

GOVERNMENT PROCUREMENT WEBINAR SERIES 2021

Probity in Procurement

Presented by Scott Alden, Partner and Victoria Gordon, Senior Associate

Tuesday, 17 August 2021

The 2021 Procurement Seminar Series

- Planning a perfect procurement – 17 July 2021
- **Probity in Procurement – 17 August 2021**
- Current Issues and Updates in Procurement - 7 September 2021
- Legal Issues and Risks in Procurement – 28 September 2021
- Tender Assessment – 19 October 2021
- Innovations in procurement – 9 November 2021
- Managing the Procurement – 30 November 2021
- Top Ten Issues for 2021/2022 - 21 December 2021

If you have any questions in relation to our Government Procurement Webinar Series, or to register to attend a session, please email Katarina Szivek (kszivek@hwle.com.au), BD Specialist

Are Lawyers Ethical?

We are part of a 'profession' – and bound by rules

Governance Institute of Australia 2020 Ethics Index Survey

Fire Fighters +82

Ambulance Officers +80

Accountants +39

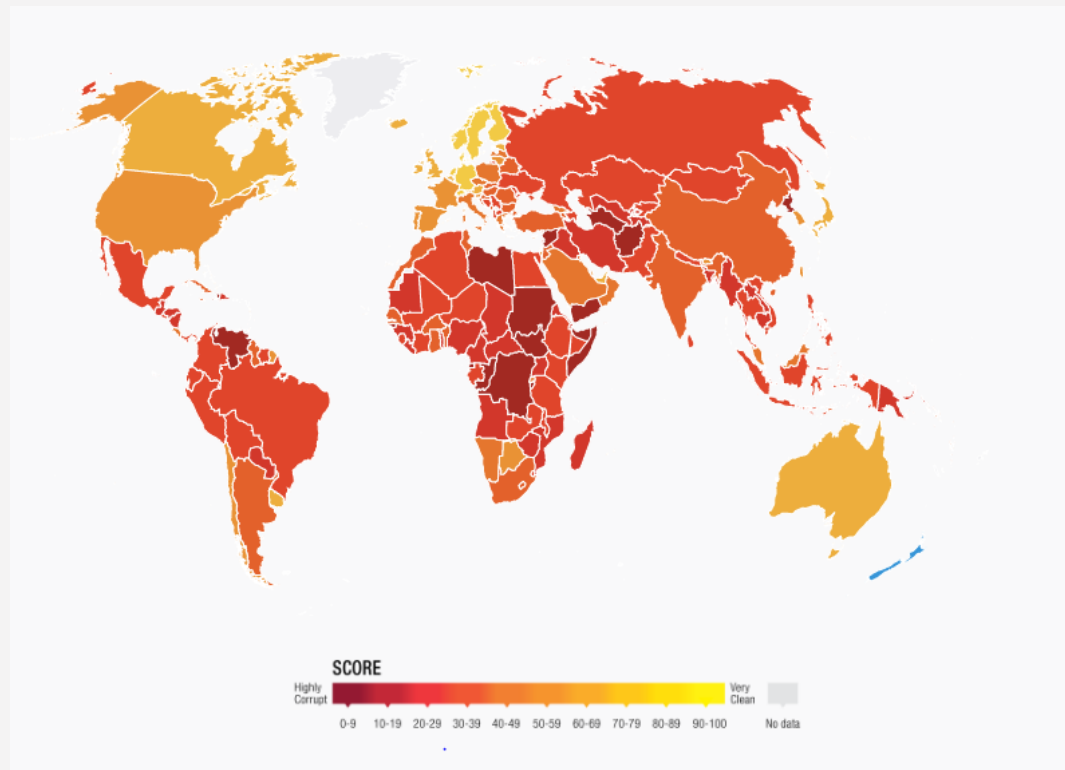
Lawyers +11

Real Estate Agents -2

Politicians -2.5

Transparency International

Corruptions Perceptions Index 2020



What is Probity?

