



New South Wales

# Public Works and Procurement Amendment (Enforcement) Act 2018 No 72

## Contents

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		Page
	1 Name of Act	2
	2 Commencement	2
<b>Schedule 1</b>	<b>Amendment of Public Works and Procurement Act 1912 No 45</b>	<b>3</b>

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New South Wales

# **Public Works and Procurement Amendment (Enforcement) Act 2018 No 72**

Act No 72, 2018

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An Act to amend the *Public Works and Procurement Act 1912* to provide for the enforcement of certain directions and policies of the New South Wales Procurement Board concerning procurements to which international procurement agreements may apply. [Assented to 22 November 2018]

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Public Works and Procurement Amendment (Enforcement) Act 2018*.

**2 Commencement**

This Act commences on a day or days to be appointed by proclamation.

## Schedule 1 Amendment of Public Works and Procurement Act 1912 No 45

### [1] Section 162 Definitions

Omit the definition of *Board direction*. Insert in alphabetical order:

*affected applicant*, in relation to an alleged contravention or proposed contravention of an enforceable procurement provision, means:

- (a) a person (or a partnership or other group of persons):
  - (i) that supplies, or could supply, goods or services, and
  - (ii) whose interests are affected by the alleged contravention or proposed contravention, or
- (b) any other person, group of persons or body of a kind prescribed by the regulations.

*Board direction or policy* means a direction or policy issued by the Board under section 175.

*enforceable procurement provision* means 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.

*international procurement agreement* means an international agreement that applies to procurements by Australian Governments and covers procurements by New South Wales.

*procurement list* means a list of suitable suppliers (including suppliers selected using a prequalification scheme) intended to be used more than once for procurements by or for one or more government agencies, but does not include a procurement panel.

*procurement panel* means a panel of suppliers for procurements by or for one or more government agencies who, following successful tenders, have entered into contracts for inclusion on the panel.

*public interest certificate*—see section 176G.

### [2] Section 172 Functions of Board

Omit section 172 (1) (c) and (d). Insert instead:

- (c) to issue directions or policies under section 175 that apply to government agencies,
- (d) to monitor compliance by government agencies with the requirements of this Part (including Board directions or policies),

### [3] Section 175 Board may issue directions or policies for government agencies

Omit section 175 (1) and (2). Insert instead:

- (1) The Board may issue:
  - (a) directions to government agencies regarding the procurement of goods and services by and for government agencies, and
  - (b) policies that apply to the procurement of goods and services by and for government agencies.
- (2) A direction or policy may apply to government agencies generally or to a particular government agency.

- (2A) A direction or policy may apply, adopt or incorporate (whether with or without modifications) any publicly accessible document as in force or effect at a particular time or as in force or effect from time to time.
- (2B) All or some of the provisions of a direction or policy (or the provisions of a document referred to in the direction or policy) relating to an international procurement agreement may be expressed to be enforceable procurement provisions.

**[4] Section 175 (3)**

Insert “or policies” after “directions”.

**[5] Section 175 (4) (as inserted by the Modern Slavery Act 2018 No 30)**

Insert “and policies” after “directions”.

**[6] Part 11, Divisions 5–7**

Insert after section 176:

**Division 5      Complaints concerning enforceable procurement provisions**

**176A    Affected applicant may make complaint**

- (1) A person (the *complainant*) may make a written complaint about the conduct of a government agency that it is alleged is a contravention or proposed contravention of an enforceable procurement provision if the person is an affected applicant in relation to the alleged or proposed contravention.
- (2) The complaint must be made to the government agency head of the agency concerned.
- (3) The complainant may withdraw a complaint by a further written notice given to the government agency head.

**176B    Investigation of complaint**

- (1) A government agency head to whom a complaint is made under this Division must:
  - (a) investigate the conduct that is the subject of the complaint, and
  - (b) attempt to resolve the complaint by taking steps that, in the circumstances, are reasonable and prompt, and
  - (c) prepare a written report of the investigation.
- (2) The government agency head may discontinue the investigation if:
  - (a) the complainant withdraws the complaint, or
  - (b) the complainant informs the government agency head that the complainant considers the complaint to be resolved, or
  - (c) proceedings are commenced in the Supreme Court under Division 6 in relation to the conduct that is the subject of the complaint, or
  - (d) the government agency head considers it is reasonable to do so in the circumstances.

- (3) The government agency head must discontinue the investigation if:
  - (a) the Supreme Court makes either of the following findings in proceedings commenced under Division 6 in relation to the conduct the subject of the complaint:
    - (i) that the conduct was a contravention of an enforceable procurement provision,
    - (ii) that the conduct was not a contravention of an enforceable procurement provision, or
  - (b) the continuation of the investigation would be likely to result in prejudice to the proper administration of justice.

