

Current Issues and Updates in Procurement

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The 2021 Procurement Seminar Series

- Planning a perfect procurement – 17 July 2021
- Probity in Procurement – 17 August 2021
- **Current Issues and Updates in Procurement - 7 September 2021**
- Legal Issues and Risks in Procurement – 28 September 2021
- Tender Assessment – 19 October 2021
- Innovations in procurement – 9 November 2021
- Managing the Procurement – 30 November 2021
- Top Ten Issues for 2021/2022 - 21 December 2021

If you have any questions in relation to our Government Procurement Webinar Series, or to register to attend a session, please email Katarina Szivek, BD Specialist on kszivek@hwle.com.au.

Overview

- Statutory tender challenge rights
 - NSW Enforceable Procurement Provisions and amended *Public Works and Procurement Act* (NSW)
 - *Government Procurement (Judicial Review) Act* (Cth)
- Sustainable procurement
- Modern Slavery
- Payment Terms Reporting Scheme
- New forms of contracting - relationship contracting / NEC4
- Covid-19 changes to procurement

Statutory tender challenge rights

Background

- Ratification of Trans-Pacific Partnership and other Free Trade Agreements (**FTA**)
- Australia's response:
 - Cth – *Government Procurement (Judicial Review) Act 2018* – Assented 19 October 2018 and commenced 20 April 2019
 - NSW – Direction issued by the NSW Procurement Board – Effective 29 November 2019
 - TAS – similar legislative response to NSW – *Government Procurement Review (International Free Trade Agreements) Act 2019* – Effective 21 February 2020
 - Other states / territories – policy response
 - QLD – resisted implementation of new FTA obligations

Overview

- New legislation giving suppliers the right to challenge Cth / NSW procurement decisions
- Potential impacts on Cth / NSW government entities tendering
- Practical tips to minimise risk and avoid challenges
- Existing remedies

Legislative Framework

NSW

- *Public Works and Procurement Act 1912*
- *Public Works and Procurement Amendment (Enforcement) Act 2018*
- Enforceable Procurement Provisions Direction (**EPPs**)

Cth

- *Public Governance, Performance and Accountability Act 2013*
- *Public Governance, Performance and Accountability Rule 2014*
- *Commonwealth Procurement Rules (CPRs)*
- *Government Procurement (Judicial Review) Act 2018*

Application

NSW

- Applies to government agencies in Schedule 1
- Subject to exempt procurements in Schedule 2
- Procurement thresholds \$9.247M (construction) or \$657K (goods and services)

Cth

- Applies to “covered procurements” - a procurement that:
 - the rules in Divisions 1 and 2 of the Commonwealth Procurement Rules apply to
 - meets the procurement thresholds \$7.5M (construction) or \$80,000 (goods or services non-corporate Cth entities) or \$400,000 (goods or services prescribed Cth entities)

Application in closer detail

NSW – Schedule 2 Exempt procurements – there are 21 including

- Land, existing buildings and other immovable property
- Health, welfare, educational and government advertising services
- Research and development services
- Procurements from a Commonwealth, State, Territory or local government entity
- Goods and services procured on behalf of exempt agency
- Motor vehicles
- Public employment contracts including contracts for labour hire
- Goods and services provided by a business that exists primarily to provide services by persons with a disability
- Engagement of an expert or neutral person for litigation or disputes (including legal counsel and barristers)
- 9 Grants/ Loans etc.

Application in closer detail

NSW – Sch. 3 Exempt Measures and Preferences

- EPPs do not apply to that part of procurement that is a protected measure in Schedule 3:
 - SME's
 - measures for the health, welfare, economic or social advancement of Indigenous People
 - national security / defence
 - environmental measures necessary to protect human, animal or plant life or health
 - a measure that requires sensitive government information to be stored in Australia
 - protection of IP

Application in closer detail

NSW – Transitional arrangements

- EPPs do not apply to a procurement that **commenced but was not awarded** before the making of the Direction (29/11/2019), if the procurement is awarded within 3 years after the commencement of this Direction
- Existing procurement **panels** are grandfathered
- Procurement from **procurement lists** published on NSW eTendering are grandfathered for twelve months, i.e. until 29 November 2020
- Direction does not apply to existing contracts, including the **exercise of any option to extend** under such a contract

Application in closer detail

Cth – commencement date

- The Act applies to alleged breaches that occur after the Act's commencement date (20 April 2019)
- Procurement processes already on foot are caught if the alleged breach occurs after that date

What can suppliers complain about?



