

MODULE 1

The Informed Purchaser

1 What is Informed Purchasing of Legal Services for Government?

1.1 Overview

In this module you will learn:

- The concept of informed purchasing of legal services
- The leading practice model in government procurement of panel legal services
- What are effective and ineffective procurement practices
- What are common issues faced by the procurer of legal services in a government context.

1.2 How will this help me?

By the end of this module you will understand:

- The informed purchaser's role is to coordinate the delivery of quality, value for money legal services to government
- The six key stages an informed purchaser goes through in procurement of panel legal services.

1.3 What is informed purchasing?

Informed purchasing¹ is an approach that focuses on obtaining quality legal services and value for money from the government's external legal spend by selecting and managing good value, high quality legal services that support the agency's strategic objectives.



The central role of the informed purchaser is management of all allocation of legal work, monitoring of the quality of legal services delivered, management of legal risk and management of legal costs and value for money.

The informed purchasing approach can be used in procuring and managing any form of external legal services, including:

- Tendering or re-tendering for a new panel of legal service providers
- Conducting a call for proposals from an existing panel of legal service providers for a piece of legal work
- Project management of complex legal work
- Requesting cost estimates from firms for high volume legal work.

Informed purchasing is facilitated by the cross-government Legal Management Services Unit in the Department of Justice and Attorney General. This unit plays an important role in leveraging knowledge from one agency to the benefit of all.

¹ The concept of informed purchasing is drawn from the Australian National Audit Office's Better Practice Guide on Legal Services Arrangements in Australian Government Agencies¹, available at <http://www.anao.gov.au/director/publications/betterpracguides>.



Government informed purchasers must be aware of and operate within the government procurement framework, including the following guidelines and policies:

- The NSW Government NSW Procurement Guidelines: Tendering Guidelines July 2010
- The NSW Government Procurement Policy Statement
- The NSW Government Code of Practice for Procurement
- The Gateway Review System (for high risk projects or those valued over \$10 million).

These and other procurement policies are outlined at <http://www.nswprocurement.com.au>.

1.4 Leading practice procurement of panel legal services

NSW Treasury have adopted a tailored leading practice² model for informed purchasing of panel legal services for government.



There are six stages in the procurement and management of legal services in the leading practice model:

1. Define legal services needs
2. Establish in-house legal resources
3. Select external legal services
4. Manage provider relationships
5. Information sharing
6. Measure, monitor and refine.