“Probity” means:

- Integrity, uprightness and honesty

[Macquarie Dictionary and “Probity and probity advising (Guidelines for managing public sector projects) ICAC November 2005 and Commonwealth Department of Finance of Finance]

“Probity” involves:

- More than the avoidance of corrupt or dishonest conduct
- Ensuring processes are conducted in manner that is fair, impartial, accountable and always in the public interest
- Adherence to public sector duties such impartiality, accountability and transparency

[ICAC]

Who is Accountable for Probity?

Everyone involved in the project is accountable for probity



The Cth Legislative Framework

- APS Values (s10 *Public Service Act 1999*) and Code of Conduct (s13 *Public Service Act 1999*)
- *Public Governance, Performance and Accountability Act 2013* and *Public Governance, Performance and Accountability Rule 2014*
- Australian Government Department of Finance guidelines and policies:
 - Ethics and Probity in Procurement Policy – June 2020
 - Procurement Publishing and Reporting Obligations (RMG 423) – May 2020
- Confidentiality in procurement legislation and policies:
 - *Privacy Act 1988*
 - *Freedom of Information Act 1982*
 - Australian Government Protective Security Policy Framework
- Commonwealth Procurement Rules (CPRs)

The NSW Legislative Framework

- DFSI Code of Ethics and Conduct (for employees) and Statement of Business Ethics (for externals)
- Independent Commission Against Corruption Act (1988) and related publications and guidance documents:
 - Probity and probity: Guidelines for managing public sector projects (ICAC), November 2005
 - Identifying and managing conflicts of interests in the public sector (ICAC), July 2012
 - Managing Conflicts of Interest in the NSW Public Sector (ICAC), April 2019
- *Public Works and Procurement Act (1912)*
- *Public Finance and Audit Act (1983)*
- NSW Procurement Board's Strategic Directions Statement
- NSW Procurement Policy Framework for NSW Government Agencies
- NSW Enforceable Procurement Provisions 2019

Probity Fundamentals

Principles of ethics and probity in procurement (Cth Dept. of Finance Ethics and Probity in Procurement Policy – June 2020)

Best Value for
Money

Managing/Dealing*
with Conflicts of
Interest

Impartiality

Accountability
and
Transparency

Confidentiality

*Section 176(1)(c) of the *Public Works and Procurement Act 1912* (NSW) and ICAC)

Probity Fundamentals

Fundamental Guidelines

- Act professionally
- Act lawfully, fairly and honestly
- Act impartially and not give preferential treatment to any respondent or individual (“without fear or favour”)
- Maintain appropriate records of decision-making
- Avoid Conflicts of Interest and declare Col throughout (see later)

Probity Fundamentals

Fundamental Guidelines

- Avoid contact with potential respondents or related parties that may (or may be perceived to) affect integrity
- Not accept gifts / gratuities or hospitality or other benefits
- Not trade in shares or similar financial transactions using project information
- Not disclose confidential information
- Not knowingly solicit or accept future employment or business opportunities
- Not make public comment about the project without authorisation

Probity Fundamentals

Best Value for Money (Cth)

- Achieving value for money is the core rule of the CPRs (CPR rule 4.4)
- But what is... and what isn't Value for Money
- PGPA Act s15(1)(a) – promotion of proper use and management of public resources where 'proper' means efficient, effective, economical and ethical

Probity Fundamentals

Best Value for Money (Cth)

- VFM (CPR 4.4)
 - Encourage competition and be non-discriminatory
 - Use public resources in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth
 - Facilitate accountable and transparent decision making
 - Encourage appropriate engagement with risk
 - Be commensurate with the scale and scope of the business requirement

Probity Fundamentals

Best Value for Money (Cth)

- VFM (CPR 4.5)
 - Price NOT the sole factor – **must** consider the relevant financial and non-financial costs and benefits including:
 - Quality
 - Fitness for purpose
 - Experience and performance history
 - Flexibility
 - Environmental sustainability
 - Whole of life costs

Probity Fundamentals

Best Value for Money (NSW)

- The overarching requirement for procurement is that a government agency achieves value for money – s 176(2) of the *Public Works and Procurement Act 1912* (NSW)
- Core rule of the NSW Government Procurement Policy Framework (section 1)
 - “Value for money is not necessarily the lowest price, nor the highest quality good or service. It requires a balanced assessment of a range of financial and non financial factors, such as: quality, cost, fitness for purpose, capability, capacity, risk, total cost of ownership or other relevant factors”

Probity Fundamentals

Accountability and Transparency

- Accountability involves agencies being able to demonstrate and justify the use of public resources to an appropriate authority.
- Transparency refers to preparedness to open a project and its processes to scrutiny and possible criticism – i.e. providing reasons for all decisions.
- Gives confidence in the decisions being made.

