Procurement?
Keeping Procurement under Control ?

Gregory Ross
Partner

EAKIN McCAFFERY COX
LAWYERS

Level 25, 1 Market Street
SYDNEY NSW 2000

DX 1069 SYDNEY

T 02 9265 3000
F 02 9261 5918
E info@eakin.com.au
W www.eakin.com.au

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Plus ça change, plus c'est la même chose.

When I was invited to write this paper, I remembered an incident to do with NSW Government procurement law which occurred soon after I was appointed Assistant Crown Solicitor for NSW in 1990.

I received a phone call from an officer of the State Contracts Control Board (SCCB). The caller started reading through what she said was a Crown Solicitor's office opinion.

As she read, I thought - this all sounds a bit familiar, but I could not re call writing it nor delegating it to be done by someone else at the Crown Solicitor's office.

Once the client officer had finished reading much of the opinion to me, I apologised for not recognising the opinion and commented consistently with the immediately preceding sentence.

She laughed.

"Oh no" she said.

She had been going through some records of the SCCB and found an opinion written by my predecessor in office in about 1932 which appealed to her sense of humour because the 1932 one raised a couple of issues to do with NSW Government procurement, which I had, since my appointment, still been raising as an unresolved issue in the 1990s.

Procurement in NSW

- ***Implications of the new NSW Government Procurement arrangements***
- ***Some Problems in Practice***
- ***Terms of the contract - Appropriateness and Tailoring of templates***

Risk Management: What can the lawyers do ?

In context of NSW Government contracting, particularly the pre-contract process, the issues are, in my understanding of the law given my involvement in Government procurement 20 years and more, to ensure:-

- understandability and transparency of process;
- resilience of process;
- ensuring fairness to would-be suppliers as well as government; and

- purchase at a price fair to vendor and purchaser.

This paper is not the opportunity to deal in any significant detail with issues of the law and process of the law of the land to do with contract law, including "process contract" but I do outline some issues relevant to Government procurement contracting, particularly goods and services (as opposed to major infrastructure deals, which have their own issues,) flowing from the most recent changes to NSW Government Procurement processes.

Time constraints prevent any detailed examination of issues relating to infrastructure projects and or Information Technology Systems and services being considered today. They could easily each involve seminars of a whole day or more, but the underlying contract, process and probity issues remain much the same as those for the general contractual procurement of goods and services.

Time today only allows a consideration of the general principles.

In Australia, Government Contracting has and always has been a specialised field. It has its own issues.

Now, more than ever, those issues include the scrutiny to which public sector staff-involved in procurement are subject.

Government procurement and Government contracting ranges, of course, from buying everything from stationery for Government offices to procuring armed weapons, from public transport to water supplies

Procurement reform has been in progress for some years and many steps have been taken in the last couple of years.

One of the most significant developments having implications for Public Sector staff is the devolution of responsibility for procurement which puts agency staff involved in that procurement more in the line of scrutiny for probity type reasons.

Accordingly, we are confronting a new regimen in which staff in agencies, in the absence of the SCCB, are no longer protected from allegations of a probity type in context of basic Government procurement.

This of course requires the Government to ensure that its staff are properly trained in both what they are doing and why they are doing it.

From my observations, that training is often, too often, inadequate.

Since I initially became involved in Government contracting in the late 1980s, having advised NSW ICAC and been a member of its internal review committee, I can tell you that many of the allegations made in respect of misfeasance or malfeasance in Government procurement and contracting flow from staff not having been properly trained.

They might be trained in process, but, all too often, not in the reasons.

In short, my attitude to Government contracting is that the people involved in negotiating contracts, especially in the Public Sector, are likely to move on.

Therefore, there is a real need to have a clear paper trail before and after grant of contract as well as being clear up front. The contract, however formal or informal, has to address clearly WHAT, WHO, WHEN, WHERE AND WHY[1] of procurement and contracting.

In my observations, operations under the new regime do not seem, to me, to place adequate emphasis on this.

Contracts and drafting, particularly in a Government procurement context, are a dynamic area of legal and commercial issues. It is also, in my experience, one in which contract templates and processes must be seen as an exercise in continuous improvement.

