

# LEGAL FRAMEWORK OF SOCIAL PROCUREMENT

**Disclaimer:** The advice provided below does not in any way constitute legal advice. It is general information/guidance only. For particular application to your operations it is recommended that you seek independent legal advice.

## 1. SUMMARY

### Common Law

- There do not appear to be any specific court decisions prohibiting social procurement clauses.

### Local Government Act 1989 (Victoria)

- The *Local Government Act 1989* makes reference to broad social outcomes in:
  - Section 3C(1) of the *Local Government Act* which requires that councils achieve the best outcomes for the local community
  - Section 186 of the *Local Government Act*, which requires that councils must undertake a competitive process

This will still require a council to demonstrate:

- the benefits of the social procurement initiative to the community are properly articulated, including the financial benefit.
- social benefit requirements are included in all procurement documentation, so the market is fully aware of the council's intentions and requirement.

### Competition and Consumer Act 2010 (Commonwealth)

- For a council activity to be subject to the *Competition and Consumer Act*, it must constitute a business activity. If not, the *Competition and Consumer Act* does not apply.
- Certain activities must be treated by councils as a business: water, sewerage and drainage functions, gas production and reticulation, and abattoirs.
- For other activities, the test is whether an activity is, or is likely to be, subject to competition by other providers and to what extent.
- If the activity is a business, the council must ensure that any procurement complies with the requirements of the *Competition and Consumer Act*.
- The council may apply to the Australian Competition and Consumer Commission for an exemption if the "public benefit" from the conduct outweighs any public detriment.

### Victorian Government Purchasing Board (VGPB)

- Councils are not subject to VGPB policies, but they may find them helpful as a form of guidance in terms of procurement policy.

## 2. LEGAL ADVICE: VICTORIAN GOVERNMENT SOLICITOR'S OFFICE

The full legal opinion of the Victorian Government Solicitor's Office (VGSO) on councils undertaking social procurement can be found in the 'Further Information and Resources' Section of the **Social Procurement: A Guide for Victorian Local Government** (the guide)– page 54.

According to the VGSO's advice, three areas of law that will need to be followed to legally conduct social procurement, they include:

1. Legislation governing local government – the *Local Government Act 1989* and subordinate and other related instruments
2. Common law relating to procurement
3. Trade Practices Law.

These three areas of law, along with 'exemptions from public tender requirements', are discussed in the advice outlined in the guide.