Probity Fundamentals

Fairness, Impartiality and Honesty

- Avoidance of bias, whether driven by personal bias or not

Probity Fundamentals

Dealing with Conflicts of Interest

- Cth: PGPA Act ss25 – 29 – must not improperly use position or information received through their position to gain a benefit or cause a detriment to the Commonwealth or another person. Officials must disclose details of any relevant material personal interest.
- NSW: ICAC Guidance

Probity Fundamentals

Dealing with Conflicts of Interest

- Defined as actual, perceived or potential
- A conflict of interest is a situation arising from conflict between the performance of a public duty and private or personal interests
- Everyone has the right to expect that decisions will not be influenced by private interests

Probity Fundamentals

Gifts, Gratuities, Hospitality

- **Avoid them**
- Must not accept any (no matter how modest)
- Disclose all offers or indications
- Money, credits, discounts, season or special occasion presents, edibles, drinks, appliances or furnishings, clothing, loans of goods or money, tickets to events or theatres, dinners, parties, transportation, vacation travel, hotel expenses and any other form of monetary or non-monetary benefit

Probity Fundamentals

Confidentiality

Confidentiality of information is the responsibility of everyone

- Pre-requisite – sign Code of Conduct
- Conversations – in private, avoid public transport mobile phone calls, water cooler conversations, your own ‘code’ etc.
- Papers – Confidential – be careful where you print, where you read, where you leave them, how you dispose
- IT – who has access to your inbox
- Social media – don’t
- No publication of anything, including even fact of involvement

Conflicts of Interest – Detailed

What is a Conflict of Interest (CoI)?

A conflict of interest is:

- a. a conflict between a public duty and personal interest; or
- b. a reasonable person might perceive that a public official's personal interest could be favoured over their public duties

Real – Right now you can be influenced

Apparent – You appear to be influenced

*NSW actual, perceived, potential

Conflicts of Interest – Detailed

What is a Conflict of Interest (Col)?

- Conflict of interest test:
 - Does the official have a personal interest?
 - Does the official have a public duty?
 - Is there a connection between the personal interest and the public duty?
 - Could a reasonable person perceive that the personal interest might be favoured?
- It is not wrong to have a Col – it is only wrong and damaging to not disclose a Col
- Ongoing consideration and disclosure
- In some cases it is obvious, in others a personal feeling and subjective test – always consult the Probity Advisor

Conflicts of Interest – Detailed

Factors that put you at risk

- Financial and economic interests (debts / assets)
- A family or private business
- A secondary employment commitment
- Affiliations with for profit / not for profit bodies, interest groups, clubs and associations
- Affiliations with political, trade union or professional organisations, and other personal interests
- Obligations to professional, community, ethnic, family or religious groups in a personal or professional capacity
- Obligations because of relationships to people living in the same household
- Feelings towards others (positive / negative / personal)
- Enmity towards, or competition with, another individual or group
- Significant family or other relationships with clients, contractors or other staff working in the same (or a related) organisation
- Highly specialised skill(s) in an area where demand for the skill(s) frequently exceeds supply
- Future employment prospects or plans (that is, 'post separation')

Managing Conflicts of Interests

Stage 1: Identifying and Reporting Conflicts of Interests

- Assess the situation and the surrounding circumstances that could affect any decisions or actions in the matter
- Identify where or not any conflicts of interest exist
- Determine what type of conflict of interest you might be dealing with

