# Report on Probity Risks Associated with the Glen Eira City Council Utilising Grant Money from the Commonwealth Government's Urban Congestion Fund

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| **Our Client:** | Glen Eira City Council |
| **Representative:** | Chief Executive Officer |
| **Assignment:** | Probity Advisory Services |
| **Our Reference:** | 2022192 |
| **Report Date:** | 1 August 2021 |

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## Assignment

Glen Eira City Council engaged Baron Consulting Pty Ltd (Baron Consulting) to conduct a review and develop a report setting out its findings and conclusions in relation to any probity risks associated with utilising grant money allocated from the Commonwealth Government's Urban Congestion Fund for the delivery of two car park infrastructure projects in the local government area.

Baron Consulting is an approved Probity Advisor to the:

- Victorian Government – listed on the Professional Services Panel, and
- Tasmanian Government – listed on the Probity Advisor Directory.

The Probity Advisors of Baron Consulting have extensive experience in providing probity and related services to a number of metropolitan and regional councils across Victoria.

## Context

Glen Eira City Council (**Council**) is required to comply with relevant legislation and Victorian Government policies when making decisions and taking actions with respect to the spending of public money (including money sourced under grant or grant-like arrangements).

The Executive of the Council, headed by the Chief Executive Officer, is required to comply with Council policies when conducting business.

In particular, the Council (including the Executive) is required to comply with relevant provisions of the *Local Government Act 2020*.

Whether by virtue of legislation, government policy or community expectation, the Council is obliged to ensure that its actions and decision-making meet relevant integrity and probity requirements.

## Commonwealth Fund

The Commonwealth Government established the Urban Congestion Fund in the 2018-19 Budget for the purpose of investing in infrastructure that reduces congestion in urban areas across Australia.

The Urban Congestion Fund aims to support, for example, upgrades to the urban road network to facilitate efficient commuting in capital cities.

Within the Urban Congestion Fund, and relevant to the Council, a Commuter Car Park Fund provides money to local government in the form of grants (**grant money**) for the upgrading or establishment of commuter car parks to encourage greater use of public transport.

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# Background

We understand that the Commonwealth Government's Department of Infrastructure, Transport, Regional Development and Communications (**Department**) approached the Council with an unsolicited offer to grant money from the Commuter Car Park Fund for the Council to facilitate the outsourced design and construction of two commuter car parks within the local government area.

Initially, this unsolicited offer was made on a dollar-matching basis, but the Commonwealth later amended its offer to a fully-funded basis to relieve pressure on the Council's budget, which has pivoted to other funding priorities to mitigate the impact of the COVID pandemic on the local community.

# Commonwealth Audit Process

The Australian National Audit Office (**ANAO**) – headed by the Commonwealth Government's Auditor-General reporting to the Australian Parliament – released an Audit Report titled 'Administration of Commuter Car Park Projects within the Urban Congestion Fund' (dated 28 June 2021).

The Auditor-General's Audit Report focused on the manner in which the Department administered the grant funding program for commuter car parks under the Urban Congestion Fund.

The Audit Report highlighted a number of concerns about the granting process, focusing on how the Department identified and selected projects for grant funding from the Urban Congestion Fund.

The findings and conclusions contained in the Audit Report have drawn the attention of media outlets and political commentators.

Subsequently, the Department released $1 million of the total funding of $20.6 million to the Council for the purpose of assessing feasibility and development options for car parks at two local sites identified by the Council.

We understand that the Council will be considering three options (i.e. Options 1, 2 and 3) for the two car park projects, as discussed further below.

# Scope of Assignment

To advise the Council on probity risks (and the viability of mitigation strategies to manage those risks) associated with the Council progressing (or not progressing) the car park projects, Baron Consulting was required to:

- undertake an assessment of the Commonwealth's Audit Report;
- perform a risk assessment to identify probity risks relevant to Options 1, 2 and 3;
- determine the viability of any strategies to manage the identified risks; and
- based on findings and conclusions, develop a report providing probity advice for the Council to consider in its decision-making process (this **Probity Report**).

