



POLICY No: WSC046

POLICY FOR PROBITY MANAGEMENT

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A. POLICY SUMMARY

- A1 This policy provides a framework for addressing probity issues and management in the conduct of Wyong Shire Council's affairs.

B. POLICY BACKGROUND

- B1 Wyong Council is involved in a number of activities, each of which present varying levels of complexity and risk to the organisation.
- B2 Council is committed to ensuring that all such activities are conducted in a manner of the highest ethical and professional standards.
- B3 Compliance with the Code of Conduct, the appointment of a Probity Advisor (either internal or external) for certain Council activities, and the requirement that Probity be a primary consideration in various key policy documents are all means of ensuring that such standards are adhered to.

C. DEFINITIONS

- C1 **Agency** means an external representative or contractor to Council, eg Consulting Engineer, Architect, Project Manager.
- C2 **Council** means the elected representatives, Councillors, who form the governing body of Wyong Shire Council and the organisation responsible for the administration of Council affairs and operations and the implementation of Council policy and strategies.
- C3 **High Risk** means activities that have revenue or expenditure equal to or greater than \$5 million per activity, or otherwise involve progress payments equal to or greater than \$1 million total per annum per activity.
- C4 **ICAC Guidelines** means Independent Commission Against Corruption, 2005, *Probity and Probity Advising: Guidelines for Managing Public Sector Projects* – See Footnote Page 4.
- C5 **Probity Advisor** means an appropriately qualified individual appointed to observe, review and provide guidance on the probity framework and/or processes of a project or activity.
- C6 **Probity** means '*Integrity, uprightness and honesty*' and is based on five fundamental principles in the context of Council activities: best value for money, impartiality, dealing honestly and transparently with conflicts of interest, accountability & transparency and confidentiality.
- C7 **The Act** means the *Local Government Act NSW 1993*.

D. POLICY STATEMENTS

Jurisdiction

- D1 This Policy covers all elected members of Council, all personnel employed by Council, any person or organisation contracted to or acting on behalf of Council, any person or organisation employed to work on Council premises or facilities and all activities of the Council.
- D2 This policy does not confer any delegated authority upon any person. All delegations to staff are issued by the General Manager.

General

- D3 This Policy applies to all Council activities, however certain other policies (eg Procurement) may set out other conditions which shall prevail, provided that such conditions are not less than contained in this policy.
- D4 Council shall keep current policies and/or procedures on:-
- Procurement, which shall contain policy conditions that set out Council's position in respect of Probity, as related to procurement practice
 - Contracting Procedures, outsourcing and contracted services which shall contain conditions that set out Council's position in respect of Probity, as related to contracting procedures, outsourcing and contracted services
 - Project Management, which shall contain conditions that set out Council's position in respect of Probity, as related to project management
 - Investment Management, which shall contain policy conditions that set out Council's position in respect of Probity, as related to investment management
 - Financial Management, which shall contain conditions that set out Council's position in respect of Probity, as related to financial management
- D5 Council will engage a Probity Advisor for activities which in the opinion of the Director concerned, contain one or more of the following:
- a. inherent complexity that could provide the circumstances in which improper or dishonest behaviour may occur
 - b. high risk
 - c. have a history of public controversy or litigation
 - d. politically sensitive
 - e. potential for the perception among the community or stakeholders of improper behaviour occurring, whether or not actual improper behaviour is likely
- D6 Council personnel, including its Probity Advisors shall have regard for *the ICAC Guidelines 2005 Probity and Probity Advising*.¹
- D7 Council shall ensure that the Probity Advisors have full access to any and all information considered relevant to the brief.
- D8 Probity Advisors shall not make decisions about a particular course of action contemplated by Council.
- D9 Probity Advisors shall not offer advice on decisions about a particular course of action contemplated by Council except in respect of probity matters.

E. POLICY IMPLEMENTATION - PROCEDURES

- E1 This Policy should be read in conjunction with Council's Code of Conduct.
- E2 Council will appoint the Manager, Corporate Governance and the Senior Project Executive within its Legal and Risk Unit as probity advisors for the organisation.
- E3 To minimise work conflicts, each probity advisor shall be engaged for a project on the basis of current competing work priorities within their unit. This will be determined by agreement between the appointed advisors at E2.

