial advisors.

4.55 The department's \$31.78 million estimate for the Leppington Triangle was used in the final Western Sydney Airport project budget and was the upper limit approved by the financial delegate in March 2018.

### **Benchmarking against other valuations**

4.56 Benchmarking can help to establish, and to demonstrate, that a proposed price is reasonable and represents value for money. The briefings had advised decision-makers that the proposed land price was found to be reasonable in light of the MJD valuation and the department's own estimations.

4.57 Decision-makers were not advised as to how the proposed price fared in comparison to other relevant valuations that the advising officials had copies of. The valuations did not need to be like-for-like for benchmarking to have been beneficial, as rates can be adjusted to account for differences.

4.58 The ANAO compared the \$2,433,852 per hectare rate the Australian Government paid for the Leppington Triangle against the rates presented in other valuations of the same or similar properties, as outlined in Table 4.1.

4.59 The results did not support the proposition that the price was reasonable. The Australian Government paid nearly five-times more per hectare than the highest rate outlined, and over 20 times more than the NSW government was expected to pay for its portion of the Leppington Triangle.

**Table 4.1: Comparison of the \$2,433,852 per hectare paid against other valuations**

Source	Purpose of valuation	Rate per hectare (% of \$2,433,852)
Valuations of the Leppington Triangle		
Report provided to the department by the NSW government in September 2017	Market valuation of the Leppington Triangle as at 6 February 2017 for acquisition purposes	\$500,000 <sup>a</sup> (21%)
Letter from NSW government to LPC in February 2017, provided to the department by LPC in June 2018	Letter of potential compensation of the acquisition of land, which included a portion of the Leppington Triangle and presented two purchase options	\$118,979 <sup>b</sup> (5%)
Report procured by the department for the purpose of setting the rent to be paid by LPC when the land was leased back	Market rental valuation of the Leppington Triangle as at 5 June 2018, based on its existing agricultural purposes and purposes ancillary thereto	\$75,041 (3%)
Valuations of land 10–12 hectares in size within a 3 km radius of the Leppington Triangle		
Report procured by the department for financial statement reporting of Administered land assets as at 30 June 2017	Fair value desktop assessment of:	
	<ul style="list-style-type: none"> <li>221 Greendale Road, Greendale</li> <li>2155 The Northern Road, Luddenham</li> </ul>	\$475,000 (20%)
	<ul style="list-style-type: none"> <li>335, 355 &amp; 400 Willowdene Avenue, Luddenham</li> </ul>	\$400,000 (16%)
	<ul style="list-style-type: none"> <li>5 &amp; 15 Vicar Park Lane, Luddenham</li> </ul>	\$375,000 (15%)

Note a: The market valuation had a per square metre rate from which the per hectare rate was calculated by the ANAO.

Note b: This figure is as calculated by the Department of Infrastructure based on the options outlined in the letter. It is the per hectare rate the department expected the NSW government would pay for its portion of the land.

Source: ANAO analysis of Department of Infrastructure records.

4.60 The acquisition process gained momentum in the lead up to the 31 July 2018 target date. There was no indication that the department paused to re-examine its assumptions as to the reasonableness of the \$30 million figure when it received counter evidence. Each of the valuations in Table 4.1 had been obtained by the department between September 2017 and June 2018, prior to acquiring the Leppington Triangle.

4.61 None of the valuations illustrated in Table 4.1, or their findings, were mentioned in the briefings to decision-makers. Omitting reference to the NSW valuations of the land, in particular, was inconsistent with the conduct expected of departmental officers.<sup>39</sup>

4.62 The briefing approach taken did not support sound decision-making. The records of the land acquisition did not demonstrate that value for money had been adequately considered or was achieved.

39 The Code of Conduct set out in section 13 of the *Public Service Act 1999* includes that 'An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment' and 'An APS employee must behave honestly and with integrity in connection with APS employment.'

## Did the department's review of the acquisition process account for the difference between the purchase price and the asset valuation?

The ANAO identified the revaluation of the acquisition in the department's financial statements as a significant and unusual transaction and recommended a review be undertaken to determine if integrity and probity were maintained during the process. The ANAO also drew the attention of the department's Audit and Risk Committee to the issue.