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# Executive Summary

Although finding some probity related issues around the Department's administration of the granting of money from the Urban Congestion Fund, the Commonwealth Auditor-General's Audit Report did not recommend that the grant funding program be terminated and allocated grant money be recovered from recipients.

With proper design, we think that mitigations can be implemented to create a probity firewall to prevent external probity risks from transferring from the Department's grant process to the Council's car park projects.

It should be noted that we do not express an opinion as to whether (or not) the car park projects should be cancelled.

The threat of external probity risks transferring from the Department's funding program would not, by itself, be sufficient reason for the Council to cancel the car park projects from a probity perspective. This is particularly so given our opinion that a robust probity firewall can be placed between the Department's program and the Council's projects. However, a relevant consideration could support a decision of the Council not to progress the projects. For example, the outcomes of a well-structured engagement process aimed at evidencing community sentiment would be a relevant consideration for defensible decision-making purposes.

If the Council is nonetheless leaning towards selecting Option 3 (Cancellation of the Projects), then the better path for decision-making from a probity and integrity perspective would be for the Council, in the first instance, to select Option 2 (Community Engagement) to gauge community sentiment to inform Council decision-making around whether to progress (or not progress) the car park projects.

In this way, Option 3 would not be immediately selected, with any decision to proceed (or not to proceed) with the projects being deferred until the outcomes of a community engagement process were presented to the Council.

Nonetheless, probity mitigations will need to be developed and applied to any such community engagement process to ensure that inherent probity risks do not impact the defensibility of Council decision-making around the fate of the car park projects.

If the Council is leaning towards selecting Option 2 in the first instance, then (again) the outcomes of the community engagement process could serve to position the Council to make an informed and defensible decision as to the fate of the car park projects. As mentioned above, the development of probity mitigations would minimise the chances of probity risk arising during the community engagement process.

If the Council selects Option 1 (either now or after the implementation of Option 2), it should be understood that any procurement process is associated with inherent probity risks. For the projects,

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which would involve the procurement of design and construction services, such inherent probity risks could nonetheless be effectively managed with robust mitigations.
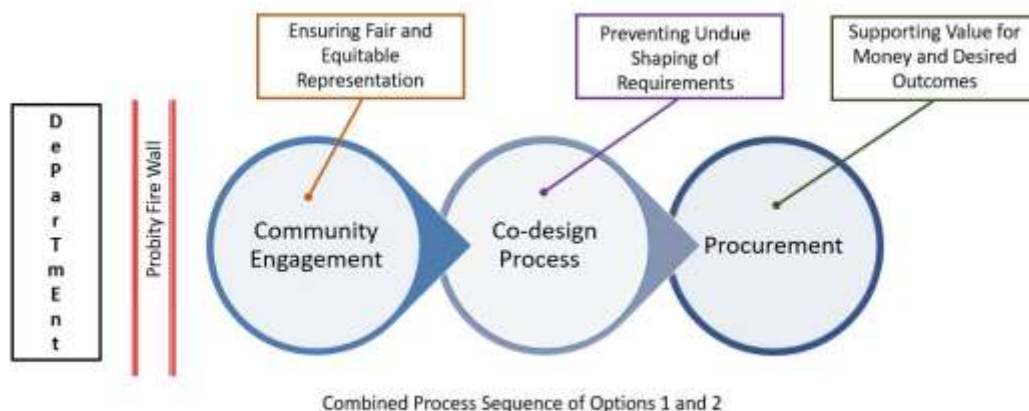
With a probity firewall in place to manage external probity risks transferring from the Department's program to the car park projects, the Council could then turn its attention to mitigating inherent probity that could arise in the projects (including community engagement, co-design and tendering processes).

Although the Council might have systems in place to conduct community engagement, co-design and tendering processes, robust probity mitigations will be needed to ensure that the mistakes of the Department are not repeated (or perceived to be repeated) to prevent any detractors leveraging issues to advance their own agendas.

