



Australian Government Procurement Webinar Series 2022

Probity in Procurement

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19 July 2022

The 2022 Procurement Seminar Series

- **Part 1 – Probity in Procurement (19 July 2022)**
- Part 2 – Current Issues and Updates in Procurement Special Event – (2 August 2022)
- Part 3 – Legal Issues and Risks in Procurement (17 August 2022)
- Part 4 – Open Q&A (30 August 2022)
- Part 5 – Tender Assessment with a focus on Sustainable Procurement (13 September 2022)
- Part 6 – Managing Procurement (28 September 2022)
- Part 7 – Prickly Issues in Procurement (11 October 2022)
- Part 8 – Open Q&A (25 October 2022)

If you have any questions about our Australian Government Procurement Series please contact Katarina Szivek, Business Development Specialist on kszivek@hwle.com.au.

Overview

1. Introduction and Scene Setting
2. What is Probity
3. Fundamentals of Probity
4. Conflict of Interest in Detail
5. Col Quiz

Are Lawyers Ethical?

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

Governance Institute of Australia 2021 Ethics Index Survey

Fire Fighters +85

Ambulance Officers +79

Accountants +35

Public Service + 46 (from 56)

Government + 5 (from 16)

Lawyers +11

Real Estate Agents -2

Politicians (Federal) – 3 (State -2) (Local +6)

Transparency International

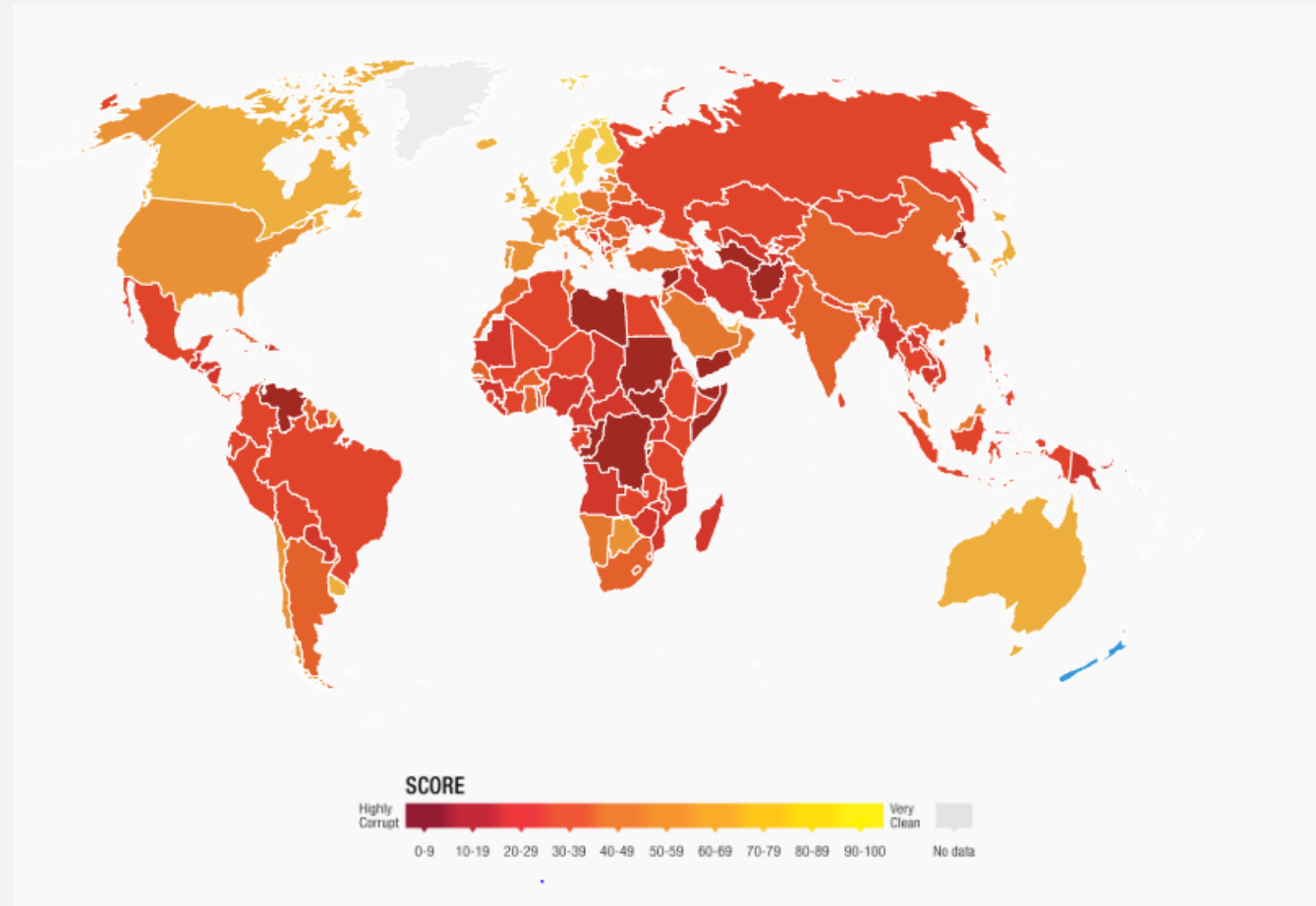
Corruption
Perceptions
Index 2021

Aus – 18/180

NZ – 1

Sing – 4

UK - 11



What is Probity?

