

IN-HOUSE COUNSEL DAY

THURSDAY, 5 MARCH 2026



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Session 4

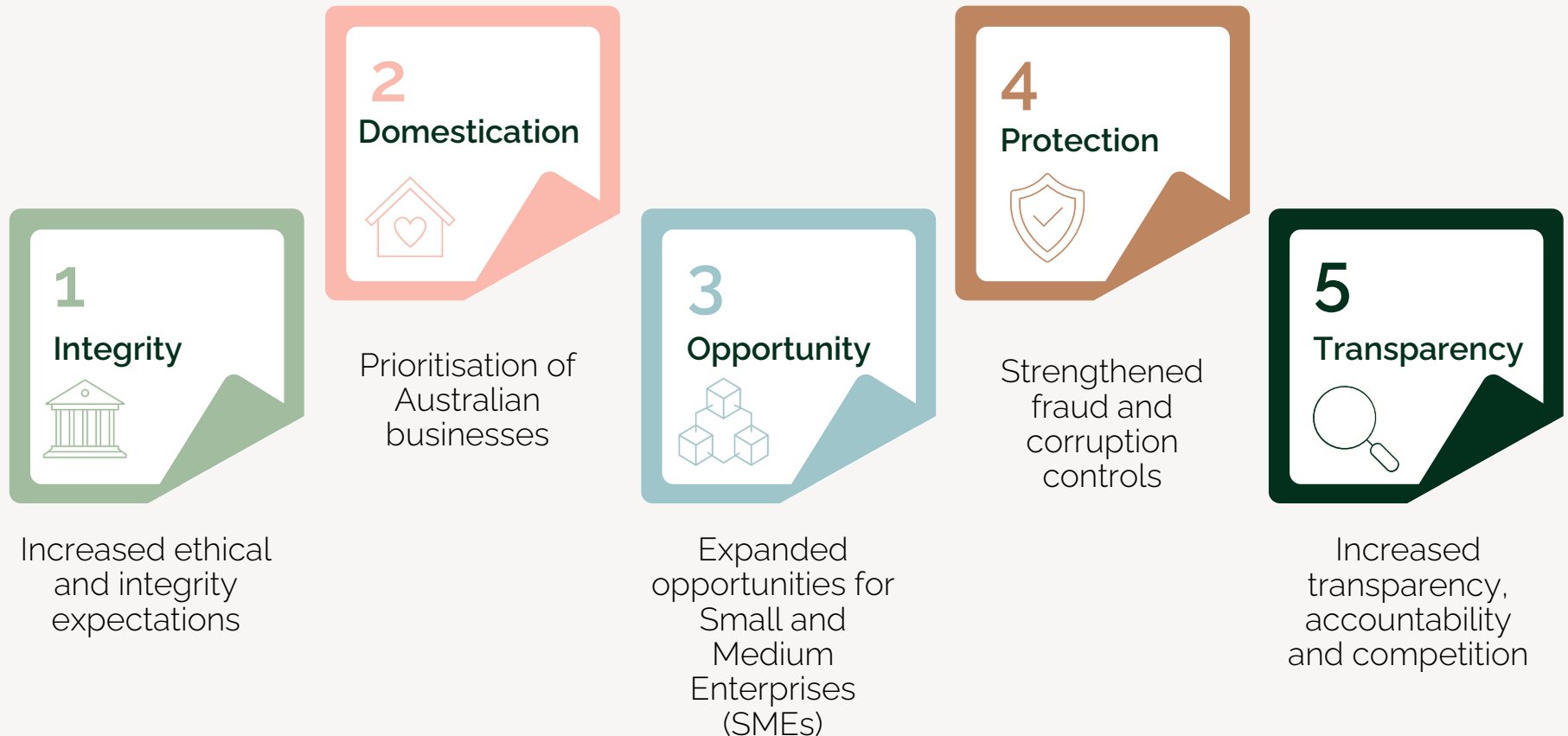
PROBITY IN PROCUREMENT

PRESENTED BY

BRIAN AMBLER | PARTNER | SYDNEY

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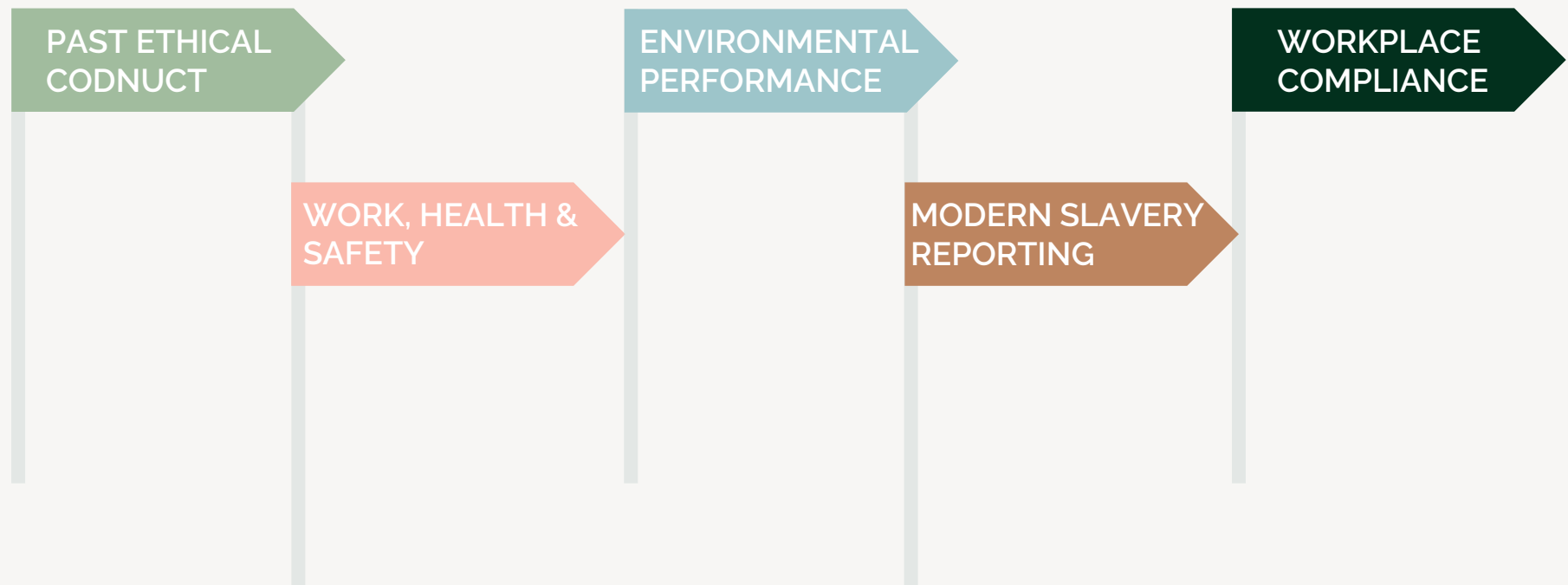
Session 1 - Recent Probity and Procurement Trends



Increased Ethical Expectations

Ethical considerations are now central to assessing value for money and evaluating supplier integrity under CPR 4.5.

Mandatory ethical procurement principles apply to all procurements as CPR 6.6 was moved to Division 1. Ethics have shifted from a background expectation, with a stronger emphasis on supplier integrity.



Strengthened Integrity Process

AGENCY SHARING



Greater inter-agency sharing of non-commercial integrity information under CPR 7.25A

NEGOTIATIONS



Tender documents must now state whether negotiation may occur under CPR 10.18–10.19

THRESHOLD INCREASE



Non-construction procurement threshold increased to \$125,000, extending Division 1 rules including ethics requirements

Prioritisation of Australian Businesses



Proactive Preference for Australian Suppliers (CPR 5.4)

A significant shift from a neutral, non-discriminatory approach to an active preference for Australian businesses.



Australian Invite - Only

Procurements between \$10,000 and \$125,000 must be invite-only to Australian businesses unless sourced from a standing offer.



Domestic Capability Focus

Any exception requires documented justification supported by market analysis, reflecting a broader strategic focus on building domestic capability.

Definition of 'Australian Business'



50% or more
Australian
ownership



Australian
resident for tax
purposes



Principal place
of business is in
Australia

Expansion of Opportunities for SMEs

Mechanism	Purpose	Practical Effect
SME-only invitations for procurement under \$125k from certain government panels (new CPR 5.5)	Build SME participation in broader procurement categories	SMEs have a greater opportunity at securing procurement work as large firms are initially excluded from panel-based spending
Updated SME definition to include associated entities	Prevents masking large corporates as SMEs	Allows procurement opportunities to reach genuine SMEs