In summary:

- unless able to rely on relevant considerations (e.g. the outcomes of community engagement), selecting Option 3 in the first instance might not be defensible from a probity and integrity perspective;
- if the Council considers Option 3 preferable, the Council should select Option 2 and allow the outcomes of the community engagement process to inform its decision-making around whether to progress the car park projects;
- a probity firewall can be created to insulate the Council from external probity risks transferring from the Department's sub-optimal administration of the grant process; and
- viable and robust mitigations can be developed and deployed to manage down inherent probity risks that could arise in community engagement, co-design and procurement processes conducted under Options 1 or 2.

Without knowing the Option(s) that the Council might select, the diagram below provides a high-level overview of the points at which probity mitigations for the combined processes of Options 1 and 2 need to be developed and applied.



Combined Process Sequence of Options 1 and 2

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As shown in the conceptual diagram above, if properly applied:

- the probity firewall with the Department can protect the Council's projects; and
- the mitigations for the:
  - community engagement process will prevent probity risks moving into the co-design process, and
  - co-design phase would shield the procurements from probity risks.

In this way, the interlocking arrangement of mitigations will assist to ensure that value for money and community benefits were delivered out of the procurements to protect the reputation of the Council.

# Reviewed Documentation

To develop this Probity Report, we have downloaded and reviewed information and documentation from:

- the Council's website; and
- relevant Commonwealth Government websites, including those of the:
  - Department of Infrastructure, Transport, Regional Development and Communications; and
  - Australian National Audit Office.

More particularly, the Council provided us with copies of the following documents for this assignment:

### Council Meeting Agenda Papers

- Ordinary Council Meeting Agenda Item 10 August 2021 – Multi Deck Car Park Update
- Assembly of Councillors Agenda Item 27 July 2021 – Update to Councillors Regarding Multi Deck Car Parks.

### Council Policies

- Glen Eira City Council Community Engagement Policy – 23 February 2021
- Glen Eira City Council Risk Management Framework and Policy – 5 February 2019
- Glen Eira City Council Procurement Policy – 30 June 2020 (downloaded from the Council's website).

### Reports for Department of Infrastructure, Transport, Regional Development and Communications

- Road Project Proposal Report – 13 April 2021
- Monthly Report – April 2021
- Monthly Report – May 2021
- Monthly Report – June 2021
- Monthly Report – July 2021.

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To give context to the Victorian Government's expectations around governance for local councils, we reviewed relevant provisions of the *Local Government Act 2020* (and related legislation) and government policies.

Our review of these documents informed our thinking and the content of probity advice set out in this Probity Report.

## Our Findings from an Assessment of the Audit Report

In its detailed Audit Report, Commonwealth's Auditor-General made the following adverse findings concerning the Department's decision-making around the granting of monies from the Commuter Car Park Fund:

- the Department's administration of the program was not effective;
- the design and implementation of the program relied on generic arrangements when customisation was warranted;
- the identification and selection of projects for grant funding was limited in coverage and not demonstrably merit-based;
- the assessment work underlying the Department's advice to award funding to selected projects was not of an appropriate standard; and
- implementation of the projects has been very slow, with only two of the 47 sites completed and a further three commenced by 31 March 2021.

The Auditor-General subsequently made six recommendations aimed at addressing the identified shortcomings in the Department's continued administration of the commuter car park funding program, all of which were accepted by the Department.

Notably, and providing a measure of comfort to funding recipients, the Auditor-General did not find that the Department's program was fatally flawed.

Consequently, the Auditor-General's recommendations focused on improving the future administration of the program in relation to the remaining projects that have received funding commitments under the Department's program.

Importantly, we note that the Auditor-General did not make any recommendation that the grant process be terminated by the Department and grant money retrieved from recipients.

