

2020 CPD CONFERENCE

13 MARCH



Session 4A: Government contracting & compulsory acquisitions

Chair: Karen Smith, Crown Solicitor

Government contracting and procurement

Felicity Shaw, Assistant Crown Solicitor

Public finance and government contracting

Michael Granziera, Director

Digging deep with underground acquisitions

Jodi Denehy, Director

James Innes, Senior Solicitor



Government contracting in a procurement context

Felicity Shaw, Assistant Crown Solicitor

Procurement regulatory landscape



- *Public Works and Procurement Act 1912*
- *Government Sector Finance Act 2018*
- *Modern Slavery Act 2018?*
- *Government Information (Public Access) Act 2009*
- *Independent Commission Against Corruption Act 1988*

Other procurement considerations

- Agency's power to procure?
- Who can sign for the agency?
- Agency's position on:
 - IP
 - risk management e.g. insurances and indemnities
- Ongoing contract management



NSW Procurement Reforms



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- NSW Government Procurement Policy Framework
- Free Trade Agreement (FTA)-related reforms:
 - EPP Procurement Board Direction
 - *Public Works and Procurement Amendment (Enforcement) Act 2018*
- *NSW Modern Slavery Act 2018* (not yet commenced)

NSW Procurement Policy Framework

- Commenced 1 July 2019
- Policy and operating framework for NSW public sector procurement
- Single source of guidance on procurement rules
- NSW government agencies must comply with mandatory sections



Procurement Board Directions

- PBD-2019-04 – Approved procurement arrangements
- PBD-2019-05 – Enforceable Procurement Provisions (EPPs)
- PBD-2020-01 – Support for bushfire affected communities



CPTPP

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COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP





PBD-2019-05 Enforceable Procurement Provisions

- Effective 29 November 2019
- The EPP Direction applies to an agency's procurement if:
 - the agency is listed in Schedule 1 of the EPP Direction and
 - it is effected by any form of contract and
 - the estimated value of the procurement:
 - >\$9.247M for construction services
 - >\$657,000 for goods or any other services
 - cannot be determined and
 - is not exempt under Schedule 2 or 3 of the EPP Direction
- If covered, the agency's procurement approach and process must comply with the EPP Direction

EPP Direction – general principles



With all three suppliers evenly matched on price, quality and technical expertise, Mark resorts to his last remaining selection tool.

- No discrimination
- No offsets i.e. no conditions requiring the use of Australian content or suppliers or similar actions
- No excluding suppliers from a procurement unless the agency has a reasonable belief as to certain matters



EPP Direction – permitted procurement methods

- Agencies must use an **open approach to market** for all procurements other than:
 - a procurement from a supplier on a **procurement panel** established by an open approach to market
 - a procurement from a supplier on a **procurement list** established in accordance with Part 6 of the EPP Direction
 - a procurement by means of **limited tendering** – provided the limited tendering meets the requirements of the EPP Direction
- Savings and transitional provisions in the EPP Direction grandfather certain procurements that commenced prior to 29/11/2019

EPP Direction – general rules

- Conditions for participation
- Specifications
- Procurement documentation
- Requests for information
- Negotiation
- Awarding of contracts



When i hired you to improve our procurement process i was expecting more than go faster stripes on the strategy document!

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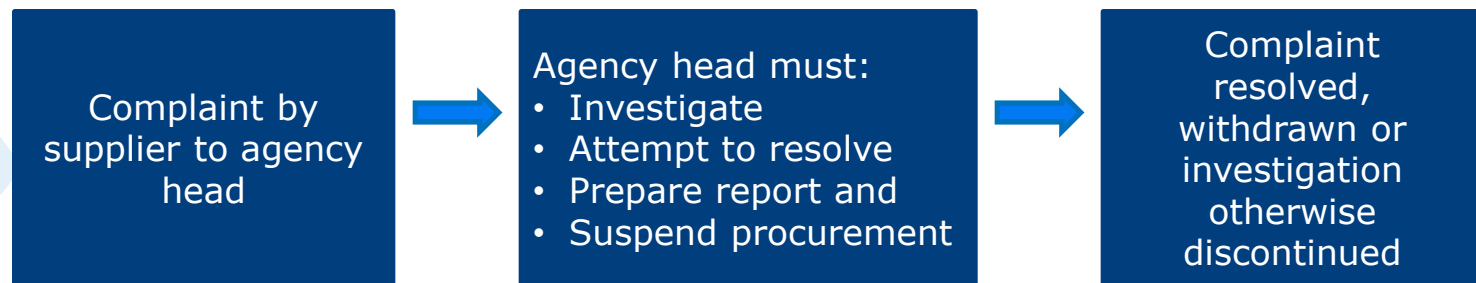
Public Works and Procurement Amendment (Enforcement) Act 2018