Strengthened Fraud & Corruption Controls

Control / Framework	Emerging Issue	Impact on Procurement Practice
Procurement Administration Counter Fraud Toolkit	Lack of consistent fraud detection measures	Use of structured fraud indicators
Commonwealth Fraud & Corruption Control Framework (2024)	Procurement as a key vulnerability category	Mandatory training; elevated scrutiny during planning & evaluation
Increased capability for officials	Lack of consistent upskilling in fraud and ethical detection skills	Fraud detection training and inclusion of ethical supplier assessments
Standardised conflict of interest (COI) declarations	No proactive COI prevention and inconsistent COI processes	COI used consistently and systematically across agencies at the earlier stages of procurement
ANAO findings on inconsistent probity controls	Systemic weaknesses in documentation & audit readiness	Agencies expected to demonstrate routine, auditable probity processes

Transparency and Accountability

New CPR emphasise a move towards strengthened measures for:



INFORMATION DISCLOSURE

CPR 7.25: Suppliers must be told procurement information may be shared across government..



ETHICAL OVERSIGHT

Ethical conduct is monitored for the entire contract period, not just at evaluation or selection.



FAIR SUBMISSION HANDLING

CPR 10.32: Processes must ensure fairness, impartiality, and confidentiality of extra tenderer information.



LIMITS ON OVER-SPECIFICATION

CPR 10.9 & 10.12: Requirements must avoid unnecessary barriers or advantaging certain suppliers over others.

Emphasis on Fair Competition

The Commonwealth is moving toward a proactive, not passive, promotion of competition.



CPR 4.4A:
Agencies must actively maintain genuine competition, even in narrow markets.



Clear, transparent processes improve audit readiness and reduce perceived bias.







CPR 9.14: Where several suppliers exist, agencies must approach more than one to foster competition.



Robust documentation and openness reinforce competitive integrity.

Session 2 Probity Overview

-  **01** WHAT IS PROBITY
-  **02** FUNDAMENTALS OF PROBITY
-  **03** CONFLICT OF INTEREST IN DETAILS
-  **04** CONFLICT OF INTEREST QUIZ

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.



Worst Case Scenario

HUGHES AIRCRAFT SYSTEMS INTERNATIONAL v AIRSERVICES AUSTRALIA

The Commonwealth was found to have breached the process contract.

- \$40-60 million paid to the losing tenderer in damages.

Practical Implications from the *Hughes* Case

THE CASE SHOWS:

- ▶ The potential risks and legal liabilities for the procuring entity.
- ▶ Right a tenderer can expect.
 - ▶ Holding the procuring entity accountable.
 - ▶ Proper procedures and conducting evaluations in accordance with the evaluation criteria.
- ▶ Potential for damages.

The Process Contract

WHAT ARE ITS TERMS?

IMPLIED

- Receive and assess an on time compliant tender
- Good Faith

EXPRESS (CONDITIONS OF TENDER)

- Closing Date
- Late Tender
- Assessment Criteria
- Value for Money?
- Mandatory Criteria
- Confidentiality
- Collusion
- Carry out committed Offer if Accepted

Other Processes Gone Wrong

THE CASES:

- NSW former premier and COI.
- Another former Premier.
- The surfing judge.
- A spreadsheet mix up.
- An offer for a bridge a bridge too far.

Case Studies

THE CASES

The Director of Both

Conflict of interest

The Involved Consultant

Bias, level playing field

The Wrong Email Addressee

Care on communications

The Unwanted Gift

Perceptions and formal process

The Big Day Out

Perceived conflict of interest

The Wrong Criteria

Pressure on evaluation team

We Didn't Really Mean Mandatory

Following RFT statements

Case Studies

THE CASES:

- I haven't read the tenders... What now?
- This looks too cheap – is it too good to be true?
- The tenderer I wanted was late – What can I do?
- The Contract is about to expire – Can I extend?

Overall Probity Guidance

- Act fairly at all times
- Develop probity and fairness controls
- Understand probity procedures
- Prevent corruption
- Manage conflicts of interest

<https://nt.gov.au/industry/procurement/how-government-buys/governance-and-oversight>

Probity

FUNDAMENTALS

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Probity Fundamentals

Principles of Ethics
and Probity in
Procurement

Best Value
for Money

Managing/
Dealing with
Conflicts of
Interest

Impartiality

Accountability
and
Transparency

Confidentiality

Acting
Ethically
and
Lawfully



Probity Fundamentals

PRINCIPLES OF PROBITY

- Officials must act ethically, in accordance with the NT “Code of Conduct”.
- 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

ACCOUNTABILITY & TRANSPARENCY

Includes:

- Communication with tenderers;
- Communications with current service providers;
- Records/creating a trail of evidence; and
- Balance with the confidentiality obligations.

