

Investigation into allegations of improper conduct in the
Office of Living Victoria

August 2014

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Letter to the Legislative Council and the Legislative Assembly

To

The Honourable the President of the Legislative Council

and

The Honourable the Speaker of the Legislative Assembly

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973*, I present to Parliament my report into an *Investigation into allegations of improper conduct in the Office of Living Victoria*.



Deborah Glass OBE

Ombudsman

4 August 2014

Contents

Foreword	3
Background	4
Investigation	4
Office of Living Victoria	5
Role of the Office of Living Victoria	6
OLV's budget and resourcing	6
Status of OLV and its relationship with parent department	8
Leadership of OLV	9
Transparency and probity in procurement	12
The allegations	16
Allegation 1	16
Allegation 2	19
Allegation 3	21
Procurement, recruitment and contract management practices	25
Procurement policy and principles	25
OLV procurement practices	26
Use of the Staffing Services State Purchase Contract	39
OLV's recruitment practices	42
Breaches of procurement policies	44
Lack of accountability and transparency regarding contracts	48
Inadequate file and document management	48
Conflicts of interest	49
Unresolved contractual issues	54
Responsibility and accountability	56
Conclusions	62
Recommendations	68

Foreword

The investigation into Office of Living Victoria was started, and substantially completed, during the time of my predecessor George Brouwer, to whom must go much of the credit for its robust scrutiny.

As the report sets out, the matter was referred as a “protected disclosure” (i.e. a “whistleblower” complaint) by IBAC to the Ombudsman in June 2013, containing allegations going to the heart of the governance of OLV, specifically in relation to its procurement and contract management practices.

As the report concludes, there was an ongoing failure by OLV to comply with Victorian Government procurement policies. The underlying philosophy appeared to be based on the view of its senior management that it had to ‘crash through’ alleged bureaucratic intransigence and resistance to its reform agenda, and that public service inertia and processes would stymie effective and timely change. Conflict of interest was also poorly handled, with many instances of previous work or personal associations with contract providers that were not declared, or any perceived conflict acknowledged.

The risks in both of these areas are obvious, and have been stated many times by my predecessor. Government procurement policies exist to protect the public purse; poorly managed conflicts of interest can fundamentally undermine the integrity of public administration. They are not optional extras for agencies funded by public money.

On 15 May 2014 I provided the relevant parts of the draft report to those subject to adverse comments. In response, the CEO of OLV referred to legal advice received after the investigation was concluded, that OLV was not obliged to comply with Victorian Government Purchasing Board policies. Other legal advice obtained by the government disagreed with this. Either way, this was a worrying state of affairs. Even if OLV was not legally obliged to comply with what amounts to best practice for government procurement, for public policy reasons alone, it plainly should have been. What is good enough for two hundred and eighty-nine state entities should have been good enough for OLV.

The evidence was that until the conclusion of this investigation, OLV did regard itself as bound by these policies: it entered into two memoranda of understanding with successive government departments about their purchasing activities; used the services of the department’s Accredited Purchasing Unit; and reported ‘breaches’ of supply policies. The recent legal advice obtained by OLV had the appearance of ex post facto justification. Whether it was legally bound or not, it was disturbing that its CEO in response to adverse comments in a draft report should assert that these policies were optional.

On 24 June 2014 I provided to the CEO of OLV and the Secretary of the Department of Environment and Primary Industries a final draft report, incorporating individual responses to adverse comments and a number of draft recommendations. One week later, on 1 July 2014, OLV was abolished. On 14 July 2014, its CEO resigned and on 25 July 2014 its former Head of Office departed.

It was not part of the Ombudsman’s remit to investigate how well OLV performed its core role to reform the way water services are managed in Victoria. This is a matter for the Minister for Water and the Secretary of Department of Environment and Primary Industries. But regardless of its performance in other areas, OLV failed to demonstrate respect for public sector values and accountability for its use of public funds. Its rear-guard defence of those practices paved the way for its own demise.

Deborah Glass
Ombudsman

Background

1. On 26 June 2013, Mr Stephen O'Bryan S.C., Commissioner of the Independent Broad-based Anti-corruption Commission (IBAC) referred a complaint to this office for investigation pursuant to section 73 of the Independent Broad-based Anti-corruption Commission Act 2011. In his referral, the Commissioner advised that IBAC had determined the matter to be a protected disclosure complaint under the *Protected Disclosure Act 2012*.
2. The disclosure involved allegations of improper conduct by officers of the Office of Living Victoria in relation to procurement matters.
3. Specifically, the disclosure alleged that:
 1. In February to March 2013 a consultant engaged by OLV split contracts to avoid procurement guidelines for tendering of services.
 2. Another consultant, Mr Simon Want, who was appointed as the Head of Office (HoO) for OLV in September 2012, received payment prior to his contract of employment being signed.
 3. During the launch of OLV, a request for quotes to engage event management services was requested from three companies, with three quotes received for \$40,000, \$60,000 and \$160,000. The highest quote was accepted by Mr Simon Want with no explanation as to why.
4. On 6 September 2013, the previous Ombudsman notified the Minister for Water, The Hon. Peter Walsh, MP, and the CEO of OLV, Mr Mike Waller, of his intention to investigate this matter under section 15C of the *Ombudsman Act 1973*.
5. During the course of this investigation the Ombudsman received further correspondence from the Commissioner of IBAC and from other sources that raised concerns about the structure, governance and operation of OLV. Several of these

matters were determined by IBAC not to be protected disclosure complaints. However because the issues were related to the matters under investigation by this office, they were taken into consideration.

Investigation

6. The investigation included:
 - reviewing OLV, the Department of Sustainability and Environment (DSE) and the Department of Environment and Primary Industries (DEPI) documentation, policies and procedures
 - examining emails and financial records
 - reviewing a small sample (12) of OLV contract files¹.
7. In addition, 21 witnesses were interviewed as part of the investigation. All witnesses were provided with the opportunity to attend with a support person or a legal representative. Seven people attended with legal representatives.
8. The investigation was hampered by the poor quality of the contract files and associated documentation received from OLV. At no time were the investigation officers confident that a file contained the complete history of a procurement activity as they found that:
 - some contract files contained little or no documents
 - no file was in chronological order
 - no file had folio numbers on documents
 - some documents were duplicated on the one file and/or found on other unrelated files
 - many documents were unsigned or undated

¹ Approximately 40 contract files were obtained from OLV but because of inadequate documentation on many of these files the review was limited to 12 contracts.

- drafts of documents were left on file
 - 'post it' notes were frequently used
 - illegible and/or unsigned handwritten comments were notated on documents, and many documents were missing.
9. The individuals interviewed had contrary opinions on the culture of OLV. All agreed that the office was dynamic and the staff were generally hard-working. However, a number of the witnesses expressed the view that OLV's tight focus on driving reforms to the urban water services system had resulted in a senior management with a 'can-do' attitude which came at the expense of sound public sector business practices that were intended to ensure transparency, fairness, value for money and accountability.
 10. All people subject to adverse comments and opinions were provided with the relevant sections of the draft report prior to finalising its contents. Their responses are fairly set out in this report.
 11. This report includes adverse comments about Mr Mike Waller, [then] CEO, Mr Simon Want, [then] HoO, and Contractor A, a former Executive Director at OLV.
 12. In accordance with section 25A (3) of the *Ombudsman Act 1973*, I advise that any other persons who are identifiable, or may be identifiable from the information in this report, are not the subject of any adverse comment or opinion. They are named or identified in this report as:
 - I am satisfied that it is necessary or desirable to do so in the public interest; and
 - I am satisfied that identifying those persons will not cause unreasonable damage to those persons' reputations, safety or wellbeing.

I note in this regard that these matters have been subject to extensive media commentary.

Office of Living Victoria

13. In January 2011, the government appointed the *Living Victoria* Ministerial Advisory Council to provide advice on the key changes needed to better manage urban water.
14. The Council recommended a series of reforms including the establishment of the Office of Living Victoria as a statutory authority. However, Cabinet did not endorse all of the council's recommendations. Instead OLV was created as an Administrative Office.
15. According to Mr Chris Chesterfield, the inaugural CEO of OLV, his letter of appointment listed the key priorities and functions of his position as set out in the Living Victoria Cabinet submission as:
 - Critical implementation actions related to the integration of water and urban planning, including the role of the WSDS [Water Supply Demand Strategy] and other water planning documents in the development of a Melbourne Integrated Water Cycle Plan
 - Administration of the \$50m Leading the Way - Living Victoria Fund
 - Development of Integrated Water Cycle Plans for Melbourne's four main growth areas and inner Melbourne
 - Preparation of a Regulatory Impact Statement for building controls to improve the water performance of new buildings
 - Leading the process to amend the Victorian Planning Provisions to apply the current performance requirements of Clause 56.07-4 for management of stormwater more broadly
 - Working with the Smart Water Fund and the Cooperative Research Centre for Water Sensitive Cities to focus research effort and create an industry knowledge hub.

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16. In response to the draft report Mr Chesterfield stated 'in my discussions with the Minister and Mike Waller [Chair of the Council and subsequently the Expert Panel] I was informed that, in exercising this role, the OLV was expected to employ around 20 staff at full strength'.

Role of the Office of Living Victoria

17. The OLV was established on 22 May 2012. Its role was to drive reforms to integrate the planning of Melbourne's water cycle system (rainwater, storm water and wastewater) into the broader urban planning framework and change the way water services are managed in Victoria.
18. These reforms mark a shift from the predominantly centralised catchment-to-building water and wastewater system to an 'integrated water cycle management' (IWCM) approach that makes use of all sources of water. The IWCM strategy moves away from the traditional emphasis on the technical issues of supply, such as the size and location of major infrastructure, to applying an understanding of how best to develop and utilise knowledge of the entire water cycle and its drivers – regional geography, topography, geophysics, hydrology, economics, climate and demography².
19. In April 2013 OLV was tasked with the responsibility of delivering the major economic reform elements of the *Living Victoria* policies that were originally allocated to DSE (now DEPI). According to Mr Waller 'this doubled OLV's workload' with no supplementation [in terms of staffing or budget] provided while awaiting the outcome of a review commissioned by the Secretary of DEPI, Mr Adam Fennessy.
20. On 28 November 2013, the scope of OLV's responsibilities (and budget and staffing levels) was further expanded to include all the functions of the Water Sector

Governance and Legislation Group. This group was previously a part of the Water and Natural Resources Division in DEPI.

21. In early 2014 the Minister for Water initiated a further new initiative – Fairer Water Bills – which involved OLV taking the lead on efficiency review of the water sector, a review of the economic regulation framework and a review of sector governance.

22. In response to the draft report:

Mr Want said:

... OLV did not have an agreed budget, resourcing, or operational relationship with the Department until well into 2013. At the same time the scope and nature of the reforms continued to evolve from November 2012 to the end of 2013. From the original set of tasks OLV was commissioned to examine, the scope of investigation more than tripled. With the ... transfer of the policy, governance and legislative oversight of the urban water sector, OLV went from being a reform agency (with a very big reform agenda) to a policy oversight and reform agency.

Mr Waller said:

The level of support for the newly established OLV provided by the Department in no way matched the Minister's request and was at no stage commensurate with the challenging nature of the role and responsibilities demanded of the Office.

OLV's budget and resourcing

23. OLV's expenditure in 2012-13 was \$13.072 million which included top-up funding of \$5.3 million provided by the Secretary of DSE to cover the cost of overruns. This expenditure also included close to \$3 million in grant expenditure. Since then OLV has had a significant increase in funding and its budget for 2014-15 is \$32.5 million, including \$13.1 million for the Living Victoria Fund.
24. During the period from 1 July 2012 to 31 December 2013, OLV had:

² Office of Living Victoria, Business Strategy 2012, A new era in urban water cycle management, page 4.

- 90 contracts with contractors/consultants who were paid approximately \$6.2 million.
- 60 agency staff engaged through the Staffing Services State Purchase Contract (SPC). This cost OLV approximately \$3.3 million. The majority of this expenditure was paid to one employment agency, which received approximately \$2.75 million for providing on-hire staffing services.

25. According to the [then] CEO of OLV, Mr Waller, it was a deliberate strategy to initially have a staffing composition that predominantly consisted of contractors/consultants/agency staff. He said:

I've had to build an organisation to deliver a very major change agenda, and I've had to do it in the absence of clarity around money – so I've had to be cautious about taking people on a permanent basis, and I couldn't do that anyway because until the end of April [2013] I didn't have any agreement about what my VPS FTE [Full Time Equivalent] is – and I had to do it in a way that allowed the flexibility and insights that I needed from both inside and outside the public service.

The only EO [Executive Officer] position I had was my own. So confronted with those circumstances ... we said that for the time being we would just use contractors to actually grow the business and to bring in people who have deep experience in planning ... so that we can start to if not capture at least intersect with the agenda around urban planning

26. At the end of May 2014 OLV had 103 staff which included 4 Executive Officers on 3 year fixed term contracts; 32 VPS ongoing staff; 37 VPS fixed term staff; 12 agency staff; 2 contractors and 16 secondees mainly from water authorities.

27. In response to the draft report:

Mr Chesterfield said:

When I left OLV after little more than four months, there was a team of around 20 ...

Our approach to delivering the priorities endorsed by Cabinet was based on using the experience and expertise in the broader water industry rather than employing OLV staff. This approach was reflected in our business strategy and was widely supported by industry stakeholders. Many had already committed resources to projects. Our business strategy proposed that OLV should have a life no greater than five years. The strategy did not propose taking over or replacing existing functions of government such as policy development.

OLV has clearly pursued a more aggressive reform agenda than the one originally endorsed by Cabinet and has now around 90 working from its offices in Spring Street.

Mr Waller also said:

... OLV had no authority to create new VPS or EO positions, and this is subject to approval from DEPI. ... OLV had at numerous times made DEPI aware of the risks of relying on contractors and temporary staff and requested agreement on an allocation of VPS positions, but DEPI's agreement to this was extremely slow, causing some contracts having to be extended until a final decision was made.

Mr Waller also added:

... it is not clear from the draft report how an incoming CEO could avoid using a mixture of qualified and capable contractors and agency staff to re-establish the organisation and begin to deliver the Government's reform agenda. ... OLV had no practical ability to use normal VPS recruitment processes and procedures to which the draft report draws attention.

28. DEPI advised that OLV had the option during the recruitment freeze [from December 2011 to December 2013] to advertise internally across DSE/DEPI and its portfolio agencies of EPA and Sustainability Victoria and to fill positions on an ongoing or fixed term (internally seconded) basis. Also there were no restrictions regarding industry placements or rotations from the water industry or local government.

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29. It also advised that additional staffing and funding were provided to OLV:

On his appointment Mike Waller commenced negotiations to increase the staffing levels for OLV. There was an original request to increase staffing numbers to 35 which was approved by Greg Wilson, Secretary DSE prior to his departure to DOJ [Department of Justice] on 12 April 2013. Further negotiations were held between the CEO OLV and the new Secretary DEPI in April 2013, with a further request for an additional 10 FTE being approved.

Status of OLV and its relationship with parent department

30. Under section 11 of the *Public Administration Act 2004*, OLV was established by order of the Governor in Council as an Administrative Office in relation to the then Department of Sustainability and Environment. On 1 July 2013 DSE was merged with the Department of Primary Industries to form the new Department of Environment and Primary Industries (DEPI).
31. In its publication, *Legal Form and Governance Arrangements for Public Entities – Guidelines, Revised May 2013*, the State Services Authority (SSA)³ states that ‘administrative offices are discrete business units and have a degree of autonomy from their parent department. They have separate internal structures and processes which allow them to operate with significant managerial flexibility ... As they are formally part of a department, they can also utilise corporate and other support functions already established in departments. Again this can facilitate an Administrative Office being operational quickly and at low cost’.
32. In response to the draft report Mr Waller said there was ‘a complete lack of understanding on the then DSE’s part about OLV’s role and status as an Administrative Office within the DSE portfolio’ and referred to a letter he sent to Mr Wilson on 23 October 2012:

The operating arrangements and agreements struck between DSE and OLV are contrary to the meaning of an Administrative Head and Administrative Office. Further, it runs contrary to the intent of the Minister’s letter to Chris Chesterfield of 25 May 2012. The current arrangements (such as the MOU [Memorandum of Understanding] between DSE and OLV) effectively treat OLV as a subordinate division of DSE. As an example, the MOU effectively constrains OLV’s employment powers, financial delegations, strategy and planning.

This is symptomatic of a broader issue – an erroneous understanding of the statutory basis of an Administrative Office and the intent of OLV. Having reviewed the documentation and spoken to OLV staff, it is clear this incorrect understanding has played a significant role in the limited progress of the OLV to date.

He also said:

[OLV’s] accountability framework has a hierarchical approach:

The Secretary of the Department is responsible to the Minister for the general conduct and the effective, efficient and economic management of the functions and activities of OLV, and must advise the Minister in all matters relating to OLV.

The Secretary is responsible for advising the Minister on matters relating to OLV including the discharge by OLV of its responsible [*sic*] including those under the *Public Administration Act* or any other Act.

The Secretary is responsible for working with, and providing guidance to, OLV to assist it on matters relating to public administration and governance.

Correspondingly, the CEO of OLV is accountable to the Secretary for the general conduct and the effective, efficient and economical management of the functions and activities of OLV. To enable this, the CEO must provide to the Secretary any information required by the Secretary.

³ Now known as the Victorian Public Sector Commission.

33. The SSA lists nine Victorian Administrative Offices at May 2013, including OLV. Of these, the majority appear to have their own corporate support services, such as the Victorian Government Solicitor's Office and OLV, while others use common services, including corporate and legal, provided by the parent department. There appears to be no guidance to inform departments on the preferred establishment model for administrative offices. In OLV's case, it appears the model was one determined by OLV's CEO, Mr Waller, and the DSE departmental Secretary at that time, Mr Greg Wilson.

34. At interview Mr Waller was asked if Ministers fail to appreciate the time required to set up new organisations, he said:

Well, I think it's always difficult to expect Ministers to understand in detail how your offices operate, it's not their job; their job is to design policy and priorities. You know if I'm being entirely brutal about it, we did have time - you know 6 months would've been more than enough to set up a functioning organisation, not a perfect organisation but a functioning one, but if I think about what are the conditions of success it would've certainly required a degree of co-operation and understanding between the new CEO and the department, the portfolio, that I think on all the evidence probably wasn't there.

35. In response to the draft report Mr Waller said:

The reference in the draft report to there being no guidance on the preferred establishment and that the model was determined by Mr Greg Wilson and me is incorrect, and not at all relevant. Administrative Offices have existed for some time in the Victorian Government. They are intended to be used flexibly, and therefore there is no need for any particular guidance on an establishment model, noting that the relevant accountabilities are already embedded in the Public Administration Act.

36. A proper governance framework may have been facilitated by detailed guidance on the establishment of Administrative Offices. Nevertheless, even without such guidance, a better framework for OLV should have been established by Mr Waller and Mr Want.

37. If the governance framework, including the right business systems and processes, had been determined at the outset of the establishment of OLV, many of the problems identified during this investigation could have been avoided.

Leadership of OLV

38. The Public Administration Act also requires that 'each Administrative Office shall have an Administrative Office Head' (s12). In the case of OLV, that role is the CEO.

39. On 16 May 2012, the Minister for Water, the Hon Peter Walsh MP, announced Mr Chris Chesterfield as the inaugural CEO of OLV. Mr Chesterfield was previously the General Manager of Waterways at Melbourne Water, a position he had held for eight years.

40. Mr Chesterfield resigned in October 2012. The reasons for his resignation are uncertain, although witnesses stated that there were tensions between Mr Waller, who at that time was Chair of the Expert Panel advising the Minister for Water, and Mr Chesterfield on key OLV projects and initiatives. At interview Mr Chesterfield stated:

I resigned from OLV after a 4-6 month period; a key part of it was the differences of view about how the role of OLV should be exercised. ...

41. In response to the draft report:

Mr Chesterfield said:

Mike Waller sought to exercise significant influence on the approach to be used by OLV in delivering on the priorities endorsed by Cabinet. Our different views on how the role of OLV should be exercised, including the relationship with DEPI and the broader water industry, is what led to my resignation as CEO.

Mr Want said:

As Mr Chesterfield described to me, he effectively asked the Minister to remove Mr Waller from his role and involvement in OLV, basically asking the Minister to choose between himself and Mr Waller. Mr Chesterfield described it to me that when the Minister was unwilling to, Chris resigned.