- Commenced 29 Nov 2019
- Implements standards agreed in international free trade agreements for the independent review of government procurement actions
- Allows suppliers to dispute procurement decisions of NSW government agencies which breach “enforceable procurement provisions”
- “Enforceable procurement provisions” are listed in clause 4 of the EPP Direction



Process for making a complaint under *PWP Enforcement Act*

- A complaint may be made by a supplier or potential supplier whose interests are affected



- Procurement will not be suspended if:
 - a public interest certificate has been issued by the agency head or
 - a contract for the procurement has already been entered into



Remedies available under *PWP Enforcement Act*

- Injunctions (s. 176D):
 - restrain agency from breaching EPP
 - require agency to take action to avoid/remedy breach
 - cannot be granted if Court is satisfied that a contract has been entered into
 - factors to be considered by Court in determining whether to grant an injunction:
 - significant delay to procurement would result
 - compensation is more appropriate
 - procedural preconditions (s. 176E)

Remedies available under *PWP Enforcement Act* (cont'd)

- Compensation (s. 176F)
 - amount must not exceed the total reasonable expenditure incurred by the supplier/applicant in the:
 - procurement process and
 - complaint and resolution process
 - does not cover loss of opportunity or revenue
- Breach of EPP does not affect the validity of any contract



To be *PWP Enforcement Act* ready...



**KEEP
CALM**

AND

ARE YOU READY

YES OR YES

- Ensure procurement processes comply with the EPP Direction:
 - procurement timeframes
 - procurement documentation
 - market engagement
- Update complaints mechanism
- Train procurement staff

Modern Slavery Act 2018 (not yet commenced)

- Senate Standing Committee to report by 27 March 2020
- Government agencies must take reasonable steps to ensure that goods and services procured are not the product of modern slavery
- NSW Anti-slavery Commissioner to maintain register identifying government agencies that breach an anti-slavery direction of the NSW Procurement Board



**people globally are subject to
some form of modern slavery**

Source: The Walk Free Foundation's Global Slavery Index estimates. Figures as at September 2017.





Public finance and
government contracting
Michael Granziera, Director

Government contracts and public expenditure

What authorities and approvals are required under the *Government Sector Finance Act 2018* when committing or incurring expenditure?





Key *GSF* Act requirements

5.5 Expenditure by accountable authorities and government officers must be authorised

- 1) The accountable authority for a GSF agency is responsible for ensuring that expenditure of money for the agency is in a way that is authorised.
- 2) A government officer must ensure that the officer's expenditure of money for the State or a GSF agency is in a way that is **authorised**.
- 3) Expenditure of money is in a way that is authorised if it is done:
 - a) in accordance with a delegation or subdelegation from a person with power regarding the expenditure of the money, or
 - b) under the authority of this Act or any other law.

(Compare with former s. 12 of the *Public Finance and Audit Act 1987*)



Key *GSF* Act requirements

“Expenditure”

expenditure of money includes:

- (a) the commitment of money for expenditure, and
- (b) the incurring of expenditure, and
- (c) the making of payments

(Section 1.4 (“General definitions”))



Key GSF Act requirements

- Concepts of “commitment of money for expenditure”, “incurring of expenditure” and the “making of payments” not defined in the GSF Act. But better view is that:
 - “Commitment of money” is the creation of a legal liability to pay money in the future
 - “Incurring of expenditure” is when a liability crystallises and money is paid – some overlap with “payment”
- Upshots:
 - Perhaps a trite proposition – lawful authority is necessary for different steps relevant to the use of money by government agencies and their officers and employees
 - Different sources of power may need to be relied upon depending on whether there is a “commitment of money”, “incurring of expenditure”, or “payment of money”