A departmental review of the acquisition process did not adequately account for the difference between the purchase price of \$29.8 million and the land asset value of \$3.1 million. The review process lacked rigour in its approach and in terms of being conducted by officers directly involved with the transaction. The department's Audit and Risk Committee did not take any action in response to the matters raised by the ANAO.

4.63 In conducting the 2018–19 financial statement audit of the Department of Infrastructure, the ANAO identified a significant decrement in the value of land held by the department. In the current market context this was viewed as unusual and further enquiries were made by the ANAO of the Department of Infrastructure.

### Valuation of land assets

4.64 The valuation decrement primarily related to a \$26.7 million difference in the value of the Leppington Triangle. The land had been purchased for \$29.8 million on 31 July 2018 and then, 11 months later, its 'fair value' for financial reporting purposes was set at \$3.1 million. The valuation of the Leppington Triangle as at 30 June 2019, and of eight other land assets held in Western Sydney, had been procured by the Department of Infrastructure from Jones Lange Lassalle (JLL).

4.65 Due to the substantial difference between the Leppington Triangle's purchase price and its fair value, the department procured a second valuation opinion from Colliers International (Colliers). Colliers valued the land at \$4 million, which supported the valuation advised by JLL.

4.66 The valuations of the Leppington Triangle were conducted by JLL and Colliers in accordance with the Australian Accounting Standard AASB 13 *Fair Value Measurement*. As noted by Colliers, the definition of 'Fair Value' is considered interchangeable with the International Valuation Standards Council definition of 'Market Value'. Fair value is defined as 'the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date'. Further, fair value is determined by reference to the asset's highest and best use, that is, 'the use of the asset that is physically possible, legally permissible and financially feasible'.

4.67 Decision-makers had been advised that the \$29.8 million purchase price reflected the market value of the land; it did not include other forms of compensation. The explanation for the \$26.7 million difference between the purchase price and the asset's value, outlined in the Department of Infrastructure's Accounting Position Paper for the valuation of non-financial assets, was:

The difference has been attributed to a substantial premium paid to purchase the land based on an unwilling seller who had previously successfully challenged a compulsory acquisition declaration.

## Significant and unusual transaction

4.68 Given the quantum of the differential between the purchase price and the asset's value, the ANAO identified it as a 'significant and unusual transaction' in the Closing Letter of August 2019 for the audit of the financial statements. In the Closing Letter, the ANAO summarised the matters that gave rise to it being considered 'significant and unusual' and stated:

We recommended that Infrastructure undertake a review of the acquisition process to determine if integrity and probity were maintained during the process, particularly in light of the later valuations obtained for the preparation of the financial statements noting a significant price differential. At the time of this report, Infrastructure had not yet written to us on the results of this review which is expected in the near future.

4.69 The Closing Letter is prepared to communicate matters to the entity and its audit committee that are directly relevant to the financial statements or that the auditing standards require be communicated before the statements are signed. Communicating a significant and unusual transaction is consistent with Auditing Standard ASA 240, *The Auditor's Responsibilities Relating to Fraud in an Audit of a Financial Report*.

4.70 Audit committees are to provide independent advice to accountable authorities to assist them to meet their duties and obligations under the PGPA Act. The functions of the Department of Infrastructure's Audit and Risk Committee include to review and provide advice on the department's system of risk oversight and management, such as its processes for effectively responding to fraud risks. The activities of the Audit and Risk Committee include reviewing the ANAO Closing Letter.

4.71 The ANAO discussed the Closing Letter and its concerns regarding the 'significant and unusual transaction' at the Department of Infrastructure's: Financial Statement Subcommittee meeting of 22 August 2019 (which the Audit and Risk Committee members attended); and at the Audit and Risk Committee meeting of 29 August 2019. According to the meeting minutes, the Audit and Risk Committee 'noted' the Closing Letter and took no action in response to the 'significant and unusual transaction' identified therein.

4.72 The department advised the ANAO on 18 October 2019 that 'a review of the transaction process' had been undertaken and that 'the department remains satisfied that the transaction was settled appropriately and that appropriate standards of probity and integrity were maintained'.