“Probity” means:

- The evidence of ethical behavior, and can be defined as complete and confirmed Integrity, uprightness and honesty in a particular process

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

“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 as impartiality, accountability and transparency

Who is Accountable for Probity

Everyone involved in the project is accountable for probity



Probity Fundamentals

Principles of ethics and probity in procurement

Best Value for Money

**Managing/Dealing*
with Conflicts of
Interest**

Impartiality

**Accountability
and
Transparency**

Confidentiality

Probity Fundamentals

Principles of Probity

- Officials must act ethically, in accordance with the APS Values. Officials must not make improper use of their position.
- Officials should avoid placing themselves in a position where there is the potential for claims of bias.
- Officials must not accept hospitality, gifts or benefits from any potential suppliers.
- Agencies must not seek to benefit from supplier practices that may be dishonest, unethical or unsafe, which may include tax avoidance, fraud, corruption, exploitation, unmanaged conflicts of interest and modern slavery practices.
- All tenderers must be treated equitably. This means that all tenderers must be treated fairly - it does not necessarily mean that they are treated equally.
- Conflicts of interest must be managed appropriately.

Probity Fundamentals

Principles of Probity

- Probity and conflict of interest requirements should be applied with appropriate and proportionate measures informed by sound risk management principles.
- Value for money outcomes are best served by effective probity measures that do not exclude suppliers from consideration for inconsequential reasons.
- Confidential information must be treated appropriately during and after a procurement process.
- External probity specialists should only be appointed where justified by the nature of the procurement.

Probity Fundamentals

Best Value for Money (CPR4 / 4.5)

VFM

- 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 (Australian Government's Sustainable Procurement Guide)
 - Whole of life costs
 - [Broader Benefits to Australian Economy >\$4m]

Probity Fundamentals

What are Whole of Life Costs

- Whole of life costs
 - Upfront price
 - Maintenance and Operating Costs
 - Transition Out Costs
 - Licensing Costs
 - Cost of Additional Features Procured After Initial Procurement
 - Consumable Costs
 - Decommissioning, Remediation and Disposal Costs

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 arises where an official, an adviser or supplier has an **affiliation** or interest that might prejudice, or be seen to **prejudice**, their **impartiality**.

Conflicts of Interest - Detailed

What is a Conflict of Interest (Col)?

- Conflict of interest test:
 - Does the official have a personal interest / affiliation?
 - 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 favored and affect impartiality?
- 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 (with the Probity Advisor if you have one)

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')

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

Further / More Detailed 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

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 (eg Data Room Access)
- Probity Deed (e.g. to manage risk/perception of collusion)
- Statutory Declarations
- Minutes of all meetings
- Records supporting all decisions
- Probity Report

Probity Advisors

- Understand the differences
 - Process Advisor
 - Probity Advisor
 - Probity Auditor

When to appoint a Probity Adviser

- High Value / Complex / Unusual or Highly Contentious
- Integrity of Project May Be Questioned
- Prequalified or limited tender process is proposed and integrity of selection may be questioned
- History of controversy or litigation
- High political sensitivity
- Nature of market makes a challenge likely (e.g. competition is strong and commercial confidentiality is particularly important)
- High likelihood of material conflicts

National Anti-Corruption Commission

- Labor's plan:
 - Broad jurisdiction (ministers, APS, personal staff, etc.)
 - Independent – Commissioner will serve a fixed term
 - Overseen by a bipartisan Joint Standing Committee
 - Retrospective powers of investigation
 - Public hearings (where in the public interest)
 - Power to find fact, and refer to AFP or DPP for criminal considerations
 - Operate with procedural fairness, findings will be subject to judicial review.

National Anti-Corruption Commission

Passage through the Senate – requires support of:

- The Greens:
 - Who already have their own model.
 - Want protection for whistleblowers and a lower bar for investigations that would include private sector stakeholders.
- The Liberal Party:
 - Want the scope widened to investigate unions.

