

ENSURING OPENNESS AND PROBITY IN VICTORIAN GOVERNMENT CONTRACTS

A POLICY STATEMENT

11 October 2000

Introduction

1. The Bracks Labor Government was elected with a mandate to restore openness, fairness and transparency to the government of Victoria. We believe that government is only doing its job properly if it allows Parliament, the community and the Auditor-General to scrutinise its activities and hold it to account.
2. Today I will be announcing a package of measures which will entrench the principles of open government and probity in Victorian public administration. These measures are in part a response to a series of reports and recommendations that have been presented to the Government since it entered office late last year.
3. In January, I commissioned an independent Audit Review of Government Contracts to examine the probity and disclosure issues arising from the contracting and privatisation activities of the Kennett Government. That review, which made a large number of recommendations to Government, published its report at the beginning of June.
4. The Government has also studied very carefully the two reports of the Public Accounts and Estimates Committee, on the "Outsourcing of Government Services in the Victorian Public Sector" and "Commercial in Confidence Material and the Public Interest." These reports were released in March, and a formal response to them will be published in the near future. The Committee's extensive analysis and recommendations have been invaluable to the Government in determining the overall approach it should take.
5. Guided by these reports, the Government has developed a package of initiatives on probity and openness which will deliver the high standards of administration the Victorian public expects from its State Government.

Guaranteeing probity

6. I would like to begin by announcing a five point program to ensure that, in future, Government business activities processes accord with the highest standards of probity.
7. There is no doubt that the last Government's privatisation and outsourcing programs gave rise to widespread and genuine concern in the Victorian community. Much of this concern was fuelled by the needless secrecy which shrouded the Government's activities. The community felt strongly that the Government was not on the level about major contracts – that probity was a less important concern than it should have been.
8. Our five point program will put that right – leaving no one in any doubt that when the Victorian Government does business in future, it will be fair, open and above board.

9. First, we intend to entrench independent oversight of probity matters and due process in all major Government contracting activities. The Victorian Government Purchasing Board (VGPB) will continue to have the primary role as the body responsible for independent scrutiny of departmental contracts. In addition, Departments will be required, for the first time, to put in place arrangements for independent oversight of all construction contracts.
10. Second, from now on, any Government Department letting a tender worth more than \$10 million will be required to develop a probity plan in advance of commencing the transaction. The probity plan will document and explain the arrangements for ensuring that a proper process is followed throughout.
11. Third, the Secretary of each Department, as the accountable officer, will have the option, for particularly large, sensitive or complex transactions, of appointing an external auditor to provide ongoing advice on probity issues throughout the tendering process. This auditor will be responsible for producing a full report at the end of the process, certifying that all proper procedures have been followed.
12. Fourth, in the interests of openness and to reassure the Victorian public, the Government has decided that in future all probity auditors' reports will be made available in full for scrutiny by Parliament, the Auditor-General and anyone else with an interest. The Government also intends to publish the Requests for Tender it provides to bidders.
13. Fifth, we will be taking steps to increase the profile of probity issues across the whole public sector. The Victorian Government Purchasing Board undertakes this role for the eight main Government Departments and the Police. The rest of Government – including functions like ambulances, schools, most hospitals, even the Australian Grand Prix Corporation – has had much less central guidance on probity issues, despite being accountable for a \$10 billion annual budget.
14. From now on, all major public sector agencies and GBEs will be required to produce a statement on the processes they have adopted to deliver standards of probity and contracting at least as high as those required under VGPB guidelines. I will be asking Ministers to review the probity arrangements of their portfolio agencies to ensure they meet the required standard. The Purchasing Board will be called in to advise on remedial action if this standard is not being met.
15. In addition, the Minister for Local Government will consult with local government on adoption of the Government's probity and disclosure standards as part of the implementation of Best Value Principles in the purchase of goods and services at the local government level.
16. The Government's objective is that a consistent set of rules on probity should apply across the entire public sector. These commonsense steps will ensure that in future Victorian Government business activities not only accord with the highest standards of probity but are seen to do so by the general public which ultimately funds them. I believe these measures will be welcomed both by Victorian taxpayers and by the business community.

Securing open government

17. I now turn to the issue of open government, and in particular the disclosure of Government contracts and associated documents. Since we came into office, we have moved quickly to make a major break with the policies of secrecy pursued by the Kennett Government – policies which were roundly criticised in each of the independent reports I mentioned earlier.