4.73 The ANAO was not assured by the information provided over the period July to October 2019 that the Department of Infrastructure had exercised appropriate due diligence in its acquisition of the Leppington Triangle. The department was notified on 6 November 2019 that the Auditor-General had decided to conduct this performance audit, pursuant to section 17 of the *Auditor-General Act 1997*.

## Departmental review of the acquisition process

4.74 The ANAO examined the records of the departmental review of the acquisition process as part of this performance audit. The review-related activities were:

- officers from the Western Sydney Unit met with the relevant Deputy Secretary in August 2019 to provide a verbal update on the ANAO enquiries into the acquisition of the Leppington Triangle. At the meeting, the Deputy Secretary requested a minute providing

a consolidated account and review of the process undertaken by the department in acquiring the land;

- officers who had been directly involved in the land acquisition drafted the 18 October 2019 letter to the ANAO (referred to in paragraph 4.72 above) and provided it for signature to their Branch Head. The Branch Head had joined the Unit after the land was acquired;
- officers who had been directly involved in the land acquisition drafted the minute to the Deputy Secretary, providing the 'consolidated account and review' and attached a copy of the signed letter to the ANAO of 18 October 2019; and
- the signature block of the EL2 officer involved was unsigned and undated on the minute. A handwritten annotation said '8.11.19 Previously submitted October', followed by the EL2 officer's initials. The Deputy Secretary 'noted' and signed the minute on 13 November 2019. The Department of Infrastructure was unable to provide evidence to the ANAO that demonstrated this minute had been submitted to the Deputy Secretary in October 2019, or advise of the date on which this was said to have occurred.

4.75 There was no indication that any officer from outside the Western Sydney Unit had participated in the conduct of the review, which would have been prudent in the circumstances.

## General findings

4.76 The minute that comprised the review presented information consistent with, and reflective of, the nine other written briefings on the acquisition process examined by the ANAO. This included focussing on the perceived benefits of acquiring the land early, which were as outlined in Table 2.1. In this regard, the minute stated:

A judgement was made that the scarcity of land on or around the airport site would result in further increases in property values, with future announcements about the airport and broader land use planning also expected to result in upwards price movements of airport land and surrounding properties.

4.77 The minute did not advise that, 20 days after the land was purchased, the Land Use and Infrastructure Implementation Plan for the Western Sydney Aerotropolis was released to the public. It placed the Leppington Triangle in the 'Agriculture and Agribusiness' precinct and not in the more commercial 'Aerotropolis Core'. The Western Sydney Unit was aware of the proposed land use well in advance of the acquisition, having provided input to the development of the Plan.

## Lessons learned

4.78 The minute identified only two 'areas in which processes can be refined for future activities'. These were:

- Documenting the investigations we undertook to satisfy ourselves that MJD appeared a suitably qualified valuer, and confirming that valuation comparisons provided as part of the MJD report remained valid.
- Undertaking our own analysis to confirm whether the respective comparison sales in the MJD report that were flagged at the higher range subsequently settled for those amounts given the gap in time between the valuation and sale (we have since done this and confirmed those sales did settle for the noted sale amounts).

### *Review's conclusion*

4.79 The review was undertaken by two officers involved in the transaction and the review's conclusion, as stated in the minute, was:

On balance, however, we remain of the view that the transaction was settled appropriately and, that appropriate standards of probity and integrity were maintained, with the terms reflecting the relative negotiating strength and interests of each party.

### **Findings as to the difference between the price paid and the asset's value**

4.80 In relation to the difference between the MJD report (at \$30 million for 13.62 hectares) and the JLL and Colliers reports (at \$3.1 million and \$4 million respectively for 12.26 hectares) the minute stated, in full:

While we do note that there is a price difference between the MJD valuation and the JLL and Colliers valuations, and that each valuation is premised on a 'highest and best use' approach, the MJD valuation is based on different valuation premises than those in the JLL and Colliers reports. In particular, the Colliers and JLL reports assume that rural/agricultural uses are reflective of the parcel's highest and best use, while MJD was instructed to value on the basis of a highest and best use that included industrial use.