Discuss:

- A tenderer rings to ask about the progress of their tender – **your actions?**

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 COI – it is only wrong and damaging to not disclose a COI

- ✔ 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) organization.
- 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 COI IS IDENTIFIED

- ▼ Disclose.
- ▼ Formally register.

- ▼ Confidential disclosures.
- ▼ No reason recusal.
- ▼ Always better to disclose than conceal.
- ▼ If in doubt... Disclose.

Conflicts of Interest - Detailed



**PERSONAL
CONNECTIONS
AND
RELATIONSHIPS**



**PROFESSIONAL
CONNECTIONS
AND
RELATIONSHIPS**



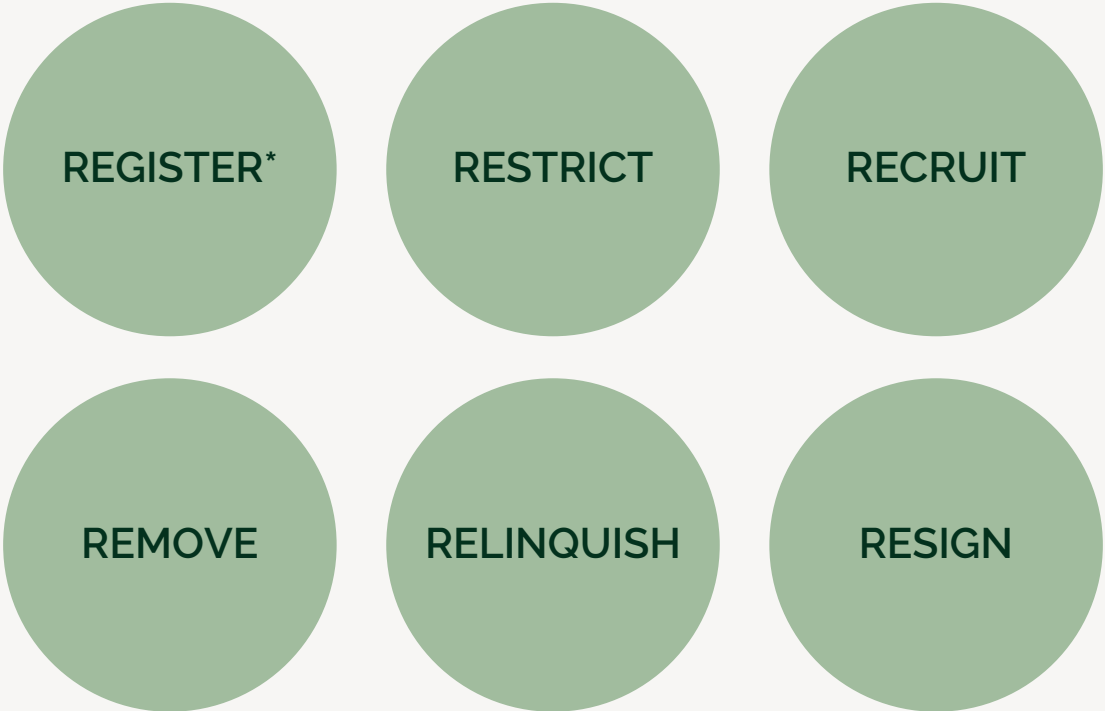
**FINANCIAL
INTERESTS**



**SPECIAL
DISCLOSURES –
CONFIDENTIAL
MATTERS**

Conflicts of Interest - Detailed

STRATEGIES TO MANAGE A COI



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.

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.

