



Legislation Review Committee

Correspondence received in response to the Legislation Review Committee
Digest No. 6/57 – 15 October 2019



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The Hon Damien Tudehope MLC

Minister for Finance and Small Business

Reference: TA19/1913
Your reference: LAC19/113.06

Ms Felicity Wilson MP
Chair
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Sent by email: legislation.review@parliament.nsw.gov.au

Dear Chair

Thank you for your correspondence of 16 October 2019, regarding the Legislation Review Committee's comments on the *Public Works and Procurement Regulation 2019* (PWP Regulation 2019) in the Legislation Review Digest No.6/57.

I refer to the two matters that the Committee has referred to Parliament for consideration and make the following comments:

1. Uncertainty regarding the level of seniority of government agency employees that may be delegated the power to undertake procurement for emergencies

The expenditure of public money and any restrictions on the power to delegate expenditure functions are governed under other legislation, such as the *Government Sector Finance Act 2018*.

The emergency procurement provision in the PWP Regulation 2019 has, in effect, been in place since 2000, when clause 35 (Exemption for emergencies) was included in the *Public Sector Management (Goods and Services) Regulation 2000* (PSM (GS) Regulation 2000). Clause 5 was subsequently included in the successor to the PSM (GS) Regulation 2000 as clause 24 (Exemption for emergencies) of the *Public Sector Employment and Management (Goods and Services) Regulation 2010* (PSEM (GS) Regulation 2010).

In July 2012, the *Public Sector Employment and Management Amendment (Procurement of Goods and Services) Act 2012* (PSEM Amendment Act) was enacted and inserted clause 21A (Procurement for emergencies) into the *Public Sector Employment and Management Regulation 2009* (PSEM Regulation 2009). Clause 21A of the PSEM Regulation 2009 is similar to clause 35 of the PSM (GS) Regulation 2000 and clause 24 of the PSEM (GS) Regulation 2010.

Clause 21A of the PSEM Regulation 2009 was substantively remade as clause 4 of the *Public Works and Procurement Regulation 2014* (PWP Regulation 2014), and then again subsequently remade as clause 4 of the PWP Regulation 2019.

As a consequence of the emergency procurement provision having been included in the PSEM Amendment Act it has, prior to its inclusion in the PWP Regulation 2019, been subject an appropriate level of Parliamentary scrutiny and debate.

2. Matters such as offences that attract significant maximum penalties, including imprisonment, that should be included in primary legislation, not subordinate legislation

Section 173(3) of the *Public Works and Procurement Act 1912* provides that a person who contravenes a provision of the regulations made under this section is guilty of an offence which carries a maximum penalty of 100 penalty units or imprisonment of 6 months, or both. Clauses 17(6) and 18(6) of the PWP Regulation 2019 provide that contravention of clause 17(4) (divulging of confidential information) and clauses 18(1), 18(3), 18(4) and 18(5) (failure to comply with NSW Procurement Board directions/requests relating to Board investigations), are offence provisions for the purposes of section 173(3) of the PWP Act.

These offence provisions have, in effect, been in place since 2012 when the PSEM Amendment Act was enacted and inserted clauses 11(5A) and 12(5A) into Schedule 1 of the PSEM Regulation 2009. Clauses 11(5A) and 12(5A) of Schedule 1 were substantively remade as clauses 17(6) and 18(6) of the PWP Regulation 2014, which were subsequently remade as clauses 17(6) and 18(6) of the PWP Regulation 2019. As such, the offence provisions included in the PWP Regulation 2019 have previously been subject to an appropriate level of Parliamentary scrutiny and debate.

Thank you for bringing these matters to my attention.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Damien Tudehope', written in a cursive style.

Damien Tudehope MLC
Minister for Finance and Small Business