4.81 The minute comprising the review did not examine the difference between the price paid for the Leppington Triangle and the indicative market value in the MJD report. This difference resulted from the 'commercial principles' agreed with the landowner, whereby the department would ensure the landowner received \$30 million for the whole 13.62 hectares. As the NSW government purchased its portion of the land at a substantially lower rate than set out in the MJD report, the department paid at a substantially higher rate than set out in the MJD report. That is, for the Leppington Triangle land, the:

- department paid \$2,433,852 per hectare;
- MJD report set out an indicative value range of \$2,094,511 to \$2,349,486 per hectare (with \$2,202,643 being the approximate mid-point for the \$30 million calculation); and
- NSW government paid \$109,091 per hectare.

### *Difference between the price paid and the nine valuations available*

4.82 The ANAO compared the \$29,839,026 the Department of Infrastructure paid for its 12.26 hectares of the land against the nine valuations of the Leppington Triangle that were in the department's records. The nine valuations comprised the:

- February 2017 report procured by RMS and provided to the department for information;
- July 2017 report procured by the department from MJD to inform the purchase price;
- October 2017 and February 2018 valuations procured by the landowner from Ralph Toyer & Associates, of which the department was aware in advance of purchase and the valuation findings were provided to the department in March 2019;



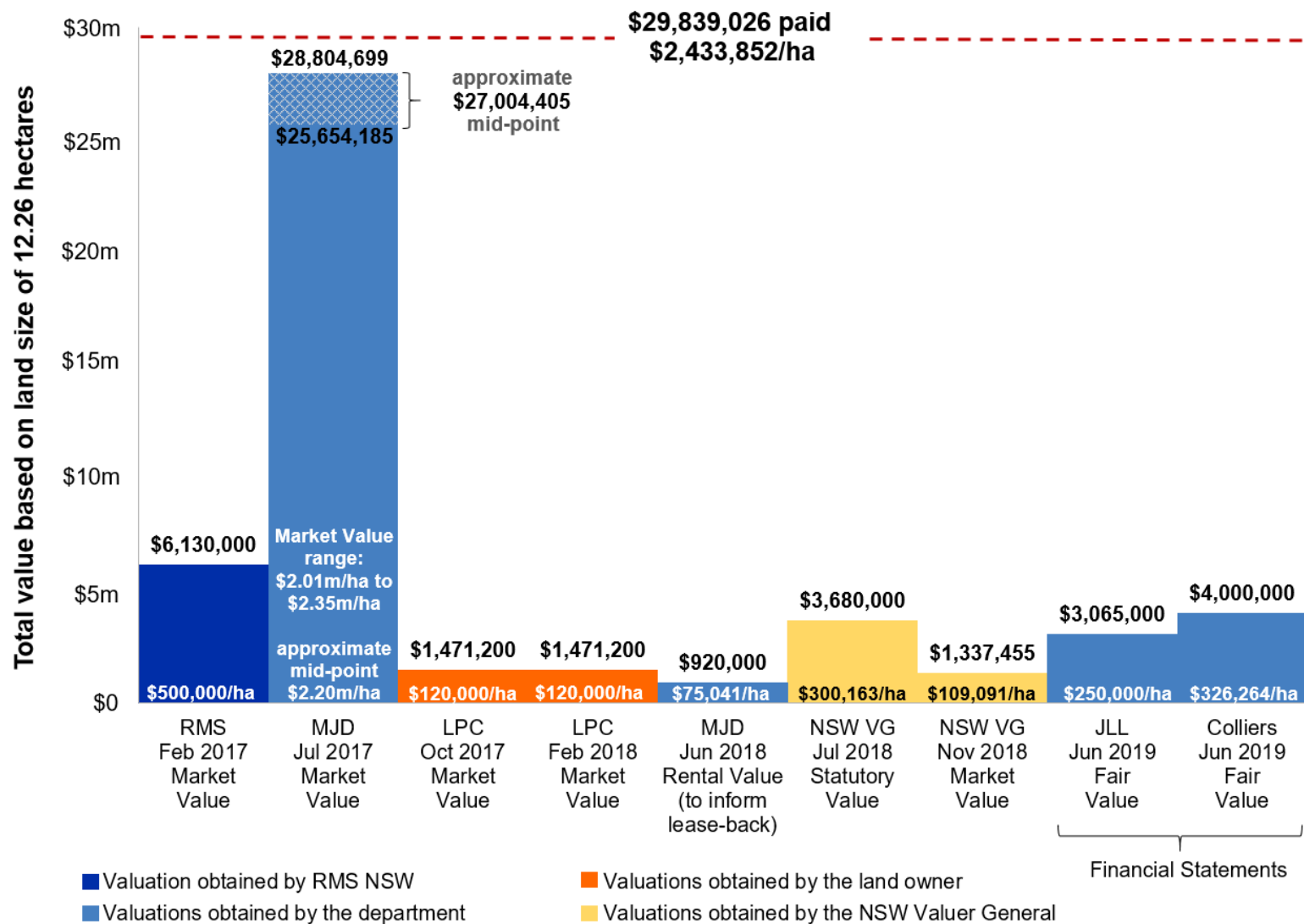
- June 2018 report procured by the department from MJD to inform the rent to be paid by LPC in the lease-back arrangement;<sup>40</sup>
- July 2018 statutory land value assessment, and November 2018 valuation for compensation purposes, procured on behalf of the NSW Valuer General; and
- June 2019 reports procured by the department from JLL and Colliers to value the land asset for financial statement reporting purposes.