What can suppliers complain about?

NSW – breach of EPPs including:

- Conditions of Participation
 - Must be limited to legal, financial, commercial or technical ability to fulfil the procurement
 - Must not require experience in Australia or with Aus government
- Procurement documentation: must include the evaluation criteria and relative importance of those criteria
- Limited direct procurement: open market, a compliant panel or pre-qualification scheme - except in limited circumstances
- Contract must be awarded to the tenderer that meets the conditions for participation and will provide the best value for money (not limited to price)

What can suppliers complain about?

NSW – breach of EPPs including:

- RFIs
 - Must provide information to tenderer asking it provided:
 - no competitive advantage
 - not contrary to Aus law
 - passes public interest for disclosure test
- Addenda to go to all
- Timing – 10 days and 25 days
- Correction of error by tenderer after submission – opportunity to be given to all
- Advertisement – NSW eTendering – OR Agency website if equivalent
- Must promptly provide notice of award or rejection and give debriefing

What can suppliers complain about?

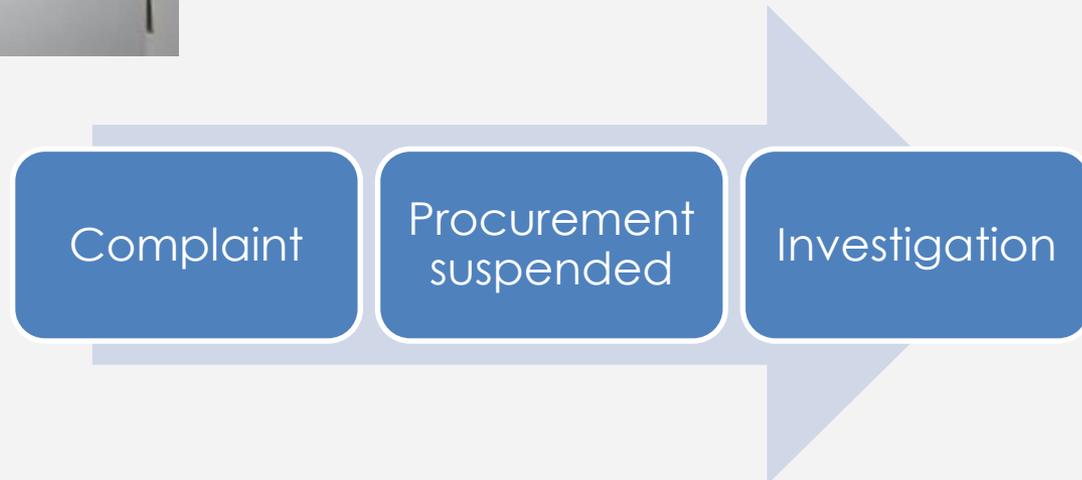
Cth – breach of CPRs including:

- the provision of additional information to a supplier which provides it with an unfair advantage
- acceptance of a late tender where a valid exception does not apply
- an approach to market is published with a response time of less than 25 days, where an exception for a shorter timeframe does not apply
- modification of the evaluation criteria without notice to tenderers or use of separate evaluation criteria for different tenderers

Who can complain?

- **NSW:**
 - Complaints can be made by local and overseas suppliers regarding failure to comply with the EPPs
 - Wide definition - not limited to 'tenderers'
- **Cth:**
 - A 'supplier' (broadly defined) if it believes:
 - a relevant Commonwealth entity engaged, is engaging or is proposing to engage, in any conduct in contravention of the CPRs (so far as those rules relate to a covered procurement)
 - the interests of the supplier are 'affected' by that conduct

Complaints procedure



Complaints procedure

NSW / Cth – similar process

- Investigate and where possible resolve complaints
- Written reports of the investigation must be prepared
- Procurement is suspended unless a ‘public interest certificate’ is in place

Suspension of procurement

If no public interest certificate in place, suspension continues until:

