



Decision Regulatory Impact Statement

Debarment regime

November 2021

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DECISION REGULATORY IMPACT STATEMENT

Executive summary

The Western Australian Government has an obligation to protect and safeguard the use and expenditure of public funds and to maintain public confidence in relation to its contracting.

The Procurement Act 2020 (the Act) will allow the Department of Finance (Finance) to deliver a more consistent framework for public procurement in the State. The Act came into full effect on 1 June 2021.

Finance continues to improve procurement practices to make it easier for suppliers to do business with government while balancing our obligations to do so transparently and in a way that maximises our support for the community of Western Australia.

While Finance recognises its role in driving better procurement practice, the State also needs to work with suppliers to improve their business practices and prevent fraud and corruption.

A debarment regime allows us to work with our suppliers to improve their business practices, and, in the worst cases of wrongdoing, establishes grounds, process and governance that allows suppliers to be excluded from government contracts.

This Decision Regulatory Impact Statement outlines the feedback Finance received during its consultation on the proposed debarment regime to be implemented by the WA Government.

In December 2019, Finance commenced its preliminary consultation. Finance engaged stakeholders across the public sector, industry groups and unions to discuss the concept of

Background

Governments around the world spend an estimated USD 9.5 trillion for goods and services each year.¹ In the 2019–20 financial year, the WA Government spent nearly \$14.7 billion on goods, services and works.² The sheer scale of the money spent by public institutions means that public procurement is an attractive target for fraud and corruption.

Not only does fraud, corruption, and poor business practice cost money; it jeopardises public health and safety by:

- x diverting money from other worthy public projects such as building schools and transportation infrastructure
- x reducing the quality of goods, services and works procured.

In addition, fraud, corruption, and poor business practice reduces innovation, inhibits genuine competition, and reduces confidence in public administration.

The WA Government has an obligation to protect and safeguard the use and expenditure of public funds and to maintain public confidence in relation to its contracting.

This obligation can only be fulfilled if all parties involved in public procurement work together to create supply chains founded on sound laws, transparent procurement policies and responsible business practices.

The WA Government recognises it can do better collectively and has tasked Finance with completing a project to enhance public sector procurement.

The first part of this reform program is complete. Procurement reform has delivered a new procurement act² the Procurement Act 2020² which enables a single set of procurement policies² and the Western Australian Procurement Rules² to be applied by agencies³ when procuring goods, services, community services and works.

Although Finance has delivered the new, more consistent framework across WA Government, we recognise that a robust, consistent procurement framework is just the beginning.

Finance will continue to influence the improvement of procurement practices to help make it easier to do business with government while balancing W K H 6 Obligations to do so transparently, and in a way that maximises support for the WA community.

While Finance recognises our role in driving better procurement practice, the State also needs to work with suppliers to improve business practices and prevent fraud and corruption.

¹ Robert D Anderson, Alison Jones and William E Kovacic Preventing Corruption, Supplier Collusion and the Corrosion of Civic Trust: A Procompetitive Program to Improve the Effectiveness and Legitimacy of Public Procurement. Source: <https://ssrn.com/abstract=3289170> visited 11 February 2020.

²) L Q D Q F H ¶ V : K R % X \ V : K D W D Q G + R Z 5 H S R U W 6 R X U F H
<https://app.powerbi.com/view?r=eyJrjoiODM2Zjc0NWU0NjY3ZS00MTIxLWlzNDUtZGQ3Mjg2M2E5MzIxliwidCI6ImI3MzRiMTAyLWEyNjctNDI5YS1iNDVlTQ2MGM4YWQ2M2FIMiJ9> visited on 20 August 2021.

³ See the Procurement Act 2020 section 5 for a definition of State Agencies to whom the Act applies.

On 18 February 2019, the WA Government approved a proposal to develop an Ethical Procurement Framework (the Framework). The Framework is designed to ensure the WA Government awards contracts to suppliers who conduct their businesses responsibly.

Central to this Framework, the WA Government considered the adoption of a debarment regime. A debarment regime establishes grounds, process and governance that allows suppliers to be excluded from government contracts.

This DRIS confirms the WA Government ¶ V F R P P L W P H Q W W R D G R S W L Q J D G H

Statement of the issue

Unlawful practices by suppliers can undermine fair competition, threaten the integrity of markets, create a barrier to economic growth and increase the cost and risk of doing business.