4.83 To aid comparison, the ANAO calculated the cost of 12.26 hectares at the GST exclusive, per hectare rate derived from each report. The results of the ANAO analysis is presented in Figure 4.1.

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40 The Department of Infrastructure's instructions to MJD, which were reflected in the report, was that it required a valuation of the Leppington Triangle 'for an annual current market rent based on a permitted use for agricultural purposes and purposes ancillary thereto'.

**Figure 4.1: Comparison of the price paid against nine valuations of the land**



Note: The February 2017 market valuation obtained by RMS had a per square metre value and did not include a total value. The ANAO has applied this rate to the amount of land that was purchased to arrive at the \$6.13 million valuation.

Source: ANAO analysis of Department of Infrastructure records.

4.84 The analysis presented by the department in the review minute was insufficient to reconcile the differences between the price paid, the indicative market value in the MJD report and the other eight valuations on record. It was also insufficient for the purposes of concluding that the 'significant and unusual transaction' was settled appropriately.

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Grant Hehir  
Auditor-General

Canberra ACT  
21 September 2020



## **Appendices**

## Appendix 1 Entity responses



**Australian Government**  
**Department of Infrastructure, Transport,  
Regional Development and Communications**

**Secretary  
Simon Atkinson**

Mr Grant Hehir  
Auditor General  
Australian National Audit Office  
[Grant.Hehir@anao.gov.au](mailto:Grant.Hehir@anao.gov.au)

*Grant*

Dear Mr Hehir

**Auditor-General Proposed Audit Report on the purchase of the 'Leppington Triangle' land for the  
future development of Western Sydney Airport**

Thank you for providing the Department of Infrastructure, Transport, Regional Development and Communications (the Department) with the opportunity to comment on the Australian National Audit Office's (ANAO's) proposed report on purchase of the "Leppington Triangle" land for the future development of West Sydney Airport.

The Department acknowledges the ANAO's recommendations. The Department's summary response and response to each of the recommendations is attached and respectfully request that the response be published in full.

Please contact Ms Kerry Vine-Camp, First Assistant Secretary, Major Transport and Infrastructure Projects on 02 6274 7664 if you would like to discuss this response.

Yours sincerely

Simon Atkinson

/ September 2020

**Department of Infrastructure, Transport, Regional Development and Communications response to proposed audit report on the Purchase of the “Leppington Triangle” land for the future development of Western Sydney Airport.**

**Department summary response**

The Department of Infrastructure, Transport, Regional Development and Communications (the Department) notes the ANAO report and agrees with the recommendations.

The Department is concerned by the findings of the report, and is taking actions to address any shortcomings in the processes and decision making arrangements identified in relation to the Leppington Triangle acquisition.

The Department has a long track record of operating consistent with expected standards of integrity and ethics. In light of the allegation of individual breaches of integrity, the matters raised by the ANAO in the report are being investigated to ensure all such matters are fully understood and appropriate action can be taken.