¹ Copy of document is found under Supplementary Material for this policy on Council's policy register on the Intranet.

E4 Fees for the provision of in-house probity services will be charged at cost and borne by the Department that engages the services.

E5 A Director shall consider the engagement of a Probity Advisor when:

- The expected cost of the project is higher than approximately 90% of projects normally undertaken by Council or its Agencies
- The project itself is complex or of high risk
- There has been a relevant history of controversy or litigation in relation to the agency, the project or one of the potential proponents
- The project is politically sensitive (for example a project with a significant environmental impact)
- It is anticipated that there will be an in-house or public sector bid and independent scrutiny is needed to avoid actual or perceived bias. Additionally, if there is an incumbent contractor with a strong relationship with Council or its Agencies, other competitors may require additional assurance that the process is genuine
- The costs of making bids for work are expected to be high, relative to the size of the contract
- The project involves significant intellectual property, an unsolicited proposal for a major project or highly subjective selection criteria
- Council wishes to make substantial changes to the scope of the project or the bidding process after it has already commenced
- The evaluation process requires lengthy and detailed face-to-face meetings with individual proponents and/or site visits
- The project is expected to be privately financed in any significant part or uses a complicated contract structure such as a build-own-operate-transfer contract or alliance contract, or where a very long term public-private partnership is to be established
- Guidelines issued pursuant to section 400C of the Local Government Act 1993 (or any other guidance from the Department of Local Government) either recommend or require the appointment of a probity advisor for a public-private partnership
- The market is highly concentrated or there are very few players and information sharing, collusion or other forms of anti-competitive behaviour are a possibility
- A proponent has already been involved in the feasibility study or pre-tender stages of the project, having thereby potentially obtained an unfair advantage
- Council or its Agencies are expecting to make a material profit or generate a considerable income stream from the project
- Council or its Agency is not an informed buyer, or lacks experience in the nature or magnitude of the project being undertaken

If any of the above criteria are identified as present or likely to be present in respect of an activity, a Director will assess the level of risk and decide if a Probity Plan and/or Advisor are necessary.

It follows that as more of the criteria are identified as being relevant in the circumstances, the case for engaging a probity advisor is strengthened.

E6 The decision to engage a Probity Advisor shall be made by the responsible Director for the activity (within the framework of Policy Statements D5 & E5). The decision and reasons for the decision must be documented and retained on Council official files.

E7 Council may at its discretion engage an external probity advisor in the event that its internal advisors are unavailable, or the proposed project has such a degree of complexity that it cannot be appropriately managed internally.

- E8 When engaging an external probity advisor, Council shall have regard to the ICAC recommendation that all engagements be based on the following probity fundamentals:
1. Best value for money
 2. Impartiality
 3. Dealing with conflicts of interest
 4. Accountability and transparency
 5. Confidentiality
- E9 A brief shall be prepared detailing the scope of work before the engagement of a Probity Advisor.

Scope of Work

- E10 The Probity Advisor's scope of work must be in writing and formally approved by the Director responsible for the activity. The scope of work may originate from Council or the proposed advisor as agreed between the parties.
- E11 A scope of work should be flexible enough to be able to address unforeseen events but should not give the project manager or Council representative the ability to steer the probity advisor away from problem areas. The scope of work should include, but not be limited to:
- the general objectives of the engagement
 - a statement of the project under review
 - methodology to be followed by the advisor
 - a list of relevant information, files, personnel and resources etc that can be accessed
 - professional standards to be applied
 - relevant legislation and policy to be observed
 - reports and audit opinions required
 - method of communication and oversight
 - tasks to be completed plus any other deliverable outputs
 - the point at which the engagement will conclude and the circumstances under which the engagement can be ended if necessary
- E12 The scope of work must include a requirement that a written report be supplied at the conclusion of the engagement.