Disclosure of contracts

18. The Bracks Government is committed to maximum disclosure of all the contracts entered into by Departments. We will shift the burden of proof in favour of contract disclosure, reducing to a minimum the information that is withheld from the public. A requirement to disclose major contracts will be entrenched in legislation as a statutory obligation on Government agencies.
19. Limited exceptions to this general policy will be permitted if there is a compelling reason. In assessing whether such a compelling reason exists, the Government will be guided by the criteria established by Parliament in the *Freedom of Information Act 1982* – as amended in December 1999 and as amplified in the rulings of the Victorian Civil and Administrative Tribunal (VCAT).
20. All Government agencies and GBEs will be required to adhere to the principles of openness and transparency specified in the FOI Act by providing as full a disclosure as possible. Only trade secrets or genuinely confidential business information will be withheld from voluntary disclosure, along with material which if disclosed would seriously harm the public interest. The Government will negotiate to achieve the same level of disclosure in the local government sector.
21. I should emphasise that our disclosure policy and the associated statutory obligations will apply as much to contracts for major events and investment attraction as they do to other types of Government contract.

Defining confidential business information

22. For our disclosure policy to be workable and transparent, we need to be clear about definitions. The Freedom of Information Act, as amended under my Government, defines confidential business information as material which, if disclosed, is “likely to expose [a private sector contractor] unreasonably to disadvantage.” It also protects proprietary business information by allowing for trade secrets to be kept confidential
23. These statutory provisions will form the basis for detailed Government guidelines on disclosure, setting out a new approach to Government contracting – one in which there is a strong presumption in favour of disclosure and in which confidentiality will be conceded only after the most stringent tests have been applied. Even where a measure of confidentiality is allowed, the Government will look to ensure that it is time-limited. We have indicated, for instance, that a confidentiality period of about six months may be necessary for some

Partnerships Victoria contracts. The key point is that secrecy should be kept to a minimum, in terms both of extent and duration.

24. As a further safeguard for open government, if an individual or organisation believes that the Government has not interpreted the principles correctly and has failed to disclose information which should be available, the *Freedom of Information Act* will enable them to seek access to that information and ultimately to appeal against the Government's decision.

How will Departmental contracts be made public?

25. Just as listed private companies are required to disclose important information to their shareholders, so we will establish procedures to make continuous disclosure an integral part of the day-to-day work of Government.
26. Government contracts will be made available in a readily accessible form. The Victorian Government Purchasing Board will maintain a database, accessible via the Internet, containing headline details of all Departmental contracts worth more than \$100,000. Government contracts over \$10 million in value will be published on the Internet. Paper copies of these contracts will be made available for sale for a reasonable price by the Department concerned and may be viewed in person free of charge. Where a clause has been deleted from a published contract, a note will be included explaining the scope of the excision and the grounds on which it has been made.

Dealing with the private sector

27. The Government will be open with the private firms with which it does business. In future, agencies will make clear to firms before they enter into contracts with the Victorian Government the strict limitations on contractual confidentiality which will apply. They will point out that the Government cannot override the Freedom of Information Act, the powers of Parliament, the Ombudsman or the Auditor-General. The Government will have a strong presumption in favour of full contractual disclosure, but it will also be fair-minded in applying FOI principles to ensure that genuinely confidential business information is protected. These principles will be spelled out to private firms at the start of each major tendering process.

Fostering a culture of openness

28. Open government is not just about rules and regulations: it is about the mind-set of politicians and public servants. The Freedom of Information Act can only achieve its purpose if Departments and agencies are committed to making it work on a day-to-day basis. Indeed, within the culture of open government we wish to promote, recourse to the Act should only be necessary as a last resort.
29. To this end, the Government will produce guidelines on open government, targeted at government employees, contractors and the public. These guidelines will explain in simple terms the principles of disclosure contained in the FOI Act and the rules which will govern the voluntary disclosure by government agencies of the contracts to which they are a party.

The Auditor-General, the Ombudsman and Parliamentary Committees

30. The Government is clear that contractual confidentiality should not inhibit the Auditor-General, the Ombudsman or Parliamentary Committees from exercising their investigative powers. The Auditor-General and the Ombudsman will have access to all contracts and tender-related documents, regardless of their confidentiality.
31. To facilitate the exercise of the Auditor-General's powers, the Government will in future seek to include a standard clause in all Government contracts requiring contractors to provide any information Departments and contracting agencies reasonably require in order to comply with requests from the Auditor-General. This will ensure that the Auditor-General's task is made easier and that he is not frustrated by claims that, as a result of contracting out, information he requires is no longer accessible. This contractual power will be complemented by legislation to increase in the penalties payable for failing to comply with a request by the Auditor-General under the *Audit Act* to supply information he has requested.