Case Study Work Throughs

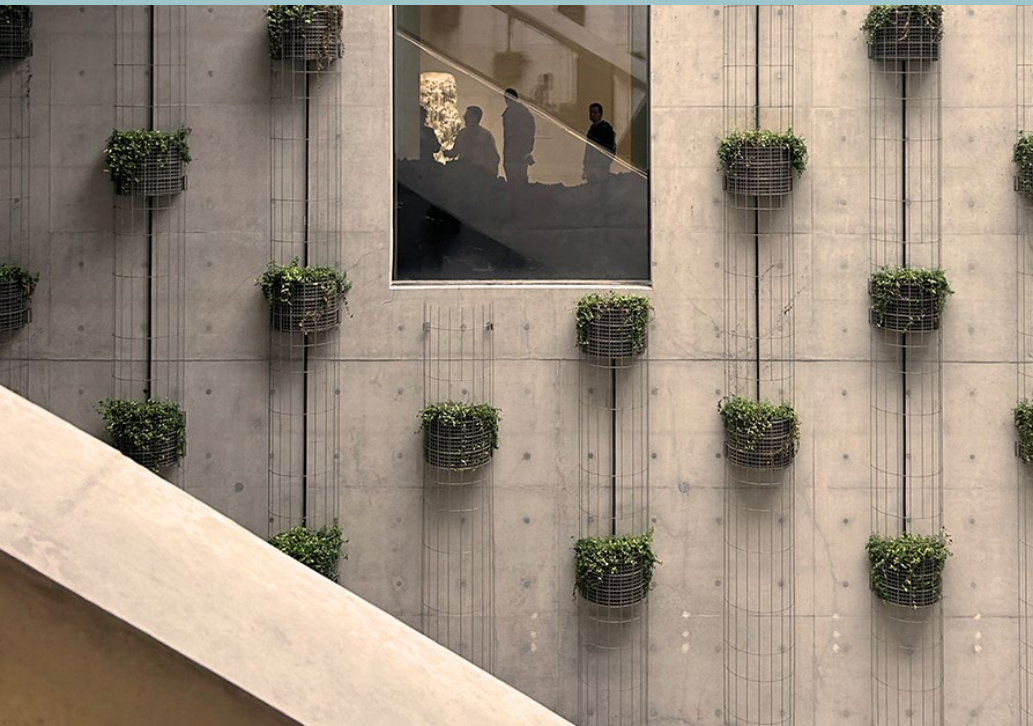
CONFLICT OF INTEREST QUIZ

ACTUAL PERCEIVED POTENTIAL NO CONFLICT?

COI QUIZ 1

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

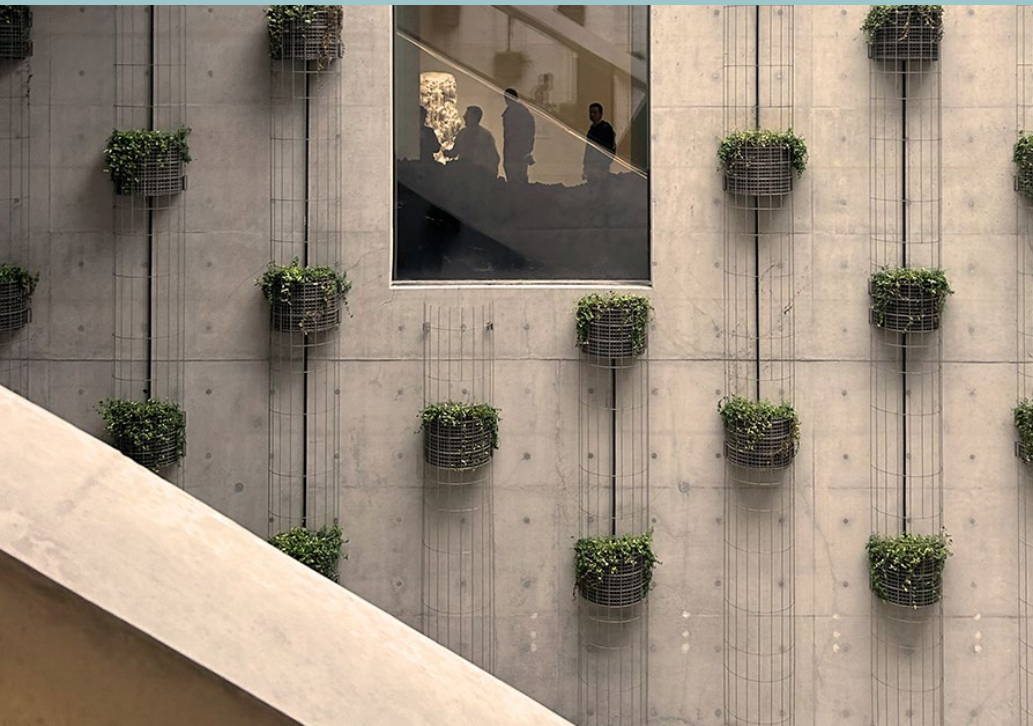
Confirm facts and monitor.



ACTUAL
PERCEIVED
POTENTIAL
NO CONFLICT?