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# Our Conclusions

The discussion below is founded on the notion that decision-making of the Council needs to be, and is seen to be, defensible from a probity and integrity perspective.

## Audit Outcome

To our way of thinking, the adverse findings from the Audit Report can be interpreted to represent manifestations of the following probity and related risks:

- poor or inappropriate process governance,
- absence of a documented and approved selection process,
- choice of a selective rather than an open process not justified,
- lack of agreed assessment criteria,
- lack of process openness and transparency,
- selection process not demonstrably based on merit and value for money, and
- poor recordkeeping.

These types of probity and related risks are inherent in community engagement, procurement and other business-related processes conducted by government or local councils.

Despite our opinion that viable mitigations can be developed to prevent external probity risks from transferring from the Department's program to the Council's projects (representing, a **probity firewall**), the Council should ensure that properly designed probity mitigations are deployed to manage inherent probity risks arising in its own processes under Option 1 or Option 2 (discussed further below).

Essentially, the outcome of the Audit Report could have gone two possible ways with respect to the grant money.

## Scenario 1: Which did not Occur

If the Auditor-General had found the Department's grant process was manifestly flawed or corrupted, the Auditor-General would likely have recommended the termination of the grant process and (if possible) retrieval of allocated grant money from recipients.

Had the Auditor-General made such a recommendation, probity and reputation ramifications would have impacted recipients. In such a scenario, and irrespective of whether the Department terminated (or did not terminate) its process, outside observers could have leveraged the situation and called for the Council to discontinue its involvement in the funding process and return grant money to the Department. In effect, such detractors would be arguing that the grant money was, by association with a corrupted grant process, necessarily tainted. By analogy, the external observers would be arguing that the grant money was poison fruit from a poison (money) tree. In such a scenario, the Council would have found it difficult to resist requests for its car park projects to be terminated and the $1 million returned to the Department.

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## Scenario 2: Which did Occur

However, and as mentioned further above, the Auditor-General did not recommend that the Department's grant process be terminated and/or grant money be recovered from recipients.

Accordingly, we consider that the Council:

- is not obliged to withdraw from the funding program, or
- return any allocated grant money to the Department.

This is not to say that the Council might, by its own volition, decide not to progress the car park projects based on the content of the Audit Report.

However, any decision of the Council to cancel the car park projects needs to be – like any other decision impacting the local community – defensible from a probity and integrity perspective.

To evidence probity and integrity, and subject to legislative requirements, any Council decision-making around whether (or not) to progress the projects needs to be:

- founded on relevant considerations, and
- made without reference to any irrelevant considerations.

We understand the Council was not requested to, and did not, lodge an application to receive the grant money. So, it could not be said that the Council caused or contributed to the noted problems with the Department's grant program.

In a way, the Council was the beneficiary of an unsolicited proposal flowing out of the Department's administrative process for the allocation of grant money.

It should be noted that we do not express an opinion as to whether (or not) the car park projects should be cancelled. We do, however, think that the Council would find it somewhat difficult to defend a decision to cancel the car park projects solely on the basis that probity risks from the Department's sub-optimal administration of the grant process might transfer to the Council's processes, especially given our opinion that robust mitigations can be developed to place a probity firewall between the Department's funding program and Council's projects.

The discussion below relates to the three options for the car park projects being considered by the Council.

## Option 3 (Not Proceed)

Option 3 relates to a non-progression of the Council's car park projects.

With the deployment of properly designed mitigations for Options 1 and 2, (and as discussed above) we think that there is little chance of residual external probity risks transferring from the Department's program to the Council's car park projects.

In this document, 'residual probity risk' means the probity risk remaining after probity mitigations (including the probity firewall) have been applied.

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Accordingly, we do not think the residual external probity risk level would necessarily require the Council to cancel the projects. That is not to say that the Council might have other reasons for not progressing the projects.

We have made the distinction in this document between:

- **external probity risks** – meaning probity risks associated with the Department's program that could transfer to the Council's cark park projects;
- **inherent probity risks** – meaning probity risks that could be generated within the Council's projects (including community engagement, procurement and related business processes).