42. Mr Waller, previously Chair of the 2011 Living Victoria Ministerial Advisory Council investigation on the reshaping of Victoria's water industry, was appointed by the Premier as Acting CEO of OLV on 22 October 2012 and as CEO on 8 March 2013. During the period of Mr Waller's acting appointment, the government engaged KPMG to find a suitable long term replacement for Mr Chesterfield. Mr Waller was a member of the selection panel for that exercise, along with the Secretary of DSE, Mr Wilson, and a KPMG consultant. When a suitable replacement could not be found, the position was offered to Mr Waller. Mr Waller was not subject to a formal interview for this position.

43. In response to the draft report:

Mr Waller said:

... Mr Wilson asked that I sit on the selection panel, to which I agreed given I would not be a candidate for the post.

The selection process proceeded with KPMG presenting a short list of candidates towards the end of January. Mr Wilson rang me shortly thereafter to say that, in his opinion, none of the short listed candidates had the right mixture of experience and capabilities to warrant immediate appointment. He, therefore, asked whether I would consider continuing in the role on a non-acting basis and on what conditions.

... I said that on my return from overseas I could work on a three day a week basis, supported by a full-time Head of Office.

He also said:

... the draft report fails to mention that there was no requirement for a formal interview, that my performance as CEO had been evident to those making the decisions, and that ultimately the Minister and the Premier were satisfied as to the process and outcome of my appointment.

44. Even though OLV had been established five months before Mr Waller was appointed as Acting CEO, at interview he said that OLV was not a functioning entity when he took over:

I didn't have any processes, any experienced staff, I had no strategy and there was no engagement with any of the external stakeholders. And in practice, this organisation had become an adjunct and a junior division of Department of Sustainability and Environment, particularly the water group, which was supposed to be ... reformed. I didn't think that was satisfactory.

45. Mr Simon Want initially commenced in OLV in August 2012 as a contractor on a part-time basis to provide ministerial liaison and strategic advice to the then CEO, Mr Chesterfield. Soon after Mr Waller was appointed as Acting CEO, Mr Want's role changed into a full-time one and became that of Chief of Staff to the CEO. On 12 March 2013, Mr Want was formally engaged as Head of Office (HoO), an Executive Officer Grade 2 position, and deputy to the CEO, with a remuneration of \$230,000. The position was not advertised nor was a selection panel appointed to interview Mr Want before Mr Waller appointed him to the HoO position⁴.

⁴ Mr Want applied for the CEO position and was shortlisted and interviewed for that position. However, he was not formally interviewed by a selection panel for the substantive position that he was appointed to - Head of Office.

46. In response to the draft report Mr Waller said:

Given the shortage of time and the need for someone with extensive knowledge of the water industry and the reform agenda and who could step in quickly to maintain delivery momentum, we agreed to draw on the short listed candidates [for the CEO position] to fill the position. Of the short-listed candidates, only Mr Simon Want fitted the required profile. Accordingly, we agreed that Mr Wilson would interview Mr Want to test his suitability, which I understand he did.

47. The distinction between the roles of Mr Waller and Mr Want is unclear. Between 12 March 2013 and 24 May 2013, Mr Waller was employed on a part-time basis and during this period was on extended leave. During Mr Waller's absence Mr Want acted as CEO.

48. While both the CEO and HoO hold financial delegations, it is apparent from interviews conducted by the investigation officers that all matters for the CEO must go through the HoO, and the CEO and HoO jointly run the office. 'Joined at the hip' was how the relationship was described by one witness.

49. It appears that the HoO had responsibility for the operational management of OLV – he chaired management team meetings which the CEO only attended on occasions – with the CEO taking a more outwardly focused and longer-term strategic role. At interview, Mr Want stated that responsibilities were shared:

One of the key aspects of my job and the CEO's job was to divide that huge workload of the day to day responsibilities of the organisation, but also the intellectual leadership of the reform agenda, and the representation of the organisation and the reform to external stakeholder groups.

Question: Who takes day to day responsibility for OLV?

Answer: Mike Waller is the CEO and under the Public Administration Act he has all the powers of a Secretary and ... he has employment powers, he has financial delegation. So he takes responsibility for the significantly important and strategically important parts of the organisation. My role is to coordinate the day to day activities inside the office ... I manage the organisation.

50. In relation to procurement matters, the CEO signed off on all significant issues.

51. In response to the draft report:

Mr Waller said:

The distinction of roles is clear to those involved, and to the senior executive within the OLV. In some circumstances professional judgment is used as to who will manage certain matters, but as we are expected to possess sound judgment, this arrangement is wholly appropriate.

Mr Want said:

OLV had a difficult start in an environment that did not entirely welcome its agenda. It was not well supported by its portfolio agency and broader government. The lack of budget, staffing allocation, establishment of systems and processes and capabilities were an important factor in its early performance.

Later Mr Waller added:

I accept OLV made some poor decisions. Some judgements made under pressure were not in all respects what they should have been.

Transparency and probity in procurement

52. Two hundred and eighty-nine state entities, including all nine government departments, are required to comply with the Victorian Government Purchasing Board (VGPB) policies in relation to the purchase of goods and services. Although outer budget agencies and government business enterprises are not required to apply VGPB's policies to their purchasing activity, most of those agencies, such as VicRoads, local government and the Transport Accident Commission, have elected to do so on the basis that they represent best practice in procurement.
53. There are currently nine Administrative Offices in the State and, aside from OLV, none dispute that it is necessary to comply with VGPB policies. Indeed OLV, until after this investigation concluded, also accepted that it was bound to comply with those policies.
54. This acceptance can be seen from:
- Evidence received from OLV officers
 - Two Memoranda of Understanding (MoU) between the CEO of OLV and the Secretary of its related department (DEPI and its predecessor, DSE). The second of which, dating from March 2014, is quite specific as it requires OLV to:
Ensure compliance with all Victorian Government Purchasing Board and APU [Accredited Purchasing Unit] requirements.
Seek APU advice in a timely manner to ensure compliant procurement processes are undertaken.
 - OLV senior management organising procurement training in September 2013 for staff which includes a slide stating 'Office of Living Victoria is required to comply with Victorian Government Purchasing Board (VGPB) policy in relation to the purchase of goods and services'.
- d. The practices of OLV which were consistent with VGPB policies, such as:
- Ministers' financial authorisation for DEPI, including the CEO of OLV, specifies in note 6 that all purchases over \$100,000 must be approved by both the APU and the relevant financial delegate.
 - OLV used the services provided by DEPI's APU, including seeking endorsement of most procurements, exemptions and contract variations.
 - OLV reported 'breaches' of the VGPB policies to DEPI in line with annual reporting requirements.
55. The primary purpose of complying with VGPB's policies and the Minister for Finance's directions is to ensure high levels of integrity in procurement processes while pursuing value for money. And it is for that reason that agencies comply with those policies, whether legislatively required to do so or not.
56. In accordance with my obligations in section 25A(2) of the Ombudsman Act, parts of the draft report were forwarded to Mr Waller and Mr Want for comment prior to this report being finalised. When their responses were received it was revealed that on 22 April 2014 OLV obtained advice from the Victorian Government Solicitor's Office (VGSO) regarding the application of VGPB policies to OLV. In particular, OLV sought an answer to the following question:
- Do the functions of the Victorian Government Purchasing Board (VGPB) pursuant to s54B of the FMA [Financial Management Act] exist in relation to the supply of goods and services to an Administrative Office?

57. The VGSO considered Administrative Offices not to be part of departments, and therefore concluded: 'that while the functions of the VGPB pursuant to s54B of the FMA can exist in relation to an Administrative Office, Part 7A of the FMA does not currently apply to OLV'. However, this is a technical issue that only considers the provisions of the FMA and the fact that no Order under s54AA has been made declaring that OLV is a specified entity for the purposes of Part 7A.

58. This advice conflicted with internal legal advice provided on 26 February 2014 by the Department of Treasury and Finance to DEPI.

We refer to your request for guidance on whether the Office of Living Victoria (OLV) must comply with the VGPB supply policies. In our view, OLV is bound by the VGPB supply policies.

OLV is established as an Administrative Office in relation to DEPI and has no legal status of its own. While it may operate with some measure of autonomy under a framework to which the Water Minister, the DEPI Secretary and the OLV CEO are parties, in reality it is part of DEPI. Ultimately, the DEPI Secretary is responsible to the Minister for the conduct and exercise of functions and activities of DEPI and any Administrative Offices in relation to DEPI (such as OLV – see s13 of the PAA).

We also note that the financial statements of an Administrative Office must be incorporated in and consolidated within the financial statements of the department (see s46(4) of the FMA). This adds strength to the view that OLV is part of DEPI.

As departments (such as DEPI) are bound by the VGPB supply policies, it follows that their Administrative Offices (such as OLV in relation to DEPI) are also bound by the VGPB supply policies as a matter of law.

59. DEPI sought further advice from the Victorian Government Solicitor on the responsibilities and accountabilities of the Secretary of DEPI for the conduct and management of OLV, particularly with regard to procurement and financial matters. On 6 June 2014, the Victorian Government Solicitor provided the following advice:

The Secretary can direct the CEO of OLV to comply with the Victorian Government Purchasing Board's supply policies and any relevant financial directions made pursuant to s8 of the FMA.

This is because the Secretary can issue directions in relation to the general conduct and effective, efficient and economical management of the functions and activities of bodies and organisations for which the Secretary is accountable. This clearly includes OLV.

The purpose of supply policies is to deliver value for money outcomes, develop procurement capability and minimise risk for the public sector. Financial directions are to improve financial administration and accountability of the public sector. The supply policies and financial directions will assist in the effective, efficient and economical management of the functions and activities of OLV.

For the same reasons ..., the Secretary can direct the CEO of OLV to comply with DEPI policies and procedures.

60. Mr Waller relied heavily on the initial legal advice in preparing his response to adverse comments in the draft report. For example he said:

... OLV is an Administrative Office under the Public Administration Act, and is not a department, part of a department or a specific entity. It is not therefore within the scope of the VGPB supply policies.

... the directions made under the [Financial Management Act] do not apply to OLV.

As OLV is not within the scope of the VGPB policy, there is no requirement for any endorsement by the DEPI APU – OLV's interaction with the APU is effectively on a voluntary basis only to assist OLV ... reporting to the APU is also voluntary ...

... OLV is not formally subject to the VGPB rules. The CEO of OLV had and has a general authority to determine OLV's procurement approaches.

OLV is not within the scope of the VGPB policies. Under the Financial Administration Act, the supply policies of the VGPB extend to departments (as defined by reference to the Public Administration Act) and specified entities. OLV is an Administrative Office, which is separate from a department under the Public Administration Act. It has not been declared a specified entity for Part 7A of the Financial Management Act.

As the DEPI APU derives its authority by delegation from the VGPB, or otherwise as exercising functions within DEPI on behalf of the Secretary, the DEPI APU has no formal relationship with OLV, and has no legal basis on which it can approve procurement decisions by OLV. Its relationship to OLV is therefore necessarily fundamentally different to its relationship to DEPI.

However, OLV has voluntarily adopted relevant DEPI processes to assist in our activities, but this does not involve abdicating OLV's independent decision making to any part of DEPI, and to the extent that DEPI policies implement VGPB policies (e.g. the authority of the APU is delegated from the VGPB, and reporting requirements) these policies are not relevant to OLV. While at times DEPI staff (and also some staff provided by DEPI to OLV) may have assumed OLV was within the VGPB scope and given advice on this basis, it is not correct.

If the government wanted OLV to follow VGPB rules, it could have made a decision for this to be so.

OLV is not required to follow VGPB rules and policies, or refer any procurement matters to the department.

... these are not actual 'breaches' as OLV is not within the VGPB rules.

The complete lack of understanding for the role and functions of OLV as an Administrative Office was particularly manifest in the strained and, on occasion, antagonistic relationship between OLV's stretch procurement function and the DEPI APU.

61. Mr Waller did not explain the inconsistency between OLV practices and the commitment made by him, and his predecessor, in the MoUs.

62. In response to my draft report the Acting Secretary of DEPI, Mr Paul Smith, said:

The Secretary does not agree with the comments made by Mr Waller and Mr Want regarding support provided to OLV by DEPI. Since the establishment of OLV, DEPI staff have sought to establish supportive and professional working relationships with OLV staff.

Any suggestion made by Mr Waller ... of an 'antagonistic relationship with the DEPI Accredited Purchasing Unit (APU) is rejected. The APU always provided OLV staff full support in a professional and diligent manner, at all times respecting the VPS values and behaviours of respect and integrity.

63. On the issue of whether OLV was required to adhere to VGPB policies the Acting Secretary of DEPI said:

The Secretary does not agree with Mr Waller's view that the OLV was not required to comply with the VGPB supply policies or that it was "*a deliberate decision of the government to establish OLV outside the VGPB policies*". Prior to the advice from the Victorian Government Solicitor's Office to OLV dated 22 April 2014, there was no suggestion by OLV that it did not have to comply with the VGPB supply policies.

Mr Waller's arguments around the direct application of the Financial Management Act 1994 to OLV are irrelevant. I had clearly advised Mr Waller on a number of occasions that I expected OLV to comply with VGPB supply policies. This was reinforced by the MoU signed by Mr Waller in March 2014. I considered that this requirement set out in the MoU was a direction and Mr Waller was required to comply with such a direction.

In addition, Mr Waller's authority to commit or incur expenditure required that all purchases over \$100,000 were to be approved by the Accredited Purchasing Unit within DEPI.

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64. There appears some uncertainty about the applicability of VGPB policies to Administrative Offices which needs to be clarified. Nonetheless, this uncertainty did not release OLV from complying with those policies or from explaining why it did not comply with those policies when it assumed that it was legislatively bound to comply – particularly in view of the undertakings made in its Memoranda of Understanding which had the force of a direction issued by the Secretary of DEPI.
65. This is reinforced by a community expectation that government agencies – regardless of their status – will be able to demonstrate high levels of integrity and value for money outcomes when using public funds. The principles that underpin the VGPB supply policies and the public sector values specified in the Public Administration Act are intended to achieve this.
66. Later Mr Waller in response to a second draft report, sent to him as CEO, adopted a more conciliatory approach about OLV's obligations in relation to procurement activities and said:
- The purpose of providing our legal advice to you was to ensure that any findings in your report were actually assessed against the correct facts. The point was not to explain or excuse OLV's activities, but to ensure the report was accurate. ...
- ... Following the baseline review in early 2013, OLV decided that it would follow DEPI procurement policies which reflect VGPB requirements. Indeed, after receiving the legal advice, I wrote to the Secretary of DEPI advising him that OLV would continue to meet the VGPB standards. It is therefore not accurate, on the facts, to say that OLV regarded adherence to these policies as optional.
67. The evidence taken during this investigation, particularly illustrated in the case studies, and the spirited defence provided by Mr Waller to the first draft report, would indicate otherwise.

The allegations

Allegation 1

In February to March 2013 a consultant engaged by OLV split contracts to avoid procurement guidelines for tendering of services.

68. Given the general nature of this allegation it was not clear which consultant and particularly which contracts were the subject of this allegation. However, a review of 12 contracts from OLV and interviews with witnesses identified the following:

- Eleven out of the 12 contracts awarded to consultants/contractors were just below the value threshold (\$100,000) where some external scrutiny and approval by DEPI's Accredited Purchasing Unit were required. Later, these 'fixed price' contracts were varied to cover additional expenditure.
- Eight out of the 12 contracts had follow-on contracts or purchase orders, and most were awarded to the same suppliers without a separate competitive process or documented justification for the additional work.
- There were many examples where OLV employed the same contractor/consultant over a period of time via a range of contract options, for example a direct engagement; then using an employment agency via the Staffing Services State Purchase Contract arrangements; or the individual returning to OLV as a sub-contractor through another consulting firm. In some cases, there was little or no change in the scope of the work undertaken by the consultant/contractor.

69. Contract splitting involves dividing contracts into small amounts in order to avoid requirements for open competition, such as a tender or quotation process, or to circumvent financial delegation thresholds⁵. (A more detailed discussion of VGPB's and DEPI's procurement policies and OLV's practices follows later in this report). The VGPB procurement policy is quite clear that it is unacceptable to split contracts⁶:

It is unacceptable to divide a particular procurement or procurement phase into separate parts or use a particular method for calculating estimated total value for the purpose of circumventing an approach to the open market.

70. At interview, the Chair of DEPI's APU advised:

The reality is that if someone wants to be fraudulent or deceptive, they could write the submission [contract] in a way that it looked like two discrete pieces of work when in fact it was not; unless we are actually there watching what the person is doing it would be difficult to identify [contract splitting].

71. In response to the draft report Mr Want said:

To the best of my knowledge, at no time did OLV ever intentionally split contracts to avoid procurement rules or APU scrutiny.
...

In the cases when more than one contract was entered into between OLV and a contractor, they would have either been for a very separate stream of activity, or for a subsequent stage of activity that could not have been known at the time of issuing the first contract.

In the cases where time and cost extensions and variations took place within a contract, these were also driven by the ever-changing environment underpinning the organisation's establishment and the reform agenda that was being delivered against.

⁵ DEPI's procurement policy requires that approval to waive tender or quotation requirements must be obtained prior to accepting quotes, engaging a supplier, commencement of work or commitment of funds by the financial delegate. If the value of the procurement exceeds \$100,000 APU approval is required.

⁶ Victorian Government Purchasing Board, *All Procurement Policies*, version 3.8, dated July 2012, page 59.

The lack of Victorian Public Service (VPS) allocation (particularly executive allocation) and the uncertainty around when resourcing would be allocated and resolved, meant OLV was left with no alternative but to engage contractors for discrete oversight projects.

72. One example of contract splitting is demonstrated in the following case study which relates to the engagement of Contractor A.

Case study 1: Contract splitting

Contractor A commenced at OLV on 28 November 2012 for a period of 60 days (\$1650 per day) and a total contract price of \$99,000 as Strategic Policy, Engagement and Communications Adviser. Documentation on the OLV file indicates the engagement was based on a curriculum vitae submitted by Contractor A to Mr Want, (then Chief of Staff to the CEO), and a subsequent recommendation by Mr Want to the CEO, Mr Waller. There is no evidence on file that Contractor A's skills and experience were considered and evaluated against any selection criteria for the role. No quotes were requested from alternative candidates for the role and the exemption from seeking three quotes was signed by Mr Waller on 14 December 2012 – well after the contract commenced – on the basis that 'it is impracticable to obtain three written quotes because of the specialist expertise required for this scope of works and the lack of readily available specialists in the field'. This practice contravenes procurement policies⁷.

The investigation identified that Contractor A had previously worked with Mr Want; both were ministerial advisers to then Deputy Prime Minister [John Anderson]. This previous work association was not recorded on file. When questioned about this, Mr Want said that he did tell the CEO about their previous association, but he could not recall if he had documented the potential conflict of interest on file.

A note on file dated 11 December 2012 asks for the contractor's role description and outputs to be finalised. This was two weeks after his engagement. This contract, while due to finish on 2 March 2013, actually ended on 22 February 2013 when it was close to reaching its maximum value – \$99,000.

On 25 February 2013, a 'new' contract was signed with Contractor A for a further 60 days (\$1650 per day), until 15 May 2013, again at a total price of \$99,000. Another exemption from seeking 3 quotes was signed by Mr Waller on 7 March 2013, again after the contract commencement, and in contravention of procurement policies. The rationale provided for the exemption was that the office had 'investigated potential service providers'. However there was no evidence on file to support this. At this time, Contractor A was working as an Executive Director providing corporate support services to OLV. This is not a role which would appear to justify exemption action as such services are provided across government. The contract expired on 15 May 2013 with an end value of \$94,050.

⁷ The exemption form must be signed by the responsible party before process approval and engagement of a supplier(s). VGPB Procurement Policies, page 59.

Contractor A was employed a third time at OLV through an employment agency listed on the Staffing Services State Purchase Contract panel. On 9 May 2013, the employment agency emailed OLV advising that Contractor A was to commence at OLV in the role of Executive Director at a daily rate of \$2237.59, an increase of \$587.59 per day. This was the same role he had undertaken under the previous contract, which was still current at the time.

On 17 June 2013, Contractor A's daily rate was reduced to \$1798.71. There is no explanation on the contract file why the rate was either increased or subsequently reduced. Contractor A finished at OLV upon the completion of his contract on 2 July 2013. Over the period of his engagement at OLV, either directly or through the employment agency, total payments for his services amounted to over \$320,000 for a seven month period.