The Department has established an independent review of the transaction arrangements to ensure the findings of the audit are addressed. The Department has also commenced management reviews into matters of staff conduct identified by the ANAO, and will ensure the concerns raised are specifically addressed.

An external probity advisor will be appointed to support ongoing functions related to major projects and land acquisitions, and will assist with the development of guidance materials on obtaining purchase valuations in consultation with the Department of Finance, to ensure that protocols are in line with operations of the Lands Acquisition Act 1989.

The Department notes the ANAO view that the purchase could have been made at a much later date, and considers that consistent with earlier approaches at Badgerys Creek, and with other airports, acquisition of the land as early as practicable has benefits. The acquisition of the Triangle represented the final parcel of land that needed to be acquired for the airport site, creating a complex market situation.

The acquisition of the Triangle came about alongside the establishment of the Western Sydney Airport Company and the public release of the Government’s Airport Plan which committed to a two runway airport.

Early acquisition provided certainty to stakeholders for long term planning, has allowed Western Sydney Airport Company to plan effectively for the entire development of the Airport as identified in the Airport Plan, and has reduced the risk of future challenges on the Airport development.

The Department agrees that the valuation strategy was unorthodox. However, we note that the strategy was developed in consultation with the Department of Finance and the Australian Government Solicitor and was designed to mitigate the risk of costly and lengthy legal challenges.

As the report notes, the land-holding company had previously challenged land acquisitions at the airport site with the Department spending over ten years in legal proceedings.

The Department’s Audit and Risk Committee has been consulted on the audit. They advised the Financial Statements Sub Committee were made aware prior to the Audit and Risk Committee recommending the financial statements be signed by the Secretary, that the accounting treatment of the transaction and its inclusion in the Department’s financial statements, had been accepted by the ANAO and that an unmodified audit opinion would be issued.

The Committee was further advised that the ANAO intended to undertake further audit procedures of the purchase, internal reviews on probity and integrity were being undertaken by the Department, and that the ANAO may conduct a performance audit on the matter at a later stage.

## **Response to recommendations**

### **Recommendation 1**

The Department of Infrastructure, Transport, Regional Development and Communications prepare comprehensive and balanced written analysis on the benefits, costs and risks of proposals to spend public money.

#### **Department response**

Agreed. The Department has existing frameworks and guidance on the requirements associated with developing proposals to spend public money in accordance with the Public Governance, Performance and Accountability Act 2013.

The Department will review and update existing material to ensure there is a clear requirement for comprehensive and balanced written analysis on the benefits, costs and risks to support proposals to spend public money, and particularly in regard to valuations and land acquisitions. All staff will be reminded of their responsibilities and updated guidance material will be made available to all staff and appropriate training provided.

### **Recommendation 2**

The Department of Infrastructure, Transport, Regional Development and Communications put in place meeting and communication protocols for when staff engage directly with individual landowners, developers or similar parties with heightened probity risks. The protocols should: include guidelines regarding suitable venues; require the presence of at least two departmental representatives; and to require properly recorded minutes of meetings and conversations.

#### **Department response**

Agreed. The Department has established protocols on meeting with interested parties developed specifically for the Western Sydney Unit. The guidance is available to all staff. The Department will review the protocols to expand coverage to other areas of the Department.

These will include, at a minimum, guidelines regarding suitable venues; require the presence of at least two departmental representatives; and properly recorded minutes of meetings and conversations. Staff will be reminded of their responsibilities and appropriate training provided.

### **Recommendation 3**

The Department of Infrastructure, Transport, Regional Development and Communications develop policies and procedures to govern its approach to obtaining purchase valuations.

#### **Department response**

Agreed. The Department will develop specific guidance materials on obtaining purchase valuations in consultation with the Department of Finance, to ensure that protocols are in line with operations of the Lands Acquisition Act 1989. All guidance material will be made available to staff and appropriate training provided.