COI QUIZ 2

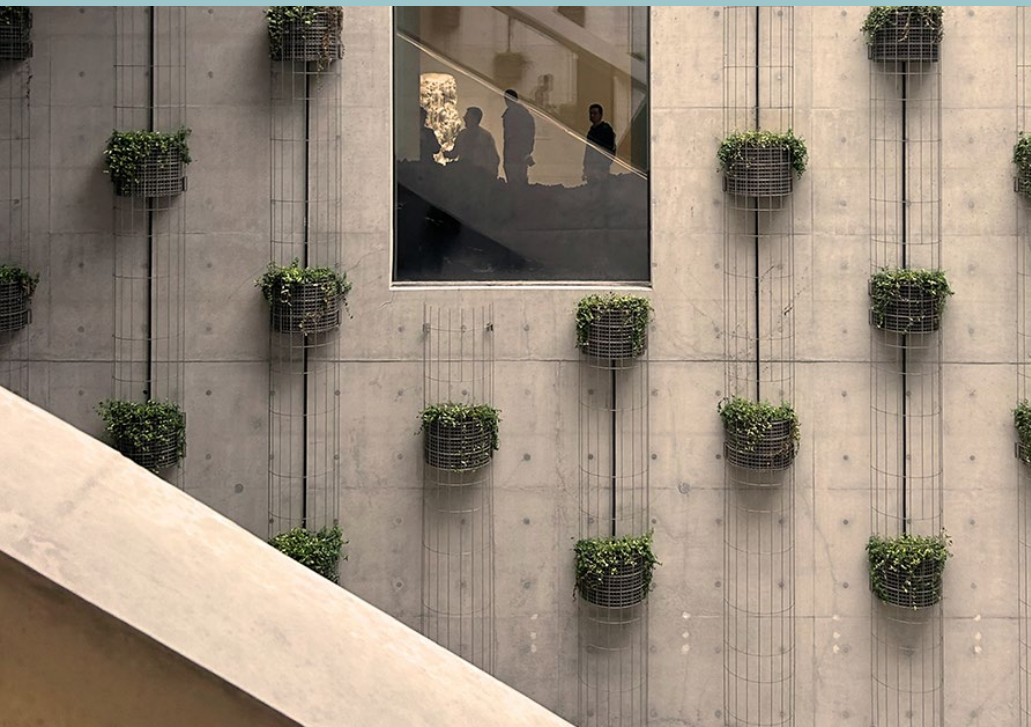
- Julie is a director in a training company that is tendering for training work with the Procuring Entity.



ACTUAL PERCEIVED POTENTIAL NO CONFLICT?

COI QUIZ 3

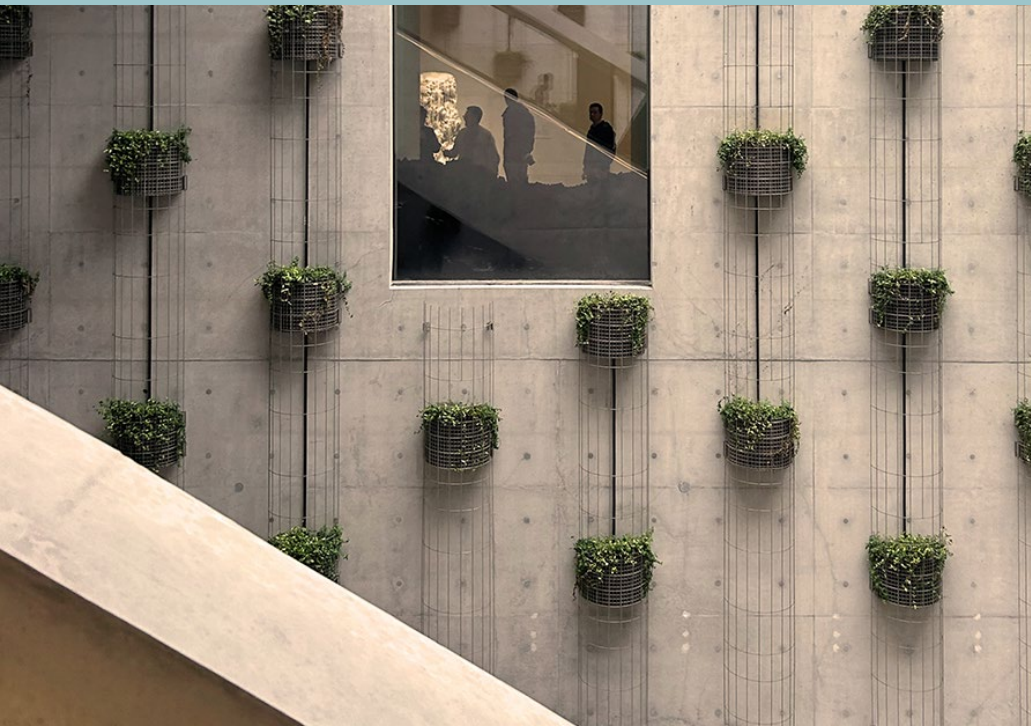
- ▶ Peter has had a contractor working with him in an entity for the last two years. The contractor is now applying for a job, and Peter is chairing the selection panel.