On 26 June 2013, Acting CEO Mr Want reported to the Chair of DEPI's APU in respect of the engagement of Contractor A. However, the details contained in the breach report are not consistent with the facts above. The breach report only identified an expenditure of \$24,000 for work undertaken by Contractor A in January 2013, followed by the 22 February contract. It did not disclose the first contract expenditure of \$94,500. Whether by commission or omission, this is poor paperwork. It is unlikely that Mr Want, who was responsible for the engagement of Contractor A and signed off on the advice, did not know the commencement date of one of OLV's most senior staff members.

73. In response to the draft report Mr Waller said:

I accept that [Contractor A] was engaged through a succession of different contracts, but I reject the unsubstantiated assertion that this was done for the purpose of avoiding procurement guidelines. There is no evidence presented in the draft report that demonstrates this was a purpose of the separate contracts.

...

Relevant facts ... are:

- At the time of [Contractor A's] engagement, OLV had identified a critical risk in operations that required urgent attention.
- At the time, DEPI had not allocated or approved the creation of new staff positions at OLV in order to fill necessary roles to address these risks.
- ... [Contractor A] was engaged for a short term (60 days) in order to meet the OLV's need while the discussions on resourcing and staffing positions were resolved. ...
- As it transpired, as the contract neared its end, it was evident that DEPI had still not progressed a decision on staffing positions for OLV and in order to provide continuity, a second contract was arranged.

... the VGPB list of circumstances for granting of exemptions is not exhaustive, and includes a general category for any exceptional circumstances as determined by the accountable officer. ... I had regard to all the circumstances and was satisfied that not seeking quotes was justified.

74. In response to the draft report Mr Want said:

This allegation is rejected in its entirety. At no time did OLV "split contracts" with [Contractor A] to avoid procurement guidelines.

During [Contractor A's] time at OLV, he was engaged under a number of contracts, but this was not for the purpose of avoiding procurement guidelines. [Contractor A] was engaged to undertake a set of short and discrete tasks during its start-up phase.

I was aware of [Contractor A] through a previous professional experience, but this in no way indicates any conflict of interest. He was not a friend. I declared my previous association to OLV at the time he was considered as a potential resource.

...

At the time when [Contractor A's] engagement was reaching an end, despite assurances, DSE had yet to provide OLV with any VPS allocations, against all expectations. These unforeseen circumstances meant that OLV was not in a position to transfer the responsibilities to a VPS employee. [Contractor A] was thus engaged to undertake a new set of discrete tasks, quite distinct from the original set that could not have been planned or foreseen at the time of his original contract.

75. Messrs Waller and Want's explanations are contradicted by the evidence of Contractor A and other evidence taken during the investigation⁸, which included many examples of contracts with an initial value of \$99,000 and then increasing significantly thereafter even though there was no change in the scope of the work to be undertaken⁹. Contractor A's contracts were split and he had undertaken the same role under the 25 February 2013 and 15 May 2013 contracts. This allegation is substantiated.

Allegation 2

Another consultant, Mr Simon Want, who was appointed as the Head of Office for OLV in September 2012, received payment prior to his contract of employment being signed.

76. There is an error in the allegation: Mr Want was not engaged formally as Head of Office until March 2013, not in September 2012 as asserted. However, this does not detract from the issue raised in the allegation, that Mr Want, as a contractor, received payment prior to his contract being signed.
77. The details on file indicate that on 9 August 2012 Mr Want emailed Mr Chris Chesterfield, then CEO of OLV, a marked up request for quote (RFQ) for a short term role to provide high level support liaison between OLV and the Office of the Minister for Water. On 13 August 2012 Mr Chesterfield responded that he was happy with what Mr Want proposed and asked him to send his proposal as soon as possible. Given that the RFQ from Mr Want is dated July 2012 and Mr Want's response references an original agreement, it is obvious there were discussions and correspondence which predated the documents on file. Such documents were not on the file and could not be located.
78. Mr Want submitted two proposals, one dated 16 August 2012 and the other 24 August 2012. The only difference is the rate of pay being proposed: the latter proposal being a lower figure¹⁰. Mr Chesterfield confirmed at interview that there had been extended discussions around an acceptable pay rate and the role envisaged for Mr Want. This is not documented on file.

⁸ See for example paragraphs 100 and 174.

⁹ See for example case study 6.

¹⁰ The proposal submitted on 16 August 2012 provided for a rate of \$2,200 per day (with travel, accommodation and other disbursements to be added). The proposal submitted on 24 August 2012 is identical other than the daily rate, which was reduced to \$1,925 per day (again with travel, accommodation and other disbursements to be added).

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79. On 19 September 2012 Mr Waller, then Chair of the *Living Melbourne Living Victoria* Expert Advisory Panel, sent an email to Mr Chesterfield urging him to sign a certificate of exemption for the contracts for Contractor KG, Contractor B and Simon Want. He argued that ‘no other contractor will have the necessary carry over experience from the [Ministerial Advisory Committee] modelling and analysis process and the confidence of/ liaison background with the Minister and his office’.
80. In response to Mr Waller’s email, the following advice was provided by a senior officer at OLV to Mr Chesterfield:
- The rules say max \$25,000 for 1 written quote and the only exemption exists for ‘where goods or services can only be supplied by a particular supplier and no reasonable alternative or substitute goods or services exist.’
- Whoever signs an exemption needs to satisfy themselves of the above – not merely assert. Nothing in the task list [for Mr Want] indicates any uniqueness. The other complication is that there is a government panel of 39 providers for media and comms services. These have been through an open tender process and it is COMPULSORY [his emphasis] to use the providers on that list. As soon as any contract is signed APU look it over and if there is a breach of the rules it has to be reported immediately to the Victorian Government Purchasing Board. Approval cannot be granted retrospectively.
81. In response to the draft report Mr Waller said:
- This may well have been advice provided to the then CEO, but it is incorrect ... because OLV is not formally subject to the VGPB rules. The CEO of OLV had and has a general authority to determine OLV’s procurement approaches.
82. Despite the senior officer’s advice, on 24 September 2012, a contract (317850) was signed by both parties (Mr Chesterfield and Mr Want on behalf of his company, Company ZA) stating the commencement date was 27 August 2012. Elsewhere on the file, there is a note dated 29 November 2013 stating ‘it has become apparent that [the] contract start date was incorrect. It has now been changed according to [the] long form contract’. The commencement date was changed to 24 September 2012, the date the contract was signed. It is noted that on a memorandum drafted or sent to the APU in April 2013 – it is unclear the formal status of the memorandum – OLV was clearly of the view that Mr Want commenced in September 2012. Nevertheless, there is a copy of an invoice on file dated 31 August 2012 from Company ZA covering Mr Want’s work during the period 16 August 2012 to 7 October 2012. The investigation confirmed an invoice for \$51,392 was paid by OLV.
83. In response to the draft report Mr Waller said:
- While the invoice from [Company ZA] was dated 31 August 2012, it was not received by the department until 16 October 2012. This was clearly after the contract had been signed and after the work described in the invoice had been performed.
84. The evidence indicates Mr Want was paid for services he provided before his contract was signed and indeed before the commencement date of the contract, whatever that was. It is a further example of poor procurement practice and should have been avoided.
85. An examination of the contract file also highlighted:
- an unsigned and undated exemption form

- Mr Want's engagement was not the subject of three quotes and should have been as the initial value of the contract was between \$84,000 (as quoted on the unsigned exemption form) and \$91,440 (as quoted on the Procurement Variation Request (PVR))
- an engagement recommendation signed by the then CEO, Mr Chesterfield, on 8 October 2012, well after the actual appointment date
- a PVR signed by the then acting CEO, Mr Waller, on 21 December 2012 requested an increase in the value of Mr Want's contract to \$160,000 and a new end date of 22 February 2013. Subsequent correspondence notes that this PVR was never sent to the APU
- a memorandum sent by Mr Waller to the APU on 8 January 2013 advising of a procurement breach in respect of the contract, and
- following an exchange of emails between OLV and the APU a further memorandum dated 15 April 2013 (on this occasion signed by Contractor A, Acting Executive Director) outlining the circumstances of the breach and requesting a new total payment of \$254,540 against this contract.

86. On 12 March 2013, Mr Want was appointed to an Executive Officer, Grade 2 position in OLV. This position was not advertised, nor were any formal interviews or background checks conducted.

87. In response to the draft report:

Mr Want said:

... my initial engagement was undertaken by Mr Chesterfield, the then CEO. As such given this person is now neither in the OLV or the public service, it is not an appropriate matter for OLV, or more specifically, Mr Waller or myself to answer.

It does however highlight, the poor state of affairs that the organisation was in prior to Mike Waller taking over as Acting CEO, on 22 October 2012. Poor paperwork, document management and contract management plagued the organisation from early on.

Mr Waller said:

...

I can accept the conclusion ... that Mr Want was paid for work performed before the contract was signed. However,... it should [be] noted that:

- There is no evidence that the services were not actually provided
- The person that approved the payment is no longer at OLV

88. This allegation has been substantiated because of irregularities in the engagement of Mr Want by OLV that circumvented the VGPB's procurement policies and procedures and the fact that Mr Want invoiced OLV and was paid for services provided prior to the date of his contract signing.

Allegation 3

During the launch of OLV, a request for quotes to engage event management services was requested from three companies, with three quotes received for \$40,000, \$60,000 and \$160,000. The highest quote was accepted by Mr Simon Want with no explanation as to why.

89. The investigation identified a procurement process for the provision of an 'Opportunity Forum' by OLV in December 2012 which related to the issues raised in the allegation. The forum involved the introduction of OLV to major stakeholders in the water industry, such as peak bodies, developers, government agencies, local government and water authorities. At the forum, the Minister for Water was to re-launch the Living Victoria funding program and OLV was to explain its business strategy. The forum was followed by a dinner for the key stakeholders.

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90. Very shortly after his appointment as the Acting CEO, Mr Waller sent an email¹¹ to Consultant C, Managing Director of Company Z (a consulting company), advising him that OLV wanted to engage him to help design and facilitate a OLV Opportunity Forum.
91. The investigation identified that prior to Mr Waller's appointment as Acting CEO in October 2012, he had been a Senior Adviser with Company Z. Mr Waller also asked Consultant C to recommend a professional event manager to whom OLV could sub-contract all the logistics of venue preparation and other details. Mr Waller nominated Mr Want as the liaison officer between OLV and Company Z. There are no records on the contract file about these arrangements or a statement from Mr Waller acknowledging his previous association with Consultant C in Company Z¹² and the potential conflict of interest.
92. Two days later Consultant C recommended the engagement of Company Y, or Company X, to provide the logistical management of the event.
93. The investigation identified that on 5 November 2012, Contractor E, engaged by OLV to provide executive advice, advised Mr Waller:
- I appreciate and understand Simon's [Want] desire to get things moving ... but you need to be aware of the procurement policies of the VGPB [Victorian Government Purchasing Board] for purchase of services ... It would be difficult for you to approve all this on the basis of the possible justifications for exemption [and] I would suggest you seriously reconsider the timing and the process. As discussed, late January makes more sense and there would be time for a proper process.
94. In response to the draft report Mr Want said:
- ... This statement was made during the early scoping phase of the activity as an input into the design, makeup and planning for the event. As an outcome of this design process, and the input of [Contractor E] and others, OLV took forward an opportunity forum that was paired back to appropriately [*sic*] to enable certainty of delivery, compliance with purchasing guidelines, but still ensure the event was successful.
95. Despite the advice from Contractor E, the forum proceeded. On 6 November 2012, Company Y responded to an 'Event Brief - LV [Living Victoria] Opportunity Forum' with a quote of \$132,440 or \$116,490 'with a multi-event discount'.
96. On 8 November 2012, Company Y submitted a revised bid of \$163,240 on the basis of 'our recent series of meetings and the site survey'.
97. That same day (8 November), OLV forwarded the event scope to a second provider, Company W. This company responded the following day with a proposal which totalled \$62,975.
98. A third quote was also received on 8 November 2013 from Company X, for \$35,060 (excluding GST).
99. On 9 November 2012, Company Y provided a revised quote of \$80,850 (excluding GST) following a request to the company from OLV. The revised quote included only related expenses, excluding third party expenses such as a proposed video production.
100. On 19 November 2013, the Acting CEO, Mr Waller, signed a contract with Company Y for \$80,850 in line with the 9 November revised quote. One day later, OLV received an invoice from Company Y for a total amount of \$104,885, which was the same day OLV requested and Company Y agreed to 'delete the reference to discounting of fees' which increased the contract price to the invoiced amount.

11 Dated 28 October 2012.

12 Consultant C (Company Z) was engaged under a separate contract. Initially the quotation was \$76,000 and later revised.

101. The Victorian Government Purchasing Board policies set the minimum standards that departments and agencies must adhere to for procurement of goods and services. The general procurement requirements specify that¹³:

The evaluation process should provide a fair comparison between the responses and be conducted in accordance with the approved evaluation methodology and criteria. ... Value for money is the essential test against which any procurement output is to be justified. It is also essential that the assessment of offers is robust, systematic and unbiased to ensure the application of proper processes and the achievement of the procurement principles.

102. In response to the draft report Mr Waller said:

The [above] paragraph is substantively irrelevant as OLV is not a 'department or agency' that must adhere to the VGPB policies (though it has chosen to follow its principles). ... the associated DTF guidelines make it clear that price is only one factor to take into account and will often be not the most important factor. Indeed, DTF guidance warns against just accepting the lowest price. Awarding a contract to the lowest price tender without explanation should raise just as many questions as awarding it to any other, but is not of itself evidence of a wrong decision or of improper conduct.

103. There was no evidence that an evaluation of the competing bids was undertaken: indeed, the evidence suggests only Company Y's bid was given any consideration. The fact that the company was asked on a number of occasions to revise its price without a similar opportunity being provided to other parties supports this view. Even with these revisions, the final figure for Company Y was well in excess of that submitted by either of the other two companies. The rationale for this decision should have been explained and documented.

104. In response to the draft report Mr Waller said:

... the DTF Conduct of Commercial Engagements guidelines state:
If a tender is clearly non-competitive, it is not necessary to retain that tender in the process.

105. On the face of it, contract discussions were continuing after the contract itself was signed. It may well be that it was an oversight in failing to amend the contract date. Whatever the reason, this is poor practice and endemic of the office.

106. This contract was included on a 'non-compliance with procurement policies' report to the APU, not in respect of the issue discussed above, but due to the fact that payments under this contract ultimately amounted to \$115,280, some \$34,430 more than the original contract price.

107. In response to the draft report:

Mr Waller said:

I accept that the reasons for the decision may not have been properly documented. However, there is no evidence presented that it was the wrong decision

Mr Want said:

[Allegation 3] is not correct. The highest quote was not accepted.

A formal assessment of quotes was undertaken, and a bid that provided certainty, value-for-money and competitiveness was selected.

What occurred was that the correct processes were in fact followed. However, those processes were not documented appropriately. I accept that as a [*sic*] being a failure of the organisation. As stated previously, poor paperwork and document management, characteristic of a young organisation that was not properly established, structured and resourced, has been acknowledged as a cause of a number of challenges for OLV.

¹³ [http://www.procurement.vic.gov.au/CA2575BA0001417C/pages/procurement_practitioners - stage 2-bid-process and contract award step 5 - evaluation selection and contract award](http://www.procurement.vic.gov.au/CA2575BA0001417C/pages/procurement_practitioners_-_stage_2-bid-process_and_contract_award_step_5_-_evaluation_selection_and_contract_award) (accessed 22 March 2014).

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108. The investigation found no evidence that an evaluation was undertaken and Mr Want did not provide any documentation to support his assertion that the highest quote was not accepted.
109. Also in response to the draft report Mr Want said 'it was entirely my decision to engage [Contractor C]'. However, the evidence obtained during this investigation does not support this as there is a clear email trail that indicates Mr Waller engaged Consultant C.

From: MikeW
Sent: Sunday 28 October 2012 11:08 AM
To: [Contractor C]
Subject: Living Victoria Opportunity Forum - 3 December
Importance: High

Hi [Contractor C]

The end of an interesting first week!
This email is a follow up to a discussion with R... on Friday to book you to help design and facilitate a forum on 3 December intended to generate interest in the opportunities presented by the Government's LV policies (shifting from disinterest and concern). ...

...

Simon Want (who is acting in a Chief of Staff role for me) has a more detailed outline which he will send you but we are open to your expert advice on how to extract the maximum benefit from such an event. I am in Singapore till Wednesday and have asked Simon to manage [Company Z] /OLV interface ... One immediate request is your recommendation for a professional event manager to whom we can safely sub-contract all the logistics etc.

Look forward to catching up next week to review progress.

Kind regards

Mike

110. Mr Want later clarified this and said that it was on [his] recommendation that Mr Waller contacted Contractor C.

The email that you have referenced was sent after my recommendation of Contractor C.

111. On the basis of evidence received during this investigation, this allegation has been substantiated.

Procurement, recruitment and contract management practices

112. In examining the allegations raised in this matter, the investigation revealed numerous examples where OLV did not follow the government's procurement policies and procedures, let alone their spirit or intent. The extent of these failures led to the examination of a number of cases in more detail to assess and better understand the underlying issues.

Procurement policy and principles

113. Underpinning the VGPB's supply procurement policies, and DEPI's procurement policies and procedures, are a number of principles which guide how procurement is carried out, regardless of what is being procured or the procurement approach being used. These stated principles are:

- Value for money
- Open and fair competition
- Accountability
- Risk management
- Probity and transparency.

114. In certain exceptional circumstances, the VGPB policies allow for the normal procurement practices to be truncated. To do so requires the financial delegate to authorise an exemption. The VGPB policies state that 'the party granting an exemption must be satisfied that the exemption is based on exceptional circumstances and not for the purposes of avoiding competition and that the integrity of the procurement process is maintained'¹⁴. The VGPB provides a list of exemption factors, noting that the list 'is not exhaustive and multiple factors may have relevance to the proposed procurement'¹⁵.

115. Each government department has an Accredited Purchasing Unit (APU) whose role is to ensure that the VGPB's policies are followed. Such APUs also develop and promulgate their own departmental procurement policies for matters which fall within their own delegation. APU policies must be consistent with those of the VGPB. DEPI has an APU (as did its predecessor DSE).

116. Financial delegates in acquiring goods and services, must do so within the VGPB and APU policy framework. Any purchases with a value of \$100,000 and more require APU approval (this also includes where the initial purchase was under \$100,000 and any cost variations to the contract that result in the cumulative value exceeding the \$100,000 threshold). The approval of the Chair of the APU or the Secretary is required for exemptions from seeking multiple quotes and open/selective tendering for purchases above a certain value¹⁶. In addition, instances of non-compliance with VGPB policies are required to be reported to the APU and where the amount of the breach exceeds \$150,000 must be reported immediately to the VGPB. Until recently, the CEO and HoO of OLV considered that they were subject to those requirements, but did not always exercise their delegated powers consistently with the VGPB and APU policy framework or immediately report apparent breaches.

¹⁴ Victorian Government Purchasing Board, All Procurement Policies, version 3.8, July 2012, page 59.

¹⁵ Ibid, page 61.

¹⁶ Exemptions from 3 written quotes and/or public tender for purchases between \$100,00 and \$250,000 must be approved by the Chair of the APU, and above \$250,000 by the Secretary of DEPI (via the APU Chair).

117. In response to the draft report Mr Waller said:

The government set up OLV as an administrative office, which are outside the VGPB scope. There is an ability under the Financial Management Act to declare entities to be covered by the VGPB policy, but this has not occurred in relation to OLV. The second reading speech in relation to amendments made to the Act in 2013 make it clear that the government will have a policy discretion as to whether other agencies will be brought within the scope of the VGPB. It is therefore a deliberate decision of the government to establish OLV outside the VGPB policies. To assess OLV against VGPB requirements is not only incorrect and without basis, but ignores the policy decision of government to establish OLV as an Administrative Office. If the government wanted OLV to follow VGPB rules, it could have made a decision for this to be so.

He also said:

...

- OLV is not required to follow VGPB rules and policies, or refer any procurement matters to the department

However, routinely OLV does make use of the services provided by the DEPI APU, including seeking endorsement of most procurements, exemptions and contract variations

- While not bound by VGPB procurement rules, OLV has voluntarily reported 'breaches' of the rules to DEPI in line with their annual reporting cycles as a way to identify process weaknesses and enable the Secretary of DEPI to monitor the operations of OLV.