Indeed, in my view, the templates promulgated by the NSW Procurement Board might best be described as "works in progress", for a number of reasons, some of which I mention later in this presentation. Not the least of those reasons is that in mid May 2013 a new version of the standard standing offer contract was published by the NSW government,

[1] Indeed, I not infrequently deliver a seminar paper so entitled.

which is totally consistent with the government policy which expressly states that documents will be reviewed from time to time.

The important thing, from a lawyer's perspective, is to ensure that the pre-contract processes and the post-contract award management as well as the words of the contract clearly specify;

- *Who Is To Do What*
- *For Who, When*
- *How*
- *For What Price & How Is It To Be Paid For*
- *Who Owns What*

However, for the purposes of today's seminar, my concern is more with the refinement of processes flowing from the NSW State Government's most recent changes of policy in respect of procurement.

In any actual contract, the main and initial issue is and will remain to identify clearly who is to do what, for whom, when, why, to what standards and for how much.

As a contract drafting lawyer, I appreciate that I may be something of a pedant but I'm not sure the documentation used under the reformed procurement arrangements in New South Wales actually creates the degree of certainty most lawyers would wish in preparing a contract.

Whilst lawyers might like all contracts to be "bespoke", it is not and cannot be the reality in most government procurement arrangements.

The Past

In the dim, dark days of last century, when I first became significantly involved in Government procurement, the system involved:

1. the SCCB organising contracts for the "*public service*", from which agencies could buy from at will;
2. agency officers could do direct purchasing for goods and services under a relatively small threshold, some without quotes (for small value), some a number of quotes (some oral, some in writing) again dependent upon the value of the contract ;
3. where quotes were required for goods to another threshold the use of EOI or RFT for procurements of significant values unless there was an existing "*period contract*" relevant to particular goods or services which would be used by agencies[2].

The threshold concept remains under the document reforms, with obvious changes to the monetary limits in question.

The terms and conditions used by SCCB for general goods and services, when I first started acting for it, involved about four pages of close print which came to about 27 clauses.

It was good for me because, after advising on them for a short while, I could practically recite them, which was great for giving advice over the telephone in response to queries which came in from time to time (by which I mean time and time and time again).

I well remember guidelines relating to value of goods or services thresholds which determined whether a full tender, a number of quotes or straight purchase could be adopted. The new procurement policies update those thresholds.

The system applicable in the early 1990s involved a handful of policies to be borne in mind. They included New South Wales regional policy development, a reference for Australian textiles and the like.

[2] This paper does not deal with the other then option of using internal Government one-stop shop "Government Stores" which changed its name to "Q Stores".

Back then, when there was a dispute with a supplier about some aspect of the goods or services provided, one could normally negotiate a settlement arrangement, if for no other reason that most suppliers were disinclined to cut off the hand that fed them by forcing Government to terminate their appointment to whatever panel contract was in issue.

In the 21st century, contractors are more litigiously minded as well as being more minded to go to the media by way of complaint. The NSW Procurement reforms are, in part, to deal with that reality.

Intending contractors are also probably more inclined to make complaint to oversight authorities, such as the NSW Ombudsman and the Independent Commission Against Corruption of NSW.

Challenges to various tender processes, led to the Courts finding the *"process contract*[3], and obligations concerning confidential information[4].

More and more government policies became relevant to the evaluation of tenders so complicating the process and warranting the recent reforms.

The Now

As I understand it from various NSW Government Annual reports, in the year 2010/2011 the NSW Government spent an estimated $12.7 billion on goods and services.

SCCB contracts accounted for about $3.8 billion of that expenditure in that year.

Under the new procurement policies we have the NSW Procurement Board, replacing SCCB, but with more an overview policy role than actual contract creation, though it does have a role in propounding templates for use by public sector agencies.

Where the NSW government has "*whole of government*" contracts in place, agencies should make use of them. The list of the contracts is available on the NSW Procure Point website.

This presentation will not address the issues relating to monetary limits for thresholds for various procurement methodologies, as they are freely available on the NSW Procurement Board website and will, of course, change over time.