**Australian Government**  
**Department of Finance**

**Rosemary Huxtable PSM**  
**Secretary**

Our Ref: EC20-000436

Mr Grant Hehir  
Auditor-General  
Australian National Audit Office  
GPO Box 707  
CANBERRA ACT 2601

Dear Mr Hehir

I refer to the Australian National Audit Office's (ANAO's) correspondence dated 4 August 2020 providing an extract of the proposed audit report *Purchase of the 'Leppington Triangle' land for the future development of Western Sydney Airport* (the Report) under s.19 of the *Auditor-General Act 1997*.

Thank you for providing the Department of Finance (Finance) with the opportunity to comment on the extract of the proposed report.

Finance notes the recommendations and findings in the Report.

As identified in the draft, Finance is currently undertaking a review of the *Lands Acquisition Act 1989* (LAA), the primary legislation used to acquire Commonwealth interests in land. The findings and recommendations in the Report will be considered as part of the LAA review and subsequent guidance issued to entities.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R. Huxtable', with a long, sweeping horizontal stroke extending to the right.

Rosemary Huxtable  
Secretary

27 August 2020



Transport  
for NSW

Our ref:OTS20/05276

Mr Grant Hehir  
Auditor-General for Australia  
Australian National Audit Office  
GPO Box 707  
Canberra ACT 2601

Cc [brian.boyd@anao.gov.au](mailto:brian.boyd@anao.gov.au)

Dear Mr Hehir

I refer to your email of 4 August 2020 and thank you for the opportunity to comment on an extract of the proposed audit report prepared by the Australian National Audit Office on the Purchase of the Leppington Triangle land for the future development of Western Sydney Airport.

I note your advice that the report includes information that the former Roads and Maritime Services provided to the auditee – the Australian Government Department of Infrastructure, Transport, Regional Development and Communications. In particular, information on the planning for the realignment of The Northern Road and on the NSW government's acquisition of a portion of the Leppington Triangle land for the purposes of the realignment.

Transport for NSW notes the references to the former Roads and Maritime Services in the proposed report and has no further comment.

If you have any further questions, Mr Ethan Nguyen, Director Audit and Corruption, Corporate Services, would be pleased to take your call on 0477 736 400. I hope this has been of assistance.

Yours sincerely

**Rodd Staples**  
Secretary

31 August 2020

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Transport for NSW

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7 September 2020

Mr. Brian Boyd  
Executive Director  
Australian National Audit Office  
38 Sydney Avenue  
Forrest ACT 2603

by email

Dear Mr. Boyd,

**Proposed Report under s.19 of the Auditor General Act 1997**

**Purchase of the 'Leppington Triangle' land for the future development of Western Sydney Airport.**

My apologies for being outside the formal 28-day window to respond to the audit report. As you are aware, I had some early technical difficulties accessing the extracts and then last week I had some unexpected corporate business that diverted me from the task of getting it to you by the end of last week as you suggested. I hope that you will apply your discretion favourably to consider this response.

Referring to Section 2.20 in the extract, I would provide some additional context to the preliminary advice quoted. In going back through the correspondence, we did assess the runway end operational clearances including the western end of the Southern Runway that abuts the Leppington Triangle. Our most senior subject matter expert was on leave and another experienced professional from our office deputized in order that a timely review could be undertaken. The response was technically sound, but English not being his strong suit, some of the wording could have been better structured and qualified.

Given the airport design was at a conceptual design level, the best practice is to err on the conservative side to avoid potential for operational constraints, particularly given this is a greenfield site. If there are other factors that need to be balanced against this, then they could be considered as the design develops subject to further detailed studies. When our senior subject matter expert returned, he provided an updated response that improved the language and messaging including these qualifications whilst staying true to the need to point to issues that needed attention and further assessment.

