



information  
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commission  
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# Universities' Compliance with the GIPA Act: Audit Report 2015

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# Universities' Compliance with GIPA Act: Audit Report 2015

## Executive summary

This report sets out the findings of the Information Commissioner's audit of New South Wales universities' compliance with Part 3 Division 5 of the *Government Information (Public Access) Act 2009* (GIPA Act) which deals with mandatory disclosure of government contracts with the private sector.

We acknowledge the reported challenges faced by universities in complying with Part 3 Division 5 of the GIPA Act and efforts made by the sector to date towards compliance. We also thank universities for their cooperation in completing the survey which formed part of this audit.

Open access to government dealings with the private sector promotes the principles of transparency and accountability underpinning our democratic system of government.

NSW universities are public institutions of strategic value to the State and significant businesses and economic drivers for New South Wales.<sup>1</sup>

Independent Commission Against Corruption (ICAC) investigations over the last 10 years have publicly reported seven separate instances where persons have corruptly obtained benefits from the allocation of university contracts, which were either falsified or unfairly awarded.

Making universities' contracts information publicly available helps to ensure that:

- contracts are awarded fairly;
- corporate malfeasance, fraud and corruption is minimised;
- public expenditure is appropriate;
- the government is getting value for money; and
- universities' resources are used efficiently and effectively.

Our primary findings are that:

- universities have a low level of compliance with the mandatory requirements in Part 3 Division 5 of the GIPA Act;
- universities lack operational maturity in managing compliance with the contract register obligations; and
- universities adopt different approaches towards compliance.

<sup>1</sup> NSW Auditor-General's Report Financial Audit, Volume Two 2014, Focusing on Universities p 41 [http://www.audit.nsw.gov.au/ArticleDocuments/332/01\\_Volume\\_Two\\_2014\\_Full\\_Report.pdf.aspx?Embed=Y](http://www.audit.nsw.gov.au/ArticleDocuments/332/01_Volume_Two_2014_Full_Report.pdf.aspx?Embed=Y)

## Recommended action

We make five recommendations that promote the development of a robust governance framework, which supports the effective operation of the register.

1. Universities to conduct an annual register review.
2. Universities' Vice Chancellors to consider an annual compliance attestation.
3. Universities to clearly define and communicate contracts register roles and responsibilities to all staff.
4. Universities to ensure that register obligations are embedded into its policies and procedures.
5. Universities to conduct periodic quality assurance reviews of the contracts register.

We propose three regulatory actions which reinforce our commitment to providing universities and the regulated population with support and guidance to assist them to comply with this legislative scheme.

1. IPC to develop guidance material for contracts register obligations.
2. Information and Privacy Commission NSW (IPC) to conduct a future review of universities' contracts register compliance after 12 months.
3. IPC to review contracts register compliance in other sectors of the regulated population within 18 months.

## Legislative framework and context

The role of the Information Commissioner is to promote public awareness and understanding of the right to access government information in NSW, and provide information, support, advice, assistance and training to agencies and the general public. The Information Commissioner also monitors agencies' functions, reports to Parliament on the operation of the GIPA Act, and reports to the Attorney-General about proposals for legislative or administrative change.

The audit is conducted in the context of the *Information Commissioner's Report on the Operation of the Government Information (Public Access) Act 2009: 2013 – 2014*, which articulated a commitment to collaboratively work with the university sector to promote compliance with the requirements of Part 3 Division 5 of the GIPA Act.

## Authorising environment

The conduct of the audit is in accordance with the Information Commissioner's function under section 17(g) of the GIPA Act to monitor, audit and report on the exercise by agencies of their functions under, and compliance with, the GIPA Act.

In accordance with section 14 and 15 of the *Government Information (Information Commissioner) Act 2009* (GIIC Act), in performing her functions under the GIPA Act, the Information Commissioner has acted in an informal manner as far as possible.

## Legislative requirements

One of the objectives of the GIPA Act is to open government information to the public by authorising and encouraging the proactive release of government information by agencies.

Part 3 of the GIPA Act provides for open access information which is required to be made publicly available by agencies. Division 5 provides disclosure requirements for three classes of government contract with the private sector, in the form of a contracts register for those contracts valued at \$150,000 or over. Three classes of contract are established, each with different mandated requirements for disclosure:

**Class 1:** A contract to which the agency is a party that has a value of \$150,000 or more.

**Class 2:** A class 1 contract, to which any of the following apply:

- result in a direct negotiation where there has not been a tender process and the proposed contract has not been publicly available;
- there has been a tender process and terms and conditions have been substantially negotiated with the successful tenderer;
- involve operation or maintenance obligations for 10 years or more;
- involve a privately financed project as defined by relevant Treasury guidelines; or
- involve a transfer of land or other asset to a party in exchange for the transfer of land or other asset to an agency.

**Class 3:** A class 2 contract, with a value of \$5 million or more.

A copy of class 3 contracts must be made available with the register.

Reporting requirements for class 1 and 2 contracts, set out in sections 29 and 30 of the GIPA Act, are reproduced in Appendix A. Some confidential information is not required to be included in the contracts register, as set out in section 32 of the GIPA Act.

Contracts must be entered in the register within 45 working days of the contract becoming effective.

## From FOI to GIPA

The contracts disclosure provisions in the GIPA Act have been adopted from section 15A of the *Freedom of Information Act 1989* (FOI Act), which was inserted in 2006 to establish mandatory public disclosure requirements for major government contracts with the private sector. The New South Wales Ombudsman's review of the FOI Act in 2009 extended contractual disclosure requirements to local authorities and state owned corporations, as the Ombudsman saw that these groups made use of public funds on behalf of the community and that transparency of the expenditure of public funds should be required.<sup>2</sup>

The GIPA Act sought to vastly improve the transparency and integrity of Government in New South Wales by shifting the focus toward proactive disclosure with the requirement that certain open access information must be published. This includes an agency's register of significant private sector contracts.<sup>3</sup>

In response to this significant legislative change the IPC produced the *GIPA Compliance Guide* in March 2012. We have reviewed and are currently updating our contracts register resources to assist in elevating the level of knowledge of the GIPA Act requirements and to promote compliance.

## Benefits of transparency

Additional to the democratic principle underlying the value in government transparency, there is evidence that increased transparency with respect to government contracts with the private sector can lead to improved performance of outsourced services, as well as increased efficiency and value for money.<sup>4</sup>

Online publication of government contracts on government websites occurs in a number of jurisdictions nationally and internationally and has been described as a standard transparency mechanism.<sup>5</sup> Our jurisdiction's contract reporting requirements supports achieving this outcome.

## Audit Office of NSW and ICAC – recommendations for the sector

The universities audited are statutory bodies under Schedule 2 of the *Public Finance and Audit Act 1983* and are subject to annual university audits and related requirements of that Act.

<sup>2</sup> NSW Ombudsman, "Opening up government, Review of the *Freedom of Information Act 1989*, A Special Report to Parliament under section 31 of the Ombudsman Act 1974", February 2009, p.22

<sup>3</sup> New South Wales, Parliamentary Debates Legislative Assembly, 13 July 2009 (Nathan Rees)

<sup>4</sup> Mulgan, R. 2015, "Transparency and the performance of outsourced government services", Occasional Paper no. 5, commissioned by Queensland Office of the Information Commissioner and prepared for the Australian and New Zealand School of Government

<sup>5</sup> Ibid p.24

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The NSW Auditor-General's 2014 Universities Report (2014 Report) concluded that universities' internal controls are generally appropriately designed and operating effectively to produce reliable and timely financial reports. However, areas were identified where internal controls could be improved, which were reported to university management. Among a list of common observations was the:

*lack of a university-wide contract register listing contracts and key obligations of those contracts; and a process to ensure conditions are being met.*<sup>6</sup>

The 2014 Report described an instance where recommendations made by ICAC to improve procurement processes were not addressed within the agreed timetable, and remained outstanding as at the date of the report, concluding that:

*Until these recommendations are fully addressed, there is an increased risk of fraud and error.*<sup>7</sup>

Further recommendations are that:

*University procurement policies and processes need to be designed to minimise the risk of corrupt conduct.*<sup>8</sup>

*In the procurement area, audits identified the need for improved management of contracts to mitigate risks and realise intended benefits.*<sup>9</sup>

The NSW Auditor-General's 2015 Universities Report observed that:

*the Government Information (Public Access) Act 2009 register of government contracts on the university's website not being regularly updated.*<sup>10</sup>

This is an area of improvement for universities' internal financial controls.