Financial delegations

- Generally made under Division 9.2 of the *GSF Act*, but may also be made under other legislation
- Character:
 - A power to authorise the withdrawal of money from a particular source – generally, either the Consolidated Fund, an account in the Special Deposits Account, or another statutory fund
 - Vital – withdrawal of money for a particular purpose needs to be authorised by a person with an appropriate financial delegation at some stage
 - Authority generally required for a person “incurring expenditure” or making a payment



Other sources of authority

- Financial delegation not (strictly-speaking) source of authority to commit expenditure – for example, not itself an authority to enter into a contract which binds the State or an agency to expend money in the future
- Source may lie elsewhere, in power to enter into particular contract – may be executive power (most common in Public Service agencies), or statutory (most common for statutory corporations)
- But even if not **strictly** necessary, advisable for the person signing the contract to have a financial delegation covering the projected expenditure under the contract
 - Avoids doubt
 - May be relevant to whether other required authority exists (for example, executive power)

Practically...

- Contractual arrangements can take many forms, and the authorities required will differ accordingly
- Three most important steps:
 1. Identify points in entering into and performing contract at which expenditure is committed and incurred, and consider whether the person undertaking these steps holds appropriate authority
 2. Financial delegations...
 3. Ensure that before the actual expenditure occurs, it is definitively authorised by a person with authority to expend money from the particular source used – generally, through a financial delegation





Hypothetical examples

- Contract in a Public Service agency for a grant, where payments conditional on satisfactory assessment of compliance with criteria
 - Commitment at time contract is signed - executive power and (ideally) appropriate financial delegation
 - Incurring/authorising of payment at time of assessment – need a financial delegation to authorise withdrawal of relevant expenditure
 - Person processing payment would do so under authority given by financial delegate
- Leasing agreement with up-front, unconditional agreement to pay monthly rent for 12 months
 - Entry into contract involves unconditional incurring of expenditure – signatory needs financial delegation to cover full amount
 - Also a commitment of expenditure, and would need authority to enter into contractual commitment
 - Person processing periodic payments would do so under authority given by financial delegate at time of entry



Tips

- Best practice is to have a financial delegation of an appropriate amount when entering into a contract involving expenditure
- Consider other necessary sources of authority
 - Note breadth of “delegable functions” defined in s. 9.7 of the *GSF Act*
- When authorising payment of money through or under a contract, consider the source of money being used and ensure that the financial delegation relates to that source



Digging deep with underground acquisitions

Jodi Denehy, Director

James Innes, Senior Solicitor

Today's road map

1. Do you have the power to acquire substratum land?



Today's road map

1. Do you have the power to acquire substratum land?
2. The three "jurisdictional gateways" – when is compensation payable?



Today's road map

1. Do you have the power to acquire substratum land?
2. The three "jurisdictional gateways" – when is compensation payable?
3. Ok, a "gateway" is open and compensation is payable, but how is it calculated?



Do you have the power to acquire substratum land?



Now more than 50 statutes that contain compulsory acquisition powers



Do you have the power to acquire substratum land?

If you have the power to acquire “land”, you have the power to acquire substratum land - subject to one important caveat...



Do you have the power to acquire substratum land?

If you have the power to acquire “land”, you have the power to acquire substratum land - subject to one important caveat...

Are you exercising the acquisition power for a proper purpose?



Cappello & Anor v Roads and Maritime Services & Anor [2019] NSWSC 439

- RMS to acquire substratum in Haberfield for the M4-M5 Link Tunnel – a tollway and therefore not a “public road”
- Mr and Mrs Cappello argued that the power to acquire the substratum under the *Roads Act 1993* was limited to only “public road” because tollways weren’t referred to in the Objects section of the *Roads Act*
- The Court held (and confirmed on appeal) that acquisition for the purposes of the *Roads Act* isn’t limited to the Objects section



Landan Development Pty Ltd v Sydney Metro [2019] NSWLEC 65

HIS HONOUR: There is, nonetheless, what one might describe as a tubular aperture underneath Mr Hale's client's land.