- **NSW** - suspension continues until
 - Withdrawn
 - Complainant advises resolved
 - PIC issued (if not already in place)
 - Proceedings are commenced
- **Cth** - procurement must be suspended until the earlier of:
 - the complaint is resolved or withdrawn
 - PIC issued (if not already in place)
 - a court makes a finding that the conduct was either in contravention or not in contravention of the relevant CPRs

Discontinued Investigations

Cth

- An investigation **may** be discontinued if:
 - the supplier withdraws the complaint / informs authority it is resolved
 - the supplier informs the authority the complaint is resolved
 - a determination is made in a court
- An investigation **must** be discontinued if:
 - proceedings are instituted in a court; and
 - the continuation of the investigation would be likely to result in prejudice to the proper administration of justice

NSW

- An investigation **may** be discontinued if:
 - the supplier withdraws the complaint / informs authority it is resolved
 - proceedings are commenced
 - a determination is made in a court
 - **government agency head considers it is reasonable to do so in the circumstances**
- An investigation **must** be discontinued if:
 - Court finding (whether or not a breach of EPPs); or
 - the continuation of the investigation would be likely to result in prejudice to the proper administration of justice

Court Ordered Remedies

- Injunctions
- Compensation
- Courts with jurisdiction:
 - NSW
 - Supreme Court
 - Cth
 - Federal Circuit Court of Australia (**FCCA**)
 - Federal Court of Australia (**FCA**)

Court ordered remedies

Injunctions

- Two types:
 - Restraining – prohibiting conduct
 - Performing – requiring compliance
- Cannot grant injunction if PIC unless in public interest
 - Factors to consider:
 - Would result in significant delay to procurement
 - Compensation a more appropriate remedy

Court ordered remedies

Injunctions – preconditions both NSW/Cth

- Time limits: must be applied for within **10 days** of breaching conduct / awareness of breaching conduct
 - Or longer determined by Court due to attempts to resolve complaint, or special circumstances
- Contract must not have already been entered into
- The Court must first be satisfied that the applicant has made:
 - a complaint to the relevant authority
 - a reasonable attempt made to resolve the complaint

Public Interest Certificates – both Cth/NSW

- PIC may be issued at any time by the agency/authority if it is not in the public interest for a procurement to be suspended while:
 - a complaint is being investigated
 - an application for an injunction is being considered
- Cth - PIC should only be issued when suspension would result in real adverse consequences (Explanatory Memorandum)
- NSW - Procurement Board Complaint Management Guidelines

Compensation

- Court may order compensation for a contravention of the relevant EPPs / CPRs
- Compensation amount must not exceed the reasonable expenditure of the tenderer in:
 - preparing the tender
 - making the complaint
 - making a reasonable attempt to resolve the complaint
- does not include loss of profit

Practical tips to minimise risk and avoid challenges

- Review current and upcoming procurements to determine if they are caught by the legislation
- Review internal processes and tender documentation to ensure compliance with the EPPs or CPRs
- Review internal complaints review processes for dealing with tenderer complaints
- Review tender processes to ensure they allow for potential time delays which may be caused by a suspension to investigate a complaint or a Court ordered injunction
- Consider where a public interest certificate may be required for current or upcoming procurements
- NSW Procurement guidance materials (process flowcharts and checklists) and templates

Existing Remedies

- Existing remedies are not limited by the legislation and continue to be available to tenderers, including:
 - damages for a breach of ‘process contract’ claim (including for loss of profit or loss of chance)
 - equitable remedies for equitable estoppel (for example an injunction, order for specific performance or damages in equity)
 - compensation for misleading and deceptive conduct under the Australian Consumer Law (where applicable in respect of Government procurement)
 - damages for misrepresentation at common law
 - judicial review of the procurement decision under administrative law

Sustainable Procurement

Sustainable Procurement

- ISO 20400 : 2017 – Sustainable Procurement
- Triple Bottom Line – Social / Environmental / Economic
- Distinguish – General Corporate vs Project Specific

Sustainable Procurement (Cont)

- Corporate Specific
 - Sustainability Charter
 - Sustainability Index
 - Third Party Certification / Accreditation

Sustainable Procurement (Cont)

- Project Specific
 - Any Environmental Externalities?
 - Any Social Differentiators?
 - How Do We Measure?
 - How Do We Value?

