

# AUSTRALIAN GOVERNMENT PROCUREMENT SERIES 2023

## PART 2: PROBITY IN PROCUREMENT

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## **Acknowledgement of Country**

HWL Ebsworth would like to acknowledge the Traditional Custodians of the land on which we are today. We would also like to pay our respects to Elders past and present.

# THE 2023 PROCUREMENT SEMINAR SERIES

Part 1: Planning for a Perfect Procurement... Setting Up For Success – Wednesday, 09 August 2023

Part 2: Probity in Procurement – Wednesday, 23 August 2023

Part 3: Current Issues and Updates in procurement – NACC, Unsolicited Proposals and ECI Processes– Wednesday 6 September 2023

Part 4: Key Learnings from the ANAO Reports – Tuesday 19 September 2023

Part 5: Legal Issues and Updates in Procurement – GPJR and the Process Contract – Wednesday 4 October 2023

Part 6: The Art of Tender Assessment and Achieving VFM – 17 October 2023

Part 7: Managing your Procurement – 1 November 2023

Part 8: Prickly Issues in Procurement – 15 November 2023

Part 9: The Cth Contracting Suite and Cth Procurement Policies – 29 November 2023

To find out more about the additional seminars in our Procurement Seminar Series, and to register to attend, please contact Katarina Szivek on [kszivek@hwle.com.au](mailto:kszivek@hwle.com.au)

# OVERVIEW

Introduction and Scene Setting

What is Probity

Fundamentals of Probity

Conflict of Interest in Detail

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

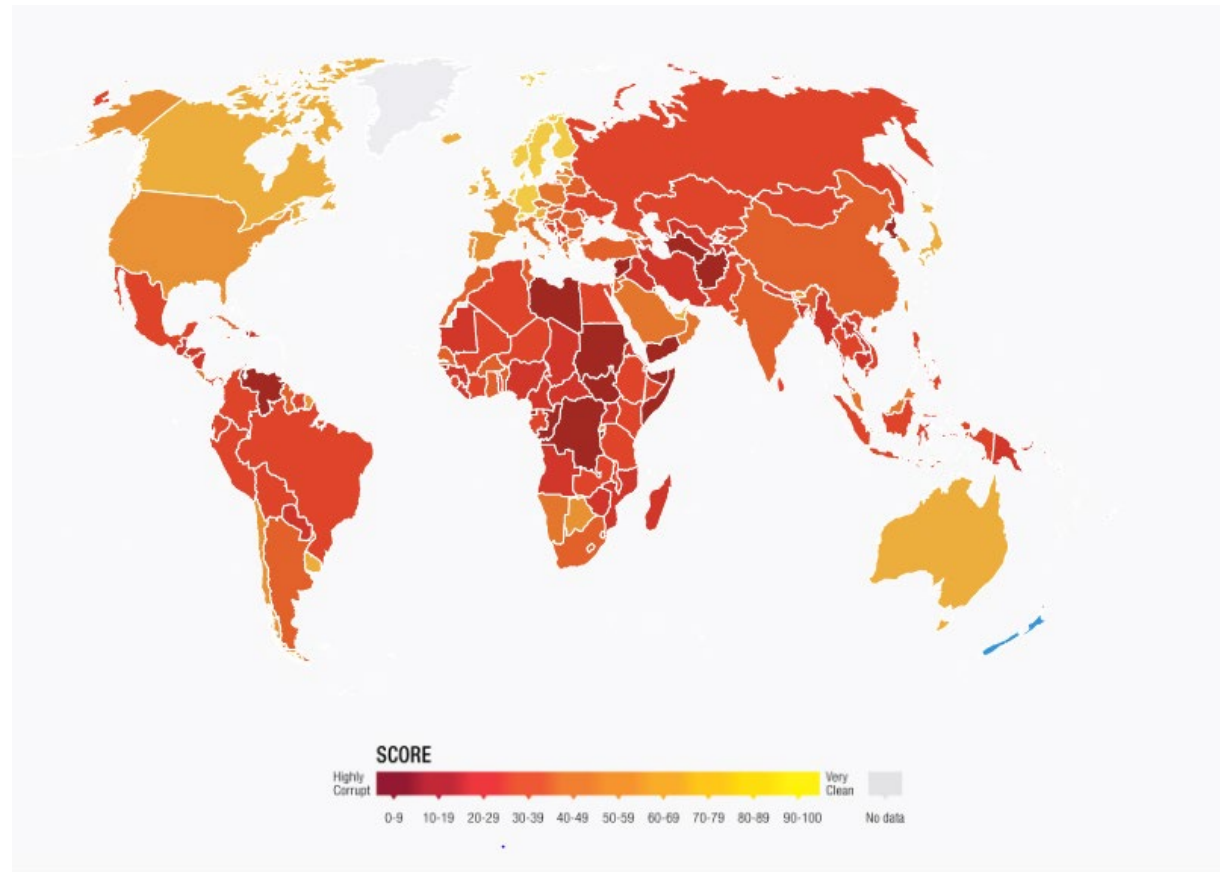
## Corruption Perceptions Index 2021

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



# 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 (COI)?

- 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 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



# 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



Deal with incumbents carefully



Make clear statement about treatment of late tenders

# CONFLICTS OF INTEREST QUIZ

1. Bob works for the Department. Bob is a partner in a commercial property firm. 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

*Adapted from the DFAT Ethics Integrity and Professional standards Policy Manual – chapter 5)*

# CONFLICTS OF INTEREST QUIZ

2. Julie works for the Department. 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

*Adapted from the DFAT Ethics Integrity and Professional standards Policy Manual – chapter 5)*

# 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

*Adapted from the DFAT Ethics Integrity and Professional standards Policy Manual – chapter 5)*

# 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.

*Adapted from the DFAT Ethics Integrity and Professional standards Policy Manual – chapter 5)*

# 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.

*Adapted from the DFAT Ethics Integrity and Professional standards Policy Manual – chapter 5)*

# 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

Actual / Perceived / Potential / No Conflict?

# CONTACT



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A large, stylized graphic of the letters 'HWT' in a light blue color, positioned behind the main text. The 'H' and 'W' are connected, and the 'T' is a simple vertical bar. The background consists of dark blue and teal geometric shapes.

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