The Audit Office of NSW's *Better Practice Contract Management Framework* (which applies to NSW government more broadly than just universities) provides that:

- a. in respect of governance, appropriate reporting and oversight practices for contract management should be in place, which includes oversight outside the business unit that 'owns' the contract. At least once per year the Audit and Risk Committee should review the contract register.
- b. in respect of policies and procedures, there is a whole of agency procurement manual that includes contract management policies and procedures. The manual should cover contract management processes, such as maintaining a contract register.

<sup>6</sup> NSW Auditor-General's Report: Financial Audit, Volume Two 2014, Focusing on Universities p.27 – [http://www.audit.nsw.gov.au/ArticleDocuments/332/01\\_Volume\\_Two\\_2014\\_Full\\_Report.pdf.aspx?Embed=Y](http://www.audit.nsw.gov.au/ArticleDocuments/332/01_Volume_Two_2014_Full_Report.pdf.aspx?Embed=Y)

<sup>7</sup> Ibid p 27

<sup>8</sup> Ibid p.6

<sup>9</sup> Ibid p.6

<sup>10</sup> NSW Auditor-General's Report: Financial Audit, Volume Two 2015, Focusing on Universities p.36 – [http://www.audit.nsw.gov.au/ArticleDocuments/371/NEW\\_FULL\\_REPORT\\_Volume%20Two%202015.pdf.aspx?Embed=Y](http://www.audit.nsw.gov.au/ArticleDocuments/371/NEW_FULL_REPORT_Volume%20Two%202015.pdf.aspx?Embed=Y)

## Methodology

We undertook a desktop audit of universities' contract registers, and issued a survey to universities to obtain a snapshot of the sector, which we used to assess the level of compliance with Part 3 Division 5 of the GIPA Act.

We have de-identified universities in tables and aggregate data. Where we identified specific areas of concern, we have chosen to engage independently with the respective universities at the conclusion of the audit. We will issue individual commentary to each university on final publication.

An instance of better practice has been identified in our case study, which is based on publicly available information.

## Audit period

In mid-March 2015, universities were notified of our intention to conduct an audit of their contract registers. We obtained sample data from each university's contract register in early March and again in late April for assessment. This was done to capture any compliance variations during this period given the inherent ongoing requirement to maintain the contract register.

## Assessment criteria

The criteria used to assess universities' compliance reflect the legislative requirements contained in Part 3, Division 5 of the GIPA Act relating to class 1, class 2 and class 3 contracts.

Our review of universities' compliance assessed the effectiveness of the design infrastructure of each contracts register and the effectiveness of its operation.

In **design effectiveness**, we analysed how well each university's design infrastructure meets each of the legislative requirements and facilitates the university's compliance. A contract register that contains relevant fields which facilitate compliance with all the requirements would achieve a favourable score. This score reflects the university's potential ability to comply with its legislative requirements.

In **operating effectiveness**, we analysed how well each university implements its design infrastructure to meet the requirements. A contract register that contains adequate and meaningful information to demonstrate how it meets, or is not required to meet, its legislative requirements would achieve a favourable score. This score reflects the university's actual compliance with its legislative requirements.

A university's operating effectiveness score cannot be higher than its design effectiveness score.

## Audit sampling and testing

Our sampling method is indicative of those contracts that we assessed or examined and our analysis may therefore not reflect the circumstances in every instance.

We tested a random sample of three class 1 contracts from each university using pre-determined criteria and assessed them for design and operating effectiveness. To the extent that this was possible, we attempted to also test three class 2 contracts and three class 3 contracts in the same manner.

Despite the small sample size, we are of the view that the observations and findings made in this report reflect university sector wide issues. This view is also supported by the limited number of contracts observed in universities' contract registers.

The random nature of sampling means that the contracts tested in March 2015 and April 2015 may differ. This is consistent with our aim of testing each university's overall compliance levels.

## Audit limitations

The desktop nature of this audit limits our ability to test the veracity of the information underlying the contracts register. This means that we relied solely on the information on the register as a true representation of fact.

Given this, we made the following assumptions of regulatory compliance:

- all contracts over the value of \$150,000 have been entered onto the contracts register in accordance with section 27(1) of the GIPA Act; and
- information about a class 1 contract is entered onto the contracts register within 45 working days after the contract becomes effective in accordance with section 27(2) of the GIPA Act.

We were able to easily obtain a sample of class 1 contracts for testing because all contracts on an agency's register are class 1 contracts. However, although the legislative regime is predicated on classification of government contracts with the private sector, we were unable to determine whether contracts are class 2 or class 3 contracts unless the university specifically stated this on its register. As a result, we could only obtain a sample of these contracts where the university identified these contracts as class 2 or class 3.

This limitation is exacerbated by the discretionary component applying to class 2 contracts, under the legislation. For example, section 30(2)(e) of the GIPA Act contains the words "if relevant". We were unable to ascertain the criteria used by universities to determine relevance in this context.

## Survey

A survey was sent to all universities, which asked 11 questions about the way universities manage their contracts registers. The survey sought information about the procedures and systems in place to capture, register and update information about contracts and asked respondents to estimate the number of contracts over the \$150,000 threshold and to identify challenges faced. Respondents had two weeks to return their responses.

The response rate was 50%. We consider that this is sufficient to contextualise the sector generally.

## Review of guidance available to the sector

As part of the audit, we examined guidance material available with respect to contracts register obligations, including IPC publications and Premiers Memorandum M2007-01.<sup>11</sup> On review, where a need has been identified to update material, we have taken the necessary steps to address this, including notifying the NSW Department of Premier and Cabinet.

## Draft report consultation process

The draft version of this audit report was distributed to all universities who were invited to provide comments and feedback. A two week timeframe was initially provided to all universities, which was extended by an additional week.

At the conclusion of the three week consultation period, three out of ten universities provided a response to the draft audit report. The universities were supportive of the recommended actions proposed in this report including the regulatory actions that relate to activities proposed to be undertaken by the Information Commissioner.

Additionally, one university informed us in its submission that it had completed a review of its contract register obligations and addressed observations 1.1-1.5 and 2.1. We welcome the action taken by this university and its commitment to implementing the recommended actions.

The responses provided by universities were considered in the preparation of the final report. However, following consideration of the responses, no amendments were made to this report as a result of this consultation process.

## Distribution of audit report

This audit report will be published and made publicly available through the IPC website.

A copy of this audit report will be provided to the Attorney-General of New South Wales as the Minister who has oversight of the GIPA Act and to the Secretary of the Department of Justice.

<sup>11</sup> Premier's Memorandum M2007-01: Public Disclosure of Information arising from NSW Government Tenders and Contracts – <http://arp.nsw.gov.au/m2007-01-public-disclosure-information-arising-nsw-government-tenders-and-contracts>

## Survey findings

The aim of the survey was to better understand universities' operational context with respect to their contracts registers.