The current link to the detail is:- http://www.procurepoint.nsw.gov.au/policy/goods-and-services/goods-and-services-policies/using-nsw-government-contracts.

As mentioned above, the most significant changes are that substantive procurement procedure is now delegated back to the agencies themselves and the practicalities of procurement in regional areas has been recognised for agencies in those areas.

With the aggregation of various agencies into mega "clusters", it is envisaged that there will be some "piggybacking" arrangements under which other agencies in the broader NSW Government *diaspora* will be able to access contracts in particular goods and services categories which had their origins in creation for and by some major agency which has a much greater needs of particular goods or services in issue.

The concept under the new arrangements is that procuring agencies will make use of the most up-to-date template for the various procurement needs. That will involve developing this skill of being able to move between and select from the various templates well aware of their own needs and the requirements and content of each of the various templates offered. They include: –

1. Easy Registration template situations and awareness of the operation of the Approved List and the Plain English Contract and Dictionary for the Approved List;
2. the non-IT Standing Offer Agreement Template;
3. the customer contract order arrangements – particularly services;

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[3] *Hughes Aircraft Systems International Inc v Airservices Australia* (1997) 76 FCR 151 and *Cubic Transportation Systems Inc v New South Wales* [2002] NSW SC 656 (in the latter of which the Court read down the attempted contractual exclusion of the process contract concept in contrast to *State Transit Authority (NSW) v Australian Jockey Club in which the Court held that the circumstances made it plain that the idea of a process contract was excluded).*

[4] *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* [2012] ACTSC 126

4. tendering conditions in Statement of Requirements;
5. Agency Specific Terms – non-IT;
6. Request for Quote whether under State contract or not.

Significant issues under the current arrangements include –

- contract amount thresholds which allow procurement under the thresholds by reference to quote or the like a relatively silent as to the actual terms and conditions of the contract;
- listing and interrelation of the many new policies relevant (though I might query how well RFT terms and contractual terms can be expected to deal with non-compliance with policies allowing agencies to take some enforcement action);
- issues to do with whether larger agencies, whose contracts are to be available for "*piggybacking*" by other agencies, will be in a position properly to know and appreciate some of the needs of the lesser agencies so as to have the terms and conditions in the main contract adequate for use by the smaller agencies. At the same time, there is the issue whether suppliers, who may be able to supply the larger agencies in an economically viable way, will not be disadvantaged by potentially being obliged to supply smaller agencies where the relevant quantum of purchase and/or a small number of delivery places may not exist; and
- that although the documents are updated from time to time, details of changes from time to time are not flagged as one might have liked.

Implications of the New NSW Government Procurement Arrangements

In late March 2013, when I started writing the main substance of this paper, I asked one of our firm' s law clerks to store all the linked NSW Procurement (and other linked agencies) website pages in one folder on my computer chose to check relevant NSW Government websites relating to procurement, particularly for goods and services.

That involved downloading 90 documents and / or webpages not including relevant Acts of Parliament, Regulations and a number of very relevant ICAC publications. That involved over 110 MB of data (comprising 76 folders containing 584 files) which I understand corresponds to I do not know exactly how many pages of text, but it was over 300 pages.

And that, does not include all relevant contract templates.

My clerk took it upon herself to prepare what might be described as a site map. It simply listed the main webpages and the follower pages. It did not purport to deal with the cross-linking which becomes obvious when one starts working through the NSW Procurement webpages.

The site map, when printed out, manages to reach 16 pages.

One can be excused for wondering how all of that will improve efficiency, transparency, understanding and the like, especially for very small traders who supply the Government.

It is perhaps not obvious that the new Procurement system:-

1. involve significant amounts of reading, review of templates and updating of agency templates consistently with the Procure Point updates;
2. involves navigating a number of interrelated websites;
3. how much it costs both the agencies and private sector entities wishing to supply goods and services to government;
4. requires a degree of vigilance in maintaining awareness of the current templates, policies, regulations, guidelines and the like, at I don't know what cost.

A couple of the standard form Procurement Contract templates I have had occasion to look at and/or advise upon, this year, exceeded 70 pages.