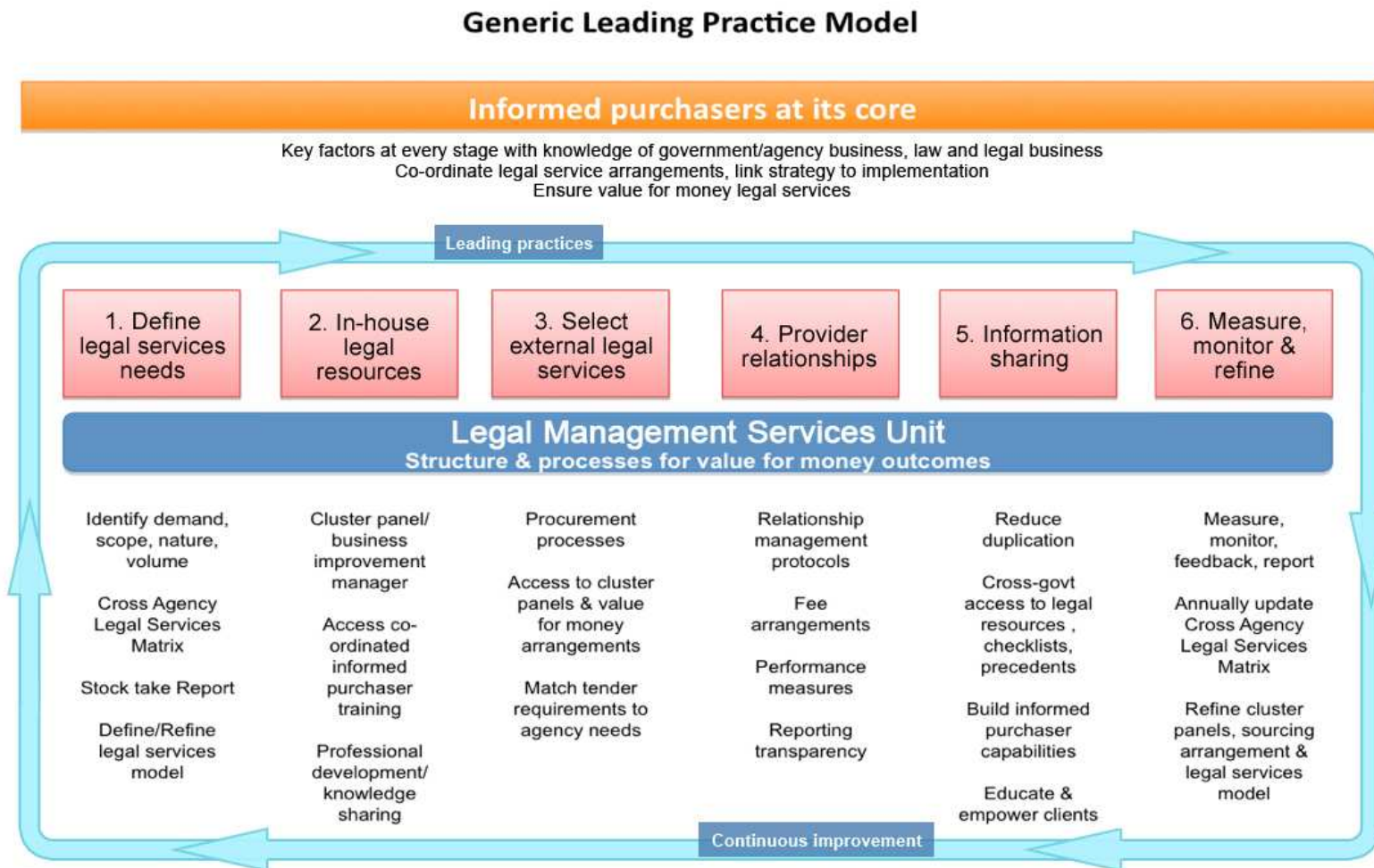


The six-stage Leading Practice Procurement Process is different to the six stages of NSW Government Procurement described in Module 3. However, there are some common features of the two processes. To distinguish each process, we refer to them in this Module as the Leading Practice Procurement Process and NSW Procurement Process.

² Leading practice in government procurement of legal services is based on the Australian National Audit Office (ANAO)'s better practice model.



Figure 1: Generic Leading Practice Model for Panel Legal Services



Informed purchasing begins in stage 1 and moves to stage 6, but the output from stage 6 (measure, monitor and refine) feeds back into the remaining stages 1 to 5, through continuous improvement.

Let's consider each of these six stages:

1.4.1 Stage 1 - Define legal services needs

In this first crucial stage, leading practice for the procurer is to identify what the legal needs of the agency are, and decide how they are to be delivered. The first issue to consider is the demand, scope, nature and volume of legal services required by the agency. Once these are identified, the decision is made about how these needs will be work will be undertaken in-house and what will be referred to external provision of legal services, both in terms of types and amount of work.

This is discussed further in Module 4.7.2.1

1.4.2 Stage 2 - Establish in-house legal resources

Once the procurer has defined the legal services needs, leading practice requires a review of the in-house legal resources including:

- The size and capacity requirements of the in-house team, the appointment of a business improvement manager and their management of cluster panels for agencies, how the team will be provided with informed purchaser training, and giving the internal team access to knowledge-sharing tools available across government.