Conflicts of Interest – Detailed

What to do if a Col is Identified

- Disclose
- Formally register

Confidential disclosures

No reason recusal

Always better to disclose than conceal

If in doubt... Disclose

Conflicts of Interest - Detailed

Strategies to manage a Col

Register*

Restrict

Recruit

Remove

Relinquish

Resign

Options for Managing Conflicts of Interest

| MANAGEMENT STRATEGY | WHEN MOST SUITABLE | WHEN LEAST SUITABLE |
|--|---|--|
| <p>REGISTER</p> <p>Where details of the existence of a possible or potential conflict of interest are formally registered</p> | <ul style="list-style-type: none"> For very low risk conflicts of interest and potential conflicts of interest Where the act of transparency through recording the conflict of interest is sufficient | <ul style="list-style-type: none"> The conflict is more significant or of higher risk The potential or perceived effects of a conflict of interest on the proper performance of the public employee's duties require more proactive management |
| <p>RESTRICT</p> <p>Where restrictions are placed on the public employee's involvement in the matter.</p> | <ul style="list-style-type: none"> The public employee can be effectively separated from parts of the activity or process The conflict of interest is not likely to arise frequently | <ul style="list-style-type: none"> The conflict is likely to arise more frequently The public employee is constantly unable to perform a number of their regular duties because of conflict of interest issues |

Options for Managing Conflicts of Interest

| MANAGEMENT STRATEGY | WHEN MOST SUITABLE | WHEN LEAST SUITABLE |
|--|--|--|
| <p>RECRUIT</p> <p>Where a disinterested third party is used to oversee part or all of the process that deals with the matter.</p> | <ul style="list-style-type: none"> It is not feasible or desirable for the public employee to remove themselves from the decision making process In small or isolated communities where the particular expertise of the public employee is necessary and genuinely not easily replaced | <ul style="list-style-type: none"> The conflict is serious and ongoing rendering ad hoc recruitment of others unworkable Recruitment of a third party is not appropriate for the proper handling of the matter A suitable third party is unable to be sourced |
| <p>REMOVE</p> <p>Where a public employee chooses to be removed from the matter.</p> | <ul style="list-style-type: none"> For ongoing serious conflicts of interest where ad hoc restriction or recruitment of others is not appropriate | <ul style="list-style-type: none"> The conflict of interest and its perceived or potential effects are of low risk or low significance The public employee is prepared to relinquish the relevant private interest rather than radically change their work responsibilities or environment |

Options for Managing Conflicts of Interest

| MANAGEMENT STRATEGY | WHEN MOST SUITABLE | WHEN LEAST SUITABLE |
|---|--|---|
| <p>RELINQUISH Where the public employee relinquishes the private interest that is creating the conflict.</p> | <ul style="list-style-type: none"> The public employee's commitment to public duty outweighs their attachment to their private interest | <ul style="list-style-type: none"> The public employee is unable or unwilling, for various reasons, to relinquish the relevant private interest |
| <p>RESIGN Where the public employee resigns from their position with the agency</p> | <ul style="list-style-type: none"> No other options are workable The public employee can not or will not relinquish their conflicting private interest and changes to their work responsibilities or environment are not feasible The public employee prefers this course as a matter of personal principle | <ul style="list-style-type: none"> The conflict of interest and its potential or perceived effects are of low risk or low significance Other options exist that are workable for the public employee and the agency |

Further Options

- Amend involvement
 - Reducing the duties
 - Giving a less senior role
 - Ensuring that an official of equal or greater seniority is involved in the matter
 - Excluding the official from certain discussions or meetings
 - Limiting access to certain systems and information
 - Placing the official in an advisory role with no decision making authority or financial delegations
 - Excluding the official from critical record keeping roles
 - Preventing the official from having dealing with external parties
- Amend influence
 - Transferring the matter to another unrelated unit or team
 - Informing other people dealing with the matter that there is a conflict of interest and instructing them on how to meet probity requirements

Further Options

- Change the system or process
 - Requiring more detailed documentation about all aspects of the matter
 - Designing the decision-making process to reduce the level of subjectivity and discretion
 - Documenting and publishing reasons for the decisions taken
 - Creating audio or video recordings of key decisions or meetings
 - Conducting post-completion audit or review
 - Establishing internal controls to identify deviations from the established process
 - Appointing probity checkers, probity advisors or probity auditors

