



PUBLIC WORKS AND PROCUREMENT AMENDMENT (ENFORCEMENT) ACT 1918

REFORM OR CLAYTON'S REFORM OF GOVERNMENT PROCUREMENT?

Earlier this year the Commonwealth Parliament brought into law the **Government Procurement (Judicial Review) Act 2018** (the Commonwealth Law) in respect of Commonwealth procurements, by way of implementation of obligations undertaken by the Commonwealth in March 2018 when it signed the Trans-Pacific Partnership (TPP_11) which required both the Commonwealth and state governments to pass facilitating legislation.

The New South Wales Parliament recently passed the **Public Works and Procurement Amendment (Enforcement) Act 2018** (PW&P Enforcement Act) by way of adoption of the principles enshrined in TPP 11 to amend the **Public Works and Procurement Act**. (PW&P Act)..

The PW&P Enforcement Act, in short, provides for the enforcement of certain directions and policies of the **NSW Procurement Board** to apply to particular procurement situations. Not unlike the Commonwealth Law which vested relevant jurisdiction in the Federal Court, the **PW&P Enforcement Act** confers jurisdiction expressly on the NSW Supreme Court.

Reservations by the Opposition?

It is interesting note that in the 2nd reading speech Mr Clayton Barr (Member for Cessnock) commented;-

“the other important thing that this legislation does in a practical and some might say benign way – but I will leave that for others to judge – is to ensure that policies and directions from the NSW Procurement Board will be enforceable for the different agencies. A fact of life that has been repeated over the years is that various New South Wales agencies often disregard the policies and directions of the NSW Procurement Board, even where there is a Premier’s memorandum”..

Given the drafting quirks outlined below, the words of Mr Barr may well be prophetic.

The Changes

The **PW&P Enforcement Act** amends the PW&P Act to do so. It builds upon the existing provisions of PW&P Act¹ to reinforce the need for NSW Government agencies to comply with NSW Procurement Board Directions and Policies.

It does so by introducing a new definition (section 162) “*enforceable procurement provision*” being:-

“a provision of a Board direction or policy (or a provision of a document referred to in a Board direction or policy) that is expressed to be an enforceable procurement provision by the direction or policy..”

At present it is not clear what will comprise an “*enforceable procurement provision*” but the legislation expressly envisages it including a policy “*relating to an international procurement agreement*” such as TPP – 11 (section 175 (2B)).

PW&P Enforcement Act introduces an internal review procedure with an agency in addition to vesting jurisdiction in the NSW Supreme Court.

Relevant complaints are to be investigated (section 176B) and have effect of suspending the procurement action (section 176C (1)), subject to a number of exceptions (section 176C (2)). These include if (section 176C(2):-

*“(a) a public interest certificate has already been issued in respect of the procurement”, or
(b) a contract for the procurement has already been entered into.”*

The investigation should continue unless (section 176C(3)) withdrawal of complaint, the complainant informing the Government Agency head that the complainant considers the complaint resolved, proceedings are commenced in the Supreme Court of the relevant provisions or (section 176B(2)(d)–

“the government agency had considered as it is reasonable to do so in the circumstances”.

There is nothing in the legislation to inform us meaningfully on how wide or narrow that discretion is intended to be.

The agency head must discontinue (section 176C (3) in the event of Supreme Court making certain findings to compliance or non-compliance with an enforceable procurement provision.

Operational Detail Still Needed

¹ Sections 175 and 176

Unfortunately at the moment, much to do with the operation of the **PW&P Enforcement Act**, of course, will depend upon detail of regulations and the actual promulgation of relevant policies and directions by the NSW Procurement Board under revised section 175. These can include international treaty obligations such as TPP – 11

Concerns

Pending clarification of those points in coming weeks and months, the following come to mind as significant potential problems with the operation of the **PW&P Enforcement Act**: –

1. Whether the NSW Procurement Board, in making directions and policies, limits it to international operations. If so, this may well narrow the operation of the provisions, such that local operators will not be able to make much use of the legislation, except in situations where the international link is fulfilled;
2. There is a potential for the issue of too frequent a use of a public interest certificate and/or the prompt finalisation and grant of contract to frustrate operation of **PW&P Enforcement Act**;
3. the interrelated nature of the Commonwealth Law and the NSW based **PW&P Enforcement Act**. Given the broad application of the Commonwealth Law there may arise the issue whether the overlap between state and federal legislation might raise issues of constitutional primacy;
4. the significant cost of litigation may well put the benefits of the legislation beyond reach of many small businesses.

Conclusion

I have significant reservations about the effectiveness of State legislation.

Subject to the implementing detail being seen and being found to be adequate, I am concerned whether the reforms are not best described as “Clayton’s Reforms”.

The text of the paper is only a summary and discussion of particular facts and principles. It is not to be taken as legal or commercial advice as to any particular factual circumstances.

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