DUGGAN SC: Yes. There is a tubular aperture under Mr Hale's client's land.



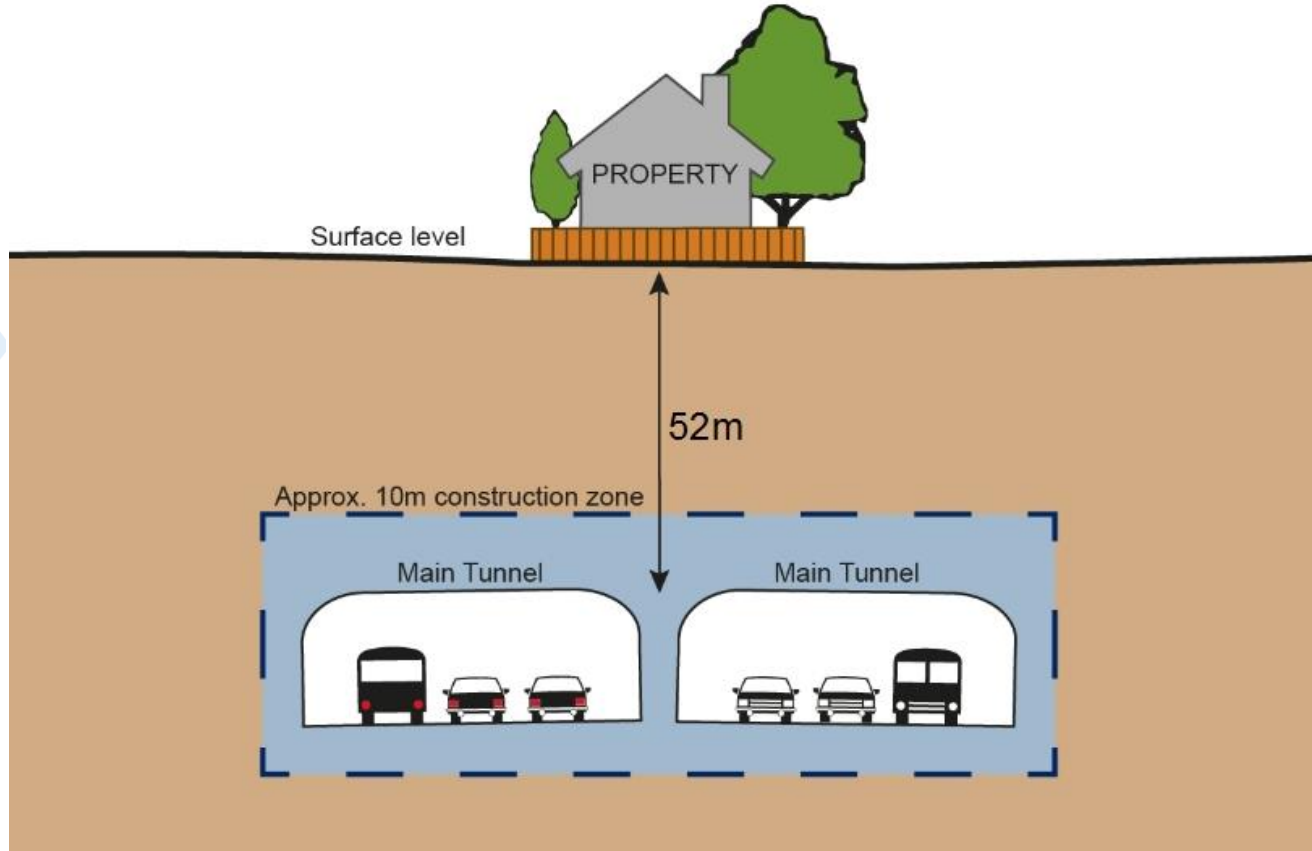
Landan Development Pty Ltd v Sydney Metro

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DUGGAN SC: Yes. There is a tubular aperture under Mr Hale's client's land.

What about the substratum supporting the “tubular aperture”?