On the face of it, Australia is widely considered a country with low levels of public sector corruption. Testa P H Q W W R W K L V L V R X U U D Q N L Q J R I W K R Q 7 U D Q Corruption Perceptions Index, which ranks 180 countries and territories by their perceived levels of public sector corruption according to experts and businesspeople.

In 2014, Austral

A1 requires agencies to seek the best value for money outcome when procuring. This

What the WA Government is proposing to do to address the issue

While the existing measures go some way to preventing unlawful practices, we can do more. A way to ensure that agencies contract with suppliers who run their businesses responsibly,

difference may be a factor of the number of grounds of exclusion available to decision makers and the location of the decision makers (that is, whether decision making is centralised). The size of the respective markets may also be a factor.

Suppliers have long been familiar with the costs of doing business with government. Tendering can be a protracted, complicated process, with significant costs. Governments also have obligations to release information, including possibly sensitive supplier information, under freedom of information legislation.

In addition, governments are traditionally risk averse and so may take a defensive approach to contractual liability.

While the broader Western Australian reform project, Enhance Public Sector Procurement ¶ aims to address some of these issues, there can be no doubt that exclusion might be yet another reason suppliers might wish to avoid doing business with government.

Some jurisdictions implement debarment regimes to achieve a punitive outcome. These jurisdictions typically have little discretion when it comes to length of exclusion, or the ability to consider mitigating circumstances.

Most jurisdictions wish to improve the business practices of their supply base to encourage effective competition and to manage the risk that suppliers might simply choose not to tender. These jurisdictions implement a regime that has a centralised decision maker, which promotes consistent decision making with the ability to work with suppliers to improve business practices ² only resorting to

The recent World Bank World Survey on Debarment Regimes²¹ found that, of the 10 jurisdictions that responded to the survey, 4 had some form of decision being made at a central level.

Most jurisdictions reported that they relied on judicial authority, which reflects the fact that most jurisdictions rely on suppliers being found guilty of certain crimes as grounds for debarment. In most jurisdictions, these judicial decisions are relied upon to make a decision to mandatorily debar. Accordingly, the judiciary can be said to be the decision makers. Italy relies on only the judiciary in its debarment decision making² making crimes the only ground for exclusion.

A number of jurisdictions also allow exclusion on the basis of decisions by individual contracting officers or decisions made at an agency level. This local decision making may reflect the fact that most debarment regimes are established by national governments, rather than State ones. Local decision making allows individual States a degree of flexibility when responding to the requirement to put in place these regimes.

The Queensland Government also adopted hybrid agency-level and centralised decision-making governance.

Tunisia, the World Bank, and Canada all rely solely on centralised

The Director General of Finance (the exclusion decision maker) is responsible for making a decision to exclude a supplier.

Finance has decided this approach, because in the majority of cases the exclusion decision maker will rely on decisions made by prosecution authorities, or other agencies or government bodies with the legislative responsibility to investigate conduct.

For example, the exclusion decision maker will rely on the decision of the court to determine debarment for contravention of the Criminal Code or the Commissioner of Taxation, to determine whether a supplier has contravened the Tax Administration Act 2003.

Where the responsible agency has determined that a supplier has contravened legislation, the exclusion decision maker will then make a decision whether to exclude that supplier. The decision will be made on the basis of public interest.

In relation to implementation, Finance has maintained its position that:

- x as most decisions rely on a finding of conduct by government agencies other than Finance (agencies empowered to investigate conduct under the legislation included in the conduct tables in the Regulations), any information on poor performing suppliers should be directed to these agencies;
- x while the exclusion decision maker may request information and input from third parties when making a decision, it is not obliged to do so;
- x the Regulations will be reviewed in accordance with the requirements in the Procurement Act 2020 – that is before July 2026; and
- x Finance will publish guidance materials on wa.gov.au for buyers and suppliers, including frequently asked questions in relation to the debarment regime.

Grounds for exclusion

All jurisdictions studied exclude suppliers on the basis of fraud. Corruption, collusion, coercion, tax offences, and labour offences, are also common grounds for exclusion.