Document a Management Response

- The management response to a conflict disclosure must be in writing
- Where the conflicted official is to remain involved in the matter in some way, a more detailed plan of action is usually required
- The documented management response should specify:
 - The measures that will be undertaken to manage the conflict
 - Responsible person for implementing each measure
 - Monitoring arrangements (periodic reporting for high-risk processes)

Related Corporate Entities

- Common Ownership
- Shared Subcontractors
- Related Bodies Corporate
- Chinese Walls / Ethical Barriers
- Shared Services
- Probity Deed

The Role of the Probity Advisor

The Probity Advisor:

- is engaged to observe, review and provide guidance on the probity framework and/or processes of a project
- provides opinions and guidance on probity risks and issues that may arise during the process and confirms whether the concluded process is consistent with the requirements in a probity plan
- is primarily engaged to ensure the integrity of the procedures and processes of the project, rather than project outcomes
- may be contacted in relation to probity issues by anyone

For NSW, the role of the Probity Advisor is set out in the Procurement Conduct Plan and the Probity and Probity Advising Document published by ICAC

When to Use a Probity Advisor

Risky Project

- Incumbent Provider (Particularly Long Term)
- High Cost Acquisition / Disposal
- Political Risk (e.g. privatisation / environmental issues)
- History of Controversy or Litigation
- If You Know There Will be a Complaint
- Changes to Scope After Bid Process Commences
- Significant Meetings / Presentations Expected
- Small / Closed Market (Collusion / Anti Competitive Behaviour)
- Related Parties
- Involvement of Consultant Bidder in Pre-Bid Stage

Key Probity Documents

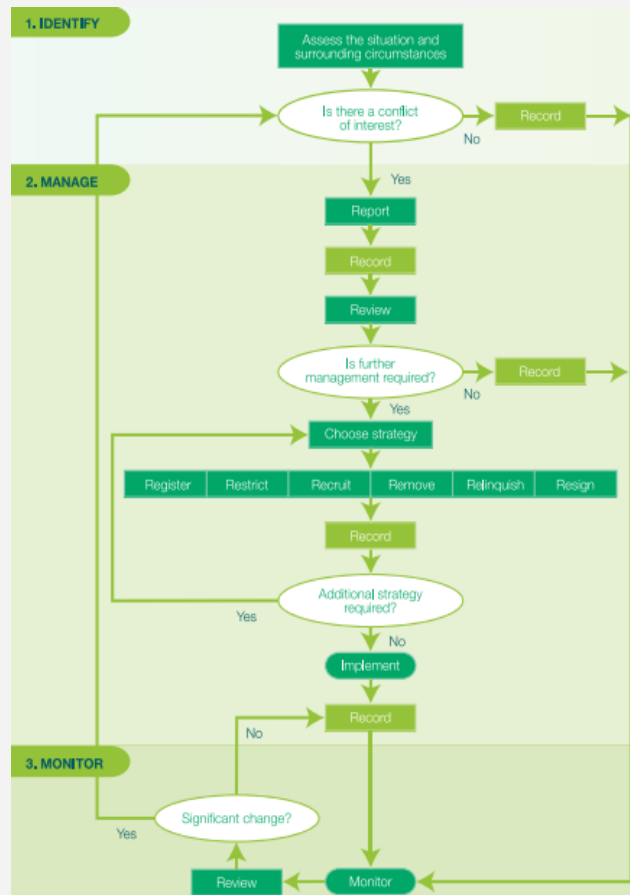
- Probity Plan
- Procurement Conduct Plan
- Probity Protocols
- Code of Conduct
(Col and Confidentiality)
- Conflict of Interest Register
- Communications Register
- *Ad Hoc* Probity Advices
- Deed of Project Participation
- Probity Deed
- Statutory Declarations
- Minutes of all meetings
- Records supporting all decisions
- Probity Report

Summary

- Understand what probity means
- Always follow the probity principles
- Always follow the Probitly Plan and 'Procurement Conduct Plan'
- Understand the legislative framework
- Understand conflicts and disclose even the most seemingly insignificant
- If it feels wrong don't do it and consider reporting it
- Be objective and make decisions and recommendation without fear or favour
- Remember the media and NSW ICAC and future Commonwealth Integrity Commission

If in doubt – ask the Probitly Advisor

Model Decision Flowchart



Conflicts of Interest Quiz

1. Amber works as a nurse for the Department of Health in a regional hospital. Her husband, Lucas, works as private GP in a different town.
Lucas has never had occasion to visit Amber's hospital although he has referred some of his patients there for emergency procedures.