118. In response to the draft report Mr Fennessy maintained that the OLV was subject to financial delegations and associated obligations. He said:

OLV has no separate legal status. It cannot contract or procure in its own right. Mr Waller, like other senior officers, has a DEPI financial delegation which authorises him to commit or incur expenditure. The delegation requires that all purchases over \$100,000 to be approved by the Accredited Purchasing Unit and the relevant financial delegate.

OLV procurement practices

119. The investigation identified a regular and ongoing failure by OLV and its senior management to adhere to the principles supporting the VGPB policies. The underlying philosophy underpinning OLV's contract management and its use of exemptions appears to be based on the view of its senior management that it had to 'crash through' alleged bureaucratic intransigence and resistance to its reform agenda; that public service inertia and entrenched views and processes would stymie effective and timely change; and that the Minister's policy could only become a reality through Mr Waller's group of 'forward-thinking' and 'committed' individuals. The following is a small sample of the views expressed by witnesses about the approach adopted by OLV senior management:

[] had an open discussion about how they need to move from ... the guerrilla phase - to mainstreaming and normalising. ..., to use his own words, that initially they were change agents and the perception was that the whole water sector and the department didn't support their new policy agenda and they had to crash through. And by implication if you have to crash through you have to use different approaches.

[] thought we had been waiting for 30 years for any change and there needed to be firmer action to make the industry change for the better, very acrimonious at times.

[]'s view of the world was 'interesting': he believed that it was the bureaucracy that was stopping all these changes from happening ... I'm not sure whether [] ever understood that the checks and balances associated with the bureaucracy are part of the deal that you copped when you worked for government.

At the start the idea was that OLV was a 'can do' place and we had to be able to do it because the minister wanted it.

120. To demonstrate these views, the following case studies highlight the approach adopted by OLV in undertaking its procurement activities. These examples are taken from the files and associated documentation selected and are only a small sample of such activities.

Case Study 2: No competitive tendering

Company ZC is owned and operated by Contractor KG. This contractor and his company have been engaged for multiple contracts by OLV since June 2012. None of the contracts were subject to competitive tender to ensure value for money. At the completion of the current contract with Company ZC, OLV's total expenditure related to Contractor KG will be in excess of \$1.3 million over a three year period.

Contractor KG, when he was the Managing Director of another company ZB, had previously undertaken contract work between February 2011 and January 2012 totalling \$475,201 for the Ministerial Advisory Council (MAC). The recommendations contained in the MAC reports led to the establishment of OLV.

Contractor KG was first engaged by OLV in June 2012 (contract 317039) to review the draft Water Supply Demand Strategy. That contract extended into October 2012 at a cost of \$99,000. There are no details on file of how this contract was initiated.

On 9 October 2012, following representations from Mr Waller, the then CEO of OLV Mr Chesterfield agreed to a further contract (317908) with Contractor KG to provide 'specialist project services' following a request for quotation (RFQ) and proposal submitted by Contractor

KG. Contractor KG described the contract as the delivery of a draft Melbourne Integrated Water Cycle Strategy. No other quotes were sought by OLV nor was there an exemption on file. The value of the contract was \$77,500.

Contractor KG was next engaged by OLV (contract 318771) on 15 February 2013 to provide 'strategic leadership and advice to OLV including leading the finalisation of the IWCM [Integrated Water Cycle Management] in a form suitable for submission to the Minister for Water and for public release'. Contractor KG responded on 4 February 2013, but no other quotes for this work were sought. There is no signed exemption on file. While the contract is dated 15 February 2013, the work program forming part of Schedule 2 to the contract indicates the first deliverable under the contract was due on 4 February 2013, some 11 days earlier than the contract commencement. This work cost OLV \$157,917, nearly \$80,000 more than the original contract price.

In March 2013, Contractor E appointed to review the procurement of specialist expertise in Integrated Water Cycle Management, reported to the CEO, Mr Waller, 'it appears that there may have been some duplication in the scope of work between the second and third contract [with Contractor KG], and further, that some of the work required under the second contract was not delivered'.

On 1 May 2013, OLV was notified by a system-generated email that Contractor KG's contract had passed its end date and expired. Two weeks later, OLV sought Contractor KG's agreement to the variation of the contract completion date to 30 June 2013. This was accepted by Contractor KG on 16 May 2013. On 17 June 2013, an internal memorandum in OLV stated 'as discussed there is [*sic*] no funds available on the Company ZC's contract'.

This contract was included on the 'breach memorandum' sent by the Acting CEO, Mr Want, to the APU on 26 June 2013. Mr Want acknowledged in that memorandum that 'the work ... was significantly underestimated by the project managers'.

By this time, OLV had expended \$334,417 over approximately a 12 month period on work undertaken by Contractor KG's company, ZC. At no time was this work subject to competitive tender.

Before the breach memorandum was sent, on 31 May 2013 the CEO Mr Waller requested from the Chair of the APU an exemption to engage Company ZC for another contract without undergoing the public tender process and seeking three quotes. The Secretary, DEPI approved the exemption on 20 June 2013 on the basis that 'it is impracticable to publicly invite tenders or seek three written quotes because of the high level skills, experience, abilities and knowledge unique to Contractor KG. OLV's Procurement Process Report was formally approved by the APU on 26 June 2013. However, the contract was signed by Contractor KG¹⁷ on 21 June 2013, five days before formal approval was granted.

The contract is for a two year period – 1 June 2013 to 31 May 2015 – for a total value of \$986,200, and includes Contractor KG undertaking the role of Chief Scientist at OLV. The contract includes a maximum amount of \$566,280 for 'Specialist Systems Analysis Support to the Office of the Chief Scientist'.

The investigation identified that the contract was the subject of detailed discussions and exchange of correspondence between solicitors on both sides. The Acting CEO, Mr Want, agreed for part of the Chief Scientist's legal costs to be paid by OLV. This is not a common practice and is inconsistent with DEPI business rules.

Some of the discussion related to the issue of the ownership and use of the intellectual property associated with Contractor KG's work for OLV.

121. In response to the above case study, Mr Want said:

The numbers quoted in the case study are not correct and the distribution of the incorrect numbers is also not correct. ... [Contractor KG's] contract has been actively managed with regular project meetings, detailed documentation of events and diligent management of the contractor undertaken.

122. Mr Want did not provide alternative numbers and a check of invoices paid to Contractor KG's companies during the period outlined in the case study confirmed the amounts are correct. Contractor KG's current contract is subject to detailed performance reporting.

17 Subsequently appointed as Chief Scientist at OLV.

Case study 3: Poor contract planning and project management

Evidence provided to this office suggests that OLV has expended more than half a million dollars on contracts with companies, U and V, but has little to show for this money. The products contracted for are not functional and still require more work before they will be suitable for public release. In addition, the investigation staff in examining the contract files identified a number of issues with the way that these contracts were initiated, varied and managed. The investigation also established that Companies U and V are in effect the same company; they are owned and managed by the same individuals.

Company V

On 29 April 2013 the HoO, Mr Want, signed a contract with Company V (contract 319697) to develop a digitally based simulated house (the interactive house). It was envisaged that the interactive house would demonstrate to the general public how much water was being used, and what savings could be made by including the principles underlying Contractor KG's model of Integrated Water Cycle Management into house design. The interactive house was to be accessible to the public via the OLV website.

Two days after the contract was signed, the CEO Mr Waller signed a certificate of exemption from seeking three quotes for this work on the basis of 'insufficient time in order to deliver information for Ministerial consideration'. It was indicated that the work was required to be completed by 31 May 2013. The original contract price was \$98,956.

Issue 1 – Poor planning

The scope of the work was significantly varied by Mr Want soon after, or possibly even before, the contract was signed. A note included in a subsequent quote for the cost of variation to this contract states that 'in a meeting to discuss the original quote on 22 April, Mr Want requested that extra dwellings be added to the model'. The note indicates that Mr Want was verbally informed that this would result in a 40% addition in cost, and that on 29 April 2013, email confirmation was received from Mr Want to proceed with all works including the extra dwellings. This means that on or before the date that the contract was entered into, Mr Want had committed to a substantial increase in the scope of work and in the cost of the contract.

The exemption document lists the contract value as \$99,000. This was signed by Mr Waller on 1 May 2013, well after this substantial increase in expenditure was initially approved by Mr Want. The invoice later issued for the cost of the requested changes totalled \$148,408.

Issue 2 – Delay in advising APU of cost over runs

On 8 May 2013 Acting Director Contractor A sent an email to the Chief Scientist advising him that a variation to the contract would be required to cover the increase in the scope of the work. The email makes it clear that there were scarce funds available for further expansion of the project, and indicates that APU approval will be required for further variations that result in cost increases. Mr Want was copied into this email. There is no record on file of any response to Contractor A's email. APU approval was never sought.

Mr Want did not report this breach to the APU until 26 June 2013, some two months after he had approved the changes and the increase in the value of the contract.

Issue 3 – Poor contract management

Whether this contract has been completed is unclear. The contract lists conflicting completion dates¹⁸, and there is no indication of the status of the various components of the contract on any of the files provided to investigation staff. Investigation staff were informed by Contractor A that Company V has produced, finalised and sent the interactive house to OLV and that it is functional. However, the Chief Scientist stated at interview that it is 'certainly not finished'. In his response to the draft report, the Chief Scientist advised that it is 'operational and requires marginal additional effort for completion'. Mr Waller advised that in a limited sense the interactive house is functional, however he said that the data input into it was incorrect and, as a result, the information that the interactive house reflects is wrong. Mr Waller acknowledged that in this respect, the interactive house is not 'totally functional and is in that sense a failure'.

Interviewees explained that the reason for the incorrect information is that the Chief Scientist, who was responsible for providing information to Company V, was delayed in providing the data, changed the data he did provide and generally did not manage the contract in an appropriate or effective manner.

Contractor A explained that Company V was caught between being told the project must be delivered by a certain date, and the Chief Scientist not providing essential information necessary for its completion. He stated that as a result, an animation coder was paid on stand-by as each day the information was promised, but then not delivered. The Chief Scientist acknowledged his role in providing data, but attributed the issues with the project to lack of management by other OLV staff and ongoing requests for changes made by other staff and not communicated to him.

The Chief Scientist also advised that a review he conducted of the interactive house in October 2013 highlighted that the program did not accurately interact with the supporting database and had a range of structural presentation issues. He explained these issues were not attributable to data but rather technical and structural problems with the program, which was not correctly reading existing data. This claim is supported by a number of emails the Chief Scientist provided to this office which show him communicating these issues to Company V and also others at OLV, and attempts made to collaborate with Company V to address these issues.

The investigation did not identify anyone at OLV who took responsibility for the management of this contract. When questioned about his role, the Chief Scientist stated that he was initially told he would be the project manager, but then he was given no role and excluded from discussions about

¹⁸ Schedule 1 states the completion date is 30 June 2013, but Schedule 3 states that the works are to be completed 'no later than 31 May 2013'. The APU 'Reporting of Non-Compliance with Supply Policies' document states that the contract expired on 28 June 2013.

the contract¹⁹. He stated that he had no direct knowledge of the contract arrangements, and only provided 'intellectual and conceptual guidance'. The Chief Scientist stated that Mr Want and Contractor A were managing the contract. Mr Waller provided a different account. He stated that he appointed the Chief Scientist to the role of project manager and this was a 'fundamental mistake' because the Chief Scientist 'had an interest in the content but had no managerial skills'. The Chief Scientist contested this statement, stating that it was 'impossible' that he was appointed as the project manager, and that Mr Waller was absent from OLV at the relevant time.

Mr Want and Contractor A both distanced themselves from the particulars of the contract. Contractor A described himself as 'a bunny in the middle of the process', and stated that he was not managing the contract and only 'trying to stop the contract[or] from leaving'. He stated that the Chief Scientist and Mr Want were managing the contract, and he had repeatedly advised them of his concerns about cost blow-outs. Mr Want alternatively advised that Contractor A and the Chief Scientist were responsible for the contract and resultant output. He stated that he was aware of the company's involvement with OLV but could not provide specific information. This is contrary to the advice of Contractor A, who stated that Mr Want had numerous meetings with Company V and was included in a significant number of emails about the project.

At interview, Mr Want advised that he was unable to answer questions about the status of the products to be delivered because he did not have that information at hand. Mr Want did not respond to three follow-up emails sent by investigation staff on 21 February 2014 and 6 and 11 March 2014 requesting further information about the contract.

By 30 June 2013 Company V had been paid \$297,864 which is \$198,908 more than was specified in the original contract. In response to the draft report the Chief Scientist provided this office with another quote from Company V dated 25 November 2013 for a further \$64,693. The quote details various additional works, including 'completely rebuild[ing] [the] model', 'recheck[ing] all data' and 'rebuild[ing] all of the network pipeline data'.

Company U

OLV entered into a number of contracts with Company U. None of the contracts with Company U are included in any of the procurement files. Investigation staff made several requests for these contracts to OLV but they were not provided.

The major contract with Company U was for the production of an iPad application (the app). While there is no contract on the file, the project specification lists as the deliverable a 'self-contained app delivered through popular, portable, multi-touch electronic device'.

¹⁹ The Chief Scientist provided copies of email correspondence which show that he had expressed his dissatisfaction about his exclusion from contract discussions and stated that this 'impact[s] on [his] ability to manage the contractors'. He also provided other emails which show he had expressed concerns about the way in which the project was being managed by other staff at OLV.

The app was intended to introduce audiences to the principles underpinning whole-of-water-cycle management, and to use interactive diagrams and video to guide audiences through the 'Melbourne's Water Future' strategy. It appears that the interactive house animation created by Company V would also be used in the iPad app.

While investigation staff did not have access to the contract to determine the start date, the TendersVic website shows the contract start date was 3 June 2013 and the contract expired on 30 June 2013. A systems-generated report for the contract lists a later end date of 30 August 2013.

Issue 1 – Company U's unfair advantage

A RFQ, including the project specification, was sent to three multimedia companies on 10 April 2013. Company U and one other company replied by the deadline. The initial estimate provided by Company U was \$148,500, and it was awarded the contract as it was the highest ranked submission according to the tender evaluation matrix. The APU approved this expenditure on 3 June 2013.

Investigation staff located an invoice dated 13 March 2013, which shows that Company U had been paid for consulting, strategising, designing and developing requirements to construct an iPad app for IWCM implementation. The total cost of this was \$24,612. This invoice indicates that Company U had a role in the development of the app long before the RFQs were sent out and its quote was accepted.

Indeed, there are emails as early as February 2013 discussing the structure, content, and work already underway by Company U for the app. This represents an unfair advantage conferred on Company U, as it played a central role in the development of ideas for the app, and was therefore privy to information unavailable to other tenderers.

Contractor A advised that Company U was engaged to help design the specifications because there was no capability in OLV to write them. Regardless of the reason, this is contrary to the principle of fair and open competition. Suppliers engaged in contract specification work should not also be allowed to tender for the resultant contract.

Issue 2 – Variation of contract

In addition to the original quote for the app, the investigation staff reviewed an estimate provided to OLV by Company U dated 21 June 2013. It lists additional work relating to the app, totalling \$98,703. OLV applied to the APU to vary the contract to include this amount. The document prepared for the APU argues that 'following the production of the Multimedia presentation, it has been identified that additional content and animations beyond the scope of the contract will be required', including production of a 90 second video promoting the app, and other changes to original scope. The DEPI APU approved this variation to the contract, taking the total revised contract price to \$247,203.

The promotional video was the major component of the variation (\$64,130). At the time this variation was approved by the APU, and even when the promotional video was completed, the underlying app was yet to be finalised. A briefing note prepared in OLV following a Freedom of Information (FOI) request states that it is likely that changes to the promotional video will be necessary once the app has been finalised, so the promotional video which has now been received and paid for by OLV was only an 'incomplete draft'. It is not clear why OLV directed that the promotional video be produced, completed and paid for in full before the item it is promoting was finalised, being fully aware that further changes would be necessary once the app was finalised.

Issue 3 - Status of the app

There is little indication of the status of the app on the files. The FOI briefing document dated 26 September 2013 states that 'the app is yet to be finalised'. At interview, Mr Waller indicated that the app, like the interactive house, had been developed, but the information it displayed was inaccurate. Mr Want was unable to clarify the status of the app. He did not respond to follow-up emails from investigation staff requesting information about its current status. Based on the information available to this office, a working version of the app has still not been delivered.

Issue 4 - Conflict of interest

During the course of the investigation, it became clear that Contractor A, who at the time that the contracts were entered into was the Executive Director, Strategic Policy, Corporate Services and Communications at OLV, had a previous work association with Company V and Company U. Although Contractor A stated that he had no role in awarding the contract to Company U nor was he responsible for the contract, it was clear to the investigation staff he did discuss aspects of the contract, including payment of invoices with both companies during the course of the contract. This association should have been declared, documented and managed. While Contractor A stated at interview that he advised Mr Want and Mr Waller of his previous association and they were made 'fully aware' of it, there is no record of this on any of the files, and both Mr Waller and Mr Want said they were unaware of the association.

It is also noted that Contractor A's association with Company U has continued. His online 'Linked In' profile states that he is a 'media, research and communications specialist at Company U (October 2013 to present)'.

Issue 5 - Expenditure

A printout from the OLV contract register included on a file listed the total expenditure on the contract as \$247,203.

From an analysis of the invoices, it appears that OLV has also paid Company U for:

- The production of a video engaging the community to consider the impact that flushing the toilet has on Victoria's water resources: \$23,014, and
- The development of a 30 second storm water educational video: \$24,900.

To date \$554,823 has been paid to Company U and Company V. When questioned about whether these contracts represented value for money, the CEO Mr Waller, stated that '... I accept that in those particular instances, what were fundamentally experimental activities, ... were not managed well from a risk point of view, ... , so you know sometimes experiments work and sometimes they don't work'.

The initiation and management of these contracts clearly demonstrated OLV's lack of contract planning, lack of project management, poor attention to detail and a failure to follow procurement policies and procedures.

123. In response to the revised draft report:

Mr Want said:

In Contractor A's position, he was responsible and accountable for their deliverables, their contracting and their contracts. If the contracts were not established appropriately, documented appropriately or managed properly, it was Contractor A's responsibility and accountability. If the deliverables were not achieved as part of the contract, then it is the responsibility of Contractor A.

Mr Waller said:

... the contracts ... were experimental in nature, entered into early on in OLV's re-establishment phase and subject to poor management of conflict of interest and contract deliverables.

124. The following case study demonstrates the fundamental lack of understanding within OLV of the policies and procedures to be followed in procurement management.

Case study 4: No contracts and documentation

Company T provided consultancy services to OLV, for a total of \$96,212. However, there were no contracts in place between OLV and Company T and no supporting documentation on the file supporting the procurement activity.

On 8 November 2012, an invoice was received in the Business Services area of OLV for an amount of \$6,765 from Company T. There was no record of any purchase order or contract with Company T. It was subsequently found that Mr Want (then a contractor at OLV) had agreed to Company T undertaking a piece of work on 25 October 2012. There was no formal quote for this work. On 6 December 2012 then Acting CEO, Mr Waller, stated that Company T had been engaged to evaluate water plans. A purchase order (PO 473761) was raised on 20 December 2012 and approved that day, some two months after the work commenced.

On 21 December 2012, a further invoice for \$65,538 was received from Company T. Again there was no purchase order or contract in place at the time. In fact, there is no evidence of any formal contractual arrangement on file. As the invoiced amount is over \$25,000, OLV was required to seek three quotes or have an exemption from this requirement in place. Neither of these processes were followed.

On 5 February 2013, another invoice was received from Company T for \$23,909. This was in response to a proposal dated 23 January 2013 and accepted by OLV on 24 January 2013. The purchase order (PO 475116) was raised on 14 February 2013, after the work had been completed.

This case was not included on the breach report to the APU, presumably because expenditure did not total the threshold level of \$100,000.

125. In response to the above case study Mr Want said:

OLV asked [Company T] to undertake multiple, discrete pieces of work. On each occasion, appropriate procurement and contract management was requested be undertaken, and expected that it was done.

If it did not occur then it is an example of where the organisation was still developing appropriate document management, filing and administrative systems.

126. Value for money is an important principle underpinning government procurement. But as the following case study highlights when there is no documentation it is impossible to demonstrate the integrity of the procurement process and value for money.

Case study 5: Lack of documentation

On 11 April 2013 an internal memorandum to Mr Want recommended that a review of knowledge and innovation in the Victorian water sector be overseen by an Advisory Panel chaired by Contractor F (from consulting company S), and consisting of Contractor G (nominated as an academic but also a principal at consulting company S), Contractor KG, and other representatives.