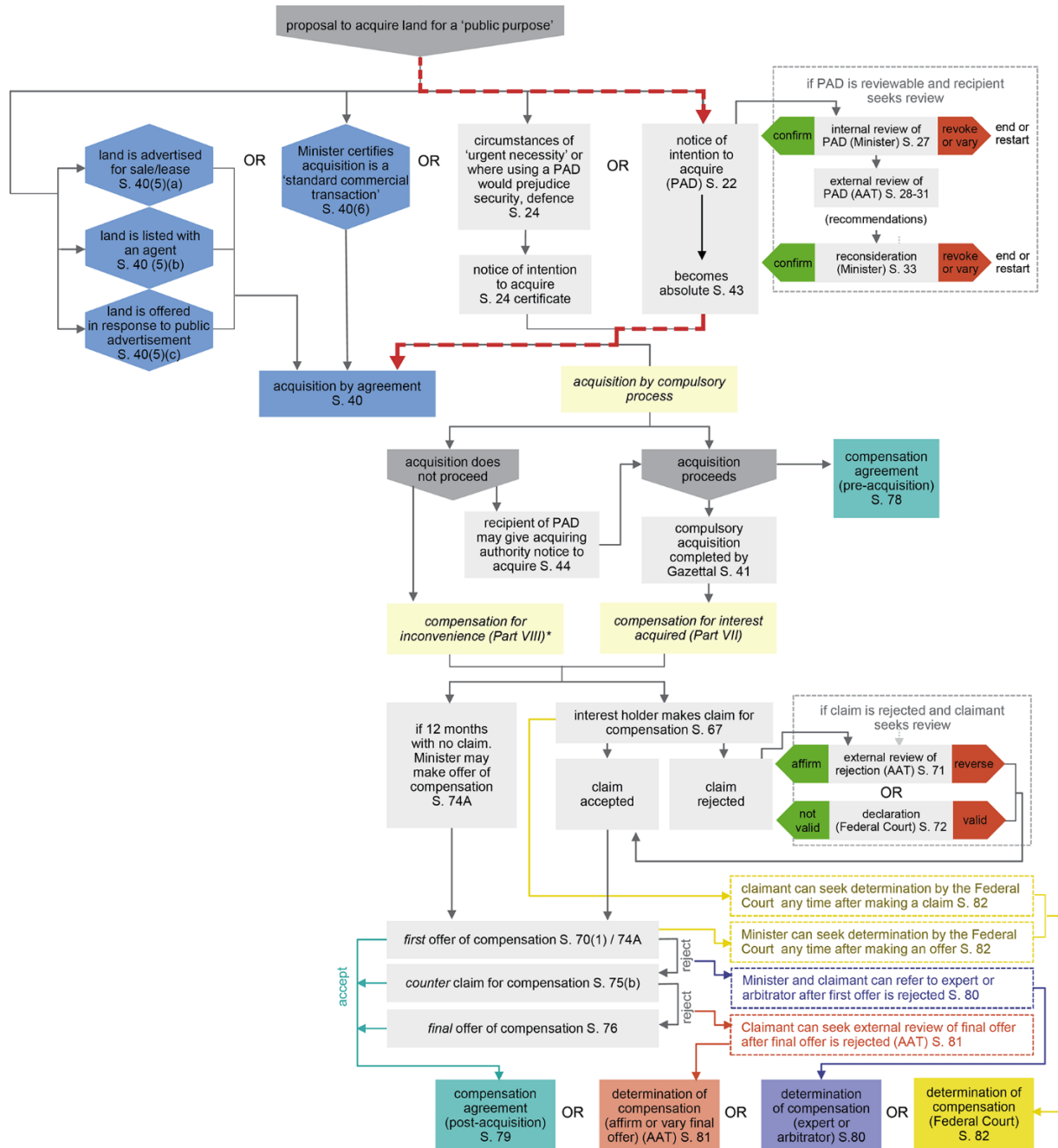
Yours sincerely,

Gary Gibb  
Chief Strategy Officer and President Asia Pacific

Global Aviation Planning and Development

## Appendix 2 Process flowchart of acquisitions under the *Lands Acquisition Act 1989*

This flowchart sets out the acquisition by agreement and compulsory acquisition process contained in the *Lands Acquisition Act 1989*. Follow the dashed red lines for the process used by the Department of Infrastructure to acquire the Leppington Triangle land by agreement.



\* compensation process for failure to acquire is similar to compensation process for interest acquired (flow chart deals with compensation for interest acquired)

Note: The dashed red lines were overlaid by the ANAO for the purposes of this audit report.

Source: Department of Finance, *Review of the Lands Acquisition Act 1989—Discussion Paper*, Commonwealth of Australia, 2020, p.15.

Auditor-General Report No.9 2020–21

Purchase of the 'Leppington Triangle' Land for the Future Development of Western Sydney Airport