Sustainable Procurement

- NSW Procurement Framework
 - Section 1: Objectives 05 Economic development, social outcomes and sustainability
 - Sustainable procurement means spending public money efficiently, economically and ethically to deliver value for money on a whole of life basis
 - Sustainable procurement extends the assessment of value for money beyond the sourcing process, considering benefits and risks to the organisation, the community, the economy and impacts on the environment

Sustainable Procurement

Relating to	Status	Category	Value	Obligation	Reference
SME and regional businesses			<ul style="list-style-type: none"> < \$50,000 < \$250,000 < \$1 million > \$3 million 	You must comply with the SME and Regional Procurement Policy to support the participation of <i>SMEs</i> and <i>regional businesses</i> in goods and services procurement.	SME and Regional Procurement Policy
Employment of Aboriginal people		 	<ul style="list-style-type: none"> < \$250,000 > \$7.5 million 	You must comply with the Aboriginal Procurement Policy to support 3,000 FTE employment opportunities for Aboriginal people by the end of 2021 through government procurement activities.	Aboriginal Procurement Policy
Employment of people with a disability		 	Any	You may purchase goods and services of any value from an approved <i>disability employment organisation</i> via a single written quote, even if there is a whole of government arrangement in place.	Public Works and Procurement Regulation 2019 (PWP Regulation)
Social enterprises		 	Any	You are encouraged to procure from <i>social enterprises</i> to support economic and social change for disadvantaged people. Social enterprises may be small businesses, SMEs, Aboriginal businesses or Australian Disability Enterprises, and if so qualify for the purchasing preferences and initiatives under the SME and Regional Procurement Policy , Aboriginal Procurement Policy or PWP Regulation .	SME and Regional Procurement Policy Public Works and Procurement Regulation 2019 (PWP Regulation)
		 	Any	<i>Social enterprises</i> are businesses that trade to intentionally tackle social problems, improve communities, provide people access to employment and training, or help the environment. Procuring through social enterprises represents significant opportunity for social enterprise growth, and social change for disadvantaged Australians.	Aboriginal Procurement Policy

Sustainable Procurement

Section 1: Objectives

05  Economic, social and sustainable procurement outcomes

Relating to	Status	Category	Value	Obligation	Reference
Skills, training and diversity in construction			< \$10 million	You, and any contractors you engage, are expected to commit to supporting skills development on construction projects.	PBD 2020-03 Skills, training and diversity in construction
			\$10 million - \$100 million	<p>You must require:</p> <ul style="list-style-type: none"> • 20% of the trades workforce on the project to be apprentices, with the target included in tender documentation, contracts, and quarterly reporting requirements • suppliers to comply with the Aboriginal participation requirements of the Aboriginal Procurement Policy • suppliers to provide quarterly reports to Training Services NSW in the Department of Education against agreed targets. <p>You may also adopt the additional Infrastructure Skills Legacy Program (ISLP) targets that apply to contracts over \$100 million (see below).</p>	Aboriginal Procurement Policy
			> \$100 million	<p>For major construction projects over \$100 million, you must also require:</p> <ul style="list-style-type: none"> • 20% of the total labour force to be learning workers • double the number of women in trade-related work (up from the NSW average of 1% to 2%) • 8% of total project workforce to be aged less than 25 years • report the employment and training outcomes for people from the local region (as defined in the contract). 	