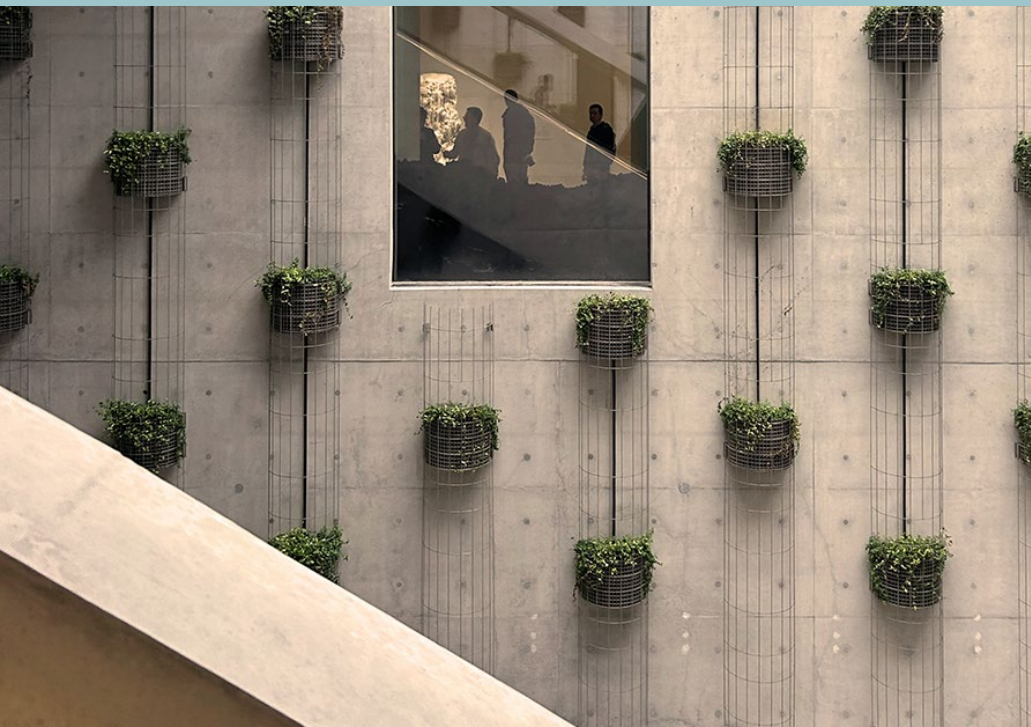
ACTUAL
PERCEIVED
POTENTIAL
NO CONFLICT?

COI QUIZ 4

- ▶ Kate is about to leave a government entity 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?



COI QUIZ 5

- ▼ 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.

Value for Money

BEST VALUE FOR MONEY

- 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.

Value For Money - What Are Whole Of Life Costs

WHOLE OF LIFE COST

- 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

Key Probity Documents

- Probity Plan.
- Procurement Conduct Plan.
- Probity Protocols.
- Code of Conduct.
- (COI and Confidentiality).
- Conflict of Interest Register.
- Communications Register.
- Ad Hoc Probity Advices.
- Deed of Project Participation (e.g., 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 DIFFERENCE



**PROCESS OR
PROCUREMENT
ADVISOR**



**PROBITY
ADVISOR**



**PROBITY
AUDITOR**

When to Appoint a Probity Adviser

WHEN:

- 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.

Legal Issues and Risks

- ▶ THE LEGAL FRAMEWORK
- ▶ THE PROCESS CONTRACT
- ▶ OTHER LEGAL RISKS
- ▶ ICAC NT

The Legal Framework

FREE TRADE AGREEMENTS

- ▶ Historical obligations for government procurement contract disclosure comes from the Singapore – Australia Free Trade Agreement (SAFTA) entered into force in 2003.

NT AS AN EXAMPLE

- ▶ The procurement and tendering provisions of the Procurement Act 1995
- ▶ Procurement Governance Policy
- ▶ Issued by the NT Government, this policy establishes the procurement framework, principles, lifecycle, governance model and international procurement obligations.

NT PROCUREMENT RULES

- ▶ A helpful consolidated view of Government procurement rules and requirements as they apply to each step of the procurement process.