Actual/Perceived/Potential/No Conflict ?

Conflicts of Interest Quiz

2. Kelly is active in her community, particularly providing counselling services for young women who are the victims of domestic violence. She gets paid a small amount for this work although she works part-time as a registrar at the Local Court (Attorney-Generals' Department) to make ends meet. She often refers the women she meets at the Court applying for apprehended violence orders to her counselling service.

Actual/Perceived/Potential/No Conflict ?

Conflicts of Interest Quiz

3. Mal is a public official who used to be a maintenance manager but has now been promoted to a more senior position at a local council. Mal's replacement is new to the position and regularly asks which suppliers to use.

Actual/Perceived/Potential/No Conflict ?

Conflicts of Interest Quiz

4. Rod works as a parking officer at the Vista Council. Rod's brother, Ted, is a builder who lives in the Vista Council area. This month parking officers are targeting builders who park over driveways and who impede the flow of traffic in the area. Rod is certain Ted will receive an infringement.

Actual/Perceived/Potential/No Conflict ?

Conflicts of Interest Quiz

5. Andrew works for the Department of Commerce in a procurement role. He is a keen sportsman and is a member of the Department's soccer team. The team nominated Andrew for sponsorship. Andrew asked all of the companies he has recently awarded contracts to as part of his work if they would like advertising in exchange for free team jerseys.

Actual/Perceived/Potential/No Conflict ?

Conflicts of Interest Quiz

6. Deborah is an experienced public official and has been appointed to sit on a recruitment panel for her agency's graduate intake program. Deborah's daughter has just graduated from university and, after discussing the program with her mother, decides to apply. Deborah regards herself as an ethical person with an unblemished employment record and firmly believes that there is no chance that she would ever favour her daughter. She therefore decides that she does not have a conflict of interest and makes no disclosure.

Actual/Perceived/Potential/No Conflict ?

Conflicts of Interest Quiz

7. Jane works in compliance at a local council. It is her job to certify that new buildings have been built in accordance with the approved development application. She is also responsible for following up complaints by local residents. One day, she is conducting an inspection of a half-completed block of units. While onsite, she is approached by a representative from the building company. He tells Jane that the business is looking to expand and its operations and asks if she would like to discuss a job offer over coffee. He also mentions that he anticipates offering Jane a “substantial remuneration package”. Jane is genuinely interested and says she will think about it.

Actual/Perceived/Potential/No Conflict ?

Conflicts of Interest Quiz

8. John is in charge of facilities management for his agency. Charlie runs his own company that provides electrical maintenance and repairs and John's agency is one of his customers.

John and Charlie are members of the same tennis club and often end up playing each other of weekends and occasionally pair up for a doubles match. Other than their regular interaction through tennis, John and Charlie do not socialise.

John's public duties include selecting maintenance suppliers from the agency's preferred supplier panel, inspecting the work performed by suppliers and approving the payment of invoices.

Actual/Perceived/Potential/No Conflict ?

Conflicts of Interest Quiz

9. A company is tendering for a project and:
- a) You previously have worked for that company
 - b) Your brother works for that company
 - c) You have previously applied to work at that company
 - d) You may work at that company in the future
 - e) You have worked closely with that company in a professional capacity
 - f) You have shares in that company

Actual/Perceived/Potential/No Conflict ?

Conflicts of Interest Quiz

10. Meredith, an experienced human resources manager working at public sector agency, is a member of a recruitment panel that is hiring a new senior executive. Once the job applications are received, Meredith notices that a close family friend has lodged an application. She discloses a conflict of interest to her manager and it is agreed that Meredith should take no further part in the recruitment process.

What further action is required?

Contact



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