Sustainable Procurement

Relating to	Status	Category	Value	Obligation	Reference	
Resource efficiency and waste reduction		 	Any	You must comply with the Government Resource Efficiency Policy (GREP) by ensuring goods, services and construction projects meet minimum energy, water use and air emissions standards. An exception applies for agencies with fewer than 100 employees, when compliance is voluntary.	NSW Government Resource Efficiency Policy (GREP)	
		 	Any	You should purchase construction materials with recycled content; copy, stationery and print publication paper with post-consumer recycled content, and non-recycled paper from sustainable sources. Refer to the GREP for information on recognised standards and certification programs for recycled content and sustainable sources.		
				Any	You must use E10 and biodiesel blends where possible, unless there is a clear operational requirement that precludes the use of biofuels.	M2012-08 Use of Biofuels
		 		Any	You should consider the product lifecycle when conducting needs analysis and developing product specifications, including taking account of <i>circular economy</i> principles, so that use of recycled materials and disposal or repurposing of goods or assets is planned into the procurement process.	NSW Circular Economy Policy Statement
Construction and demolition waste management			Any	To the extent they relate to construction procurement: <ul style="list-style-type: none"> You must comply with the Protection of the Environment Operations Act 1997. If you are disposing of construction waste, the construction and demolition waste facility must comply with the Standards for Managing Construction Waste in NSW. 	Protection of the Environment Operations Act 1997 Standards for Managing Construction Waste in NSW	
			Any	You should refer to the Construction and Demolition Waste Management Toolkit prepared by the Environmental Protection Authority (EPA) for guidance on engaging contractors and working on contracts that involve construction and demolition.	Construction and Demolition Waste: a Management Toolkit	
			Any	Unlawful waste disposal or fraudulent behaviour by contractors and subcontractor creates the potential for significant reputation damage, financial penalty and criminal conviction.		

Whole of Life Costs Considered

ACQUISITION COSTS	OPERATING COSTS	MAINTENANCE COSTS	END-OF-LIFE COSTS
Purchase Cost	Labour	Specialist Labour	Safe Disposal
Delivery Charge	Materials	Specialist Tooling	Resale
Insurance and Taxes	Consumables	Spare and Replacement Parts	Ongoing Liabilities
Installation and Commissioning	Energy Supply and Consumption	Reduced Output with Age	Decommissioning
Training and Support	Contract and Supplier Management	Maintenance and recommended downtime	Removal for sale or scrap
Internal Costs Associated with Changing Suppliers	Transaction Costs	Servicing and Inspection Regimes	Reinstatement of Land or Buildings for Alternative Use
37	Cost of Change	Cost Associated with downtime	

Modern Slavery

Modern Slavery

As of 2018:

40.3 million

people in modern slavery



Female

71%



Male

29%



\$354 billion

at-risk products imported by G20 countries

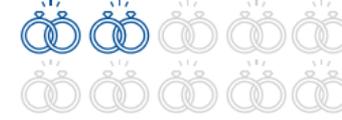


24.9 million

24.9 million in forced labour

15.4 million

in forced marriage

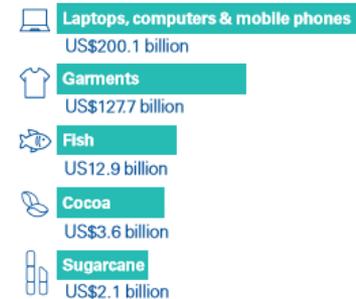


On any given day in 2018, there were



people living in conditions of modern slavery in Australia

Top 5 At-risk products of modern slavery imported into the G20:



NSW

Modern Slavery Act 2018 (NSW)

- ❑ First jurisdiction in Australia
- ❑ Came into force on 21 June 2018
- ❑ Was expected to commence on 1 July 2019
- ❑ **Delayed from commencement** and referred to Legislative Council Standing Committee on Social Issues for review
- ❑ Applies to 'commercial organisations' with \$50M+ annual turnover
- ❑ Provides for penalties for contravention

Commonwealth

Modern Slavery Act 2018 (Cth)

*"An Act to establish a Modern Slavery Reporting Requirement and require certain large businesses and other entities in Australia to make Modern Slavery Statements on their actions to address **modern slavery risks in their operations and supply chains**"*

- ❑ Commenced on 1 January 2019
- ❑ 'Reporting entities' must submit a Modern Slavery Statement 6 months after EOFY
- ❑ Currently no penalties for non-compliance (this may change)

Update on NSW Legislation

- 25 March 2020: Legislative Council Standing Committee on Social Issues handed down its long-awaited report on the Act
 - 17 recommendations made including:
 - a harmonised reporting threshold
 - reporting obligations for local councils be introduced equivalent to those imposed on NSW Government agencies
- 24 September 2020: NSW Government responded to the Report by letter to Parliament
- 8 June 2021: Modern Slavery Amendment Bill 2021 introduced in the Legislative Council
 - Yet to be progressed
 - Cth / NSW 'harmonization discussions' still underway