Invoices were received from Company S for \$288,031 dating from 15 March 2013. However, it does not appear that the contract/purchase order details were settled until 11 June 2013, when Contractor A of OLV advised Company S that one contract and three purchase orders were in place, as follows:

Working Groups & Information Exchange – contract 320040 [for \$99,000]

Purchase Order relating to Contractor G – contract 476765 [for \$22,000]

Purchase Order relating to model translation – contract 478049 [for \$24,850].

There is also no evidence on the contract file of the receipt, evaluation or acceptance of proposals from Company S prior to any work being undertaken.

It was on Mr Waller's initiative that Contractor F was engaged. There is evidence that Mr Waller, in a former capacity, used the services of Company S and had provided a testimonial on their website. Contractor F and Mr Waller had also worked together previously on the Board of Sustainability Victoria²⁰. There were no declarations of this prior association on file by Mr Waller or an acknowledgement of a potential conflict of interest.

²⁰ While it is common for individuals to have previously worked at or with companies, it is important that such previous associations are declared, recorded and managed to ensure transparency in the engagement process.

The absence of detailed information on file made it difficult to gain a clear understanding of the events related to the activities performed for OLV by Company S. On face value, invoices totalling \$288,000 clearly exceeded the combined contract/purchase order value of \$145,000. The relationship between these purchases orders and the contract would also suggest that they should have been the subject of one and not three separate orders. The timing of the work and the provision of the purchase orders also supports the view that the orders were put together to match the events, rather than the orders specifying the work to be undertaken. The strong inference is this was done for the purposes of contract splitting.

127. In response to the draft report:

Contractor A said:

[Company S] had been engaged to undertake work by [the Chief Scientist], approved by Mr Want to which I wasn't aware of until it came to end of financial year reconciliation of accounts. At this point a PO was issued for the two smaller pieces of work they had undertaken for [the Chief Scientist]. Finding out about work that people had undertaken where there was no approvals or PO/contract coverage was an all too regular common occurrence at OLV.

Mr Want said:

... These were very distinct tasks and separate from each other. In each instance, the CEO and I requested that the appropriate procurement and contract management be undertaken. If it did not occur then it is an example of where the organisation was still developing appropriate document management, filing and administrative systems. ... The three events were very separate and the engagements were very independent, both in timing and scope. The inference that is contract splitting is false and apt to mislead.

Mr Waller said:

I accept that during this time, contract management and payment of invoices was not well managed – with key staff responsible for these functions often not raising purchase orders until invoices were received and not adequately linking invoices to contracts.

128. The following case study demonstrates OLV's deliberate circumvention of procurement policies and procedures in order to secure the services of a particular contractor.

Case study 6: Circumvention of procurement policies and procedures

On 5 July 2013, OLV approached Company R, a major international company, to respond to a RFQ to provide strategic, economic and governance advice to OLV. Company R responded three days later on 8 July 2013. OLV submitted a request for an exemption from the public tender process and the requirement to seek three quotes to the Secretary of DEPI. It sought the engagement of Consultant H, a Director at Company R, for three days a week over a 25 week period at a cost of \$249,375 (including GST); this was in line with Company R's response to the RFQ. The document on the file is undated. On 8 July 2013, the same day as Company R's response to the RFQ, Mr Want was advised by DEPI's APU that the 'request for approval of exemption from a public tender process and the requirement to seek three written quotes for the purchase of strategic, economic and governance advice ... has not been approved by the DEPI Secretary ... [and] other options are to be explored'.

The Secretary of DEPI, Mr Adam Fennessy, advised at interview that he 'rejected the Consultant H application in explicit discussion with Mike Waller because he and I agreed that he needed to get public servants into his executive'.

On 19 July 2013, some 11 days after the Secretary's refusal, Mr Waller signed an exemption for the engagement of Consultant H for 29 days at a total contract price of \$99,000. Supporting that exemption was a copy of Company R's earlier response with only the number of days and total price changed: there was no change to the work specification. That same day, a contract (320362) commenced with Company R for the amount of \$99,000. It would appear that the CEO was determined to proceed in this way despite the Secretary's earlier decision.

The end date of the contract was 20 September 2013. On 26 September 2013, OLV submitted a procurement variation request seeking to vary Consultant H's contract for an additional amount of \$505,245.40 to be paid to Company R (\$314,314 for the provision of Consultant H's services, plus a research support officer (\$145,000), plus a 10% contingency) and a new end date of 31 January 2014. This was approved by the APU on 30 September 2013.

During this period, Consultant H worked on a part-time basis with OLV and continued to work as a director of Company R. There is no documentation on file about how perceived or actual conflicts of interest in relation to his dual employment were to be managed.

These arrangements are contrary to the advice given by the Departmental Secretary and to the spirit and principles outlined in procurement policies. Given that OLV's intention was clearly to engage Consultant H for longer than 29 days, it is obvious that the initial contract was contrived to fall below the amount requiring external approval. This is evidenced by the fact that Company R's proposal was merely altered in terms of days and dollar amount: no other changes to project scope or any other aspect of the proposal were made. Based on these figures, up until the end of January 2014 the cost of services provided by Company R to OLV amounted to some \$415,000 over a six-month period.

Consultant H is now employed at OLV and occupies an Executive Director Grade 2 position on a full-time basis, having resigned from Company R. This position was not advertised nor open to competition.

The processes followed in this instance allowed no opportunity for other parties to compete for this work; there has been no transparency and equity, and value for money is questionable. There is no reason why an Executive Officer role should not have been advertised and an appropriate recruitment appointment process undertaken. Investigation staff were advised that an Executive Officer position was offered very early to OLV for this purpose. The basis for the exemption is unconvincing. 'Strategic, economic and governance advice' is a commodity widely available within the public sector, if not within DEPI, then within the Department of Treasury and Finance and numerous other agencies.

The HoO, Simon Want, recommended on 18 July 2013 that the CEO grant an exemption from competitive tendering for Consultant H's contract. When questioned about the circumstances of this contract, Mr Want stated that he made this recommendation despite the Secretary's decision on the basis that the engagement of Consultant H was necessary to OLV. He was unable to explain why he chose not to include the fact of the Secretary's rejection – a critical piece of information for the CEO to consider in his decision-making – in his submission to the CEO. When questioned about the basis on which he considered Consultant H's skills to be unique, Mr Want stated 'that Consultant H is a highly respected and very talented individual, and his skills were deemed substantially unique and important enough for me to put forward the exemption'.

At interview, Mr Waller gave the following explanation for his actions: 'When Adam Fennessy said it was a lot of money and suggested we go to market, I then went ... to [the Chair of the APU] and said these are considerations, I looked at them against the public sector procurement guidelines around exemptions and value for money, and it was within the construct that I came to the conclusion, particularly in the sense that the longer game was to get him [Contractor H] on staff, because it was palpably such a high value return to the taxpayer, that's why I did it'.

The issues associated with this contract did not go unnoticed by other staff within OLV. An internal email to a senior officer of OLV on 11 November 2013 raised the following issues:

1. As the project purchase order (the contract) has not been signed by Company R, the outputs and KPIs are not currently being measured or managed;

2. This engagement is the second highest risk to OLV in terms of our expenditures and the way this was procured;

3. In the event of an FOI request, (which is possible to happen soon) it is important that we are prepared to address the reasoning's [*sic*] of awarding a contract of \$604,245.40 for a six-month period.'

There is no evidence on file that these concerns were addressed.

Other than Contractor H, Company R provided 'secondedes' to OLV on a number of occasions. The work undertaken was variously described as 'accounts processing and procurement', 'finalising financials and budgets', 'financial management, reporting and compliance' and 'operational budget preparation'. While exemptions and staffing services contract arrangements have been used to source these services, these are skills which are readily available within the public service. One individual was paid a daily rate of \$1799 in July 2013, and \$2365 in September 2013. Little consideration appears to have been given by OLV executives to negotiating a reduction in the rates proposed by Company R.

129. In response to the above case study:

Mr Want said:

Whether I was advised that I was not required to, or that it was omitted by the staff that prepared the exemption, I am unable to explain why the fact that the Secretary's rejection of the exemption was not included in my recommendation to the CEO.

Mr Waller said:

Firstly, the discussion between Mr Fennessy and I did not conclude that OLV needed to get public servants into the executive as at that time there were no EO positions available that OLV could use for this purpose. I would therefore have never agreed to such a suggestion. It is also inconsistent with the expectations set by the Minister that OLV should work differently than the department, including to draw in expertise from outside government.

The matter had been referred to the Secretary as at the time there was some lack of clarity among DEPI staff about my level of delegation. This action was taken by staff in OLV at the instruction of the APU. My discussion with the Secretary ended with an understanding that I had ability to make the decision within my delegation and Mr Fennessy advised that if I wanted to grant the exemption I should do so. ... The Secretary never rejected the exemption or directed that it not be approved. Indeed, I am not aware on what basis the Secretary would have a basis for directing particular decisions that were in OLV's control.

... The \$99,000 contract was put in place as the need to get the work started had become critical – it was always the intention to put a contract in place to allow the work to start and always the intention to seek appropriate approval of the whole contract amount.

130. In response to the draft report the Acting Secretary, DEPI said:

OLV was advised that the Secretary had not approved this exemption and that he had requested that other options be explored for these services. The suggestion of anything otherwise is false. DEPI APU wrote to Mr Simon Want on 8 July 2013 confirming that the request for an exemption had been rejected.

Use of the Staffing Services State Purchase Contract

131. The investigation also identified that OLV was using the Staffing Services State Purchase Contract (SPC) arrangements to avoid open competition from across the public service and the private sector when engaging staff to undertake roles in OLV. The SPC is a whole of Victorian Government contract for the provision of on-hire staffing services (mandatory) and permanent staff (optional) to state government departments. Generally, employment in the public service comes under the provisions of the Public Administration Act (PAA) and the VPS Workplace Determination 2012 (the Determination).
132. Part 2 of the PAA sets out the public sector values and employment principles, and section 8(e) requires that public sector body heads ensure that the development of a career public service is fostered.
133. Section 13.7 of the Determination states that 'the Employer will not use fixed term contract positions for the purpose of undermining the job security or conditions of full-time ongoing employees ... [and] is limited to:
 - replacement of employees ... on approved leave;
 - meeting fluctuating client and employment needs and unexpected increased workloads;
 - undertaking a specified task funded for a specified period;
 - filling a vacancy resulting from an employee undertaking a temporary assignment or secondment;
 - temporarily filling a vacancy where, following an appropriate selection process, a suitable ongoing employee is not available

- filling a vacant role whilst a review of the area is undertaken, provided that such appointment does not exceed a period of twelve months’.

134. Significant funds are expended across the public sector on labour hire under the SPC, with the Department of Treasury and Finance estimating the value of the contract from 1 January 2006 to 30 June 2011 to have been \$987 million.
135. The SPC has been used extensively for the engagement of staff at OLV. Between 1 July 2012 and 31 December 2013 only one vacant position at OLV has been advertised on the government’s employment website and there is little evidence of formal interview panels being used to recruit staff to OLV. Despite assurances from Mr Want that OLV roles were advertised, he provided no evidence to this effect despite several follow up requests to do so. OLV was a closed shop to the wider public service.
136. In response to the draft report Mr Want said:
- ... OLV used a variety of advertisement mechanisms to engage staff. This included expressions of interest, use of external recruiters and agencies, requests for secondments to stakeholder organisation’s [sic] including central agencies, water authorities and local government.
137. However, there is no evidence to support this assertion. Mr Want has not provided a response to the following email sent by the investigation staff to him on 21 February 2014:
- To: Simon Want
Mr Want, further to our discussion, please provide the following information:
...
2. Recruitment
a. Which positions in OLV have been advertised within the last 12 months; how were they advertised, internal memo, careers website etc?
b. Which positions have been subject to a formal interview panel?
c. What other government agencies were contacted for staff? Who was contacted and when? Were OLV vacancies advertised within these agencies?

138. In response to the draft report Mr Waller said:

OLV did not have the authority to create VPS positions. OLV repeatedly sought approval from DEPI for the creation of sufficient positions, which was always promised but then delayed, or agreed at reduced numbers. This necessitated use of temporary resources, and for such purpose the whole of government panel is the appropriate mechanism. DSE recommended and encouraged OLV to use the SSP arrangement.

139. The engagement of agency staff member KK at OLV is an example of how the SPC was used in an apparent circumvention of public service recruitment and selection policies and resulted in a contractor being paid premium rates.

Case study 7: OLV’s recruitment and selection processes

In November 2012, OLV engaged agency staff member KK through an employment agency as a Communications Assistant at a VPS 4 level²¹. At interview, the staff member acknowledged that she had not actually undertaken this role: ‘at the time I worked for the Business Manager and Simon Want, and pretty much supported both of them in terms of work that was coming through, diary, organising things [including] events ...’.

In May 2013, the staff member was appointed to the Business Services Manager role at OLV. Again, this staff member did not undertake the majority of these functions: ‘I haven’t been managing procurement matters and I haven’t been overseeing the HR function because I have been through probably three senior changes in terms of my bosses, and I haven’t provided direct supervision of the staff because I’ve had other people managing them.’

²¹ Salary range \$68,388 to \$77,593.

So on my job description it says I do but in terms of what I actually do I tend to work a lot more on the special projects ... So I am the Business Services Manager but my job title probably doesn't reflect what I've been responsible for'.

Agency staff member KK's engagement from 7 November 2012 to 10 May 2013 cost OLV \$128,616. That is equivalent to some \$220,000 over a full-year. In May 2013, the agency staff member was employed (without advertisement or a formal interview panel) on a three year fixed-term employment contract at the VPS 6.1 level²² at OLV. As the expenditure exceeded the \$100,000 limit, this fact should have been reported immediately to the APU. It was not, even though it was included on the internal memorandum detailing OLV breaches sent to the OLV Executive.

Not only did OLV pay a premium rate for the services of staff member KK through the employment agency, but that officer now has a three year contract for a VPS 6 role – a classification level which would be likely to draw much interest from within and beyond the public service – without being subject to formal interview or competition for the position.

140. In response to the above case study:

The employee said:

... OLV had limited resources in the initial stages of development. Job descriptions were yet to be formalised and staff were reasonably expected to carry out roles and functions both within their scope and competencies, but also to adapt to other tasks requiring attention.

Mr Waller said:

The arrangement with [the employment agency] is based on an hourly rate. [Staff member KK] was paid for the hours actually worked – as there was a high demand on her time leading to substantial overtime, the accumulated total was obviously higher than a standard VPS salary (based on standard hours) for the same period.

141. The engagement of agency staff member J raises questions about the rate at which this individual was paid and OLV's recruitment and selection processes.

Case study 8 – OLV's recruitment and selection processes

Agency staff member J was initially engaged to work at OLV through an employment agency in April 2013. The file indicates that the individual submitted his curriculum vitae to Contractor A at OLV on 12 March 2013. In an email to Mr Want, Contractor A stated that '[Agency staff member J] has the necessary senior skills – he knows government players, he knows how to write a cab[inet] sub[mission] and he knows the cabinet process ... thinking of placing [him] against the policy position or the ministerial position'. What Contractor A failed to document was that he and agency staff member J had previously worked together in a Victorian Minister's Office and in the same government department in the Northern Territory, and this agency staff member was a nominated referee on Contractor A's curriculum vitae. This represents at best a lack of understanding of conflict of interest.

²² Salary range \$101,207 to \$118,322.

Agency staff member J was engaged against a VPS 6 position. His initial engagement, some 95 days or four months to 9 August 2013, appears to have cost OLV \$98,292, which represents an annual rate of close to \$300,000.

On 9 August 2013, the APU approved a variation to extend the staff member's contract to 7 February 2014 and additional expenditure of \$134,867.

In total, OLV expended in excess of \$233,000 for ten months' work for this agency staff member. The top of the salary range for a VPS 6 classification level was \$131,139 per annum at the time. Since then this staff member has been appointed to a fixed term two year Senior Technical Specialist (VPS 7.1) position at OLV at the top of the salary range \$158,000 plus superannuation, without the position being advertised or subject to a formal interview process.

142. In response to the above case study Mr Waller said:

... It is common in any workplace for people to include in a search process people they have previously worked with where their skills or experience is relevant.

...

The draft report fails to mention when quoting a total amount that the rates through [the employment agency] are hourly rates and [agency staff member J] was required to work more than standard hours.

143. Another example involves the employment agency being contracted to provide the services of agency staff member K from 11 November 2012 to 30 June 2013. This staff member was contracted in the position of Graphic Designer and Creative Director at OLV, a position that is equated to VPS mid-level 5 to 6 classification. It then cost OLV \$207,651 for the 7 months that agency staff member K worked at OLV.

This staff member was subsequently employed on a fixed term employment contract at OLV, without formal interview or competition for the position.

OLV's recruitment practices

144. In OLV's case, an analysis of its organisational chart at 11 October 2013 shows that of the 66 positions identified, 36 were filled by current or previous contract staff, and 20 filled by staff on secondment (noting that included in the secondment count are some contractor staff). Of the remaining 10 positions, 2 were vacant. Of the total staffing, secondment and contract staff comprised 85% of the total staff count. Of these, 29 contract staff were engaged through the one employment agency.

145. In response to the draft report:

Mr Want said:

This ... represents a very historical point-in-time moment for OLV the organisation. Since then the majority of staff are now VPS, and a small minority remain temporary employees, either through contract or consultancy.

Mr Waller said:

... Since OLV was provided certainty on the number of VPS positions available in late 2013, the Office's contractor staff now make up less than 15% of total staff.

146. The documentation on file and information obtained at interviews suggests:

- a full time equivalent staffing count was not provided to OLV until April 2013;
- that the budget estimates for OLV did not extend beyond 3 years, and
- that it had been conveyed to OLV management that contract staffing was the preferred employment arrangement in the establishment phase of OLV.

147. In response to the draft report Mr Want said:

The uncertainties surrounding OLV and its tenure, remained until the end 2013 ...

Once a VPS complement was established OLV sought to transfer the individuals that had competitively secured their short term roles, into a long-term contract.

148. While early uncertainties about the longer term future of the office and the need to get 'runs on the board quickly' are mitigating circumstances in OLV's initial reliance on contract staff, it is a concern that this practice runs counter to public service employment principles, unfairly excludes other career public servants from competing for positions in the office, and heightens opportunities for unwarranted pay rates and inconsistencies in pay rates.

149. The available evidence indicates that previous work associates of senior OLV staff were engaged with no transparency, no formal interview panel and no declaration on file as to that previous association²³.

150. An unsigned, undated 'confidential informal notes' document found on an OLV file states that 'the initial setup phase can be characterised as not representing a serious commitment to the establishment of an organisation structure that would have the necessary standing, credibility and expertise to deliver the Government's Living Victoria policy'. That same document also states that between December 2012 and May 2013, with no VPS position allocation, 'premium rates were paid for temporary staff, contractors and consultants'.

151. In response to the draft report Mr Want said:

An unsigned and undated note cannot be relied upon to make findings of this type. Even so, it validates that the office was not established appropriately by DSE and the then CEO, Chris Chesterfield.

It is also important to note that OLV has evolved substantially Since May 2013, OLV has had its VPS staffing allocation confirmed, vital Executive Officer positions have been allocated to OLV, the machinery of government transition has taken place (clarifying OLV's responsibility and resources), and the scope, scale and timing of the Government's urban water reform agenda has been confirmed.

152. Witnesses interviewed during the investigation provided different opinions about the level of support provided to OLV. OLV executives spoke of lack of support by their parent department and of the constraining nature of a limited budget and resources. The Departmental Secretaries gave a contrary view, namely that money and staff were offered to OLV. Both Secretaries, Mr Wilson and Mr Fennessy, spoke of their support and commitment to OLV, acknowledged the challenges facing the office and referenced regular discussions about options to overcome apparent process and governance issues. Both Secretaries advised that they were aware of some of the issues at OLV but not the full extent of them.

153. In response to the draft report Mr Want said:

There is no documented evidence that DSE offered money and resources. This statement acknowledges that Mr Wilson and Mr Fennessy recognised the challenges facing the office, but did not fix them. ... For example, the Executive Officer position for Corporate Services was requested in early 2013. OLV did not receive the allocation until March 2014. If the Secretaries recognised and acknowledged the position and were discussing solutions, why were the solutions (such as the EO) position not offered sooner?