Whilst lawyers may well like each and every contract, in the perfect world in which they would wish to live, to be bespoke, separately and discreetly negotiated and drafted, that cannot be the policy or procedure in government.

It is too costly, too impractical and too time-consuming.

Careful use of appropriate flexible templates is, of course and with appropriate risk management exercises being undertaken, the only viable option.

Regrettably in my experience of the templates which have crossed my desk and those I have found online and read, I find the following problems have regularly arisen: –

1. definitions are adopted, but not used;
2. the substantive part of the contract using words and expressions which require definition without defining them;
3. the flawed or inadequate linkage between the Definitions and the Substantive part of the contract with various schedules allowing some issues to fall through cracks;
4. in some, the linkage between the substantive contract provisions and the goods or services being specified in a non-existent supply schedule;
5. the liability and particularly liability cap provisions are not being properly understood;
6. things like Performance Criteria being alluded to but not properly outlined, let alone measured;
7. in one or two, the "*performance criteria*" and performance milestones involved more filing reports as to performance, than actual performance or compliance with milestones and measurement.

The consequence is likely to be one of lack of contractual linkage.

In many, perhaps most, contracts, it may not matter.

However, in my experience Government contracts and Government Contract being what they are, it is only a matter of time before some contract is put in place which has significant linkage problems.

The last thing Government needs is not to be able to enforce performance standards under contracts or be unable to take enforcement action, such as termination and/or recovery of damages.

Earlier in this paper I touched upon the issue of agency staff now being much more in the firing line for criticisms relating to tender processes and/or other procurement procedures and projects.

From my own experience with the Media and Government Procurement Contracts over the years, I can almost see journalists rubbing their hands in anticipation of writing articles critical of the outcome of some procurement contract process, lambasting some public sector officer the journalist sees as "*responsible*" and who may or may not have made some minor mistake inherent in using standard templates.

The old adage of not letting the truth get in the way of a good story seems almost to have been created especially to deal with journalistic stories about government procurement exercises.

I myself have been described by the media as an "*interventionist bureaucrat*" and "*die hard defender of the old legal order*" in respect of advice I gave in respect of a flawed tender process which needed a dose of common sense legal advice.

A perhaps unintended consequence of the devolution of the procurement function to agencies, is that much of the expertise previously existing at SCCB/NSW Procurement has been dissipated.

As I mentioned earlier, in the 21st century, contractors are more litigiously minded as well is being more minded to go to the media by way of complaint. The NSW Procurement reforms are, in part, to deal with that reality.

Overall in one sense, other than clarifying monetary threshold issues a little and having some of the actual procurements now carried out by agencies, not a central contract authority, I am not sure that the new procurement arrangements will actually make very much difference, though the insertion of the provision requiring agencies to pay interest on accounts not paid within 30 days may well cause some aggravation.

Some Problems in Practice

Peekaboos -- "PCBUs"

Recent legislation, particularly that to do with *Workplace Health and Safety Act* 2011 NSW [see particularly sections 20 to 26], now places obligations much more on the person or persons in a position to "*control*" a workplace or particular aspects of it.

In the context of procurement contracts involving contractors coming on to a government site, contractors going onto a third party site and/or government staff going onto a contractor site, real issues of control and responsibility can and do arise.

The historical option of having a broad brush indemnity, such as that contained in some template contracts, is, in my view, no longer adequate.

Indeed, given the template's[5] provisions allowing the relevant government agency to inspect premises of the supplier [and/or the reverse], I can imagine that in some circumstances inspection of those premises before grant of contract and from time to time, during the term of the contract, will need to be carried out.

The nature of obligations imposed on the person in a position to "*control*" a workplace under current legislation involve quasi-criminal liability.

There must be some real doubt as to whether the contractual indemnity will be adequately enforceable in respect of such liability let alone whether it is even worth considering as an option to deal with the issue by purporting to "delegate responsibility" to a contractor.

Probity in the Process

The delegation back to agencies of procurement task of course brings with it the obligation to maintain openness and transparency of process.