This is discussed further in Module 4.7.2.2

1.4.3 Stage 3 - Select external legal services

Leading practices in this stage focus on the Request for Tender (RFT) and includes:

- Establishing the performance management regime
- Agreeing any relationship management protocol
- Determining terms of engagement with panel firms
- Agreeing innovative fee arrangements with panel firms.

Leading practice requires tailoring generic RFT documents to specific agency needs. Issues to be considered include agency specific tender requirements, the performance and monitoring regime, the evaluation criteria and the evaluation approach and methodology. Crucially, government would implement leading procurement practice through the use of a business manager.

This is discussed further in Module 5.7.2.3

1.4.4 Stage 4 - Manage provider relationships

Arguably the most critical part of the model, this stage focuses on implementing and managing legal services provider relationships. The focus is on managing performance and value through monitoring, and providing and seeking feedback by reference to:

- The performance management regime
- Any relationship management protocol

- The terms of engagement
- Innovative fee arrangements.

These should be actioned in an effective, efficient and ethical way.

This is discussed further in Module 6.7.2.4

1.4.5 Stage 5 - Information sharing

Leading practice in this stage focuses on sharing information to reduce duplication (such as where the advice on the same legal question has been sought and provided to two agencies, or the duplication of commercial starting point templates). Leading practice is achieved through greater information sharing – across agencies and between government and the panel firms. Leading practice is to share this information not just within in-house legal teams and panel firms, but also through business unit managers (such as panel managers) who can facilitate the sharing of information across government. Information can be shared with non-lawyers through document creation tools and checklists, to empower and educate the internal client base.

This is discussed further in Module 7.2.5

1.4.6 Stage 6 - Measure, monitor and refine

There are two leading practice aspects to consider at this stage. First, the process of measuring, monitoring and refining the legal services model for each panel and agency. Second, the process of measuring, monitoring and refining legal services procurement across government through a central, coordinated, legal services unit. During this process, some firms will come off the panels to be replaced by more competitive firms. This stage is part of the continuous improvement cycle, feeding back into to earlier stages of the leading practice model.

This is discussed further in Module 6.7.2.6



Exercise 1

The Department of Robots and Computers has a legal panel that has been in place for 5 years, but is due to expire. The panel includes top tier firms and boutique firms. Vims Perbeek Lawyers is one of the panel firms and has worked for the Department for many years. As a result, it knows the agency's environment, operations and business extremely well.

Over the past 5 years, the external legal spend has risen by an average of 27 per cent per annum, without an increase in matters, or service level. 85 per cent of the external work is outsourced to the top tier firms, with the bulk of this going to Vims Perbeek Lawyers.

The Department does not hold formal panel reviews. However, the general counsel, Hilary Clinton, has occasional informal discussions with the managing partners. In one call with Brody Vims, managing partner of Vims Perbeek, Hilary queried the increased costs. Brody replied:

"Thanks for your call Hilary but you know that we're the experts on this. So unless you want to end up in court with even more costs, you'll have to trust us that we need to do this work to mitigate your risks."

Hilary did not know how to address this problem, having had several of these discussions in the past. To compound Hilary's problems, the Department's CEO had made clear his preference for the use of this firm in high profile matters.

Hilary is concerned to re-tender the panel so that the workload can be managed. She uses the Request for Tender (RFT) documentation from the last five-year panel term, changing the RFT due date and panel start/expiry dates. One of the evaluation criteria, weighted at 50%, is previous experience working with the agency. Hilary decides against making changes to the evaluation criteria.

The panel is re-tendered and six of the seven firms on the panel are reappointed. Costs continue to escalate.

Question 1: Which of the six stages in the Leading Practice Model did Hilary undertake?

(Online answers provided at http://www.lsc.lawlink.nsw.gov.au/lsc/documents/doc/informed_purchaser_answers.doc)

Question 2: By reference to the six stages in the Leading Practice Model, what different approach could Hilary have taken?