**FINDING: DESPITE HAVING PROCESSES IN PLACE, REGISTERS ARE IMPLEMENTED IN AN AD HOC, INCONSISTENT MANNER WITHOUT ADEQUATE GOVERNANCE OVERSIGHT**

### OBSERVATIONS

1. Four out of five respondent universities indicated that they had a clear understanding of the legal requirements. However, one university identified that this was particularly challenging.
2. Universities do not have a common governance approach towards managing the contracts register obligations. The business unit responsible for managing the register varies across universities and includes the procurement, finance, records management and legal functions.
3. Universities rely upon work being performed accurately and expeditiously in different business areas to comply with their contracts reporting requirements. The people responsible for performing various duties involving the register do not usually comprise staff from the business unit with responsibility for managing the register. For example, the managing business unit relies on other staff to complete internal forms and lodge documents for inclusion onto the register.
4. Universities stated that they have policies and procedures in place to manage compliance with the contracts register requirements. To ensure compliance universities have relied on various methods including staff checks, internal sign offs and reviews. Universities place information onto their registers with differing regularities, which do not appear to be driven by or reflective of the mandatory legislative timeframes.
5. Despite universities having policies and procedures in place, there are challenges which impact upon how compliance risk is able to be appropriately managed.
  - a. The decentralisation of the procurement function results in an increased reliance on business units, whose main speciality is not procurement and who use different and varying processes, to adequately perform their register specific duties. Ensuring this is done adequately involves having people who are knowledgeable regarding the requirements and expectations of the legislation.
  - b. Maintenance of the register is not seen as a core business activity which adds value to business. Register requirements do not align to normal business as usual tasks and processes, which creates a burden on universities to do additional work to input this data into the register.
  - c. The contract register requirements are complex and require people with specialist knowledge to administer. The different classes of contracts create additional complexity.
6. Having identified the challenges to compliance, some universities are currently working on improving the manner in which they manage compliance. This includes reviewing the design infrastructure, including the information that is captured, with the view to improving the register's overall efficiency and effectiveness. Other universities report working collaboratively with other business units to create new centralised compliance systems that also allow for real time reporting. Another university identified a backlog of contracts that as at the time of the survey had not been processed, and consequently decided to review its procedures to better manage compliance requirements.
7. Universities' contracts registers do not appear to reflect the actual number of contracts entered into by universities. When asked to estimate the number of contracts they have with a value of \$150,000 or more, respondent universities' answers ranged from 41 to 724.

## Audit findings

The audit results show that universities have an awareness of the legislative requirements of the contracts register regime and that some universities have design infrastructure in place to comply with these requirements. However, the audit also identified that the effective implementation of the infrastructure in universities is a compliance challenge.

### **FINDING 1: UNIVERSITIES ARE FAILING TO COMPLY WITH THE REGISTER OBLIGATIONS**

#### **OBSERVATION 1.1: One university does not have an operational register**

One university has no contracts entered onto its register. This is despite that university having design infrastructure that enables it to comply with only class 1 contract requirements. At a minimum, we would have expected contracts of this type to be entered onto its register.

As a consequence, the Information Commissioner will separately engage with the university to assist it to comply with this legislative scheme.

All other universities audited have entered some contract information into their registers in some form.

#### **OBSERVATION 1.2: Universities do not have design infrastructure enabling full compliance**

No one university has a design that enables it to achieve full compliance with all the contracts register obligations. Despite this, the design effectiveness scores across the sector for class 1 obligations show that universities have made efforts to put in place infrastructure enabling compliance to be demonstrated for these obligations.

However, the 0% score returned from a majority of universities for design effectiveness in relation to class 2 and class 3 obligations highlights sector wide inadequacies in design infrastructure for these obligations.

The failure to have adequate infrastructure in place to enable compliance is an issue that should be taken seriously. This is particularly as class 2 and class 3 contracts deal with higher levels of inherent risk and are associated with a greater reporting obligation under the legislation. This is evidenced by the requirement for full disclosure of class 3 contracts in accordance with section 31 of the Act.

We note that University G advised us during the audit period that they had just launched a new contracts register which was in development prior to the audit. This resulted in an improvement in its design effectiveness score for this university in the post-notification results.

#### **OBSERVATION 1.3: Universities have not achieved optimal implementation of their design infrastructure**

Universities achieved varying levels of success in implementing their design infrastructure to demonstrate compliance for class 1 obligations. Some universities have performed better than others.

We observed that some universities have implemented their design infrastructure very well and are able to effectively demonstrate compliance with their regulatory obligations. This is reflected in the close alignment between the design and operational effectiveness scores.

The average operating effectiveness score is 14% below the average design effectiveness score for class 1 contracts. This means that universities have the potential to demonstrate compliance with a further 14% of obligations, if the design is implemented optimally.

The desktop nature of the audit means we are unable to definitively explain the reason for the disparity; whether it is an issue related to a lack of resources, knowledge or adequacy of systems and procedures, or a failure of leadership to demonstrate a commitment to statutory compliance. However, the survey identifies some of the challenges that universities face in complying with the legislative requirements.

We observed that agencies that are more engaged and proactive regarding a centralised contracts register are more likely to achieve better compliance outcomes. Our case study demonstrates that a university which has actively responded to the legislative environment has attained high design and operational effectiveness scores. The university's register appears to be supported by systems and procedures, which were developed as a response to NSWAO recommendations to centralise its contracts register.

There were minimal changes between pre-notification and post-notification results in the operational effectiveness score, which can be explained through sampling variations.

#### **OBSERVATION 1.4: Universities' registers may not contain all the contracts that a university has with a value of \$150,000 or more**

#### **OBSERVATION 1.5: No register contained a class 3 contract**

Agencies are required to record information on their registers about any contracts above this threshold. We observed that some universities have relatively low numbers of contracts on their registers including some with less than ten contracts.

We recognise that this desktop audit is unable inform us of the total number of contracts that each university is required to include on its registers.

However, our audit has also been informed by publicly available information, including universities' annual reports

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and written statements on the register websites that there may be contracts which were not included on the registers. We also hold a reasonable expectation that, given the size, budget and type of services offered, universities would have recorded more contracts than there are currently, particularly in relation to class 2 and class 3 contracts.

## RECOMMENDED ACTION 1: UNIVERSITIES TO CONDUCT AN ANNUAL REGISTER REVIEW

Leveraging upon the approach expounded by the NSW Audit Office in its Better Practice Contract Management Framework, we recommend that oversight of the contracts register obligations form a part of universities' risk governance framework. We recommend that this be achieved by universities' Audit and Compliance Committees conducting an annual review of the contracts register and its compliance with the legislative obligations. Universities' Audit and Compliance Committees should also include the GIPA Act on their compliance registers.

## RECOMMENDED ACTION 2: UNIVERSITIES' VICE CHANCELLORS TO COMPLETE AN ANNUAL COMPLIANCE ATTESTATION

Further to recommended action 1, we are of the view that the accountability for ensuring legislative compliance resides at the agency head and senior executive level. A recommended mechanism to achieve this is the implementation of an annual attestation by the Vice Chancellor to the university's compliance with the register obligations. It is envisaged that this will form a part of each university's compliance management framework.

## RECOMMENDED ACTION 3: UNIVERSITIES TO CLEARLY DEFINE AND COMMUNICATE CONTRACTS REGISTER ROLES AND RESPONSIBILITIES TO ALL STAFF

To promote and maintain optimal implementation of the register, we recommend that the role and responsibility of each individual participating in the process be clearly defined and communicated. This includes the executive team, senior management, line management and operational staff, across relevant business units. Increased understanding of individuals' roles in the process will promote more effective collaboration and communication between business units and increased synergies. This will facilitate more effective and rigorous oversight, allowing register requirements to be better managed.