Not infrequently and particularly for large procurements government has long adopted the prudent practice of making use of probity auditors and/or probity advisors.

A little to my surprise, I have noticed an increasing propensity for both State and Federal agencies to make use of internal resources for probity advice/audit.

The very nature of probity advice/audit implies something of an external review of the particular processor subject of the advice/audit.

Whilst I can appreciate the cost savings of using internal resources for probity advice/audit, it does raise the real risk that some probity advice/audit might not be considered as sufficiently objective to satisfy the requirements of the market place.

Whether that role can or should be carried out by a department or agency legal team, to bolster the objectivity aspect, will, of course, depend on the availability of staff to do so.

I would have thought that another reason in favour of the use of lawyers for probity advice/audit is that, at least to some extent, much of their advice may well be privileged from disclosure. However, that will really depend on the detail of the operations of any internal legal team and the extent to which it can properly assert a degree of objectivity sufficient to attract legal professional privilege.

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[5] For the purposes of this paper the reader should note that I worked from NSW Procurement goods and services standing offer templates obtained from NSW Procurement 's website in May 2013 and which is described as being dated January 2013 but which was updated by way of refinement on that site in mid May 2013.

Keeping up to Date

Needless to say, agencies which have not previously been much involved in the procurement process will have to think carefully about their systems for tracking contracts. I have often, over the years, have had to advise agencies which, for one reason or another, had forgotten to replace contracts before they expired.

Keeping Procurement Under Control ?

It seems trite to say that the ability of anyone to keep procurement under control very much depends on the size of the organisation in question and, more importantly, the resources being put into doing so.

Indeed, the very fact that smaller agencies are allowed to "*piggyback*" on the contracts of larger agencies somewhat complicates the issue.

I well appreciate that long-term unavailability of resources has led to a situation in which the current government moved to implement its policy of reform of the Procurement system.

Almost universally within NSW State Government, the internal legal teams of departments and agencies are under significant stress resource-wise and may often be unable adequately and properly to support their internal procurement teams as well as the NSW Procurement Reforms seem to envisage.

Legal teams will have to take great care clearly to identify their role so far as concerns procurement exercises undertaken by their employer department/agency. Responsibility to agencies (especially those which are comprised within a different legal entity) which "*piggyback*" on a main contract is problematic, at best.

One of the NSW Procurement Board templates talks in terms of the Government Principal being able to "novate" the contract to other government departments and agencies. One can only hope that the use of the word "novate" was not intended to convey the meaning understood by lawyers which is clearly inappropriate to arrangements between government departments which are all themselves the one legal entity – the State of New South Wales.

Legal teams will have to clearly identify their role in the terms of engagement relating to the role so far as concerns procurement exercises undertaken by their employer department/agency.

That will include, I suggest:-

1. clear specification of minimum notification and turnaround times. The last thing needed by an overstretched internal legal team is a request from the Procurement section of the department/agency giving 24 hours or less time to consider and advise on what will often involve very large contract documents with a considerable amount of support –explanation papers;
2. finding time to settle agency templates well before they are needed;
3. recommending apt process to deal with the Workplace safety issues mentioned above;
4. clear specification of the need to give consideration to the liability cap provisions in the standard documents;
5. acceptance, almost as due diligence exercise, but in light of new workplace safety legislation, that there is a need to consider all aspects of the location of the performance of the services as relevant to who is in control for the purposes of that legislation and "*PCBU*" issues rather than, as may historically have been the norm, simply to rely on broadbrush indemnities which do not now adequately deal with the situation;
6. consideration whether proper "milestones" and/or "performance criteria" have been identified and adequately provided for in the contract documents;
7. finding time to settle agency arrangements to apply where the particular agency is to be the lead agency in respect of which other agencies can "piggyback", consistently with the new Procurement Policy, when the "lead agency" may not be particularly familiar with the requirements of "piggybacking" smaller agencies; and
8. development of agency specific risk management profiles and how they link to the relevant provisions of the approved templates.

Terms of the Contract - Appropriateness and Tailoring of Templates

With most of today's audience being lawyers, they will not be surprised to know that my view is that contracts are not simply about "*widgets*" and that there is no such thing as a "*one size fits all*" standard form contract appropriate for all circumstances.