Some Final Tips

- Don't set up process rules which are then not followed (e.g. mandatories / Conditions of Participation)
- Don't change the criteria and make sure the advertised criteria are strictly observed
- Use a Probity or Process Plan
- Keep good records
- Act on probity / process issues quickly, using guidance and advice
- Declare all conflicts
- Dealt with incumbents carefully
- Make clear statement about treatment of late tenders

NSW Case Study: ICAC Operation Ember (May 2022)

- Investigation into the awarding of contracts by employees of the former NSW Roads and Maritime Services
- Whether those employees partially and dishonestly exercised their official functions in relation to the awarding of contracts
- ICAC found the employees engaged in serious corrupt conduct
- Findings included failure to make declarations of conflict(s) of interest and false declarations of the same

NSW Case Study: ICAC Operation Ember (May 2022)

- Seven recommendations, including:

Recommendation 1

That Transport for NSW (TfNSW) updates and reissues its online training and other awareness-raising products relating to conflicts of interest, fraud and corruption prevention and procurement...

Recommendation 2:

That TfNSW:

- reviews all supplier panels created or used by the former Compliance and Regulatory Services (CaRS) Division (that remain in existence) with a view to assessing compliance with past and current procurement policy, any undisclosed conflicts of interest or similarities with the conduct identified in this investigation*
- considers mandating additional oversight or involvement by agency procurement experts in the formation and maintenance of all TfNSW supplier panels.*

NSW Case Study: ICAC Operation Ember (May 2022)

Recommendation 7

That TfNSW performs a “lessons learnt” exercise or audit based on the findings from this investigation. This could include an examination of:

- *whether the weaknesses identified in the HVP Unit exist elsewhere in TfNSW*
- *business units that lack adequate supervision*
- *procurement governance and reporting*
- *the need for a new corruption risk assessment*
- *substantial procurements that proceeded without a procurement strategy*
- *whether the scope of responsibility and resourcing of the procurement advisory function is sufficient*
- *whether the devolved procurement framework provides sufficient assurance regarding value for money and compliance.*

Cth Case Study: Entrepreneurs' Programme (24 June 2022)

■ Facts

- The Entrepreneurs' Programme was announced as part of the 2014–15 Budget with funding of \$484.2 million.
- Following a redesign process, a Request for Tender was issued in September 2019 for the engagement of delivery partners to deliver expert business advisory and facilitation services.
- Estimated value of procurement was \$182 million for maximum contract term of five years.
- Fifty-five responses were received to the Request for Tender, of which 10 were from incumbent providers. Seven contracts were entered into.

Cth Case Study: Entrepreneurs' Programme (24 June 2022)

■ Findings

- *The design and conduct of the procurement did not comply with the Commonwealth Procurement Rules, and the signed contracts are not being appropriately managed.*
- *Department did not demonstrate achievement of value for money. There was not open and effective competition for the delivery partner roles as competing tenders were not treated fairly or equitably.*
- *The delivery partner contracts are not being appropriately managed. The contract management framework is inadequate and the contracts do not include an effective performance management framework.*

Cth Case Study: Entrepreneurs' Programme (24 June 2022)

- **Recommendation no. 8**

- *The Department of Industry, Science, Energy and Resources adopt a proactive approach to managing delivery partner conflicts of interest by:*
 - *ensuring conflict of interest declarations are completed, updated regularly or their ongoing currency otherwise confirmed; and*
 - *regular review of delivery partner reporting of conflicts of interest in order to monitor compliance with contractual obligations.*

Conflicts of Interest Quiz

1. Bob is a partner in a commercial property. The Department intends to lease the property partly owned by Bob. Bob has not been involved in any tender or contract process.

Actual / Perceived / Potential / No Conflict?

Confirm facts and monitor

Conflicts of Interest Quiz

2. Julie is a director in a training company that is tendering for training work with the Department.

Actual / Perceived / Potential / No Conflict?

Declare conflict, and either withdraw tender or exit ownership and directorship of company

Conflicts of Interest Quiz

3. Peter has had a contractor working with him in the Dept for the last two years. The contractor is now applying for a job and Peter is chairing the selection panel.

Actual / Perceived / Potential / No Conflict?

Actual / perceived – good practice would be to exit the panel – but may not be necessary

Conflicts of Interest Quiz

4. Alfred has developed a friendship with the person that provides floral art to the Department through involvement in a local sporting club. Alfred has no involvement at work with his friend or the contract.

Actual / Perceived / Potential / No Conflict?

Low Risk – no action required.

Conflicts of Interest Quiz

5. Kate is about to leave the Department to take up a position with a current contractor that she currently has dealings with. The Contract is up for renewal in about 12 months.

Actual / Perceived / Potential / No Conflict?

Kate is privy to official Department information and contacts within the Department. Remove / reassign until end date. Debrief employee on exit. Advise other staff in the Unit.

Conflicts of Interest Quiz

6. 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



| Any Questions?

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