NSW Act: NSW Gov Obligations

- Requirement to report annually
- Separate regime – new provisions under the:
 - *Public Works and Procurement Act 1912 (NSW)*
 - requires government agencies to take reasonable steps to ensure goods and services are not the product of modern slavery
 - NSW Procurement Board (in consultation with Commissioner) may issue directions to government agencies re reasonable steps to be taken

NSW Act: NSW Gov Obligations

- Separate regime – new provisions under the
 - *Public Finance and Audit Act 1983 (NSW)*
 - allow the Auditor-General to conduct audits to assess whether goods and services procured by government agencies are the product of modern slavery
 - Annual Reports (Departments) Regulation 2015 and Annual Reports (Statutory Bodies) Regulation 2015
 - requiring annual reports to include:
 - a statement of action addressing any issue raised by the Commissioner in the previous year
 - a statement of steps taken to ensure goods and services procured were not the product of modern slavery

Commonwealth Act – Cth Gov Obligations

- The following are **reporting entities**: The Commonwealth, Commonwealth entities or companies, with a revenue over \$100 million per financial year, or an entity which has volunteered to comply with the Act (s 5)
- No penalties – compared to significant penalties under NSW legislation
- Administered by the Cth Minister of Department of Home Affairs

Payment Times Reporting Scheme

Payment Times Reporting Scheme

- Under new Cth legislation: *Payment Times Reporting Act 2020*
 - Commenced 1 January 2021
- Aim: to improve payment times for Australian small businesses
 - essential for cash flow/solvency
- Requires: government enterprises to report their small business payment terms and times
 - Twice yearly (first reports due 30 September 2021 for those with a 30 June FY – for 1 Jan 2021 – 30 June 2021 period)

Payment Times Reporting Scheme (cont)

- Reports to include:
 - Details of standard payment periods
 - Changes to payment periods in the 6 month reporting period
 - Proportion of invoices paid across various times:
 - Within 20 days, between 21-30 days, 31-60 days, 61-90, 91-120, 120+ days
 - Proportion of all procurement from small business suppliers (determined by total value)
 - Other details as prescribed by the Payment Times Reporting Rules
- Penalties: (failing to report – up to 60 penalty units) and (providing a false or misleading report – up to 350 penalty units)

NSW Gov - Small Business Shorter Payment Terms Policy

- New Policy that requires large businesses with NSW Government contracts valued at \$7.5 million or more to pay their small business subcontractors within 20 business days
- Aims to promote the faster payment of small businesses subcontracted on NSW Government contracts
- NSW Government agencies must apply the policy to new procurement activities that start from 1 July 2021
- The policy does not apply to construction-related procurements
- <https://buy.nsw.gov.au/news/2021/new-sme-and-regional-procurement-policy-and-small-business-shorter-payment-terms-policy>

New forms of contracting

Standard Form Contracts

- The familiar standard form contracts are easy to use, predictable and often prescribed; BUT
- Not without their problems:
 - Too many amendments
 - Not up to date (legislative requirements)
 - Adversarial
- Collaborative/relationship contracting is gaining traction...

Traditional v Collaborating Contracting

Traditional Contracts

- Price Driven or Market Oriented
- Arms-length, Autonomous Relationships
- Often Inflexible and have Standardised Processes and Contracts
- Adversarial Approach to Contract Administration

Collaborative Contracts

- 'Good Faith' Commitment
- Early Warning Mechanisms
- Early Involvement
- Governance Arrangements for Collective Problem Solving and Decision Making
- Incentive "Best for Project" Payment Arrangements

Procurement during and after COVID

Electronic Execution – Rules reinstated

- Temporary measures were reinstated on 10 August 2021 after having expired on 21 March 2021 – the Corporations (Coronavirus Economic Response) Determination (No. 3) 2020 (Cth)
- This Determination:
 - permits directors and secretaries of companies to sign documents under section 127 of the Corporations Act on **separate paper or electronic copies or counterparts**;
 - allows company officers to **witness** the fixing of a company's common seal **electronically**; and
 - enables companies to convene meetings online instead of face to face.

Electronic Execution (cont)

- Deeds
 - Where the proper law of a deed is NSW, VIC or QLD, then the effect of the Determination allows the deed to be executed and formed electronically
- Temporary measures – to end by 1 April 2022 (at this stage)

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