## RECOMMENDED ACTION 4: UNIVERSITIES TO ENSURE THAT REGISTER OBLIGATIONS ARE EMBEDDED INTO ITS POLICIES AND PROCEDURES

Agencies can achieve higher levels of compliance when regulatory obligations are embedded into agency systems, policies, processes and procedures. Recommended mechanisms to embed compliance include ensuring that:

- design infrastructure captures all the requirements of the GIPA Act;

- policies and procedures adequately document and describe how the university will achieve compliance;
- staff are fully aware, trained and capable of discharging their duties; and
- regular reviews are conducted to ascertain the effectiveness of its processes. See Recommended Action 7, page 8.

## RECOMMENDED ACTION 5: IPC TO CONDUCT A FUTURE REVIEW OF UNIVERSITIES' CONTRACTS REGISTER COMPLIANCE AFTER 12 MONTHS

A further audit of the university sector to be conducted after 12 months to reassess compliance levels would enable the Information Commissioner to evaluate any change in compliance levels resulting from this audit and from future guidance and collaboration.

## FINDING 2: UNIVERSITIES LACK OPERATIONAL MATURITY IN MANAGING COMPLIANCE WITH THE REGISTER OBLIGATIONS

### OBSERVATION 2.1: Information on the register is not always meaningful or accurate

Some universities are not entering mandatory information about class 1 contracts, or are entering information in a way that is not accurate or meaningful.

We observed the following specific failures to comply with section 29 of the GIPA Act:

- Some universities do not enter the business address of the contractor at all, or provide the name of the suburb only (section 29(a) of the GIPA Act).
- Some universities do not enter meaningful information regarding the date on which the contract became effective and the duration of contract (section 29(b) of the GIPA Act). For example, entering the numeral 4 without any meaningful descriptor provides no indication as to whether the duration is four weeks, months or years.
- Some universities do not enter meaningful information regarding the particulars of the project to be undertaken, the goods or services to be provided or the real property to be leased or transferred under the contract (section 29(d) of the GIPA Act). Some registers include information that cannot be read stand alone or without context, such as unidentifiable acronyms and jargon, or internal document file references. Universities should provide greater clarity in this publicly facing document given the objectives of the GIPA Act.
- In the case of a contract arising from a tendering process, some universities do not enter information regarding the method of tendering and/or a summary of the criteria against which the various tenders were assessed (section 29(h) of the GIPA Act). For example, some registers contain

information about whether the contract was awarded through a tender process but not a summary of the assessment criteria.

Other observations are that:

- Contract register fields were left blank with no description and the words “true” or “false” were used in a way which gave no meaning or context.
- Fields were used incorrectly, inaccurately, or not for their intended purpose. For example, entering information regarding project particulars, relevant dates and the name of the contractor in the ‘title’ field.
- Responses were insufficiently detailed or did not go towards addressing the legislative requirement.

### ***OBSERVATION 2.2: Universities indicate that class 2 obligations do not apply to their contracts in a majority of circumstances***

Most of the contracts we assessed for class 2 obligations indicated “N/A” to all the legislative requirements.

Despite universities entering all the information their design infrastructure allows in order to demonstrate compliance, universities have indicated that most class 2 obligations do not apply to their contracts.

The desktop nature of the audit does not allow us to assess the veracity of the information and determine whether those class 2 requirements actually apply to the respective contracts.

We observe that little value can be derived from the information contained in the assessed contracts with respect to class 2 obligations.

### **RECOMMENDED ACTION 6: IPC TO INVESTIGATE DEVELOPMENT OF GUIDANCE MATERIAL FOR CONTRACTS REGISTER OBLIGATIONS**

In order to address perceived knowledge gaps and to ensure consistency in understanding across the regulated population, we propose to consider the development of an e-learning module or other guidance material dealing with contracts register obligations. We envisage that this guidance material will contain an explanation of the legal obligations and address how compliance can be demonstrated in an adequate manner. This material can be used by staff responsible for managing and maintaining agencies’ contracts registers, to assist them to achieve compliance.

### **RECOMMENDED ACTION 7: UNIVERSITIES TO CONDUCT PERIODIC QUALITY ASSURANCE REVIEWS OF THE CONTRACTS REGISTER**

To promote consistent outcomes and prevent information that is not meaningful or accurate from being placed onto the register, we recommend that the register is subject to

periodic quality assurance. There should be formal procedures in place for maintaining the accuracy and completeness of the register. The results from this assurance review should be provided to the Audit and Compliance Committee as an input for its annual review and any attestation to be provided by the Vice Chancellor or authorised senior executive.

### ***FINDING 3: UNIVERSITIES HAVE TAKEN DIFFERENT APPROACHES TOWARDS COMPLIANCE***

#### ***OBSERVATION 3.1: Registers include contracts in which the university receives consideration for performance of the contract***

Some universities include details of contracts on their registers in which they are the recipient of monetary consideration, in exchange for performance of a service. For example, a lease agreement by which a university leases its premises to an external party in exchange for rent, or a research agreement, by which a university agrees to conduct research in exchange for money.

The GIPA Act does not prohibit the inclusion of such contracts and we recognise that this interpretation of Part 3 Division 5 of the GIPA Act varies between universities across the sector.

The IPC will consider avenues to provide clarification on this issue.

#### ***OBSERVATION 3.2: Registers do not distinguish between the contract classes***

We observed that only one university divided its register into the various contract classes. While there is no reporting requirement for contracts to be classified in the register into class 1, class 2, or class 3, the legislative regime is predicated on classification of government contracts. Our view is that the legislation interpretation required to distinguish between contracts is not well demonstrated in the reporting of contracts by universities.

More distinct classification will assist members of the public and agencies to more readily identify different contracts, which further promotes the objects of the GIPA Act. It would also assist agencies to better manage compliance with their obligations and potentially improve performance management with respect to larger contracts. The IPC will consider avenues to provide clarification on this issue.

#### ***OBSERVATION 3.3: Universities have varying approaches to register design***

We observed that universities have adopted various forms of design infrastructure to assist them to achieve compliance. This ranges from the completion of template forms that are uploaded, information uploaded directly onto websites and collated spread sheets.

One such design is a manual template that two universities appear to share. The template poses a series of questions framed in the same terms as the GIPA Act requirements in a checklist style design. It requires a person to complete the questions systematically, whilst recognising and addressing the various threshold differences between the contract classes. Importantly, this template is the only design form that considers the thresholds and requirements across all three contract classes. If this template is effectively implemented, universities are able to more easily and better demonstrate compliance with most of its regulatory obligations across all classes.

However, we note that the template is three pages in length and that the two universities which use it recorded a relatively low number of contracts (less than 20 contracts) in comparison to the rest of the sector. This observation suggests a possible correlation between the size of the document and how effectively it is used.

An effectively designed contracts register can be in any form, as long as it captures all necessary information required by the legislation. Universities are not bound to any one form and can tailor their contracts register design to the individual needs and circumstances of the particular university.

In the *Report on the Operation of the Government Information (Public Access) Act 2009: 2013 – 2014*, the Information Commissioner expressed an intention to work collaboratively with the university sector to promote compliance through the development and implementation of a sector template that will facilitate public access to contracts. We recognise the work already undertaken to develop and design individual contract registers, and encourage universities to consider the findings and recommendations in this audit report for adoption to ensure that the contracts registers are as compliant as they can be.