As a further point, OLV uses all of DEPI's computer, budget, human resources, ministerial and accounting systems and infrastructure. The Secretary has access to exactly the same information set as OLV in real time. In addition, OLV was meeting with both Secretaries on a regular basis (weekly/fortnightly) and providing regular updates of what was happening.

23 See Table 1.

154. According to Mr Fennessy he seconded an officer to the EO Corporate Services position at OLV as from 14 October 2013.

155. In response to the draft report Mr Waller said:

... OLV had notified DEPI of the identified risks and sought further support to address these risks. Funding and staff were offered to OLV, but these were inadequate or inappropriate to our needs – in general only 1 or 2 staff at any time, who subsequently were found to have inferior knowledge of compliance requirements and risks management.

Breaches of procurement policies

156. VGPB guidelines require departments and agencies to report annually on any breaches of or non-compliance with VGPB policies and procedures for contracts with a total contract price of more than \$100,000. On 26 June 2013 Mr Want, as Acting CEO, wrote to the APU Chair to report on OLV's non-compliance with APU/VGPB purchasing and supplies policies in the 2012-13 financial year. This memorandum advised of 13 breaches and the 'actions taken by the OLV to avoid recurrences of such instances'. Some of the cases previously outlined in this report formed part of that breach memorandum.

157. In response to the draft report Mr Waller said:

... the breaches memo deals with instances of apparent process failures (i.e. to notify the APU when contracts exceed a certain amount). The seven contracts in 2013-14 have been provided to APU for endorsement of the variation. ... these are not actual 'breaches' as OLV is not within the VGPB rules, and therefore there is also no actual requirement to report breaches to the APU or the DEPI Secretary. In line with the implementation of the KPMG baseline review and good practice, OLV prepares these reports as a way to identify issues and improve its procurement and contract management practices.

... there are legitimate reasons why the original contract amounts require variation ... None of the seven contracts have breached any rule ...

158. Witnesses confirmed that on the initiative of Mr Waller the Chair of APU was requested to take no action on this memorandum until a review had been undertaken 'to ensure that any breaches of the business rules for contracts are reported in the appropriate manner'. The review was undertaken by KPMG in August 2013 but the outcome was not reported by the CEO of OLV to the Secretary of DEPI until 8 November 2013.

159. In response to the draft report the Secretary of DEPI, Mr Fennessy said:

On 1 August 2013, the Chair of the APU submitted a briefing to the Secretary regarding the breaches reported by OLV on 26 June 2013.

160. The contracts listed in the June 2013 breach report were originally worth \$1,173,970. The total end value of these contracts was in fact significantly higher: \$2,033,458, a difference of \$940,512. This trend has continued in 2013-14; another seven contracts have been submitted to the APU by OLV seeking approval to increase the value of the contracts. These seven contracts were originally valued at \$769,883; they now have a revised value of \$1,747,172 – a difference of \$977,289. Of particular interest is one contract that had an original value of \$129,133, which has now been revised to \$405,470²⁴.

161. These reported breaches do not necessarily represent the totality of breaches of procurement policy by OLV, but only those exceeding the \$100,000 threshold which were required to be reported to the APU. This investigation identified other breaches involving Company Z and Company V that have not been reported to the VGPB.

²⁴ Contract with Company ZE to undertake a cost benefit analysis of Integrated Water Cycle Management Building Regulations.

162. In response to the draft report:

Mr Want said:

... OLV was operating in a highly uncertain environment, which include [*sic*] a lack of resources, and a evolving organisation structure and requirements and policy scope. These external factors meant that OLV was unable to plan for, and deliver with certainty. This was the driving factor behind the contractual changes. There is nothing wrong with the revision of scope, time and budget of a project and seeking extensions of time and cost, due to changes in project scope.

Mr Waller said:

... there is no requirement [for] OLV to notify the APU.

163. On 10 September 2013, the CEO, Mr Waller, commented²⁵ in a revised report on OLV's non-compliance with purchasing and supply policies that 'it is essential that OLV's contract management arrangements in future ensure full compliance with government procurement/contracting policies. I am satisfied that procedures, processes and training are now in place to deliver this outcome'.

164. This investigation established that this was not the case. OLV had been aware of problems in the procurement area for some months but had not addressed the issues raised. In January 2013, KPMG had presented a 'Baseline Report' to Mr Waller and Mr Want in which it was critical of OLV's procurement and contract management practices stating:

An overarching finding ... is the lack of governance and a systematic approach to the implementation of business controls and processes critical to the efficient and effective administration of the OLV. In turn, this has resulted in a lack of accountability for administrative and operational processes by OLV personnel, including management.

... there are critical control gaps and limited documented procedures in place to govern key business processes, including records management, budgeting, purchase and contract management, project management.

165. This advice predates the employment of Consultant H (see case study 6).

166. In response to the draft report Mr Waller said:

It was never intended, nor feasible, for problems identified to be corrected overnight. As my letter to Mr Wilson of 24 January 2013 made clear, the recommendations of the baseline review were the basis for subsequent discussion with DSE/DEPI on how we could and should integrate some systems, and ongoing discussions about staff positions and resources, which were not promptly resolved by DSE/DEPI.

By the time of the 10 September 2013 memo, I was satisfied that procedures and processes were being put in place – albeit there would still be some time for all staff to become fully familiar with the processes.

... While I do not pretend that every element is now complete ...

167. There were no apparent consequences for OLV following the identification of these breaches. Such a large number should have given rise to significant concern about procurement and contract management in OLV. At the very least, OLV's procurement activities should have been placed as a priority on the department's annual audit programme. This is now the case, with an audit of OLV's activities undertaken in March 2014 since the commencement of this investigation.

²⁵ In a memorandum, dated 10 September 2013, reporting on OLV's compliance with Purchasing and Supply Policies and detailing a number of breaches Mr Waller included this handwritten comment.

168. In response to the revised draft report the Acting Secretary said:

The Secretary does not agree that there were no consequences for OLV following the identification of the breaches. The breaches were reported to me in late November 2013 and it took the APU until late January to clarify and resolve with OLV a number of queries in relation to these breaches. As soon as these queries were resolved and the breaches reported DEPI's internal auditors, PriceWaterhouseCoopers (PwC) were immediately requested to commence an audit of OLV's administrative and procurement practices.

Mr Waller sought to amend the terms of reference of the PwC audit of OLV and when it was made clear by the Secretary that the audit would commence immediately under terms of reference proposed by DEPI's independent Risk and Audit Committee, Mr Waller sought deferral of the audit. The Secretary expressly rejected any deferral and directed the audit to commence immediately, which it did.

169. In response to the draft report Mr Waller said:

... the breaches memo very largely referred to events in the period November 2012/May 2013, effectively the ramp up phase of operations. Since then, further evolution had taken place.

... the internal audit was ... scheduled for earlier than it occurred, but was deferred by agreement with DEPI due to machinery of government changes that were being developed in the second half of 2013.

170. At interview Mr Fennessy advised that he had asked his staff to ensure that support and assistance was given to OLV to overcome these deficiencies of process. In addition, in the latter part of 2013, Mr Fennessy seconded an Executive Officer to OLV and another senior DEPI officer to act in the Executive Director Corporate Services role at OLV to 'further assist you during this time of transition and consistent with my obligations under s13 of the PAA'. The senior officer in charge of corporate services has since returned to DEPI.

171. In response to the draft report:

Mr Want said:

Mr Fennessy may have advised his staff to provide support, but on the whole his staff were very reticent and unwilling to deliver on the requests of their Secretary. The general attitude of DSE/DEPI has been a general unwillingness to provide support, through to strong resentment towards OLV.

Mr Waller said:

The draft report fails to make any substantive assessment of the claims of the quality and scale of support. On the overall evidence, this has been patchy and inadequate, particularly in relation to repeated requests to provide EO/STS [Executive Officer/Senior Technical Specialist] cover for an ED [Executive Director] Corporate Services.

172. In addition to the cases cited above, investigation staff found numerous examples of:

- poor paperwork
- lack of paperwork
- post-dated approvals
- cost overruns
- unsigned contracts, and
- generally a lack of appreciation and understanding of DEPI's and VGPB procurement policies and procedures.

173. They also found instances where OLV staff identified and presented actual and potential procurement issues to OLV management. However, there was no acknowledgement of these issues found on file, nor was there any evidence that they had been addressed.

174. One example is an email sent by the Acting Executive Director, Strategic Policy, Corporate Services and Communications, Contractor A, to the HoO, Mr Want, on 16 June 2013, highlighting some urgent items relating to procurement that he needed to discuss with him:

-
- We have contracts that will be or are breaches:
 - [Company ZA] (did not complete variation in right manner)
 - [Company N] (contract splitting)
 - [Company Y] (did not attain proper variation)
 - [Company P] (overpaid contract without variation)
 - [Contractor KB] (no contract - no PO - no paperwork)
 - Serious risk of breach:
 - [Contractor KA] (no proper paperwork)
 - [Company S] (contract splitting)
 - [Contractor A] (contract splitting)
 - [Company V] (no variation paperwork to cover additional works)
 - Agency staff member [K] (not registered under panel use)
 - Agency staff member [KK] (not registered under panel use)
 - ...
 - [Contractor E] (no paperwork at all)
 - [Company ZC] (lack of paperwork - process breakdown)
 - [Contractor KC] (overpaid contract without variation)
 - [Contractor KD] (paperwork incomplete)
 - [Contractor KE] (no contract signed - over paying contract)
175. Another example identified is in a file note by a staff member at OLV, dated 30 October 2013, who stated that 'during the past 6 months OLV has awarded 5 contracts to different suppliers/consultants to have our general financials dealt with ... total amount spent on the above 5 contracts is a staggering \$353,895.04'. The staff member recommended the appointment of a CFO (Chief Financial Officer).
176. In response to the draft report Mr Want said:
- ...
- OLV's lack of clear budget, the lack of support and clear direction from DSE/DEPI and the poor state of financial management across the organisation when Mr Waller took over as Acting CEO, meant that it was a complex and difficult task to budget and manage the finances.
177. Another common but questionable practice at OLV was to prepare the necessary paperwork after the engagement commenced. As one contracted adviser to OLV, Contractor E, explained the practice in an email to Mr Waller: 'from a process/arse covering perspective. You need to reverse engineer a submission to you from Simon (I guess) and proposal (RFQ) to [the contractor, Company Z] for an audit trail on file'.
178. In response to the draft report Mr Want said:
- I have never requested (nor am I ever aware of Mr Waller doing so), nor authorised officers to backdate paperwork.
179. Investigation staff found numerous examples of poor procurement and contract management: some of which, at best, can be put down to inadequate documentation and poor administration. However there was clearly a lack of strong leadership in ensuring that OLV adhered to best practice in procurement and VGPB supply policies and procedures were followed. Indeed, the evidence supports the view that senior officers at OLV were instrumental in circumventing VGPB and DEPI policies and as the signatories to contracts and procurement documentation, should have been aware of and followed the VGPB and APU requirements. The MoUs made it clear that OLV had an obligation to comply.

-
180. At interview, the Chair of DEPI's APU advised that OLV had sought to deal direct with the VGPB and not fall under DEPI's APU umbrella policies. He further stated that it had been a 'constant battle' to get OLV to comply with these policies.
181. As a result of concerns and bearing in mind that investigation staff only examined a small proportion of OLV's contracts, on 28 March 2014 the Ombudsman referred the financial management of OLV, including its grants assessment and approval process, to the Auditor-General for appropriate action.

Lack of accountability and transparency regarding contracts

182. In accordance with the Department of Treasury and Finance's Financial Reporting Directions, all public sector agencies are to make standard disclosures in their report of operations as part of their annual report. Financial Reporting Direction (FRD) 22C was applicable for the financial years 2011-12 and 2012-13 in relation to consultancy disclosure requirements. FRD 22C required that:
- details of each consultancy valued in excess of \$10,000 (exclusive of GST) be disclosed;
 - the total number of consultancies individually valued at less than \$10,000 and total value be disclosed; and
 - details of all consultancies and contractors be available on request.
183. The investigation has revealed that no such details relating to OLV were included in DEPI's (its parent department) annual report for 2012-13. OLV does not produce its own annual report. Investigation staff also requested from DEPI the list of contractor/consultancy engagements during the 2012-13 financial year.

The list provided by DEPI indicated that only two consultants/contractors²⁶ were engaged by OLV in 2012-13. This is incorrect. Clearly, from the case studies alone, more than two consultants/contractors were engaged by OLV during 2012-13.

184. In response to the draft report Mr Waller said:

The financial reporting directions apply to DEPI, but not to OLV. Administrative Offices are not within the scope of the direction ...

... Part 7 of the Financial Management Act only applies to departments and public bodies, as defined in that Act. OLV does not fall within those definitions and therefore is not covered by Part 7, with the exception of section 45(4) of that Act which requires the financial statements of administrative offices to be consolidated with those of its related department. This requirement relates only to financial statements, and not reports on operations or other reporting requirements in that Part. OLV is not required to produce a report on operations, nor is DEPI required to include OLV activities in its report on operations.

Inadequate file and document management

185. Careless paperwork lacking attention to detail was routinely identified during the investigation. There was a high incidence of exemptions post-dating contract dates; the same was the case with conflict of interest statements. Other examples of poor documentation, such as an exemption discussing the merits of one contractor and approving another name, and a contract where an officer had signed as a witness to a signature which was not there. There are many other examples. In isolation they could be regarded as minor administrative areas, but their high incidence at best suggests that there was indifference by senior management to good practice in public sector record keeping.

²⁶ Urban Water Cycle Solutions IWCM for the Office of Living Victoria \$986,280 and James Lantry Consulting environmental assessment \$99,000.

186. In response to the draft report:

Mr Waller said:

From the time I was appointed CEO I was adamant that we needed to improve on the almost complete absence of systems and processes. I therefore commissioned the KPMG baseline review and wrote to the then Secretary of the department to outline our implementation intentions, including the support and resources needed from the department to achieve this. The sufficient level and quality of support was never provided.

Mr Want said:

... I acknowledge that OLV could have done a better job at managing paperwork, filing and document management. However, no evidence has been cited that supports the claim of “indifference by senior management”.

Conflicts of interest

187. The VPS Code of Conduct requires public officers to use their power in a responsible way. It states that public officers do not ‘use their power to provide a private benefit to themselves, their family, friends or associates’ and that they exercise power in a way that is fair and reasonable, and family and other personal relationships do not improperly influence their decisions’.
188. It also prescribes that public sector employees declare and avoid conflicts of interest, whether actual, potential or perceived, to help maintain community trust and confidence in public decision making.
189. There is nothing unusual or ethically wrong in having a conflict of interest. However what is important is that the processes for identifying, disclosing and managing conflicts of interest must be transparent – that is the processes should be open to scrutiny and help maintain accountability.

190. This investigation identified that conflicts of interest have been poorly handled by OLV and in a number of instances not even acknowledged let alone documented. This is disappointing given the number of occasions this office has raised concerns about this issue in previous reports to Parliament²⁷. Where conflict of interest statements were found on file, they (like the risk assessment proformas) were only produced where external approvals were needed. Generally they were post-dated contract award and therefore of questionable value.

191. In response to advice from DEPI’s APU on the subject of Conflict of Interest/ Declaration of Interests/Confidentiality Agreement in September 2013, a senior officer at OLV stated in an email to a colleague ‘not sure I get it – do you?’.
192. The following flow chart (Table 1) provides a snapshot of the associations between some officers, including the executive management team, at OLV and some contractors/ consultants/agency staff that have worked at OLV. This demonstrates that there has been a personal relationship or a shared professional history between the following senior executives at OLV and a number of contractors/consultants/ agency staff engaged by OLV:

A – Sustainability Victoria and Contractor F

From 2008-2011 Mr Mike Waller and Contractor F were members of the Board of Sustainability Victoria.

- Mr Waller engaged Company S (a company in which Contractor F is the Managing Director) to undertake three projects valued at \$288,032.

²⁷ Such as:
Investigation into the alleged improper conduct of councillors at Brimbank City Council, May 2009;
A report of investigations into the City of Port Phillip, August 2009;
Investigation into allegations of improper conduct by CenITex officers, October 2012;
Conflict of interest, poor governance and bullying at the City of Glen Eira Council, March 2012;
Investigation into allegations of improper conduct by a Magistrates’ Court registrar, May 2013;
Report on issues in public sector employment, November 2013;
Report on conflict of interest in the Victorian public sector – ongoing concerns, March 2014.

B – Simon Want and Contractor KG

From 2010-2011 Contractor KG and Simon Want worked together at Company ZB. Contractor KG was the Managing Director and responsible for the employment of Mr Want, who became an Associate Director. Contractor KG and Mr Want co-authored the report submitted by Company ZB to the Living Victoria Ministerial Advisory Council.

C – Living Victoria Ministerial Advisory Council and Contractor KG

From 2011-2012 Mr Waller was the Chair of the Living Victoria Ministerial Advisory Council (MAC). Mr Waller engaged Company ZB (a company in which Contractor KG was Managing Director) to provide a report to the Ministerial Advisory Council.

- Company ZC (owned by Contractor KG) has been awarded three contracts by OLV, all without any competitive tendering. Contractor KG has been appointed as the Chief Scientist of OLV and his company is responsible for providing specialist systems analysis support to the Office of the Chief Scientist. The Chief Scientist's contract was negotiated initially by Mr Want when he was Acting CEO in Mr Waller's absence, and then by Mr Waller.

D – Living Victoria Ministerial Advisory Council and Simon Want

From 2011-2012 Mr Waller was the Chair of the MAC. Mr Want was Associate Director at Company ZB and co-authored the report presented to the MAC.

- Mr Waller appointed Mr Want to the MAC for three months in 2012.
- Once Mr Waller became CEO of OLV, he appointed Mr Want as his Chief of Staff, and later, as the Head of Office at OLV.

E – Mike Waller, Company Z and contracts at OLV

From 2011-2012 Mr Waller was a Senior Advisor at Company Z.

- Company Z was awarded multiple contracts by OLV.

E(i) – Mike Waller and Contractor KF

Mr Waller worked with Contractor KF at Company O Consulting, where Mr Waller was a Director and Partner, and Contractor KF was also a Partner. Contractor KF and Mr Waller worked together again at Company Z, where Mr Waller was the Principal Advisor and Contractor KF was a Senior Advisor.

- Contractor KF undertook a substantial proportion of the work contracted by OLV to Company Z

F – Contractor B, Contractor KJ and Contractor KG

Contractor B, an Associate at Company N, Contractor KJ, Managing Director at Company N and Contractor KG have had a long standing professional relationship that involved co-authoring academic articles and undertaking joint consultancy projects. In addition, Contractor B provided technical support to Contractor KG during the preparation of the report for the Living Victoria Ministerial Advisory Council (MAC). Both Contractor B and Contractor KJ have had contracts with OLV:

- Contractor B has undertaken analyst support services at OLV related to Contractor KG's model
- Consultant KJ was awarded a contract by the MAC to 'independently' review and verify aspects of Contractor KG's model
- Company N has also been awarded contracts by OLV for the input and analysis of the Chief Scientist's data.

G - Simon Want and Contractor A

Over an 8 month period in 2004 Contractor A and Mr Want worked as ministerial advisors for the same Commonwealth Government Minister.

- Mr Want was responsible for awarding two contracts to Contractor A for Senior Executive work at OLV.

H - Contractor A and Agency Staff members J, KH and KI

From 2011-2012 Contractor A, Agency staff members J, KH and KI all worked for the same Victorian Government Minister. Agency Staff J and Contractor A's association has been long standing as they previously worked together at the same department in the NT Government during 2010.

- Contractor A recommended the engagement of Agency Staff J, Agency Staff KH and Agency Staff KI at OLV.
- Agency staff members J, KH and KI were all appointed to fixed term positions at OLV.

I - Contractor A and Company M

Contractor A's company, Company L, partners with Company M to undertake consultancy work.