If the Council did decide to proceed with the projects, or (alternately) proceed with community engagement to inform decision-making around whether (or not) to proceed with the projects, then inherent probity risks (as opposed to external probity risks controlled by the probity firewall) would need to be identified, assessed and mitigated.

Based on our findings and conclusions set out above, and with reference to the low probability of external probity risks transferring from the Department's program, we believe that the Council should consider Options 1 or 2 over an immediate selection of Option 3.

We are not arguing that the Council should not cancel the car park projects. If the Council decided to cancel the projects, that would be within its mandate and discretions.

We are, however, highlighting that the Council does not need to immediately select Option 3. The Council could, as an alternative to immediately selecting Option 3, leverage the benefits from conducting community engagement under Option 2 before making any decision related to Option 3.

## Option 2 (Community Engagement)

This option relates to conducting community engagement to inform Council decision-making about progressing (or not progressing) the car park projects.

Our thinking is that – and before immediately selecting Option 3 – the Council should consider selecting Option 2.

Immediately selecting Option 3 would rob the Council of the benefits of Option 2.

Option 2 would allow the Council to seek community feedback to inform its decision-making as to the fate of the car park projects.

At the completion of the community engagement process, the Council could then (and armed with relevant considerations) turn its mind to Option 3.

If the Council subsequently selects Option 3 after conducting community engagement, it would be in a better position to defend its decision-making about the fate of the projects than if it had selected Option 3 in the first instance.

Any community engagement process in connection with the spending of public money (including grant money) can be associated with inherent probity risks.

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For clarity, and if sufficient mitigations are put in place to establish a probity firewall, we consider that externally generated probity risks from the Department's program are unlikely to attach themselves to the Council's car park projects.

We consider that such probity mitigations can be designed in a way to effectively:

- protect the probity and integrity of Option 1 and Option 2; and
- as a consequence, safeguard the reputation of the Council.

## Option 1 (Proceed)

Option 1 relates to progressing the car park projects, including conducting the following phases:

- community consultation,
- due diligence,
- co-design of requirements,
- approval of concept design, and
- procurement activities.

As the Council would appreciate, any project or procurement involving the spending of public money (including grant money) is associated with inherent probity risks that need to be: (a) clearly articulated and (b) effectively managed.

Although activities of Option 1 are likely to be associated with inherent probity risks, we consider that effective planning and design of mitigations would reduce probity risks to an acceptable level (i.e. similar to the risk level expected for any standard procurement conducted by the Council).

The probity mitigations would:

- create a probity firewall between the Department's program and the Council's car park projects; and
- manage the probity risk profile of each of the phases of Option 1.

Further below we have:

- outlined the results of a risk assessment aimed at identifying probity risks for Options 1 and 2; and
- discussed the points at which probity mitigations could be deployed to manage the identified probity risks.

# Community Engagement

The Council's community engagement policy sets out a framework for consultation in the community, with the dual objectives of enabling the community to have input to Council decision-making and ensuring that Council decisions are well informed.

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The framework utilises the five levels of participation on the IAP2 Spectrum of Public Participation, namely:

- Inform
- Consult,
- Involve,
- Collaborate, and
- Empower.

The policy identifies the actions that the Council will take to meet the goal of each of these levels and provides examples of relevant engagement activities (with more set out in the Toolkit which aligns with the policy).

It is noted that a community engagement plan is required to be developed in relation to each proposed decision or activity. We consider that a community engagement plan would be an essential tool in helping to manage and mitigate reputation risks arising from consultation with the community (and other stakeholders).

The community engagement plan would allow the different types of stakeholders to be identified, along with their information requirements at different phases of the project.

Probity mitigations could be designed to supplement and support effective community engagement activities.

# Probity Risk Identification and Management

Based on the provided information, along with our understanding of the Department's conducted grant program and the Council's proposed projects, we have undertaken a preliminary risk assessment to identify inherent probity risks that could arise in relation to Options 1 and 2.