Careful preparation, storage, use and updating of precedents for appropriate situations is paramount. The changes to the procurement regime in New South Wales do not change that.

In fact and in part, they rely upon documentation management of that type and apt risk management.

Many times over the years, I have been engaged by agencies with a view to "*tailoring*" a "*widget contract*" to a fairly specific (and often quite sophisticated) procurement need well beyond what was in contemplation when the "*widget contract*" template was put together.

In my observation, this seems to relate more to "services" procurements than to "goods", "IT" type goods can raise the issues similar to those applying in respect of "services".

The goods and services template propounded by the NSW Procurement Board does have some flexibility to deal with "*Service Level*" issues and some extra contract provisions provided they can come within the definition of "*Additional Terms and Conditions*" in the template for Goods.

The "*Customer Contract Order Template*" contained in the current goods and services template with which I have worked suggests that the scope for "*Additional Terms and Conditions*" is fairly narrow as is the definition of "Service Levels".

One version of the template uses wording suggesting that the scope for tailoring for Additional Conditions and the like may be limited to things like working with children checks, Intellectual Property rights to be assigned to the customer and insurance amounts.

Surely, that is too impractically narrow.

The standard templates refers to "*Service Levels*" as "*the minimum performance levels set out in a Supply Schedule*" but in the absence of a specified Supply Schedule (an issue which applies more to the Head Contract than a Customer Contract and few I have seen actually provided for it) the matter would appear to be someone up in the air.

The *Customer Contract Order Templates (Services)* attached to the standard Goods and Services Template has provision for "*Special Terms*" and it is a somewhat unresolved question whether and to what extent "*Special Terms*" can involve terms and conditions at variance to or inconsistent with terms and conditions of the standard template, as are often need for more sophisticated "services".

Thankfully and not infrequently, the template contract envisages "Additional Conditions" being added when purchasing agency places an Order.

Client agencies I have advised understand that NSW Procurement does not see these provisions as allowing really free amendment but in one or two contracts upon which I have had to advise, there was a need to make considerable special provision.

Thankfully some of the current templates do not use the wording which caused problems in some earlier procurement contracts which allowed amendment provided it did not "derogate" any material sense from the template.

Unfortunately the template for Procure IT v3.0, whilst using terminology suggesting a degree of flexibility for variations does so in a somewhat circuitous way with which I and my clients have had difficulty.

Careful Review of the Templates

Careful review of the various Procurement templates, is a matter of prudent risk management, is needed because perusal of the current version discloses the usual sort of problem;-

1. definitions are adopted, but the definition is not used in the substantive text of the substantive part of the contract document;
2. the substantive part of the contract uses words and expressions which require definition but are not defined;
3. the linkage between the Definitions and the Substantive part of the contract with various schedules is not thought through adequately with the consequence that a number of issues may fall through cracks;
4. indeed, in some, the linkage between the substantive contract provisions and the goods or services to be specified with in a supply schedule the format of which is not always provided;
5. the liability and particularly liability cap provisions are not properly understood by those in some agencies who are involved in putting the contract together;
6. things like Performance Criteria are alluded to but not properly outlined, let alone measured.

In one or two, the "*performance criteria*" and performance milestones involved more filing reports as to performance, than actual performance or compliance with milestones. Indeed, in one contract template the words "performance criteria" do not appear in the reference to "milestones" appears in the schedule is not picked up in the substantive text

Procurement Contract or Funding Contract

I have, in advising on many contracts in the last decade, noticed something of a shift in Government operations, much of it driven by outsourcing.

In my perception, governments not infrequently now using the procurement processes and formats for what might really be described as "funding agreements".

This obviously raises the question "What is it?" in respect of any particular "procurement" proposal. "

I use the four slides in the presentation simply to raise the issue of whether, in any given situation, the use of a procurement process by Government might not involve something other than a conventional procurement and something more in the nature of a funding arrangement and whether there is a meaningful difference.

This type of contract may well raise significant issues under Government Information Provision Act type legislation.