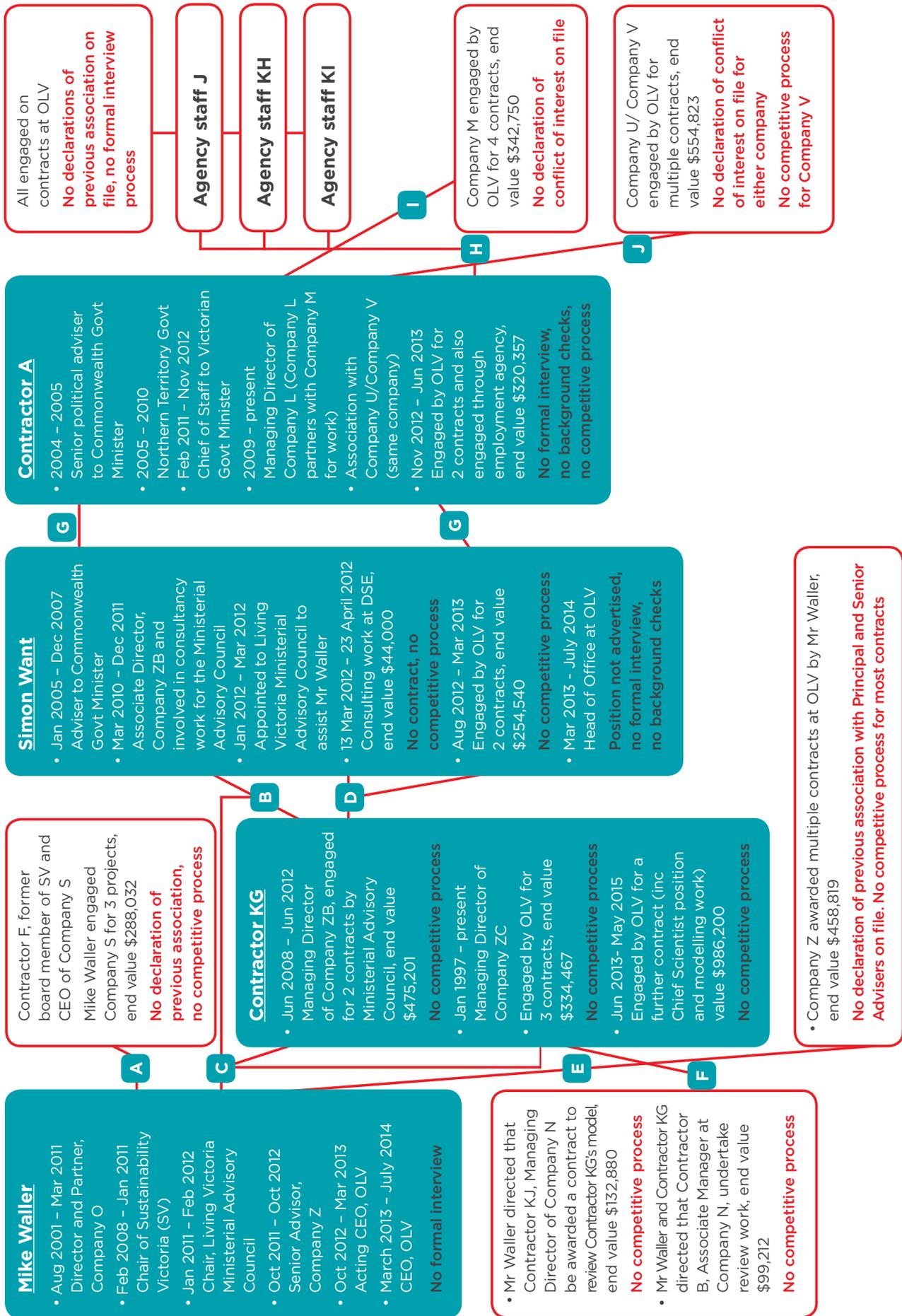
- Company M received four contracts from OLV.

J - Contractor A and Companies U and V

Contractor A had a professional friendship and a professional association with the management of Companies U and V.

- Both companies received contracts from OLV.

Table 1 - Mapping of Associations



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193. At interview, OLV officers did not appreciate the distinction between perceived and actual conflicts of interest, and the files investigation staff examined contained no examples of where OLV officers had declared previous work or personal associations with individuals presenting proposals to OLV. In fact, it appears most likely that such associates were invited to submit proposals which were then recommended for engagement. Clearly there was a view within OLV that jobs and contracts were being given to a select few known individuals. The evidence supports this. On many occasions investigation staff found that there had been previous work and business relationships between OLV management and some contractors/consultants/agency staff which were not declared. The implications for this are issues of patronage and 'jobs for mates'.
194. While it is inevitable that within a relatively small industry people will regularly come across one another in a work or business environment, the important issue is that such associations should be open and transparent and are managed to ensure that the principles of fairness and integrity in the procurement process are and are seen to be upheld. This did not occur at OLV.
195. In response to the draft report Mr Want said:
- ... It is not inappropriate to recommend experienced professionals for positions that have a known demonstrated track record of delivery.
- It is also inaccurate to suggest that conflict of interests were not declared. In every instance that I am aware of where known individuals were recommended, existing relationships and previous associations were stated, and decision-making was devolved to others. The paperwork may not have been kept up to date on all of these cases ...
196. There is no evidence on the contract files that declarations of conflicts of interest were made and decision making about engagements of former professional associates delegated to others.
197. In his response to the draft report, Mr Waller argued that the relationships discussed are not sufficient to justify a conclusion that there have been conflicts of interest, but acknowledged that 'these may give a perception of bias and should have been managed better...'
198. He relied on a number of reports of ICAC, the State Services Authority (now Victorian Public Sector Commission), the Australian Public Service Commission, the Queensland Crime and Misconduct Commission, the National Audit Office, the OECD and this office to argue that a 'shared professional history' is not 'a basis for a conflict of interest in the public sector'. He maintains that 'Nowhere in these publications is prior common employment, in the absence of any particular personal relationship, a recognised type of conflict of interest'.
199. As discussed earlier and in Table 1, there are numerous engagements for considerable sums, conducted without appropriate competitive processes by Mr Waller or Mr Want, on behalf of OLV, with persons with whom either or both had prior close working or business relationships. The question is not whether those relationships fall within 'a recognised type of conflict of interest', but whether the relationship or relationships are sufficient to amount to 'circumstances where a public official could be influenced, or could be reasonably perceived to be influenced, by a private interest when performing an official function'²⁸.

²⁸ Victorian Ombudsman, *Conflict in the Public Sector*, March 2008, page 12.

200. A 'private interest' does not necessarily include a pecuniary relationship. As ICAC and the Crime and Misconduct Commission said in 2004, non-pecuniary interests can include:

any tendency toward favour or prejudice resulting from friendship, animosity or other personal involvement with another person or group. [emphasis added]

201. Mr Want and Mr Waller deny having any actual bias or having any expressed favouritism of the various persons with whom they contracted on behalf of the OLV. I have no basis to reject those views and to be clear, I am not suggesting that there has been an actual conflict of interest. However, this does not prevent those relationships being perceived as conflicts of interest.

202. A perceived conflict of interest is not any perception of any person and does not encompass 'irrational flights of fancy'²⁹. It is present when a conflict can be perceived by a 'reasonable person'³⁰. It is the view 'a reasonable person looking at the relevant facts and circumstances of the particular case would think there was a real sensible possibility of conflict'³¹. Alternatively, the term has been expressed as being the view of a 'fair-minded member of the public' or a 'reasonably well-informed person'³² or a 'reasonable member of the public, properly informed'. And when there is such a perception the relevant value in the Public Administration Act is to demonstrate integrity by, inter alia: avoiding 'any real or apparent conflicts of interest', not to avoid unnecessary conflicts or perceptions of conflict³³.

203. I remain of the view that the nature, extent and relationships in this instance are clearly sufficient to indicate to a 'reasonable person' that there is a 'real sensible possibility of conflict', that is perceived conflicts that Mr Waller and Mr Want should have avoided, disclosed or otherwise managed.

Unresolved contractual issues

204. Contractor KG has developed what is described as a 'unique' modelling framework which is one of a number of important inputs into the development of Melbourne's Water Future policy framework.

205. Between June 2012 and March 2013 Contractor KG was engaged by OLV for three contracts that involved him working on the development, integration, automation and refinement of his model. Although one component of the contracted work included reaching agreement on the commercial terms on which access to and use of the model will be provided, the investigation revealed that this has not been done.

206. As previously mentioned in case study 2 in this report, the fourth contract between OLV and Contractor KG provides that all issues relating to intellectual property (IP) rights will be dealt with in a Deed Agreement. During this investigation it became apparent that there is no agreement between OLV and Contractor KG over the pre-existing IP rights in the model.

29 Treasury Board of Canada, Secretariat, *Apparent Conflict of Interest* (2006) section 6, page 11.

30 See for example, paragraph 6 of the British Civil Service Code (2006).

31 Boardman v Phipps [1967] 2 AC 46 at 124.

32 Queensland, Crime and Misconduct Commission and New South Wales, Independent Commission on Corruption, *Managing Conflicts of Interest - Toolkit* (2004) 37.

33 Section 7(1)(b)(iv) *Public Administration Act 2004*.

207. Although OLV owns a licence to the IP in the model, Contractor KG's company, owns the IP in the model, as it existed prior to the start of his contracts with OLV and possibly DSE. At interview, Contractor KG's lawyer explained that the contractor is not offering to transfer the IP to the Victorian Government but is willing to offer full rights to use it provided he has some continuing management role in relation to the framework. Resolving this issue has delayed finalising the Deed of Agreement.

208. The modelling framework has now progressed from a prototype to being used to analyse the entire water cycle across the greater Ballarat region as an input to the development of an integrated strategy for the region. The longer term intention is to develop the modelling framework and use it across the water sector in Victoria.

209. The uncertainty over the intellectual property rights with Contractor KG's model represents a significant financial and reputational risk to OLV and the Victorian Government. The outstanding issues around the IP rights need to be resolved as soon as possible.

210. In response to the draft report, Mr Waller said:

Consideration of IP issues had deliberately set to one side pending completion of the extension and automation of elements of the framework and agreement on a plan for their transfer into the Melbourne framework. This is now in train and draft proposals in relation to IP and other matters have now been sent to [Contractor KG].

Responsibility and accountability

211. The relationship between an Administrative Office and its parent department is defined by sections 13 and 14 of the Public Administration Act 2004 (PAA). Under section 13 of the PAA:
- A Departmental Head is responsible to the public service body Minister or Ministers for the general conduct and the effective, efficient and economical management of the functions and activities of:
- (a) the Department; and
 - (b) any Administrative Office existing in relation to the Department –
- and must advise the public service body Minister or Ministers in all matters relating to the Department and any such Administrative Office.
212. Section 14 of the PAA specifies that ‘An Administrative Office Head is responsible to the Head of the Department ... for the general conduct and the effective, efficient and economical management of the functions and activities of the Administrative Office and must advise that Department Head in all matters relating to the Administrative Office’.
213. Section 14(3) of the PAA states that ‘An Administrative Office Head has, in relation to an Administrative Office, the same functions as a Department Head in relation to a department’.
214. At interview, Departmental Secretaries, Mr Wilson then Secretary, DSE and Mr Fennessy, Secretary DEPI, stated that such relationships with OLV were difficult to manage. It was not until 27 September 2013 that DEPI received legal opinion from the Victorian Government Solicitor’s Office that ‘the Secretary can issue directions in relation to such matters and is entitled to be advised of information from the Administrative Office Head. This is notwithstanding [OLV’s] Terms of Reference – they cannot override the PAA’.
215. Prior to that legal opinion, both Departmental Secretaries considered that there was ambiguity and uncertainty about the respective responsibilities of Departmental Secretaries and Administrative Office Heads in relation to the general conduct and the effective, efficient and economical management of the functions and activities of the Administrative Office. In addition, it is clear that Mr Waller resisted any suggestion of oversight by the department.
216. In his response to the draft report, Mr Waller disagreed. He said:
- From the moment I assumed responsibility, I (and my staff) engaged with the then Secretary of DSE and his staff on regular occasions about the manifest shortcomings and risks from a value for money and probity perspective created by both inadequate resourcing and support provided to OLV and ambiguity and lack of understanding of the role of OLV as an Administrative Office.
- ... My correspondence with the then Secretary Mr Greg Wilson was to point out that the expectations that he had for how OLV was to operate in relation to the department were inconsistent with the clear direction given by the Minister, and that this needed to be resolved.
217. Mr Waller provided copies of letters he wrote to the Secretary of DSE in October 2012 and January 2013. While the letters clearly demonstrate Mr Waller had communicated his concerns about budgetary and staffing constraints to the Secretary of DSE, they by no means invite or encourage any oversight by the department; quite the contrary. For example, in his letter to the Secretary of DSE on 25 October 2012, Mr Waller stated:
- for all intents and purposes the CEO has the same powers as the Secretary of DSE ... The current arrangements (such as the MoU [Memorandum of Understanding] between DSE and OLV) effectively treat OLV as a subordinate division of DSE ... Against this, in my view, the MoU in its present form cannot be left to stand ... I see no need for a MoU at all, certainly not one of the type and breadth of the current document.

And

... I am unsure why OLV's business strategy should be subject to detailed oversight by an [inter departmental committee] chaired by DSE.

Mr Waller also added:

The context in which OLV had effectively been re-established and re-launched in late October 2012 was deeply unsatisfactory, from both a policy delivery and organisational perspective. The Minister's expectations of OLV were unambiguous and demanding but clearly not being delivered in any respect.

218. In response to the draft report:

Mr Want said:

... At all times, OLV sought to work in a collaborative manner with DSE/DEPI, particularly in the areas of significant risk - budget, staffing allocation, Executive Officer positions, the transfer of appropriate systems and processes from DSE/DEPI to OLV with the necessary training.

The Acting Secretary of DEPI said:

Mr Waller makes a number of comments regarding staffing for OLV and stating that the former Department of Sustainability and Environment (DSE) did not provide OLV with any VPS staffing positions.

In December 2011, the Victorian Government announced a number of efficiency measures. The Sustainable Government initiative included reforms to reduce the public service workforce. A recruitment freeze commenced on 15 December 2011.

As a public sector body, OLV was required to comply with the SGI measures including the recruitment freeze for roles other than those deemed a technical, critical or specialist role.

219. The recruitment freeze ceased on 31 December 2013.

220. At interview, the Hon. Peter Walsh, the Minister for Water, agreed that he was aware of relationship issues between OLV and DEPI and he was 'more as an instigator to get those discussions [between Mr Waller and Mr Fennessy] happening because it is an issue for the Secretary to resolve'. The Minister also said that 'the Secretary is ultimately responsible for OLV as an Administrative Office of what is now Department of Environment and Primary Industries. It is his responsibility but no he did not bring that [breaches of procurement guidelines] to my attention'.

221. Mr Fennessy stated that he 'had conversations with the Minister about how OLV is performing ... and to be fair to the Minister he will invariably say to me "it's your job Adam how they are performing administratively"'. Mr Fennessy recalled advising the Minister towards the end of last year that 'I need to do an audit [of OLV], I'm not satisfied we have the right settings', and more recently following the receipt of a written submission from the APU, he said that he stated to the Minister that 'we've got some procurement problems ... this is why I've been saying for the last six months that I need to audit OLV'.

222. Mr Waller acknowledged at interview that 'the area of processes around contract and procurement has been quite challenging ... [and] particularly as a result of the rush we were in in the first quarter of last year that in some instances we weren't clear about what success looked like from a contracting point of view ... The way that some of the input has been managed has not been according to public processes as it should be and I regret that'.

223. On the issue of the management of conflicts of interest in OLV, Mr Waller further acknowledged that 'where there were perceived or actual conflicts of interest in those hiring arrangements, they should have been recorded and that's under my watch and it's a failure and I'll put my hand up and accept it'.

224. At interview, Mr Want stated that 'as a nature of where the organisation started and the speed of which the reforms evolve and the expectations that was put on the organisation, ... there was a time gap between ... when processes were identified to be needed to when they ... became effective ...'. Later in the interview, when asked who is ultimately responsible for the poor contract planning and project management at OLV, Mr Want stated: 'I think it's the organisation's responsibility to have the overall function of the organisation. Managers are responsible for their area of responsibility. The Head of Corporate Services is responsible for their area, the Head of Planning Projects is responsible for their area. Ultimately that responsibility ... comes back to the Head of Office and CEO'.

225. Mr Fennessy clearly made attempts to improve governance arrangements at OLV. In mid-2013, Mr Fennessy raised the possibility of an internal audit with Mr Waller related to OLV's financial management and business practices but it was decided to put this on hold at Mr Waller's request, to allow him further time to establish adequate processes.

226. It was not until 8 November 2013, two months after Mr Waller had signed off on a report that detailed OLV's purchasing breaches for 2012-13, that Mr Fennessy received written confirmation from Mr Waller about OLV's failure to adhere to procurement policies. This was when OLV acknowledged the 13 breaches of procurement policy to the Secretary of DEPI.

227. In response to the draft report Mr Waller said:

The 'breaches' (which are not actual breaches as VGPB policies do not apply to OLV) were first reported to the DEPI APU in June 2013. It is therefore incorrect to say that OLV did not acknowledge the breaches until November. The November date refers to when the matters were provided by OLV to the Secretary, as discussion with the APU led me to conclude that further reconciliations were required on a number of contracts.

228. In relation to information exchange with the department about procurement issues, Mr Waller said:

OLV provided regular reports on individual procurement matters and on the overall position in relation to contract overruns and exemptions on which they commented. The APU was provided with a comprehensive report on procurement issues, covering cost overruns and process breaches on 26 June 2013. In light of APU comments, that challenged certain aspects of that report, I instructed the report be further examined by a party external to OLV. At no time did I instruct APU not to keep the Secretary informed - given the 'oversight role' that the APU considered they exercised at the time, internal DEPI handling of the material was a matter for the head of APU.

229. I note that the memorandum dated 8 November 2013 from Mr Waller to the Secretary of DEPI in the key information section states:

On 26 June 2013 OLV submitted a report to the DEPI APU Chair on breaches of Victorian Government Purchasing Board (VGPB) purchasing policies for contracts in excess of \$100,000 in 2012/13.

Subsequently OLV requested the APU Chair to hold any action on this report until the content had been reviewed by KPMG.

That review has now been concluded and, while substantially similar to the original report, there have been a number of changes which make the final report more complete.

230. On 19 December 2013 Mr Fennessy wrote to Mr Waller outlining their respective responsibilities under the PAA and requesting that Mr Waller advise in a timely manner of any issues which may impact on the general conduct and management of OLV. He also advised that he would be providing a report template to Mr Waller to fulfil the reporting requirements of the PAA. Additionally, Mr Fennessy seconded a DEPI executive to OLV for six months to provide corporate support, permanently transferred a DEPI executive to provide additional expertise in the areas of policy, governance and legislation, and provided three other DEPI staff to assist OLV.

231. Mr Fennessy continued to offer additional staff to assist OLV in various corporate areas of the office. However, the majority of those offers were rejected by Mr Waller and Mr Want.

232. In response to the draft report:

Mr Waller said:

The staff offered by the Secretary were staff that had already been identified as surplus to need to DEPI as part of the government's sustainability initiative. In effect, the Secretary was trying to find something to do with these people. Entirely appropriately, OLV considered whether the persons offered were suitable to the needs of the office, and in some cases were found to not be suitable.

He further stated that:

... this support was insufficient, that ongoing requests for adequate staffing were not approved or progressed by DEPI in a timely way, and the OLV had expressed to the Secretary that the quality of support provided by other corporate parts of DEPI was less than expected.

Mr Want said:

... the first and only provision of resources in the business management area was in late 2013. The person that was offered was a displaced DEPI employee, that Mr Fennessy was unable to find a role for elsewhere.

...

... I am not aware of many other resources offered from DEPI to OLV.

233. In response to the second draft report DEPI's Acting Secretary said (on behalf of Mr Fennessy):

In response to Mr Want's comments, I provided OLV with a senior public servant who I considered had an excellent understanding of corporate governance and processes and whose integrity and work ethic I consider to be beyond reproach. I determined that this would assist OLV in improving its corporate processes and practices. I understand that the secondee identified a number of issues with corporate processes and practices at OLV and made a number of attempts to rectify these issues.

234. Additionally, Mr Fennessy asked for action to expedite the completion of the proposed Memorandum of Understanding between DEPI and OLV on governance matters and raised again with OLV the need for an internal audit. The governance arrangements were part of a review undertaken by KPMG and included recommendations on the transfer of certain functions from DEPI to OLV. That review was completed by KPMG in July 2013.

235. A DEPI/OLV transition group was established in October 2013 to implement the functional transfer agreed by the Minister and the governance arrangements between DEPI and OLV. On 25 February 2014 the scope for the internal audit was signed off with the internal auditor, PricewaterhouseCoopers. On 21 February 2014, Mr Fennessy sent an email to Mr Waller advising that he had commissioned PricewaterhouseCoopers to commence the audit on 24 February and requested that the MoU, which he had expected to be signed off by Christmas 2013, be ready for execution by 3 March 2014. The email stated:

The internal working group of DEPI and OLV senior executives provided us with a final version for sign off in late December 2013 and I was expecting you to sign the MOU at our meeting before Christmas. The document has been with your office for finalisation since then. I understand that it is now close to completion and there are no issues from DEPI perspective. I have asked all relevant staff at DEPI to ensure finalisation occurs without delay, and would appreciate if you could likewise at OLV.