Performance data

32. Another recommendation of the Audit Review of Government Contracts was that, where possible, the Government should improve and expand the public reporting of information about the performance of major contractors. Performance-related information is arguably even more important to open government than the details of the contract itself, in that it helps to determine whether and to what extent the contract is working successfully.
33. I have therefore asked Ministers to review the performance data currently collected by their Departments and to consider how and when it might be made public. We will be looking to publish performance data frequently and comprehensively, where appropriate with the agreement of the contractors concerned.

Kennett Government contracts

34. The measures I have just outlined relate to the contracts the Government will sign in future. But we have also inherited a range of major contracts from the previous Government, many of which have hitherto been kept secret or are heavily censored.
35. The Audit Review of Government Contracts identified a checklist of the 70 most significant contracts entered into by the former Government. Only a handful of these had been publicly disclosed – often in the face of Ministerial opposition and sometimes after protracted FOI disputes. The Audit Review recommended that, where possible, we should make these contracts publicly available. For some contracts, we have been hindered by the far-reaching confidentiality clauses agreed to by the Kennett Government, which even now prevent our publishing details of the contracts without the approval of the other signatory.
36. I am pleased to announce, however, that after negotiation with private sector contractors we have secured the release, for the first time, of major Kennett Government contracts. These

documents are now freely available for review by members of the public through a Central Register of contracts, maintained by the Victorian Government Purchasing Board and accessible on the Internet.

37. Many of the contracts we have not so far been able to publish are those which contain confidentiality clauses. We have an overarching policy of honouring existing contracts and will of course stick to that policy. But we will continue to negotiate with the contractors concerned to secure the maximum possible disclosure.

Major events and business attraction

38. Government not only does business with the private sector. It is also actively involved in promoting Victoria as a place to invest and as a place to host major events.
39. As I have already made clear, like all other major agreements the Government enters into, contracts for major events and business attraction will subject to statutory disclosure obligations. There may be circumstances, however, when Ministers judge that there is an overwhelming public interest case for conceding a degree of confidentiality – for instance, if Victoria can only secure or retain a major facility, event or service by maintaining the confidentiality of contractual terms. The existing contract in relation to the Formula One Grand Prix is an example of such an arrangement: to disclose its terms would conflict with the Government's wish to continue to stage the event.
40. For such contracts, it may be legitimately against the public interest to disclose the relevant documents. In such circumstances, additional safeguards will apply:
- the Minister responsible will notify Parliament via the Annual Departmental Report of contracts which have not been disclosed and explain why the information is being withheld.
 - The Government will make the contract available in full for review by the Auditor-General, who will have the powers to report on it publicly if he believes it is necessary to do so.
 - The Minister's decision to withhold the information will be open to challenge through FOI in the normal way.
41. We will also report each year on the aggregate level of budget sector funding provided during the preceding twelve months to facilitate: (a) major events and (b) inward investment in Victoria. All contracts for major events and inwards investment will be listed in the Annual Financial Statements.

Conclusion

43. The measures I have just announced will protect the rights of the community, Parliament and other bodies like the Auditor-General, while recognising the legitimate interests of the contractors with whom we do business as a Government. Taken together, they constitute a major program of reform which will deliver an unprecedented level of openness and accountability in the government of Victoria. They establish a clear break with the past by:
- Ensuring probity standards are subject to consistent, rigorous standards and independent oversight across the Victorian public sector.
 - Legislating to lock in the disclosure of Government contracts.
 - Removing the ambiguity that has surrounded “commercial in confidence” in the past and allowed it to become a pretext for excessive secrecy.
 - Promoting a culture of openness at all levels within Government.
 - Ensuring that Parliament, the Auditor-General and the Ombudsman are able to exercise their powers without unjustified obstruction from politicians and bureaucrats.
 - Publishing as many as possible of the seventy major contracts which the last Government tried to keep secret.
 - Publishing performance data to ensure that contractors providing vital services are properly accountable to the Government and the wider community.
44. Over the weeks and months ahead, we will progressively implement the proposals I have outlined today. Wherever necessary, we will consult with our contractors, with the business community generally and with other key stakeholders.
45. Our key message, however, is crystal clear: open government is good government, and there can be no return to the secrecy of the past.