We will continue to engage with universities to identify how existing templates within the sector can be used or adapted to achieve a consistent sector template to promote better compliance outcomes

## **RECOMMENDED ACTION 8: IPC TO REVIEW CONTRACTS REGISTER COMPLIANCE IN OTHER SECTORS OF THE REGULATED POPULATION WITHIN 18 MONTHS**

To enable the Information Commissioner to obtain a better understanding of compliance across the entire regulated population, we consider that compliance monitoring could be expanded to include all sectors including government agencies and local councils. This would assist the Information Commissioner to identify challenges that apply across the entire regulated population and drive positive sector wide compliance outcomes.

## **Conclusion**

Our primary finding is that universities are not fully compliant with the mandatory contract register obligations in the GIPA Act.

We observe that the low levels of compliance are characterised by a:

1. lack of adequate design infrastructure;
2. lack of accountability at the responsible business unit level to drive and manage implementation of the infrastructure;
3. lack of governance and oversight at leadership levels to ensure compliance;
4. lack of clarity about individuals' roles and responsibilities; and
5. lack of understanding across all levels in operationalising the legislative intent of contracts register provisions.

There are no penalties that arise from a breach of the contract register obligations. This may be a factor agencies consider when assessing their compliance risk appetite and subsequent resource allocation. This view, if correct, would seem to undermine the objects of the GIPA Act.

The contracts register requirements are mandated in Part 3 Division 5 of the GIPA Act. The university sector's history of poor compliance, the identification of significant risk as evidenced by ICAC investigations, the apparent failure to adopt recommendations by other oversight authorities (in particular the NSW Audit Office) and the results of this audit collectively demonstrate the need for significant change.

Our recommendations to universities address:

- staff awareness of their role in the process and how it is to be performed;
- management accountability and its role in the governance and oversight of the process;
- strategies to embed compliance into policies and procedures;
- data quality of the register; and
- staff knowledge supporting the effective operationalisation of the register.

We will continue to provide assistance and guidance to agencies in order to assist the sector to comply with the intent of the legislation and the GIPA Act generally. Our recommendations and proposed regulatory actions will go towards promoting more positive compliance outcomes not only in the university sector but also across the regulated population.

# Universities' Compliance with GIPA Act: Appendix A

## Appendix A: Legislation Part 3 Division 5 of the GIPA Act

### Division 5 Government contracts with private sector

#### 27. Register of government contracts valued at \$150,000 or more

- (1) An agency is to keep a register of government contracts (its government contracts register) that records information about each government contract to which the agency is a party that has (or is likely to have) a value of \$150,000 or more (**class 1 contracts**).
- (2) Information about a class 1 contract must be entered in the register within 45 working days after the contract becomes effective.
- (3) A contract **becomes effective**:
  - (a) when it is entered into by or on behalf of the agency concerned, or
  - (b) if the contract contains a provision to the effect that one or more conditions are to be met before the obligations of the parties under the contract are enforceable—when the condition or conditions have been met (and not when the contract is entered into by the agency).

#### 28. Value of contract

The following information about a class 1 contract is to be entered in the government contracts register:

- (a) the total estimated value of the project,
- (b) the total estimated value of the goods or services over the term of the contract,
- (c) the value of the real property transferred,
- (d) the rent for the term of the lease.

#### 29. Information to be entered in register—class 1 contracts

The **value** of a contract is whichever of the following values is appropriate to the kind of contract concerned:

- (a) the name and business address of the contractor,
- (b) particulars of any related body corporate (within the meaning of the *Corporations Act 2001* of the Commonwealth) in respect of the contractor, or any other private sector entity in which the contractor has an interest, that will be involved in carrying out any of the contractor's obligations under the contract or will receive a benefit under the contract,

- (c) the date on which the contract became effective and the duration of the contract,
- (d) particulars of the project to be undertaken, the goods or services to be provided or the real property to be leased or transferred under the contract,
- (e) the estimated amount payable to the contractor under the contract,
- (f) a description of any provisions under which the amount payable to the contractor may be varied,
- (g) a description of any provisions with respect to the renegotiation of the contract,
- (h) in the case of a contract arising from a tendering process, the method of tendering and a summary of the criteria against which the various tenders were assessed,
- (i) a description of any provisions under which it is agreed that the contractor is to receive payment for providing operational or maintenance services.

#### 30. Additional information for class 2 contracts

- (1) Additional information is required to be entered in the government contracts register for class 1 contracts to which any of the following paragraphs applies (**class 2 contracts**):
  - (a) there has not been a tender process, the proposed contract has not been made publicly available and the terms and conditions of the contract have been negotiated directly with the contractor,
  - (b) the proposed contract (whether or not made publicly available) has been the subject of a tendering process and the terms and conditions of the contract have been substantially negotiated with the successful tenderer,
  - (c) the obligations of one or more parties under the contract to maintain or operate infrastructure or assets could continue for 10 years or more,
  - (d) the contract involves a privately financed project as defined by guidelines published by the Treasury (as in force from time to time),
  - (e) the contract involves a transfer of a significant asset of the agency concerned to another party to the contract in exchange for the transfer of an asset to the agency.
- (2) The additional information required to be entered in the register for class 2 contracts is as follows:
  - (a) particulars of future transfers of significant assets to the State at zero, or nominal, cost to the State, including the date of their proposed transfer,

# Universities' Compliance with GIPA Act: Appendix A

- (b) particulars of future transfers of significant assets to the contractor, including the date of their proposed transfer,
- (c) the results of any cost-benefit analysis of the contract conducted by the agency,
- (d) the components and quantum of the public sector comparator if used,
- (e) if relevant, a summary of information used in the contractor's full base case financial model (for example, the pricing formula for tolls or usage charges),
- (f) if relevant, particulars of how risk, during the construction and operational phases of a contract to undertake a specific project (such as construction, infrastructure or property development), is to be apportioned between the parties, quantified (where practicable) in net present-value terms and specifying the major assumptions involved,
- (g) particulars as to any significant guarantees or undertakings between the parties, including any guarantees or undertakings with respect to loan agreements entered into or proposed to be entered into,
- (h) particulars of any other key elements of the contract.

## 31. Register to include copy of class 3 contract

If a class 2 contract has (or is likely to have) a value of \$5 million or more (a class 3 contract), the register must include a copy of the class 3 contract.

## 32. Confidential information not required to be included in register

- (1) A requirement of this Division to include information or a copy of a contract in the government contracts register does not require the inclusion of:
  - (a) the commercial-in-confidence provisions of a contract, or
  - (b) details of any unsuccessful tender, or
  - (c) any matter that could reasonably be expected to affect public safety or security, or
  - (d) a copy of a contract, a provision of a contract or any other information in relation to a contract that is of such a nature that its inclusion in a record would result in there being an overriding public interest against disclosure of the record.
- (2) If an agency does not include a copy of a contract in the register, or includes only some of the provisions of a contract in the register, because of this section, the agency must include in the register:

- (a) the reasons why the contract or those provisions have not been included in the register, and
- (b) a statement as to whether it is intended that the contract or those provisions will be included in the register at a later date and, if so, when it is likely that they will be included, and
- (c) if some but not all of the provisions of the contract have been included in the register, a general description of the types of provisions that have not been included.

## 33. Variations to contracts

- (1) If a material variation is made to a contract that would affect the particulars that are required to be included in the government contracts register in relation to the contract, the particulars included in the register are to be amended to reflect the variation within 45 working days after the variation becomes effective.
- (2) If a material variation is made to a contract a copy of which is required to be included in the register, a copy of the variation or the varied provisions is to be included in the register within 45 working days after the variation becomes effective.