236. In reply and in expressing his support for both the audit and the MoU, Mr Waller sought a deferral in the commencement of the audit and further changes to the MoU. Mr Waller wrote:

I very much agree with you that an internal audit in relation to OLV is essential. ... I have, however, two serious concerns about the proposed approach, namely in relation to scope and timing.

237. The internal audit has now been completed and the MoU was signed on 4 March 2014 by Mr Fennessy and a few days later by Mr Waller.

238. In response to the draft report:

Mr Waller said:

I had assurances from DEPI that I would be consulted on the scope of the internal audit. This consultation never occurred as promised.

... my position on the scope was that the scope should be expanded ...

... my concerns about the timing of the internal audit were purely as a result of the Ombudsman's investigation - the internal audit was intended to include procurement, and as [the Ombudsman's] office had all our procurement files at the time, I thought it correct to delay the internal audit until our files had been returned.

OLV's tardiness in finalising the development of an MOU - a major continuing issue here was the portfolio's continuing lack of understanding of the appropriate balance between accountability and service arrangements between OLV and DEPI.

The draft report reflects a misunderstanding in the Department about the purpose of an MOU, driven in turn by the Department's misconstruing the appropriate role and powers of an Administrative Office. The MOU was only ever intended to be a services support agreement, not a performance or compliance monitoring framework for DEPI to oversight OLV's activities. In particular, the MOU as drafted contained (and still contains) no reciprocal performance requirements on DEPI and the reporting template failed to reflect the fact that OLV have continued to use the Department's financial accounting system, thus ensuring full transparency of OLV's budget. There is no evidence that OLV was tardy in addressing these issues. The documentary evidence points to active engagement from the day I became acting CEO.

The Acting Secretary, DEPI advised that he did not agree with the comments made by Mr Waller.

239. The internal audit of OLV, undertaken in February-April 2014 reviewed six matters, one aspect related to compliance testing of OLV procurement and contract management arrangements. Five of the six contracts selected by the auditors for review had not been considered by the investigation staff and none of those files were held by this office.

240. Given that the majority of the failures to follow procurement policies were initially below the threshold level requiring external scrutiny by DEPI's APU, there was little visibility within DEPI or by the Secretary of these failures until they were reported as breaches by OLV to DEPI after the end of the 2012-13 financial year. This was not until 8 November 2013. Mr Fennessy confirmed at interview that OLV did not provide any earlier advice to him concerning these failures.

241. In response to the draft report Mr Waller said:

The Secretary is free to set out what information he wants reported to him and when, but he has not yet done so.

DEPI should have sought [legal] advice and worked out reporting arrangements at the establishment of OLV. It did not do so, nor did Mr Fennessy when he became Secretary. It should not be for OLV to determine what information the Secretary wants or how the Secretary should acquit his responsibilities under the Public Administration Act. It is entirely inappropriate that Mr Fennessy could meet his responsibilities under the Act by just expecting OLV to provide information.

Conclusions

242. There are some lessons to be learnt from this investigation in relation to the establishment of future Administrative Offices. Setting high standards and examples of good governance start with the leadership team of an organisation. From the earliest days of OLV, the inclination and focus have been on the end not the means, and adherence to established supply policies, procedures and principles has taken a back seat to pragmatism, 'urgency' and a 'can-do' attitude. This has resulted in a number of issues, as follows:

Poor leadership and lack of a governance framework

243. Good governance and expeditious policy-making are not mutually exclusive. Governance arrangements are in place for valid reasons: public moneys should be spent effectively and economically without any taint of favour. The public has the right to expect transparency, fairness, value for money and accountability. While the VGPB and other procurement policies and procedures outline the environment within which decisions are to be made, it is incumbent on senior executives to set the example, to establish an internal framework of effective business practices and to foster attitudes and a culture which adopt and support those principles. This did not happen at OLV.

244. Senior management at OLV lost sight of its obligations to be compliant with the government's procurement policies and procedures and to be accountable for the expenditure of public money.

Lack of planning

245. It is evident that on many occasions, requests for quotation, project briefs and related documents when prepared were done hurriedly. In some cases, they were prepared after the contract was in place – apparently to give some semblance of credibility to the arrangement – and in others they were prepared by the contractor.

246. Not only did this lead to rushed decisions but milestones, outputs, outcomes and other deliverables were not well documented, leading to uncertainty about what was expected and whether contracts were even fulfilled. It also made the consideration of value for money difficult, if not impossible, to determine. In some instances involving large amounts of money, it is not clear what has been delivered, if anything, for example with the app from Company U.

247. A lack of planning also led to an over-reliance on exemptions and a perceived and actual need to produce results in tight timeframes.

248. In response to the draft report Mr Waller said:

... the reform path has been incremental and to some degree experimental, when often the outcomes of one discrete project defined the scope of work for the next step. This requires adaptive planning in the face of uncertainty about how the reforms would translate into particular workstreams and resources/capabilities.

In many instances, having to return to market through a competitive process would require work of the OLV to have to stop for a significant period, wasting resources that were already there and of proven ability and therefore putting at risk the reform outcomes.

Mr Waller later added:

I accept that in its initial re-establishment phase, in seeking to regain the major lost ground from both an organisational and reform perspective, it made some poor decisions and our judgment under pressure was not in all respects what it should have been.

Use of exemptions to avoid competition

249. Exemptions should be used rarely and only when exceptional circumstances allow for the procurement process to be truncated, for example when open competition would produce no better or more cost effective result; or when the nature of the deliverable

could not be produced by any other party; or when to advertise more widely would be a waste of time for the agency and the contractor.

250. Rather than focusing on the question of whether the grant of an exemption compromised the integrity of the process, OLV's use of exemptions was generally based on limited time availability, the need to acquire so called 'unique' skills, and a reluctance to employ public servants. Better planning would have overcome the first issue. A number of witnesses queried the identified uniqueness of many tasks cited on exemptions. The fact that many exemptions were dated well after contract commencement also suggests that the use of exemptions was viewed by OLV as the rule rather than the exception.

Poor contract and project management

251. In many cases, it was difficult to identify any project manager, and contract managers were often default roles undertaken by procurement staff processing the contract details. Contract management was a reactive rather than a proactive role; seemingly only happening once system generated emails indicated that a contract was due to expire. Any action to modify contract details was undertaken on contract expiry rather than being identified during the process as it should be. Again, this led to hurried decisions rather than considered ones.
252. Project management was not recognised as a specific and responsible task. It was left to Managers, Directors or Executive Directors, whoever happened to have overall responsibility for the area where the contract activity was undertaken. Sometimes project management was assumed to lie with the person having the most contact with the contractor. There was a failure to assign responsibility and to have a nominated project manager in place to ensure, on an ongoing and regular basis,

that deliverables were being met, and where they were not or other unforeseen factors came into play, early corrective action was undertaken. There was no evidence of this. In fact, the consistent evidence was of breaches of process and regular cost and delivery overruns. The evidence is also that there were no consequences for or changes resulting from these failures of process.

Limited or no evaluation/management of risk

253. Evaluation of proposals, of ongoing contractor performance and of products and deliverables are critical, not only in determining value for money for a particular contract, but also in any consideration of whether a contractor should be used in future. It is equally critical that such evaluation is documented so that over the course of time there is a body of work which provides an insight into contractor performance.
254. Part of the evaluation of proposals is to consider the risk to the organisation of undertaking and not undertaking the project. For obvious reasons, high cost projects carry higher risks, and unless there is ongoing project management of such projects the possibility of risk to the reputation and/or financial stability of the organisation is heightened. On occasions, investigation staff sighted proforma risk assessments, but like most other documentation these often post-dated contract signing and were 'tick and flick' exercises required when external approval was necessary. There was no evidence that following completion of such risk proformas, the identified risk was managed in any meaningful way.
255. There was no such documentation relating to the management of risks on any of the OLV contract files reviewed by investigation staff.

256. In response to my draft report Mr Waller stated:

I accept that, in general, formal evaluation processes in the re-establishment phase were inadequate, particularly in relation to what were essentially experimental projects undertaken early on.

Use of the Staffing Services State Purchase Contract

257. There appeared to be excessive use of the Staffing Services State Purchase Contract to obtain staff rather than using the normal public service recruitment process. This is a high cost means of achieving an end result and it has seen staff engaged for significant periods of time without a formal interview process and, on occasions, with no referee and background checks. These same staff were then offered fixed term contracts within the VPS, again without advertising of the roles or formal interviews being conducted. Moreover, investigation staff identified instances where individuals were placed on the books of one employment agency by OLV, and then engaged by OLV. In other words, the individual had no prior contact with the employment agency. The process was facilitated by OLV. By engaging the individual through an approved employment agency, OLV obviated any need to seek an exemption to engage the individual in their own entity while the OLV paid premium rates for staff. The employment agency was effectively a post box, but a paid one taking its commission for the engagement and any subsequent placement of the individual with OLV.

258. The SPC contract is intended 'to provide more effective and efficient procurement' in relation to the sourcing of on hire labour by government agencies. However, this investigation has again highlighted how this contract can be misused to avoid competition and merit-based selection processes, and to split contracts to evade scrutiny.

259. A review of the processes and controls in relation to this contract is needed to ensure that VGPB purchasing principles – value for money, open and fair competition, accountability, risk management and probity and transparency – are upheld.

Breach of public service employment principles

260. Not only has this investigation identified a lack of competition in OLV's procurement activities but its engagement and recruitment of staff has followed the same pattern. Conflict of interest was poorly understood and badly managed in OLV.

Poor record-keeping

261. The standard of record keeping at OLV was poor. It was one of the worst examples this office has seen during many investigations across a wide range of public sector agencies. It was not possible to have any confidence in:

- the status of individual documents
- the relevance of a document to the subject-matter of the file
- that other documents or conflicting documents might exist elsewhere on other files or in electronic form
- or whether the file represented a comprehensive and accurate record of the subject.

262. It is clear that the records management practices at OLV did not meet the standards required by the Public Records Office of Victoria³⁴.

Responsibility and accountability

263. Responsibility and accountability for the breaches of procurement policies and governance lay with Mr Waller, the [then] CEO and Mr Want the [then] HoO of OLV. The failures were on their watch, the decisions made were clearly theirs at a time when they and OLV considered

³⁴ For example Public Records Office Standards: 10/10 Strategic Management; 10/17 Operations Management; 11/07 Capture; and 11/09 Control.

that OLV was subject to the VGPB's procurement policies; and, despite advice that their businesses processes were deficient in January of 2013, had not taken adequate and timely action to put in place the required governance framework and business processes. They acknowledge this. Nor did they report these deficiencies to the Secretary of DEPI in a timely manner.

264. In response to the draft report, Mr Waller said:

I accept that in its re-establishment phase the measures identified in the January 2013 KPMG baseline report in relation to contract and project management were not implemented as quickly as they should have been.

265. The evidence is also that the measures proposed by Mr Fennessy – the MoU, provision of experienced staffing resources, an internal audit and reporting arrangements – were not well supported or implemented expeditiously by OLV.

266. Even with the MoU in place, under the then current administrative arrangements, the responsibility remained with Mr Waller to self-report deficiencies of process to the Departmental Secretary. Unless there was a comprehensive reporting and monitoring framework that supported the MoU, the Secretary would not have the visibility of OLV decisions to effectively meet his statutory responsibilities under the PAA. Based on the performance of OLV's CEO and HoO in relation to procurement and HR governance matters, there needs to be a change in culture and improved business practices at OLV, and a stronger focus on compliance if the deficiencies identified during this investigation are to be addressed.

267. In response to the draft report Mr Want contested all but three of the preliminary conclusions. He said that there was 'no evidence to establish that [he] or Mr Waller:

- Exhibited poor leadership
- Lost sight of [their] obligations
- Exhibited a lack of planning
- Demonstrated a use of exemptions to avoid competition
- Demonstrated limited or no evaluation/management of risk
- Undermined the principles of a career public servant [*sic*] or that the SPC was used as a mechanism to bring in individuals to OLV without the need to consider the exemption process.

268. While Mr Want rejected all the above assertions, he did not provide any evidence to support his position beyond stating that OLV's record of delivery is testament to its good leadership and planning and that 'OLV did the best it could under difficult circumstances and sought at all times to comply with relevant guidelines and regulations'.

He also said:

OLV placed an equal weighting and importance on both the policy areas of reform and the governance. It has simply been challenging to establish a properly functioning organisation.

269. In response to the draft report:

The Secretary of DEPI, Mr Fennessy, said:

As Secretary I have worked with the OLV Administrative Office Chief Executive respecting his authority as a public administration body head and taking into account my responsibilities as a Secretary under both the Public Administration Act 2004 and the Financial Management Act 1994. I have sought to provide Mr Waller in his capacity as Chief Executive of OLV with broad support and advice regarding OLV's obligations and whole of Victorian Government requirements.

As I have become aware of governance issues, I have sought to remedy them. I have done so in a careful and measured way recognising the importance of the initiative being delivered by OLV and the experience of the Chief Executive.

In light of the matters raised in this report I am reviewing the current operating arrangements with OLV. I also intend to emphasise to the CEO of OLV the importance of complying with the Public Service Code of Conduct in all matters ...

I wish to advise you of the range of measures that have been put in place or are currently being implemented to address governance issues in general at OLV:

1. Following the machinery of government changes, I reviewed and updated the memorandum of understanding between DEPI and OLV. I was keen to ensure that it reflected the new functions assigned to OLV and provided the appropriate level of support whilst also providing a mechanism for OLV to report against.
2. I commissioned an internal audit of OLV by our internal auditors ... to identify opportunities to improve governance and related arrangements in place at OLV. This report has been finalised and the recommendations are being implemented.
3. I have instigated a formal quarterly meeting which requires OLV to report on specific matters. Again this has been developed in conjunction with OLV.
4. A performance and assurance committee is being established by OLV. This committee will provide advice to Mr Waller on procurement matters.
5. More broadly I am putting in place arrangements to assist with managing corporate functions at OLV. This will include working with OLV to appoint a suitably qualified corporate services executive as well as confirming the financial management and procurement arrangements expected of an Administrative Office such as OLV.
6. Confirming other financial management accountability and procurement arrangements between OLV and DEPI ...

On 2 July a letter was sent to Mr Waller detailing the Secretary's expectations of both Mr Waller and the OLV Group. The letter included the following paragraphs which I consider are relevant to your report:

... my expectations are that you will be responsible for ensuring that the OLV Group:

- continues to deliver the Government policy on Melbourne's Water Future operating at all times within the DEPI business model;
- complies with all DEPI and whole of Victorian Government policies and procedures and in particular complies with all DEPI Accredited Purchasing Unit requirements and all Victorian Government Purchasing Board Supply Policies;
- obtains the written approval of the Secretary for all Ministerial briefs and advice, and ensures that all briefings to the Minister are appropriately recorded on the DEPI Ministerial Briefing System; and
- cooperate with all audits and reviews undertaken, including but not limited to Phase 2 of the PwC Audit, which has been endorsed by Government ...

... With the abolition of the Administrative Office of OLV: the MOU and schedules outlining the ongoing arrangements between DEPI and OLV are no longer relevant ...

Mr Waller said:

The draft report is based on the presumption that OLV is formally within the ambit of Victorian Government Purchasing Board (VGPB) supply policies. Section 54B of the Financial Management Act states, however, that the supply policies of the VGPB apply to departments and specified entities. OLV is an Administrative Office under the Public Administration Act, and is not a department, part of department or a specific entity. It is not therefore within the scope of the VGPB supply policies.

The draft report also assumes that OLV is subject [to] reporting arrangements set out in Part 7 of the Financial Management Act. Part 7, however, only applies to departments and public bodies, as defined in that Act. OLV does not fall within those definitions and therefore is not covered by Part 7, with the exception of section 45(4) of that Act which requires the financial statements of

administrative offices to be consolidated with those of its related department. This requirement relates only to financial statements, and not reports on operations or other reporting requirements in that Part. As such, the directions made under the Act do not apply to OLV.

Later Mr Waller added:

Following the baseline review in early 2013, I sought to immediately put in place adequate policies and decided that it would follow DEPI procurement policies which reflect VGPB requirements. While instances of non-compliance occurred, it was always my expectation that the normal departmental procedures should be followed, and communications to staff occurred on this basis. Indeed, after receiving the legal advice, I wrote to the Secretary of DEPI advising him that OLV would continue to meet the VGPB standards.

Mr Want said:

As Head of Office, I accept responsibility for aspects of the OLV's activities and behaviour that do not meet the standard of the Victorian Public Service. As I acknowledged in my interview conducted by your staff, OLV has had to improve its document management, record keeping, and filing and general administrative organisation. Since October 2012 OLV has spent significant time and attention on improving its competence and diligence in this area. OLV will continue to make continuous improvement in this area a priority.

Contractor A said:

I attempted to change the culture of the organisation and attempted to make it one that was compliant to the processes expected by a public entity.

Mr Want and Mr Waller had the attitude that they would spend whatever they needed and had little to no regard for how much that was and that they would lean on DEPI and the LV Fund to fill the funding gap ...

...

... at no point while I was at OLV did I have delegation to make any financial decision.

... While I may have made mistakes I did however make clear my conflicts of interest and stepped aside from procurement processes where they existed.

... I was not responsible for the approach to the public service rules or the culture at OLV, rather that I attempted to change both.

Mr Chesterfield said:

The urgency to establish OLV necessitated some short cutting of processes when I was CEO. However, I often sought advice from DEPI to ensure OLV adhered to purchasing guidelines.

Mr Waller later added:

As CEO, I am clearly responsible and accountable for all aspects of OLV's performance and accept that in important respects in its establishment phase issues of procurement and contract management were not effectively handled as they should have been.

270. While I was in the process of finalising the report into this investigation, on 1 July 2014 the Office of Living Victoria was abolished as an Administrative Office³⁵, and all the functions undertaken by OLV were transferred to DEPI.
271. On 14 July 2014 Mr Mike Waller resigned as Chief Executive of OLV and on 25 July 2014 the HoO, Mr Simon Want, departed.

³⁵ By order of the Governor in Council. Published in the Government Gazette, No. S 231 Tuesday 1 July 2014.

Recommendations

I recommend that the Department of Treasury and Finance and the Victorian Government Purchasing Board:

Recommendation 1

Review the operation of the Staffing Services State Purchase Contract arrangements to ensure these are meeting expectations and addressing the identified need in an effective, economical and transparent manner.

Department response:

DTF is currently undertaking preparations to re-tender the Staffing Services State Purchase Contract (which expires June 2015) and will take that opportunity to address any potential misuse of the contract and where necessary strengthen controls around this.

Recommendation 2

Consider options to ensure that all Administrative Offices are obliged to adhere to VGPB supply policies.

Department response:

... DTF notes that all Administrative Offices are obliged to adhere to VGPB supply policies and DTF provides guidance and support for these policies.

I recommend that the Secretary of Department of Environment and Primary Industries:

Recommendation 3

Clarify the arrangements relating to the intellectual property rights associated with the Integrated Water Cycle Management model.

Department response:

... since receiving a copy of the draft report OLV has been abolished as an Administrative Office and the functions and staff transferred to DEPI. The Secretary is now ultimately responsible for ensuring the issues raised regarding OLV are dealt with. Accordingly, I accept [this] recommendation ...

I recommend that the Victorian Auditor-General undertake:

Recommendation 4

An audit of OLV's financial management, including its grants assessment and approval processes.

VAGO response:

DEPI's financial statements are audited annually and areas such as financial management practices, internal governance arrangements and grants processes are considered as part of the audit planning procedures ...

...

My Annual Plan 2014-15 contains an area of focus titled 'Implementation of Water Reforms'. This audit is scheduled to commence in 2015-16 and has an objective of assessing the effectiveness of OLV's implementation of the Government's water reforms. I will consider whether to specifically include OLV's grants assessment and approval process as part of the audit during its planning.



The Victorian Ombudsman
Level 1 North Tower
459 Collins Street
Melbourne VIC 3000

Phone 03 9613 6222
Fax 03 9614 0246
Email ombudvic@ombudsman.vic.gov.au
www.ombudsman.vic.gov.au