Most jurisdictions, including the US, allow for exclusion based on behaviour that is not criminal. These include grounds include SRRU SHUIRUPDQFH RKJ DOJH QW K D W DOORZV D VXSSOLHU WR EH H[FOXGHG IRU DQ\ μ «FDXVH RI LW DIIHFWV WKH VXSSOLHU ¶V μ SUHVHQW UHVSQRVLELOLW\

The Canadian system, however, excludes almost exclusively for criminal offences. The system is currently under review and the proposed regime is more expansive. In response to the proposed new system the Canadian Bar Association²² stated:

μ 7 R WKH H[WHQW WKH VFRSH RI GHEDUPHQW RIIHQFHV PRY to government contracting, the rationale for debarment may become less clear. While the goal is laudable, using debarment to achieve other social, economic, and environmental policy objectives could create uncertainty and inadvertently limit the number of companies prepared to bid on government contracts. Broader debarment adversely affects not only the debarred company, its employees and shareholders, but also taxpayers who are left with a OHVV FRPSHWLWLYH SURFHVV DQG PD\ SD\ PRUH RU UHFHL\

²² Source: <https://nationalmagazine.ca/en-ca/articles/cba-influence/submissions/2019/public-works-suspension-policy-needs-more-consulta> visited 10 March 2020.

Feedback received

Some respondents felt that the focus on compliance with legislation, as reflected in the conduct tables included in the Regime, was a missed opportunity to improve business practices more broadly. That is, that the exclusion decision maker be given more discretion to exclude suppliers.

Others felt that the discretion to exclude suppliers was too broad.

There were also a number of requests to include additional grounds for exclusion in the conduct tables. These suggestions were numerous, but included, environmental offences; modern slavery offences; and disability, racial and sexual discrimination offences.

Several respondent felt that poor performance on government contracts should be a ground for exclusion ±other stakeholders disagreed with this position.

Grounds for exclusion in the draft Regulations

The draft Regulations specify three classes of conduct as grounds for exclusion; those grounds cover both conduct by a supplier and conduct

State agencies retain the ability to manage supplier performance under specific contracts using appropriate contract management, and, if necessary, contractual remedies available to them under the relevant contract.

Scope of Exclusion

Most debarment regimes have two different processes that are followed to exclude suppliers.

Immediate exclusion results in exclusion without allowing the supplier a

that

Feedback received

Some respondents felt that the discretion to award to an excluded supplier should not be

Can extend to affiliated individuals	<input checked="" type="checkbox"/> European Union <input checked="" type="checkbox"/> Germany <input checked="" type="checkbox"/> United Kingdom <input checked="" type="checkbox"/> US
Must extend to affiliated individuals	<input checked="" type="checkbox"/> Chile <input checked="" type="checkbox"/> Spain
Must not extend to affiliated individuals	<input checked="" type="checkbox"/> Brazil <input checked="" type="checkbox"/> Tunisia

Feedback received

There was no feedback received on this element.

Extension to affiliated individuals or corporations in the draft Regulations

The draft Regulations provisions that allow the exclusion decision maker to exclude affiliates of excluded suppliers. For example, an entity that controls or is controlled by the debarred supplier. Section 50AA of the Corporations Act 2001 is used when determining control.

Rights of the Supplier

In every jurisdiction surveyed by the World Bank, suppliers have a right to present their case in an exclusion proceeding. This is a recognition by the decision maker that the consequence of exclusion is severe for suppliers and the need for natural justice.

Most jurisdictions require notice to be given to a supplier at the start of an investigative process, and all jurisdictions allow the supplier to make a written submission to the decision maker during the process.

Appealing a decision is not so consistent

Implementation

The draft Regulations must now be approved by the Governor of Western Australia.

If approved, the Regulations are likely to take effect on 1 January 2022.

Transition and Review

To be excluded an entity must be a current supplier to the WA Government on or after the effective date of the Regulations. In this way, the Regulations are not retrospective in their application.

The Regulations do, however, allow suppliers with a valid contract in place on or after 1 January 2022 to be excluded:

- x for conduct that occurred before the Regulations came into effect; and
- x where that contract commenced prior to the effective date of the Regulations.

The Regulations will be reviewed concurrently with the *Financial Markets and Procurement Act 2020*. In accordance with that Act, the review must be completed by August 2026.

Where can I find more information?

Finance will conduct information sessions with procurement officers to ensure there is a shared understanding of the operation of the Regulations.

In addition, Finance will update WA.gov.au to include information for suppliers and buyers.

Glossary

Term

Meaning