The Legal Framework

ACTS

- These Acts, Regulations and Guidelines set out what you can and cannot do, and most importantly what you must do, when it comes to procurement:

The Procurement and Tendering Provisions of Procurement Act 1995

Procurement Regulations 1995

Financial Management Act 1995

Independent Commissioner Against Corruption Act 2017

Information Act 2002

Free Trade Agreements

Consumer Affairs and Fair Trading Act 1990

NT Procurement Governance Policy And Procurement Rules

Independent Commissioner Against Corruption NT (ICAC)

WHO ARE THEY?

- ICAC works to “to guard against improper conduct in the Northern Territory Government (NTG), local councils and other public bodies”.
- “The ICAC Act enables the ICAC to investigate the most serious, systemic and sensitive improper conduct.”
- Corrupt Conduct is defined in section 10 OF the ICAC Act. It may involve (but is not limited to):
 - Dishonesty
 - Any conduct breaching public trust
 - Failure to manage adequately an actual or perceived conflict of interest
 - Collusive tendering etc.

NT Case Study

ICAC INVESTIGATION INTO NT GOVERNMENT (APRIL 2021)

- Investigation into the conduct of two public officers in a Northern Territory Government department, including a procurement advisor.
- Whether those officers engaged in unsatisfactory conduct as members of a procurement assessment panel, as there were only two members on the panel despite the tender having Tier 3 procurement requirements.
- ICAC found that their actions did not reach the threshold of unsatisfactory conduct under the Act, but it was non-compliant with procurement governance and best practice.

NT Case Study

ICAC INVESTIGATION INTO NT GOVERNMENT (APRIL 2021)

Seven recommendations were given to align with best practice, including:

- ✔ Recommendation 2:
 - The review should consider corruption risks in procurement and allocate necessary resources to incorporate prevention and detection into any reforms.
- ✔ Recommendation 4:
 - The review should focus on simplifying the existing procurement processes to achieve workability and compliance by public officers undertaking 'casual' or 'occasional' procurement.
- ✔ Recommendation 5:
 - That Procurement NT review the Procurement Capability Framework with NTG agencies to agency requirements for procurement roles, skills, capability and training.

NT Case Study

ICAC OPERATION SOUTHERN (OCTOBER 2023)

- Review of the Department of Infrastructure, Planning and Logistics (DIPL) due to several reports of alleged impropriety arising out of procurement activities in the Katherine office.
- Whether the employees in the DIPL Katherine office had engaged in dishonest and corrupt conduct and lack of reasonable oversight in the procurement process.
- ICAC did not make any findings against specific employees but found there to be a basis for these complaints.
- Findings included manipulation of the tender process, non-disclosure of conflicts of interest, acceptance of inappropriate gifts, and inadequate oversight of employees who disclosed confidential tender information.

NT Case Study

ICAC OPERATION SOUTHERN (OCTOBER 2023)

Eighteen recommendations were given to align with best practice, including:

▸ Recommendation 1:

- I recommend that the Chief Executive Officer cause relevant DIPL policies and procedures to be amended to require all staff to complete an annual disclosure of interests, including actual and perceived conflicts of interest, and potential conflicts of interest that might arise in the future owing to existing personal interests.

▸ Recommendation 5:

- I recommend that the Chief Executive Officer cause a memorandum to be circulated to all staff reminding them that tender responses are not to be provided to panel members until each panel member has completed a conflict-of-interest declaration and confidentiality form, and any declared conflicts have been properly assessed and managed as necessary.

▸ Recommendation 7:

- I recommend that DIPL establish a system for monitoring and ensuring compliance with mandatory conflict of interest training, and that the identification, disclosure and management of conflicts of interest feature in mandatory yearly refresher training.

NT Case Study

ICAC OPERATION SOUTHERN (OCTOBER 2023)

Eighteen recommendations were given to align with best practice, including:

▸ Recommendation 8

- I recommend that DIPL introduce changes to the gifts and benefits declaration process to require:
 - The declaration of all gifts and benefits offered, whether or not the gift or benefit was received;
 - Establish a central register of gifts and benefits declarations, accessible by managers and delegates, in order to identify trends and particular points of risk;
 - Establish mandatory fields in any declaration requiring the value of any gift or benefit to be included;
 - Empower managers and supervisors to verify that compliance with a direction to decline a gift or benefit; or return a gift or benefit, has occurred.

▸ Recommendation 12

- I recommend that the process of shortlisting tender responses before consideration by a tender panel be captured in a document that is publicly available, and include the detailed criterion applied in shortlisting and the information that might be relied upon during the shortlisting process.

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 and weightings 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

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