

# Probity and Procurement in Government

**Your speakers:**

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Victorian Government Solicitor's  
Office

**Andrea Hassett**

O'Connor, Marsden &  
Associates Pty Ltd

Strategic advice  
practical legal solutions

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## What probity means for Government procurement

- Integrity, uprightness and honesty
- Defensible process
- Fair and equitable treatment

## Importance of probity

- Maintaining public confidence
- Ombudsman – s 13 *Ombudsman Act 1973*
- Auditor-General s 3A(3) *Audit Act 1994*
- Probity controls in public hospitals for procurement August 2008
- New ticketing system Tender report October 2007

## Law of tendering and probity

- *Hughes Aircraft Systems International v Airservices Australia*
- Contract law governs pre-award period of government tender process
- Implied term to act fairly

## Victorian legislation and policies on probity

- Directed at promoting integrity, trust, accountability of public monies
- *Public Administration Act 2004*
- *Gambling Regulation Act 2003*
- VGPB Guidelines

## Case law on probity

- *Cubic Transportation Systems Inc v New South Wales* (2002)
- Court held implied term of fair dealing in assessment of bids
- Facts didn't demonstrate breach
- Must be actual unfairness or bias compared with possibility of bias

## Case law on probity

- *Pratt Contractors v Transit New Zealand* (2003)
- Court held duty to act fairly and in good faith in tender process
- Standard not breached
- Government entitled to act in its own interest

## Case law on probity

- *Dockpride Pty Ltd v Subiaco Redevelopment Authority* (2005)
- Tender allowed Authority to accept tender that not highest and departed from design guidelines
- No implied term to accept highest bid or to communicate information on guidelines to tenderers

## Case law on probity

- *Diagnostic Medlab Limited v Auckland District Health Board* [2007] 2NZLR
- *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NSCA 385
- *Diagnostic Medlab v Auckland District Health Board* 8 OTS Sc 80/2008 [12 February 2009]

## Case law on probity

- Alleged:
  - conflict of interest by board member who was a shareholder of the consortium that awarded contract
  - lack of probity and procedural fairness
  - improper use of confidential information that gave competitive advantage

## Case law on probity

- Asher J of High Court in 2007 found a lack of probity in decision making process
- Improper use of information by Dr Bierre as Auckland District Health board member that gave his tender advantage

## Case law on probity

- Court of Appeal reversed decision
- Differed on factual assessment of confidential information
- No improper use of inside information
- DMC as incumbent knew about need for open book accounting and perception opposed to change
- February 2009 leave to appeal refused

## What case law tells us

- Government agencies must conduct tender process with integrity, uprightness and honesty
- Treat all tenderers fairly in assessment of bids
- No quasi judicial rules apply

## What case law tells us

- Obligation to act fairly, doesn't mean Government can't act in own commercial interest
- Government must ensure that all conflicts of interest arising during the tender process are managed
- Management extends to not only people conducting the tender but probity advisers and legal advisers

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## Common Themes

- Probity principles
- Conflict of interest management
- Working with incumbents
- Whole of Government projects
- Probity auditors v probity advisor

## Probity Principles

- Accountability for the process
- Transparency in the process
- Confidentiality is maintained
- Value of money is achieved
- Conflicts of interest are managed

## Conflicts of Interest

- Definition
  - A clash between a persons public interest or duty and their private interests
  - Concept of related interest and actual, potential or perceived conflicts
  - Project by project basis

## Conflicts of Interest

- Management strategies:
  - Related interest declarations
  - Maintain register of interest
  - Revisit declarations at key project points
  - Document and review management strategies
  - List as a regular agenda item

## Working with Incumbents

- Dealing with issue of inherent bias
  - Access to and understanding of project
  - Evaluation on actual submissions
- Management of confidential information
  - Inadvertent access as a result of the day to day relationship

## Working with Incumbents

- Management strategies
  - Share data and information with the market
  - Keep day to day teams separate from project
  - Have clear evaluation plan and criteria
  - Review physical and electronic access to information

## Whole of Government Projects

- Benefits in the form of:
  - Input from diverse stakeholders
  - Promotes innovation and efficiencies
  - Improves cost effectiveness
- Challenges come from:
  - Achieving value for money across competing requirements
  - Accountability

## Whole of Government Projects

- Management strategies
  - Clear terms of reference
  - Detailed requirement specification
  - Clear evaluation criteria
  - Allow sufficient time

## Probity Auditor v Advisor

- Auditor role
  - Assist with interpreting principles
  - Review and comment on risk mitigation plans
  - Continually review and provide opinion
- Advisor role
  - Assist with defining issues
  - Recommend course of action
  - Assist in implementation of risk mitigation plans

Please leave your nametag at  
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