Often have I seen Funding Agreements which amounted to little more than a services contract under which a Government Agency, for one or other reasons, wishes to have an external entity or entities carry out certain activities rather than doing so itself. I have seen them used effectively to cover a budget deficiency.

The slides were to do with the Ansett staff entitlements bailout. In that sense, you may recall that the Commonwealth Government implemented an arrangement to ensure the payment to employees of the failed Ansett group's certain specified salary entitlements, the cost of which was to be borne by the travelling public which had to pay a levy with every domestic flights in Australia for a period of time.

The matter is outlined in the Report[6] to the Commonwealth made under Section 24 of the *Air Passenger Ticket Levy (Collection) Act 2001*

> *"Section 24 of the Act requires the Workplace Relations Minister to table a report on the following matters:*
>
> *• payments authorised under section 22 of the Act;*
>
> *• the activities to which those payments relate.*
>
> *This is the first such report and it covers the period 1 October 2001 to 31 March 2002.*
>
> *In summary, payments made under s.22 of the Act during the reporting period were:*
>
> *• $8.0 million paid to a private sector entity (SEES Pty Ltd) to meet repayment obligations of a loan facility established for the Special Employee Entitlements Scheme for Ansett group employees (SEESA).*
>
> *This report also provides other relevant information, including:*

[6] http://www.deewr.gov.au/WorkplaceRelations/Programs/EmployeeEntitlements/SEESA/Documents/SEESA_010801to310302.pdf

• *$283.3 million advanced from the loan facility to the Ansett Administrators for payment of employee entitlements under*

the provisions of SEESA;

• *$1.7 million expenses incurred by the Commonwealth in collecting the ticket levy and administering SEESA;"*

Sometimes activity envisaged in contract is, to my view, jurisdictionally and constitutionally, a State matter and the Commonwealth was merely providing funds sometimes to procure a particular end result but, on a number of occasions, I found the content of the documents was such that I considered that the Commonwealth was actually using the Funding Agreement to overcome its lack of power in a particular field and to impose its requirements contractually[7].

Alternatively, I had to ask 'was the obligation undertaken *ultra vires* the State?'

Even to the extent any particular Funding Agreement involves activity between three or more Government agencies of a kind which might be perceived as having a commercial aim, the question arises whether things like *the NSW Public Authorities (Financial Arrangements) Act*'s "*joint-venture*" provisions would apply and be subject to the new NSW Procurement arrangements will stop.

Whilst there is some exemption in those provisions where Government agencies are involved, it is not, in my view, as simple as saying that in the event that there are all Government agencies the relevant provisions do not apply.

In one or two such examples, I found contractual provisions requiring a State agency to comply with Commonwealth procedures and/or policies notwithstanding that there was NSW legislation directly on point.

Indeed, I see that as having led to cl. 6 *Public Sector Employment and Management (Goods & Services) Regulation 2010*[8] which overcame that perceived inconsistency issue in context of projects funded under the *National Building and Jobs Plan (State Infrastructure Delivery) Act 2009*.

In that situation, existing State provisions and or Regulations dealing with the issues the subject of the contract, particularly procurement, were overruled.

To an extent, that was to facilitate the Building Education Reform policy of the Commonwealth. It was seen as apt to amend the then NSW *Public Sector Management (Goods and Services) Regulation* to put beyond doubt that compliance with the contractual provisions with the Commonwealth would not put New South Wales public servants in conflict with the law of New South Wales.

I do have to wonder how prudent and proper it is, in a Federation, for one sovereign entity to require another sovereign entity to abdicate its sovereign status by requiring it to comply with the laws and policies of the funding jurisdiction which laws and policies may well not be applicable in the jurisdiction of the funded sovereign entity.

Would not too much of that undermine the constitutional structure of the Federation?

But that is not for consideration today.

Risk Management: What Can the Lawyers Do?

The new NSW regime envisages the NSW Procurement Board having an overarching role in respect of terms and conditions but I doubt it has the resources properly to carry out such a role.