The literal and figurative grey area





Pennant Hills Golf Club Limited *v RTA [1999] NSWCA 110*

- RTA acquired an easement for rock anchors to be secured into the substratum of land as part of the construction of the M2 motorway
- Easement included a right not to have the soil **around** the rock anchors disturbed
- The Court held that the right to have the soil remain undisturbed was an incident of the grant of the easement for rock anchors, as a rock anchor can only work if the material around it remains static and stable

The three “jurisdictional gateways” – when is compensation payable?





The three “jurisdictional gateways” – when is compensation payable?

If substratum land is compulsorily acquired for the purpose of constructing a tunnel, compensation is **not** payable **unless**:

1. the surface of the overlying soil is disturbed, or



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If substratum land is compulsorily acquired for the purpose of constructing a tunnel, compensation is **not** payable **unless**:

1. the surface of the overlying soil is disturbed, or
2. the support of that surface is destroyed or injuriously affected by the construction of the tunnel, or

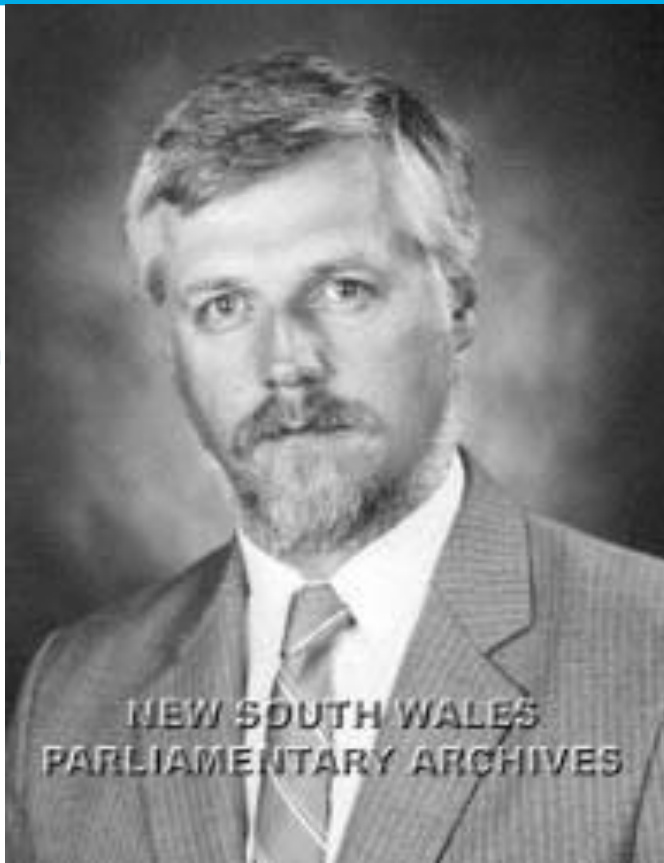


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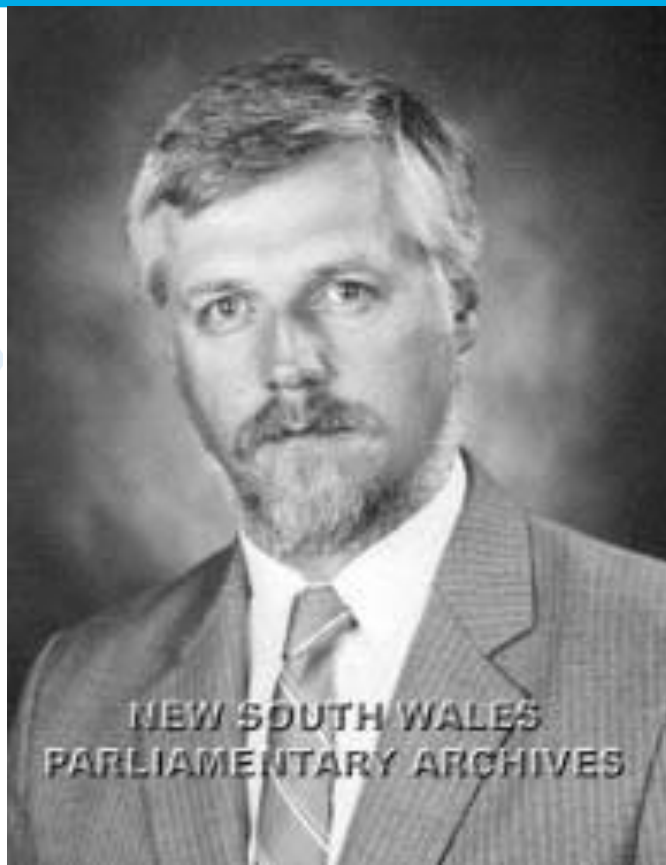
1. the surface of the overlying soil is disturbed, or
2. the support of that surface is destroyed or injuriously affected by the construction of the tunnel, or
3. any mines or underground working in or adjacent to the land are thereby rendered unworkable or are injuriously affected.