Although not having detailed information about how the Council's processes will be conducted, the reviewed policies and other documents provided us with insights into how Options 1 and 2 might be carried out.

## Preventing Transfer of External Probity Risks

As described above, effective mitigation strategies could be developed to establish a probity firewall to prevent the transfer of external probity risks from the Department's program to protect the Council's reputation.

The probity firewall would assist the Council to demonstrate an intention not to repeat any of the probity and related shortcomings of the Department.

The Council would need to demonstrate openness and transparency of process, particularly in its dealings with the community, other stakeholders, and prospective tenderers.

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The probity firewall would need to evidence (amongst other matters):

- appropriate governance arrangements,
- regulated information flows,
- a documented and pre-approved process, and
- a selection process based on merit and value for money.

It goes without saying that, if the car park projects proceed to the design and construction phase, the procurements should be in the form of transparent and open processes. We note that an open tender process is mandated under the Council's Procurement Policy for works valued above $200,000.

## Managing Inherent Probity Risks

Once the probity firewall is established, the Council could then focus on the identification and management of inherent probity risks capable of arising at certain points in any conducted processes relevant to Options 1 or 2.

Here, and not being an exhaustive list, the broad types of probity risks that could arise include:

- whether supporting the project or not, individuals or organisations might exert unfair or undue influence in an attempt to shape actions, requirements or decision-making for the projects;
- whether accidental or intentional, confidential information might be disclosed to third parties to the detriment of the Council's (or another party's) position;
- conflicted participants assisting the Council could attempt to undermine project outcomes.

If these types of risks are not effectively mitigated by the Council, they have the potential to impact the integrity and probity of the projects and, consequently, the reputation of the Council.

We think that viable mitigations can be developed and applied to relevant risk points to:

- reduce the chance of inherent probity risks arising; and
- if arising, manage down the effects of those risks impacting projects and the Council's reputation.

## Community Engagement

Whether conducted under Option 1 or 2, mitigations from a probity perspective would concern, amongst other matters:

- managing the direction, types, sequence and scope of information passing to and from different types of stakeholder groups;
- whether by direct or indirect means, ensuring biased, prejudiced or conflicted stakeholders do not influence the outcomes or decision-making in an unfair or undue manner; and
- ensuring integrity of process for the community engagement process.

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## Co-designing Requirements

Enabling individuals and organisations to co-design the requirements for the projects can result in optimal outcomes. With some similarities to community engagement, we imagine that the proposed co-design process would involve participants informing Council decision-making around requirements for the proposed car parks.

We note that co-design of requirements for the car park projects will pose additional probity risks to the Council. Such additional probity risks in co-design processes include, for example:

- whether through intermediaries or not, participants on the construction supply-side of the market could try to inappropriately influence or shape the requirements to compromise value for money outcomes and/or community benefits; and
- legitimate demand-side participants (i.e. including users and peak bodies) might not be able to effectively contribute owing to underlying barriers in the process.

Nonetheless, we consider that robust mitigations can be crafted and applied to various points of Option 1 to manage down these probity risks.
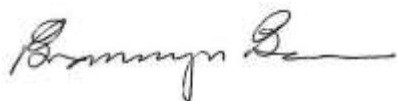
## Procurements

With pre-tendering probity risks managed, the Council would be positioned to conduct procurement processes in a lower probity risk environment. Nonetheless, probity mitigations would need to be developed to manage any inherent probity risks from impacting procurement outcomes and Council reputation.

# Disclaimer and Conflict of Interest Declaration

This Probity Report should not be interpreted or relied upon to be legal, accounting or financial advice. We have not been asked to, and we are not in a position to, comment on the merits of the car park projects.

We confirm that we have no conflicts of interest in relation to the allocation of the grant money by the Commonwealth.

Yours sincerely,

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**Ricky Bolton**
Director

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