#### **176C Suspension of procurement**

- (1) A government agency head to whom a complaint is made under this Division must suspend all processes involved in the procurement that the government agency head considers would adversely affect the complainant's participation in the procurement if the processes were continued.
- (2) However, subsection (1) does not apply if:
  - (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.
- (3) The government agency head must ensure that suspended processes remain suspended until the time when the earliest of the following occurs:
  - (a) the complainant withdraws the complaint,
  - (b) the complainant informs the government agency head that the complainant considers the complaint to be resolved,
  - (c) a public interest certificate is issued in respect of the procurement after the complaint is made,
  - (d) proceedings are commenced in the Supreme Court under Division 6 in relation to the conduct that is the subject of the complaint.

**Note.** The Supreme Court may grant an interim injunction under section 176D to prevent the continuation of conduct that may be a contravention of an enforceable procurement provision pending a final determination on the issue.
- (4) When a complaint relates to a refusal or failure to include a supplier on a procurement list or procurement panel:
  - (a) if the process for compiling the list or establishing the panel has not yet ended—the suspension of processes involved in the procurement must include the process of compiling the list or establishing the panel, and
  - (b) if the process for compiling the list or establishing the panel has ended—the suspension of processes involved in the procurement does not prevent the use of other suppliers on the list or panel for procurements.
- (5) For procurement lists that have already been compiled and to which new suppliers may be added, subsection (4) does not prevent:
  - (a) the addition of new suppliers to the list, or
  - (b) the use of suppliers who are already included on the list.

## **Division 6 Injunctions and compensation for contraventions of enforceable procurement provisions**

### **176D Supreme Court may grant injunctions**

- (1) If a government agency has contravened, is contravening or is proposing to contravene an enforceable procurement provision, the Supreme Court may, on the application of an affected applicant, grant an injunction restraining the agency from doing so or requiring the agency to do any act or thing necessary to avoid or remedy the contravention or proposed contravention.
- (2) The Supreme Court may not grant an injunction under this section if the Court is satisfied that a contract has already been entered into for the procurement concerned.
- (3) The Supreme Court may grant an interim injunction pending determination of an application under this section if the Court thinks it is desirable to do so.
- (4) However, the Supreme Court may not grant an interim injunction if a public interest certificate has been issued in respect of the procurement concerned unless the Court is satisfied that it would be in the public interest to do so.
- (5) In determining whether to grant an injunction under this section, the Supreme Court must consider whether:
  - (a) the grant of the injunction would result in a significant delay to the procurement concerned, and
  - (b) the making of an order under section 176F for the contravention or proposed contravention would be a more appropriate remedy in the circumstances.
- (6) The power of the Supreme Court to grant an injunction under this section restraining a government agency from engaging in conduct may be exercised:
  - (a) whether or not it appears to the Court that the agency intends to engage again, or to continue to engage, in conduct of that kind, and
  - (b) whether or not the agency has previously engaged in conduct of that kind, and
  - (c) whether or not there is an imminent danger of substantial damage to any person if the agency engages in conduct of that kind.
- (7) If the government agency is not a corporation, an injunction under this section may be addressed to the government agency head for the agency.
- (8) The Supreme Court may discharge or vary an injunction granted under this section.

### **176E Preconditions for granting injunctions**

- (1) This section provides for certain procedural preconditions before an injunction may be granted under section 176D.
- (2) An injunction is not to be granted unless the Supreme Court is satisfied that the application for the injunction was made:
  - (a) for a contravention that is alleged to have occurred—within 10 days or any other period prescribed by the regulations after the later of the following days:
    - (i) the day on which the alleged contravention occurred,

- (ii) the day on which the applicant became aware, or ought reasonably to have become aware, of the alleged contravention, or
  - (b) for a contravention that it is alleged is occurring—within 10 days or any other period prescribed by the regulations after the day on which the applicant became aware, or ought reasonably to have become aware, of the alleged contravention, or
  - (c) for an alleged proposed contravention—within 10 days or any other period prescribed by the regulations after the day on which the applicant became aware, or ought reasonably to have become aware, of the alleged proposed contravention, or
  - (d) within any longer period as may be allowed by the Court.
- (3) The Supreme Court must not allow a longer period under subsection (2) (d) unless the Court is satisfied that:
  - (a) the applicant's failure to make the application within the applicable period referred to in subsection (2) (a), (b) or (c) is attributable to the applicant's reasonable attempt to resolve the complaint as referred to in subsection (4) (b), or
  - (b) there are special circumstances that warrant allowing a longer period.
- (4) Also, an injunction is not to be granted unless the Supreme Court is satisfied that:
  - (a) the applicant has made a complaint under Division 5 concerning the conduct of a government agency for which the injunction is sought, and
  - (b) if the Court considers that it would have been reasonable for the applicant for the injunction to have attempted to resolve the complaint—the applicant has made a reasonable attempt to resolve the complaint before applying for the injunction.