(Online answers provided at http://www.lsc.lawlink.nsw.gov.au/lsc/documents/doc/informed_purchaser_answers.doc)

1.5 What Are The Attributes Of The Informed Purchaser?



The attributes of the Informed Purchaser have been defined as:

- Active management of the acquisition of legal services
- Knowledge of the agency's "business", with specific attention drawn to the environment, constraints, applicable policies and similar factors
- Knowledge of the relative strengths and weaknesses of potential legal service providers in the market
- Knowledge of legislation and policy relating to the public service and government financial management and associated policies, including those relating to legal engagement, core or tied work, contract, alternative dispute resolution (ADR)
- Knowledge of the law and legal practice and in particular, a working knowledge of commercial law
- Skill in coordinating legal service arrangements
- Ability to link strategic decision making to its daily implementation
- Skill in delivering value for money in legal services
- Knowledge of procurement policies, guidelines, processes and templates.

The skills required for the informed purchaser role include:

- Knowledge and experience of law firms and the relevant legal market
- Understanding of the agency, government and experience with government legal services
- Contract and relationship management skills of a high order
- Legal management
- Risk management
- Experience with the retention, briefing and management of counsel
- Experience with in-house delivery and requirements.

The role includes an overall legal awareness and training function, as well as an ability to implement practical, workable, systematised policies and procedures. Proper data collection, analysis reporting and the capacity to gather and incorporate feedback is also required.

It is important to understand that the informed purchaser role is a capacity, an approach, a unit and an individual. It is a capacity and an approach held by an agency and ultimately across government, involving practices, procedures and knowledge management. It is also a unit – a number of individuals working together to obtain optimum results for the agency and the government as a whole. At the core is the individual informed purchaser, a person who purchases and manages external legal services, who is focused on obtaining quality legal services and optimum value for money for the government's legal spend.



Exercise 2

The Department of Birds and Seeds embarks upon a process of reducing its legal spend and increasing the quality of its legal advice. The Department reviews its past legal cases, examining the legal spend, and interviewing key staff and partners of existing panel firms to determine the demand, nature, scope and volume of its legal work.

It identifies the ideal mix of legal work to be conducted in-house and externally, and then recruits five legal firms to a new three-year fixed-term panel of legal providers. The Request for Tender (RFT) documentation and the panel induction process explain that the Department was taking a new approach to purchasing external legal services.

- For the first six months of the panel's term, the firms would receive an equal distribution of the Department's work
- During this initial six months, the firms' performance would be measured against a series of performance measures detailed in the RFT documentation
- Those legal firms that performed best against the performance criteria would be allocated the most work. If a firm failed to meet the performance criteria in two consecutive quarters, it would be dropped from the panel
- The firms were to be ranked relative to each other every three months over the three-year term, and each firm was to be shown those rankings (with the other firms' names masked)
- Monthly panel meetings were to be held with all the firms present, where they would be asked to update on their work, share information and suggest ways in which their own firm's performance could be improved.

Question (Online answers provided at http://www.lsc.lawlink.nsw.gov.au/lsc/documents/doc/informed_purchaser_answers.doc):

What attributes and skills of an informed purchaser did the Department of Birds and Seeds demonstrate? Check boxes as appropriate and briefly explain the reasons for choosing each:

Active management of the acquisition of legal services

Knowledge of the agency's "business", with specific attention drawn to the environment, constraints, applicable policies and similar factors

Knowledge of the relative strengths and weaknesses of potential legal service providers in the market

Knowledge of legislation and policy relating to the public service and government financial management and associated policies, including those relating to legal engagement, core or tied work, contract, alternative dispute resolution (ADR)

Knowledge of the law and legal practice and in particular, a working knowledge of commercial law

Skill in coordinating legal service arrangements

Ability to link strategic decision making to its daily implementation

Skill in delivering value for money in legal services

Knowledge of procurement policies, guidelines, processes and templates

Understanding of the agency and government, and experience with government legal services

Contract and relationship management skills

Legal management

Risk management

Experience with the retention, briefing and management of counsel

Experience with in-house delivery and requirements.