## 34. Minimum public access period for information on register

- (1) Information (including a copy of a contract) required to be included in the government contracts register in relation to a contract is only required to be made publicly available as open access information for the public access period.
- (2) The **public access period** is whichever is the longer of the following periods:
  - (a) 20 working days,
  - (b) the period until the project to which the contract relates is complete, the goods and services concerned have been provided under the contract, the term of the lease has expired or the real property has been transferred.

## 35. Register to be published on Government tenders website

- (1) A copy of an agency's government contracts register is to be published on the Government tenders website (that is, the website with the URL of <https://tenders.nsw.gov.au> or such other internet website as the Premier may authorise for the purposes of this section).

- (2) Each of the following agencies is not required to have a copy of its government contracts register published on the Government tenders website but is required to have a copy of the register published on any website of the agency:
  - (a) a State owned corporation or a subsidiary of a State owned corporation,
  - (b) a local authority,
  - (c) a university.
- (3) A copy of an agency's government contracts register is also to be made publicly available in any other manner in which the agency decides to make its open access information publicly available.

### **36. Disputes**

- (1) If a person other than an officer of the agency (including, for example, a party to a government contract) disagrees with the way in which an agency has interpreted its obligations under this Division, the agency is to obtain:
  - (a) the opinion of the Chairperson of the NSW Procurement Board in relation to the matter, or
  - (b) if the principal officer of the agency is the Chairperson of the Board—the opinion of the Minister in relation to the matter.
- (2) This section does not apply to:
  - (a) a State owned corporation or a subsidiary of a State owned corporation, or
  - (b) a local authority, or
  - (c) a university.

### **37. Agency obligation to find information**

Information is required to be included in an agency's government contracts register only to the extent that the agency holds the information or it is reasonably practical for the agency to obtain the information.

### **38. Exception for industry support contracts**

This Division does not require the Department of State and Regional Development to include any information about or a copy of a government contract in its government contracts register if the contract involves the provision of industry support.

### **39. Exception for SOCs – competitive neutrality**

This Division does not require a State owned corporation or a subsidiary of a State owned corporation to include any information about or a copy of a government contract in its government contracts register if the contract relates to activities engaged in by the corporation or subsidiary in a market in which it is in competition with any other person.

### **40. Exception for Landcom – contracts for sale of land**

This Division does not require Landcom to include any information about or a copy of a government contract in its government contracts register if the contract is a contract for the sale of land.

**Note:** Any exception under this Division from the requirement to include information about or a copy of a contract on a government contracts register does not of itself constitute grounds for refusing an access application.

# Universities' Compliance with GIPA Act: Appendix B

## Appendix B: Pre-notification results

The results of the audit are contained in the tables and graphs below.

### Table of university sector compliance with contracts register requirements

	Class 1 Contract		Class 2 Contract		Class 3 Contract	
	DE	OE	DE	OE	DE	OE
UNI A	33%	31%	0%	N/A	0%	N/A
UNI B	83%	50%	0%	N/A	0%	N/A
UNI C	92%	56%	65%	N/A	25%	N/A
UNI D	100%	86%	88%	88%	75%	N/A
UNI E	100%	N/A	0%	N/A	0%	N/A
UNI F	100%	100%	0%	N/A	0%	N/A
UNI G	17%	14%	0%	N/A	0%	N/A
UNI H	100%	94%	88%	88%	75%	N/A
UNI I	92%	69%	0%	N/A	0%	N/A
UNI J	50%	42%	0%	N/A	0%	N/A

Note: N/A means not assessable. A result could be not obtained as no contract was available to be assessed.

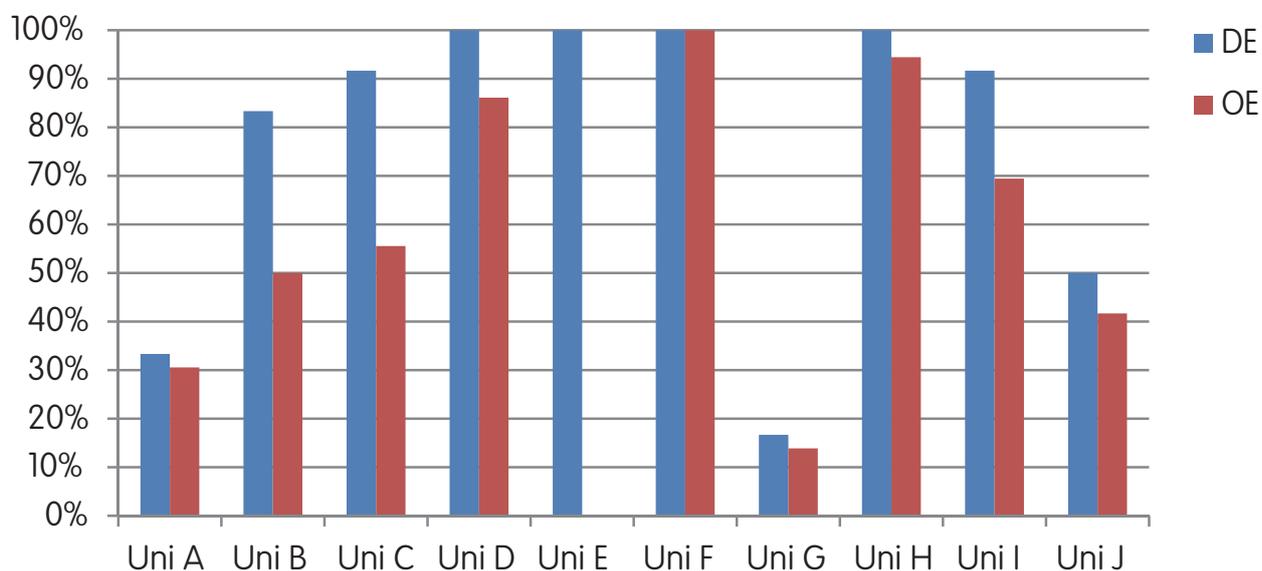
Please refer to our "Audit Limitation" section for further commentary on our methodology.

DE = Design effectiveness

OE = Operating effectiveness

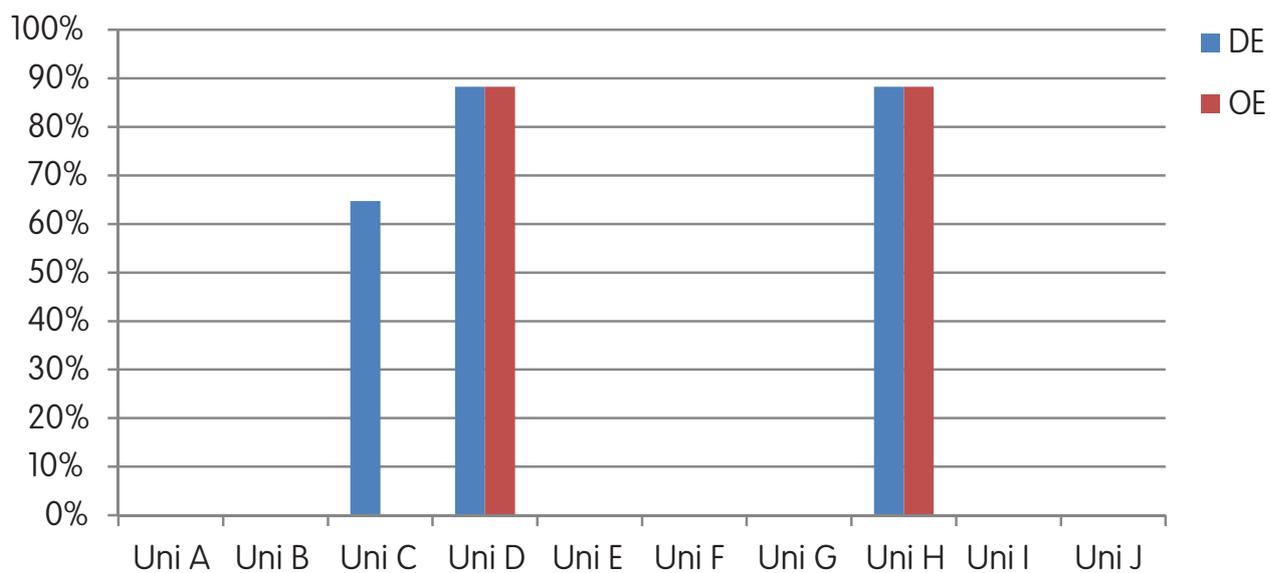
### Graphs of university sector compliance for each class