Landan Development Pty Ltd v Sydney Metro



Are the circumstances identified in ... [the three jurisdictional gateways] limited to circumstances of the kind specified **that have occurred after construction of the relevant underground rail facilities?**

Landan Development Pty Ltd v Sydney Metro



Are the circumstances identified in ... [the three jurisdictional gateways] limited to circumstances of the kind specified **that have occurred after construction of the relevant underground rail facilities?**

YES

BACK TO THE EIGHTIES!

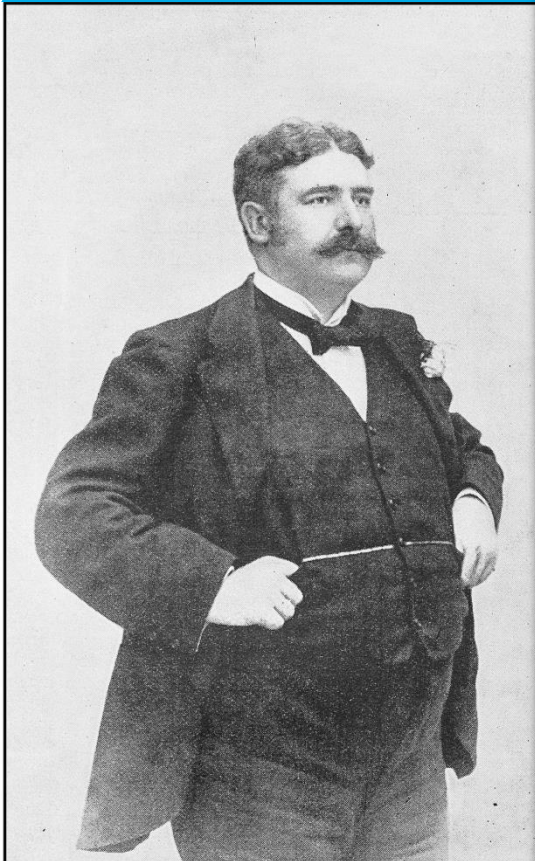


The fashion!



The
fashion!

The
cars!



The
fashion!

The
cars!

The hot
new bands!





Lands for Public Purposes Acquisition Act 1880

No. XVI.

An Act to provide for the Acquisition by Government of Lands for Public Purposes. [12th July, 1880.]

LANDS FOR
PUBLIC PURPOSES
ACQUISITION.

WHEREAS it is expedient to make provision for the acquisition Preamble.
on behalf of the Crown of Lands required for the construction
of works for Water Supply and Sewerage throughout the Colony as
well as for sites for Public Schools light-houses free libraries court-
houses gaols hospitals wharfs ferries bridges fortifications and other
purposes of defence and for buildings or works of any kind what-
soever to be erected or constructed for public purposes and to provide
compensation for lands so acquired Be it therefore enacted by the
Queen's Most Excellent Majesty by and with the advice and consent
of the Legislative Council and Legislative Assembly of New South
Wales in Parliament assembled and by the authority of the same as
follows :—



The three “jurisdictional gateways” – when is compensation payable?

If substratum land is compulsorily acquired for the purpose of constructing a tunnel, compensation is **not** payable **unless**:

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Ok, a “gateway” is open and compensation is payable, but how is it calculated?

Two alternatives?

1. Compensation for damage only?
2. The full suite of compensation under s. 55 of the Just Terms Act?

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