

The Role of the Probity Adviser and Probity Auditor.

(A paper delivered to the Women in Insurance group, Polo Club, 22 April 2008 by Judge Michael Forde)

Introduction

1. You may have noticed a slight variation to the topic. I have left the word lawyer out as a probity advisor or auditor need not be a lawyer. I know that the audience this morning consists of non-lawyers so the topic is of interest to you as well. The last time I had the pleasure of attending one of your breakfast talks, Ashley Jones was talking about the discovery of documents under the PIPA legislation. His first piece of advice was to adopt an appropriate documents retention policy and then get rid of the paper shredder. My talk this morning will not be as practical as his but it may provide some food for thought of alternative employment opportunities. Some of you may be thinking what is a probity adviser or auditor anyway. It arises in the context of the tendering process. Many of you as part of your employment or general knowledge would be aware that construction firms, law firms, insurers or other professions have to tender for work. This is especially so when government contracts are being sought. It is not limited to the public sphere as many private enterprises seek to put their work out to tender with a view to obtaining value for money.
2. Probity is about “integrity, uprightness, honesty and uncompromising adherence to the highest principles and

ideals.(Box and Forde, *Probity and Managing Procurement: How to avoid corrupting the process*, Butterworths LexisNexis 2007 at [1.4] Much of the material in this talk can be found in that text)

The term is used ‘to mean a defensible process which is able to withstand internal and external scrutiny’ The tendering process should be transparent and fair and equitable to all concerned.

Procurement is a term which relates to the purchasing of goods and services. Various issues are raised as part of that process including accountability, impartiality and avoiding a conflict of interest and compliance with statutory requirements and guidelines.

3. The internal scrutiny can be by a probity advisor. The external scrutiny can be by an external auditor. Those roles can be filled by someone with the training to do so. They need not be an accountant or a lawyer. There are no professional qualifications required. However, I do note that Curtin University in WA has a post graduate course on the topic. Sometimes there is a more holistic approach to fulfilling the roles by having technical persons such as engineers, lawyers, accountants and project managers forming a team to carry out the internal scrutiny. A probity auditor on the other hand will usually be retained after the process has been completed to ensure the contractual aspects have been complied with and generally tick the boxes to ensure that the probity aspects have been complied with. Regulation of government procurement involves a complex overlay of statute, policy, guidelines and quasi legal requirement. Examples of this are the Financial Management and Accountability Act 1997 (Cth) and State Purchasing Policies. There is also a Code of Ethics for those employed in the public sector.

4. On his retirement from the Department of Prime Minister, Mr Peter Shergold, the former head of the Department, stated that the biggest disappointment in his role was the Australian Wheat Board (AWB) scandal. He said that there was a failure in policy, supervision and departmental failure.

Facts of the AWB Scandal

5. The AWB traded with Iraq. There were sanction imposed by the UN following the Gulf War which was called the food for oil programme. In order to avoid that programme, the AWB was dealing contrary to the requirements of that programme. There was a kickback paid to a transport company owned by the government of Iraq of some \$290 million. In effect, it was a payment to the Iraq government to allow the AWB access to that market. The wheat growers of North America and Canada are now suing the AWB under the US legislation called the Racketeer Influence and Corrupt Organisations Act. The Australian Government denied any knowledge of the kickback.
6. What in effect happened was that there was a complete failure of proper procurement procedures tainted with illegality and bribes. There was no ongoing supervision by the Australian government of the activities of the AWB even though it was regarded as a public agency. There was no probity audit performed.

The attributes of a probity adviser or auditor

7. You might like to consider if you qualify for the task:

- a. Persistent, thorough, ethical and honest.
 - b. Good interpersonal and communication skills
 - c. Well developed analytical skills
 - d. An ability to understand a wide variety of systems and procedures
8. Experience in procurement and contracting processes is desirable but experience in financial or internal audit are not essential.

Indemnity Insurance

9. It would be prudent for anyone engaging in work as a probity adviser or auditor to ensure that the policy of insurance which she or he may hold covers such activities. The policies held by lawyers or accountants may not necessarily cover those activities as they are not usually done by lawyers or accountants with no auditing background. Also, it would be necessary to determine whether the advices are as an adviser or auditor as the professional risk may be quite different.

Probity audits contrasted to other audits

10. Probity audits for example can be contrasted to financial audits. Financial audits usually determine whether the particular organisation has complied with the accounting standards relevant to that organisation. This is usually done by the Commonwealth Auditor or State Auditor General in so far as it relates to government departments. In private enterprise, the professional requirements of the Institute of Chartered Accountants or the requirements of the Corporations Law set the standards required.

11. In relation to probity audits, there may be guidelines or industry standards applicable to the particular procurement contract. There are no mandatory requirements. The ICAC and the Queensland Crime and Misconduct Commission do provide some guidelines.

The growth of the probity services industry

12. A probity audit can be an effective tool to obtain independent verification of compliance with the desired process or standard. Many organisations require a combination of a probity adviser and auditor. It is desirable that they be separate persons or entities. The joint view of both the Queensland and New South Wales governments is that government agencies should ensure that they develop probity management expertise internally and that external probity services should be engaged by exception such as for complex sensitive or high value procurements, or where supplier grievances have emerged or are likely to emerge.

13. While the external probity services would normally come from the private sector (usually the big five accounting firms) there is potential for their party government agencies to provide probity services independently to other government agencies. My co author Jim Box carries out such probity services as a private contractor. He is also engaged in providing in house programmes to educate the public service sector. In Queensland there is the Chief Procurement Officer responsible for probity issues. The Western Australian Attorney General's Office has recently advertised for a Procurement Officer.

14. In Victoria, government policy requires that a probity plan be developed even before tenders are called where the tender is valued at more than \$10 million. Across the three levels of government in Australia there are many variables in procurement and contracting

procedures and policy which influence the decision to engage probity services. Consequently, there is considerable scope for probity services.

Laywers acting ‘in house’ as probity advisers

15. When a lawyer is acting as a probity service provider for a principal who employs her or him, there may be some ethical issues that arise. These include questions of privileged information, conflicts of interest and the duty to the court if the matter becomes litigious.
16. In a recent decision of *Rich v Harrington* [2007] FCA 1987, Justice Catherine Branson had to decide whether Mallesons Stephen Jaques who were acting for the respondents had to produce for inspection certain classes of documents in respect of which they had claimed client legal privilege. The applicant Ms Christina Rich had been dismissed by Price Waterhouse Coopers and she claimed that she had been the victim of sexual harassment and that Price Waterhouse had discriminated against her. She was a former partner of Price Waterhouse Coopers. Mr Harrington was the Senior Partner for Australia and so represented the respondents or partners of Price Waterhouse. One question for determination was whether the respondents could maintain a claim for client legal privilege in respect of legal advice provided by persons comprising the Office of General Counsel of Price Waterhouse. The critical question was whether the relationship between the in house counsel and the partners of Price Waterhouse with respect of Ms Rich’s allegations was one of professional detachment [58]. Her honour held that the relationship was not such as to secure the advice of its in house counsel concerning Ms Rich’s allegations the objectively

independent character necessary to support the respondent's claim of client legal privilege.

Conclusions

17. I trust that these preliminary observations of the role of probity service providers has stirred your interest in this growing area. It also raises issues for lawyers who are involved in the process. Even for non-lawyers questions of conflicts of interest arise. Government processes are supposed to be transparent. Currently, government is the primary client for probity services. While ministers and their bureaucrats have a responsibility to ensure they employ the appropriate expertise to support probity and accountability, the extent to which government engages external resources for probity services should be governed by sound internal processes and effective risk assessment.