#### Class 1 compliance

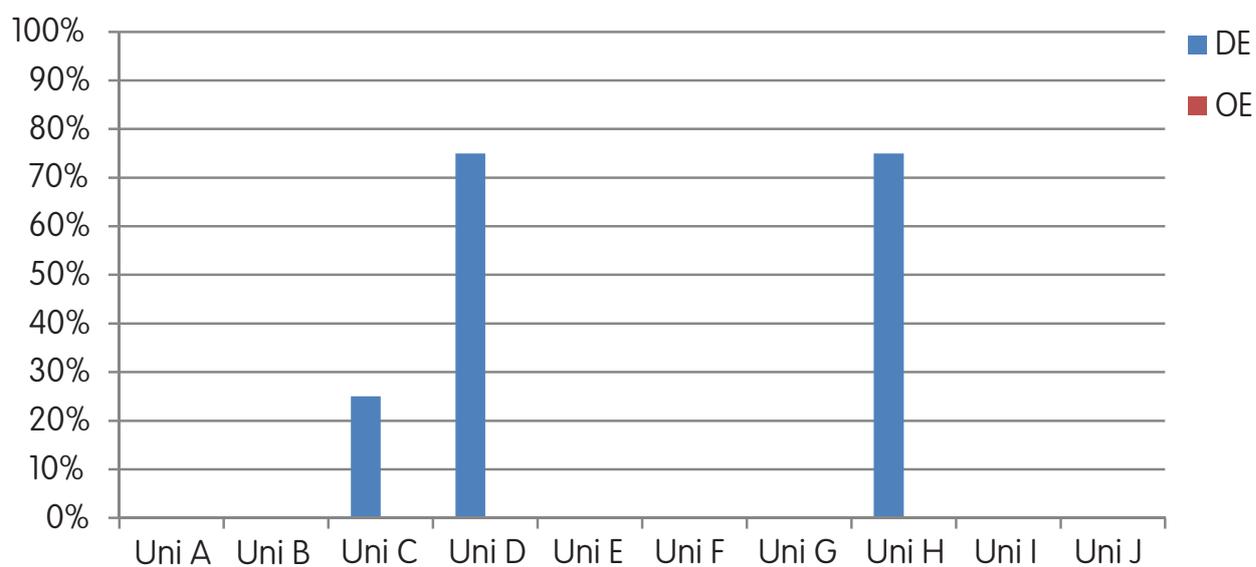


## Graphs of university sector compliance for each class (continued)

### Class 2 compliance



### Class 3 compliance



# Universities' Compliance with GIPA Act: Appendix C

## Appendix C: Post-notification results

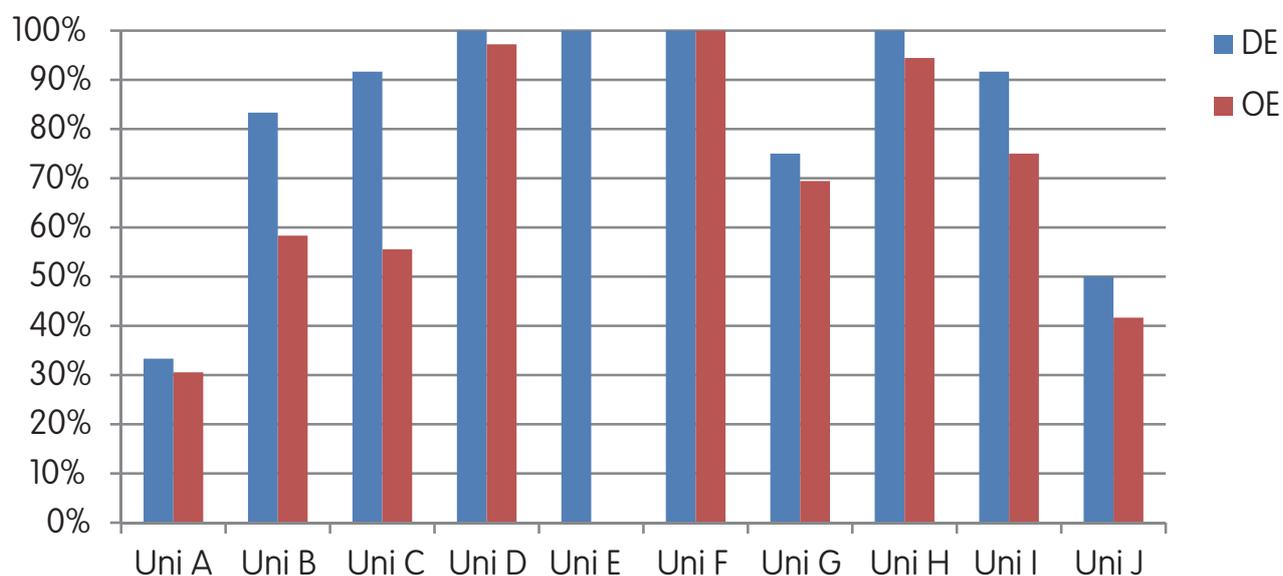
Table of university sector compliance with contracts register requirements

	Class 1 Contract		Class 2 Contract		Class 3 Contract	
	DE	OE	DE	OE	DE	OE
UNI A	33%	31%	0%	N/A	0%	N/A
UNI B	83%	58%	0%	N/A	0%	N/A
UNI C	92%	56%	65%	N/A	25%	N/A
UNI D	100%	97%	88%	88%	75%	N/A
UNI E	100%	N/A	0%	N/A	0%	N/A
UNI F	100%	100%	0%	N/A	0%	N/A
UNI G	75%	69%	35%	35%	0%	N/A
UNI H	100%	94%	88%	88%	75%	N/A
UNI I	92%	75%	0%	N/A	0%	N/A
UNI J	50%	42%	0%	N/A	0%	N/A

Note: N/A means not assessable. A result could be not obtained as no contract was available to be assessed.  
Please refer to our "Audit Limitation" section for further commentary on our methodology.  
DE = Design effectiveness  
OE = Operating effectiveness