Even if the NSW Procurement Board consistently sets template provisions, the old problem which will arise will be as to the extent to which agencies, exercising the procurement function themselves, will properly and adequately appreciate the commercial, risk, probity in process and legal reasoning behind some of the terms and conditions set by the NSW Procurement Board.

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[7] Query whether and to what extent the implications of the case of *Williams v Commonwealth of Australia* [2012] HCA 23 (20 June 2012) do not in fact now bear upon the proposed referendum for Constitutional amendment to recognise Local Government and so overcome doubts as to the Commonwealth powers to fund Local Government activity.

[8] now repealed.

In my observations, often the procurement section of agency, for one reason or another, seeks to operate independently of the Legal Services section of agency.

That may make it very difficult for Legal Services sections to have meaningful input into and/or maintenance of approved templates, but Legal Services sections will have to work closely with relevant procurement staff on lines of responsibility.

Too often have I seen, both in public sector and private sector, the benefits of good templates being wasted by people working, not from the base template but from a contract recently used by somebody they work with who said was a good one for that type of deal.

An earlier document may well have been very appropriate for the earlier deal, but if and to the extent that it departed, for one reason or another, from the provisions of the standard template, alas, too often, the reasons for doing so in the reasons for particular provisions will not be apparent . I doubt Procurement Sections will have resources adequate to compare the terms of the "*recent*" agreement with the template to allow staff to determine what has been removed or added and what the reasons were for doing so.

Hence, staff should work from the base template but, alas I fear they too often will not be able to do so. Those base template will themselves need, from time to time updating and review.

Where a Procurement Section wants advice from the Legal Services section or some approval from Legal Services section, it is an absolute imperative that a proper timeframe be set in place to enable lawyers to give meaningful and useful advice.

Similarly and where at all possible, I would recommend that Legal Services sections of agencies become involved in the training of procurement staff and the settling (and long-term review from time to time) of relevant agency specific refinements to template precedents.

When I refer to training, I mean not simply the basics of the contract process that the probity and processor rules relevant to procurement in the public sector.

As mentioned earlier in the paper, an internal legal team may well be able to offer assistance in the context of probity advice/audit and, in doing so, provide aspects of the probity advice/audit with legal professional privilege.

Thank you

Greg Ross | Partner
Eakin McCaffery Cox

Level 28, 1 Market Street Sydney NSW 2000
PO Box Q1196 QVB NSW 1230; DX 1069 Sydney

t: (02) 9265 3070 f: (02) 9261 5918
M: 0413544106 w: www.eakin.com.au

EAKIN McCAFFERY COX
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Some Useful Weblinks

https://www.procurepoint.nsw.gov.au/policy-and-reform/nsw-procurement-reform/about-nsw-procurement-reform

https://www.procurepoint.nsw.gov.au/policy-and-reform/nsw-procurement-reform/information-agencies

https://www.procurepoint.nsw.gov.au/policy-and-reform/nsw-procurement-reform/information-agencies/agency-accreditation-scheme

https://www.procurepoint.nsw.gov.au/policy-and-reform/nsw-procurement-reform/information-agencies/role-agencies

https://www.procurepoint.nsw.gov.au/policy-and-reform/nsw-procurement-board/strategic-directions-2013-2014

https://www.procurepoint.nsw.gov.au/sites/default/files/documents/code_of_practice_for_procurement_2005.pdf

https://www.procurepoint.nsw.gov.au/sites/default/files/documents/log_of_revisions_to_original_code.pdf

http://www.procurepoint.nsw.gov.au/before-you-supply/standard-contract-templates-lp/easy-registration-agreements-and-rfq-templates

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EAKIN McCAFFERY COX
LAWYERS

Level 28, 1 Market Street
SYDNEY NSW 2000
PO Box Q1196
QVB NSW 1230
DX 1069 SYDNEY
T 02 9265 3000
F 02 9261 5918
E info@eakin.com.au
W www.eakin.com.au

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Level 28
BT Tower
1 Market Street
Sydney NSW 2000
DX 1069 Sydney
Telephone (61 2) 9265 3000
Facsimile (61 2) 9261 5918
email: info@eakin.com.au
www.eakin.com.au