Probity Plan

- E13 A Probity Plan shall be considered for every project with the issues and all decisions recorded. A record of the consideration shall be kept on the project file.
- E14 If a probity advisor is engaged, that person shall oversee the preparation of a plan.
- E15 Where a plan is deemed advisable, the Project Manager shall develop the plan which:
- Should include, or follow from, a risk assessment of the known and likely probity risks associated with the project
 - Should be prepared at or near the commencement of the project
 - Must be approved by the Director responsible for the activity
 - Specifies that Council and the Director have ultimate responsibility for any departures from the probity plan
- E16 A Probity Plan should address:-
- The complex issues of the project and how they will be managed
 - The project risks and the mitigating strategies to be employed, including the potential for litigation
 - Property issues and potential issues

- Political and community consultation issues as they relate to management of the project
- Management of existing strong trading relationships that may give rise to other tenderers perceiving a disadvantage
- The management of selection criteria to avoid significant subjectivity
- Management of proposals that are unsolicited and/or if significant intellectual property is involved
- The process for making substantial changes to the scope of the project or the bidding process after it has already commenced
- Evaluation processes that may require lengthy and detailed face-to-face meetings with individual proponents and/or site visit
- Private financing proposals exist or may exist for any significant part or where a complicated contract structure such as a build-own-operate-transfer contract or alliance contract may be proposed, or where a very long term public-private partnership is to be established
- Council's treatment of bids in a market that is highly concentrated or there are very few players and information sharing, collusion or other forms of anti-competitive behaviour are a possibility
- Council's tender management where a proponent has already been involved in the feasibility study or pre-tender stages of the project, having thereby potentially obtained an unfair advantage
- The transparency and accountability of projects that are expected to generate a material profit or considerable income stream
- Council's lack of ability as an informed buyer and/or lack of experience in the nature or magnitude of the project being undertaken

E17 Probity Advisors, internal or external, shall attend key meetings. A probity advisor cannot reasonably perform his or her job without attending key meetings and events. This may include meetings where the evaluation process is discussed and meetings of the evaluation committee itself. In particular, the probity advisor should be present at all meetings involving proponents.

Reporting

E18 Probity Advisors, internal or external, shall provide a written report or reports (as required) which comment on:

- the letter of engagement and scope of work
- the methodology used
- the specific work performed
- details of any departures from the probity plan or the probity advisor's own scope of work and how these were or were not addressed
- details of any other probity issues and how these were or were not addressed
- The probity advisor's opinion or conclusion, including any necessary qualifications
- Probity advisors shall record or convey their advice in writing (such as in a file note or via email), even if it is unlikely to appear in a formal report. A record of all the advice provided will help to protect both the integrity of the project and the probity advisor.

E19 The probity advisor must do whatever work is required in order to support and defend his or her written opinion or conclusion.

E20 Reports prepared by probity advisors should be accessible under Freedom of Information Act (or its successor) subject to other relevant privacy legislation, except where commercial sensitivity-in-confidence is apparent. Wherever possible, probity reports should not contain information that is commercial-in-confidence, against privacy or subject to legal privilege.

E21 Probity advisors will be available to testify in legal proceedings, before Parliamentary committees or to provide information to agencies such as the ICAC, Ombudsman or Auditor-General.

Records

- E22 A record must be kept in regard to the engagement in accordance with Council's Records Management Policy.
- E23 Record all interactions (telephone file notes, email etc) between Council and the advisor.
- E24 The written record of the engagement, investigation and report shall be co-located (adequately cross referenced) in Council's records (TRIM).

Review and Audit Consideration

- E25 In respect of any project, Senior Managers, Directors or the General Manager should review their decision for not requiring a Probity Plan and/or Probity Advisor at any stage if any of the circumstances detailed in clause E5 become apparent. A written record of the review shall be kept on the project file.
- E26 If a review results in a decision that a Probity Plan or a Probity advisor is required, implementation shall be immediate and the resultant plan (if a Probity Advisor is appointed mid-stream, a plan will exist or will need to be created in any event) must record the progress of the project to-date in addition to the requirements detailed in clause E16.
- E27 The General Manager or a Director may initiate a Probity Audit after the completion of a project for any reason, which shall be conducted by an independent person from the staff or from the Department of Commerce list of acknowledged Probity Advisors.
- E28 It is the personal responsibility of all Council employees and agents thereof to have knowledge of, and to ensure compliance with this policy.

E29 Associated Documents:

- Council's Code of Conduct
- ICAC Guidelines – Probity and probity advising
- Council's Record Management Policy
- Local Government Act NSW 1993