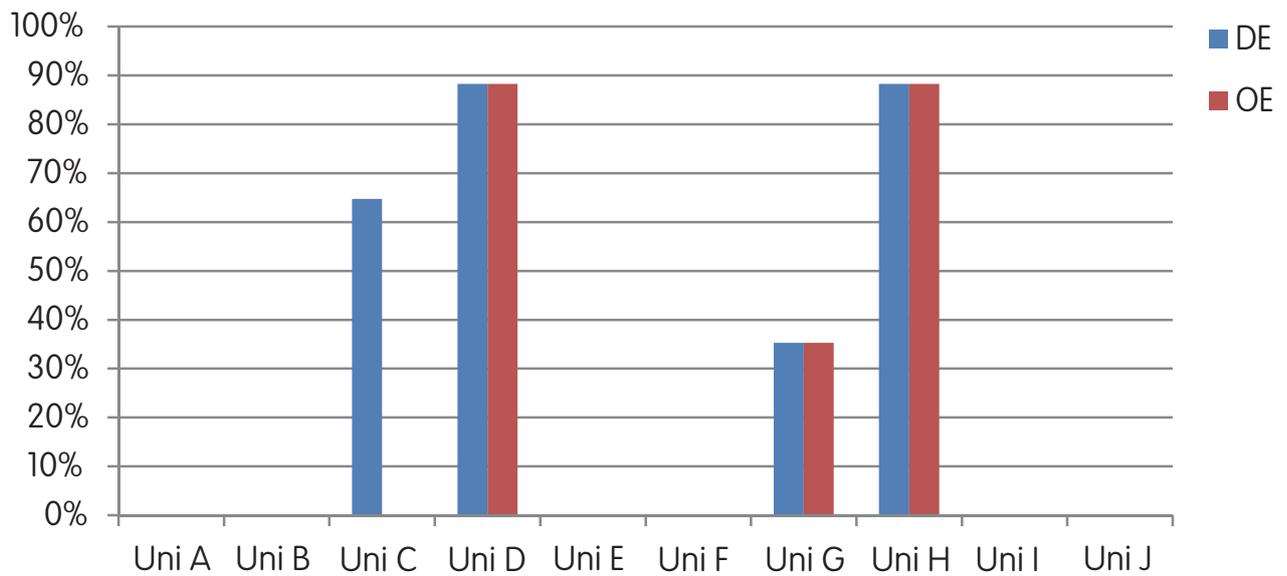
### Graphs of university sector compliance for each class

#### Class 1 compliance

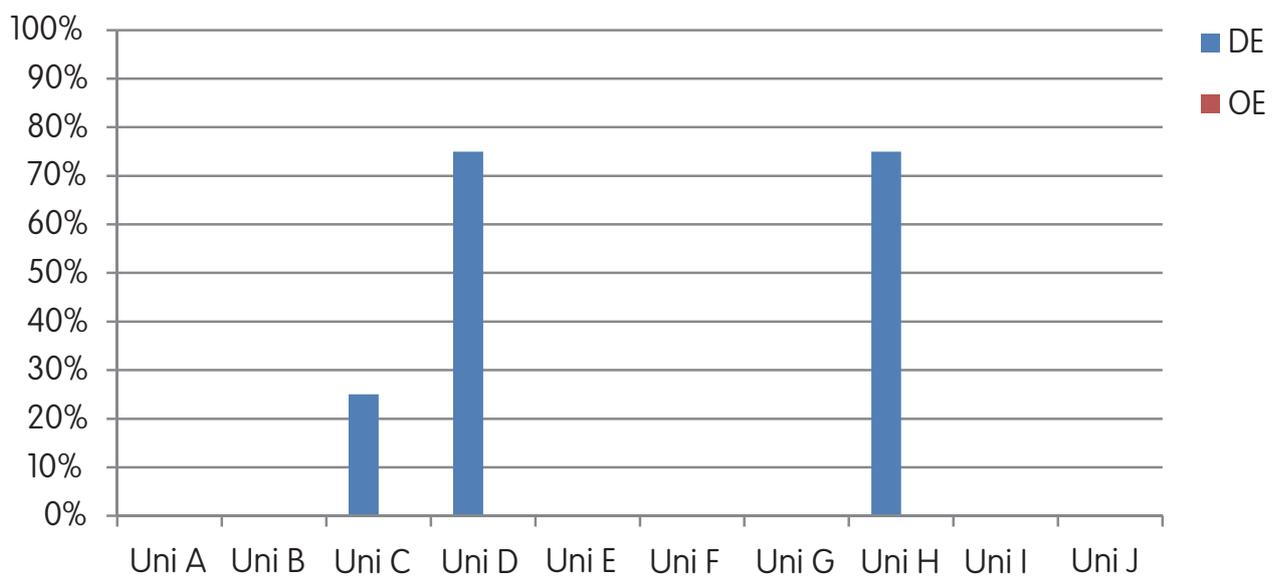


## Graphs of university sector compliance for each class (continued)

### Class 2 compliance



### Class 3 compliance



# Universities' Compliance with GIPA Act: Appendix D and E

## Appendix D: List of universities audited

Ten universities, established under New South Wales legislation, are subject to the GIPA Act and were audited for compliance with Part 3 Division 5 of the GIPA Act. They are listed below in no particular order:

1. Macquarie University – [www.mq.edu.au](http://www.mq.edu.au)
2. University of New South Wales – [www.unsw.edu.au](http://www.unsw.edu.au)
3. The University of Sydney – [www.sydney.edu.au](http://www.sydney.edu.au)
4. University of Technology, Sydney – [www.uts.edu.au](http://www.uts.edu.au)
5. University of Western Sydney – [www.uws.edu.au](http://www.uws.edu.au)
6. University of Newcastle – [www.newcastle.edu.au](http://www.newcastle.edu.au)
7. University of Wollongong – [www.uow.edu.au](http://www.uow.edu.au)
8. Charles Sturt University – [www.csu.edu.au](http://www.csu.edu.au)
9. University of New England – [www.une.edu.au](http://www.une.edu.au)
10. Southern Cross University – [www.scu.edu.au](http://www.scu.edu.au)

## Appendix E: Case Study

During the course of this audit, we identified positive engagement by one university with the requirements of Part 3 Division 5 of the GIPA Act through their score of 100% in both design and operational effectiveness for class 1 contracts.

This case study shows that it is possible to comply with the contracts register requirements on a practical level through an integrated approach to compliance.

In 2006 and 2010, the Auditor-General produced two reports that focussed on that one university. We are of the view that this university's audit results are reflective of them adopting measures in these reports to improve their compliance. These reports are publicly available and name the university.

The 2006 Audit Report recommended that the university "establish a centralised register for all contracts entered into by the university and all of its controlled entities".<sup>12</sup>

The 2010 Audit Report recommended that the university maintain a central register for contractors not paid through the human resources systems to reduce the risk of non-compliance with taxation laws and regulations.

As a result, the university now has:

- a contracts register that sits within the university's Records and Archives Office;
- a central contact point for matters relating to registering contracts;
- an established procedure on how contracts are to be registered through the Records Office; and
- clear instructions on its website informing staff of their obligations with respect to contract registration.

It appears that the university has adopted the recommendation of the Auditor to develop a centralised contracts register, with procedures and processes in place which go towards ensuring compliance with the obligations in the GIPA Act.

<sup>12</sup> NSW Auditor-General's Report to Parliament, Volume Two, 2006, University of New South Wales, p.41 – [http://www.audit.nsw.gov.au/ArticleDocuments/151/11\\_Vol\\_2\\_2006\\_UNSW.pdf.aspx](http://www.audit.nsw.gov.au/ArticleDocuments/151/11_Vol_2_2006_UNSW.pdf.aspx)

# Universities' Compliance with GIPA Act: References

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*NSW Auditor-General's Report to Parliament, Volume Two 2014, Focusing on Universities*, 27 May 2014 – [http://www.audit.nsw.gov.au/ArticleDocuments/332/01\\_Volume\\_Two\\_2014\\_Full\\_Report.pdf.aspx?Embed=Y](http://www.audit.nsw.gov.au/ArticleDocuments/332/01_Volume_Two_2014_Full_Report.pdf.aspx?Embed=Y)

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*Better Practice Contract Management Framework* – [https://www.audit.nsw.gov.au/ArticleDocuments/197/Better%20Practice%20Contract%20Management%20Framework\\_b.pdf.aspx?Embed=Y](https://www.audit.nsw.gov.au/ArticleDocuments/197/Better%20Practice%20Contract%20Management%20Framework_b.pdf.aspx?Embed=Y)

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