#### **176F Compensation for contravention**

- (1) If a government agency has contravened, is contravening or is proposing to contravene an enforceable procurement provision, the Supreme Court may, on the application of an affected applicant, make an order for the payment of compensation to the applicant in respect of the contravention or proposed contravention.
- (2) The amount of compensation ordered must not exceed the sum of:
  - (a) the reasonable procurement process expenditure incurred by the applicant, and
  - (b) the reasonable expenditure incurred by the applicant in connection with making a complaint under Division 5 about the contravention or proposed contravention, and
  - (c) the reasonable expenditure incurred by the applicant in connection with making a reasonable attempt to resolve the complaint.
- (3) Despite subsection (2):
  - (a) an amount of compensation cannot include:
    - (i) expenditure in connection with making or attempting to resolve a complaint if it is incurred after the affected applicant ought reasonably to have known that litigation was likely, or



- (ii) costs already awarded by a court or tribunal to the affected applicant in respect of proceedings before the court or tribunal, and
- (b) costs cannot be awarded by a court or tribunal to the affected applicant in respect of proceedings before the court or tribunal after an amount of compensation is ordered if the amount already includes those costs.
- (4) If the government agency is not a corporation, the order may be made against the State rather than the agency.
- (5) In this section:  
*procurement process expenditure*, in relation to a procurement, means:
  - (a) the expenditure in preparing a tender, expression of interest or request for tender for the procurement, and
  - (b) the expenditure in applying for inclusion in a procurement list used for the procurement, and
  - (c) the expenditure in tendering for inclusion in a procurement panel used for the procurement.

**176G Public interest certificates**

A government agency head may issue a written certificate (a *public interest certificate*) stating that it is not in the public interest for a specified procurement to be suspended while:

- (a) a complaint made under Division 5 is being investigated, or
- (b) an application for an injunction made under section 176D is being considered.

**176H Rules of court**

- (1) Rules of court may be made under the *Supreme Court Act 1970* or the *Civil Procedure Act 2005*, not inconsistent with this Act or the regulations, regulating practice and procedure in respect of proceedings in the Supreme Court under this Division.
- (2) Subsection (1) does not limit the rule-making powers conferred by the *Supreme Court Act 1970* or the *Civil Procedure Act 2005*.

**176I Division does not limit remedial powers of Supreme Court**

This Division does not limit any power that the Supreme Court has apart from this Division to provide remedies for contraventions or proposed contraventions of enforceable procurement provisions.

**Division 7 General**

**176J Contravention of enforceable procurement provision does not affect validity of contract**

A contravention of an enforceable procurement provision does not affect the validity of any contract.

**[7] Section 177 Delegation of functions by government agencies**

Omit section 177 (b). Insert instead:

- (b) any Board direction or policy, or

- (c) any provision of Division 5 or regulations made for the purposes of section 178 (1A) (a).

**[8] Section 178 Regulations**

Omit section 178 (1). Insert instead:

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to:
  - (a) the procurement of goods and services by and for government agencies (including but not limited to exemptions from any of the requirements of this Part), and
  - (b) any other matter that by this Part is required or permitted to be prescribed.
- (1A) Without limiting subsection (1), the regulations may make provision for or with respect to the following:
  - (a) complaints concerning the conduct of government agencies in connection with enforceable procurement provisions that apply to them, including by providing for:
    - (i) the persons, groups of persons or bodies who have standing to make complaints, and
    - (ii) the kinds of complaints that may be made, and
    - (iii) the manner, form and time periods for making complaints, and
    - (iv) the resolution of complaints (including the suspension of procurements pending their resolution),
  - (b) preconditions for the making or granting of applications under Division 6 that are additional to those specified in the Division.
- (1B) A regulation made for the purposes of subsection (1A) (a) may provide for complaints to be dealt with in a way that is different from Division 5 (whether generally or in relation to particular kinds of complaints).

[Second reading speech made in—

Legislative Council on 24 October 2018

Legislative Assembly on 14 November 2018]