Government of **Western Australia**
Department of **Finance**

# Decision Regulatory Impact Statement

## Debarment regime

November 2021

# Contents

# 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 a debarment regime. This consultation sought stakeholders' views on what should be included in the WA Government's debarment regime, rather than whether the State should adopt such a regime.

On 9 June 2020, Finance released a public request for feedback. This request sought feedback on whether the WA Government should adopt a debarment regime; and if so, what should be included in the regime. A discussion version of a debarment regime was published with the request. Submissions closed on 27 July 2020.

Finance received 16 responses to our request for feedback. All respondents were supportive of the concept of a debarment regime but several disagreed with certain elements of, or suggested improvements to, the discussion version.

This feedback helped the WA Government to draft the *Procurement (Debarment of Suppliers) Regulations 2021* (the draft Regulations).

On 26 August 2021 the draft Regulations were released to those stakeholders who provided feedback in July 2020.

Finance received five responses. The responses reiterated previous feedback received, and in most instances suggested changes to the categories of conduct included in the Regulations.

This Decision Regulatory Impact Statement (DRIS) confirms the WA Government's preferred option.

## 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:

- diverting money from other worthy public projects such as building schools and transportation infrastructure
- 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 act—the *Procurement Act 2020*—which enables a single set of procurement policies—and the Western Australian Procurement Rules—to be applied by agencies[3] 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 the State's 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://ssm.com/abstract=3289170 visited 11 February 2020.

[2] Finance's Who Buys What and How Report. Source: https://app.powerbi.com/view?r=eyJrIjoiODM2Zjc0NWUtNjY3ZS00MTIxLWIzNDUtZGQ3Mjg2M2E5MzIxIiwidCI6ImI3MzRiMTAyLWEyNjctNDI5YS1iNDVlLTQ2MGM4YWQ2M2FlMiJ9 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's commitment to adopting a debarment regime.

## 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. Testament to this is our ranking of 11th on Transparency International's 2020 Corruption Perceptions Index, which ranks 180 countries and territories by their perceived levels of public sector corruption according to experts and businesspeople.

In 2014, Australia fell outside the index's top 10 countries. Australia fell eight points in the years from 2012 to 2018[4]—a significant fall beaten only by seven other nations including Yemen, Syria, and Liberia.[5]

PricewaterhouseCoopers' 2014 Global Economic Crime Survey: The Australian Story[6] identified procurement fraud as the second most common economic crime experienced by Australian organisations. In the 24 months preceding the survey, 33 per cent of respondents experienced procurement fraud, and globally, 46 per cent of this fraud occurred in the public sector.[7]

The Australian Criminal Intelligence Commission's report, Organised Crime in Australia 2017[8], stated that public procurement was considered most at risk of corruption by serious and organised crime. These criminal organisations often establish businesses to launder money and these businesses may look to winning government contracts to establish legitimacy.

Locally, unethical behaviour, as identified in the Corruption and Crime Commission's reports into bribery and corruption in maintenance and service contracts within the North Metropolitan Health Service, and alleged corruption within the Department of Communities, undermines taxpayers' confidence.

---

[4] Source: https://www.transparency.org/cpi2018 visited 11 February 2020.

5 See previous. Other nations include Saint Lucia, Hungary, Bahrain, and Guinea Bissau.

6 Source: https://www.pwc.at/de/publikationen/global-economic-crime-survey-2014.pdf visited 26 August 2021.

7 Source: https://www.pwc.at/de/publikationen/global-economic-crime-survey-2014.pdf visited 11 February 2020.

8 Source: https://www.acic.gov.au/publications/unclassified-intelligence-reports/organised-crime-australia-2017 visited 26 August 2021.

The problem of fraud, corruption, non-compliance with laws and poor business practices exists in Australia and has wide reaching effects. Transparency International best summed up the effects of fraud and corruption in public procurement[9] as follows:

- Financial impact:
    - Unnecessarily high costs; low quality of supplies or works for the price paid; burdening government with financial obligations or purchases not required.
- Economic impact:
    - Burdening a government with operational, maintenance and debt servicing liability for investment/purchase. Corruption costs and threat to business operators may also affect economic growth and employment.
- Environmental impact:
    - Corruption can engender bad choices such as implementing projects that do not comply with environmental standards, causing environmental health risks, financial liabilities, or long-term adverse impact on the environment.
- Impact on health and human safety:
    - Risks can be due to quality defects, environmentally unacceptable investments, non-compliance with environmental or health standards, or sub-standard construction leading to building failure and consequent human losses.
- Impact on innovation:
    - Companies relying on corruption may not spend resources on innovation and non-corrupt companies will be less inclined to invest if they cannot access markets due to corruption.
- Erosion of values:
    - A lack of concern for integrity and the common good among senior officials, as well as corrupt behaviour not being sanctioned, reduces the integrity standards of others out of need and often greed.
- Erosion of trust in government:
    - When others observe reckless corrupt behaviour among government representatives not being sanctioned, they conclude that government is not to be trusted and that cheating government is normally acceptable.
- Damage to honest competitors:
    - Corruption by bidders, if successful and not sanctioned, damages the honest competitor that invests more in innovation and quality.
- Serious danger to economic development:
    - If a government allows corruption in purchases and investments, and often selects projects on their ability to generate bribe payments, investment opportunities are squandered and the country's economic development is delayed.

[9] Transparency International Curbing Corruption in Public Procurement: Handbook. Source: https://www.transparency.org/en/publications/handbook-for-curbing-corruption-in-public-procurement visited 26 August 2021

## What the WA Government is already doing to address the issue

Such an intractable problem does not come with easy solutions. Law makers, law enforcement, agencies responsible for procurement policy, procurement practitioners, and suppliers must all work together to deliver a meaningful and effective solution, founded on sound laws, transparent procurement policies and responsible business practices.

### Sound laws effectively enforced—the legislative framework in WA

The purpose of this paper is not to outline the legislative response to fraud, corruption, and poor business practices in Australia. It is sufficient to point out that there are Acts, both at a State and Federal level, which prescribe business practices, including, for example, the payment of taxes, industrial relations standards, environmental standards, anti-discrimination requirements and modern slavery practices[10]. There are also Acts that establish crimes relating to fraud, money laundering, corruption, and terrorism[11]. In addition, there are public servants charged with enforcing these standards and laws.

### Transparent policies effectively applied—the WA Government procurement framework

While legislation and enforcement are clearly the primary tools by which government regulates business and prevents crime; public procurement can be leveraged to support these aims.

Broadly, a transparent and efficient public procurement system can minimise the risk of corruption, fraud, and poor business practices by:

- establishing and promoting a culture of integrity
- establishing transparent procurement policies and practices
- professionalising its procurement workforce
- making use of procurement data and other available data to inform procurement decision making and auditing
- fostering better business practices by defining expectations for suppliers, incentivising suppliers to improve these practices, and working only with suppliers who meet these expectations.

The new *Procurement Act 2020* establishes the framework for such a transparent and efficient public procurement system. Finance commits to continuously looking for opportunities to improve the framework already in place; and is driven to reflect best practice procurement as it applies in the Western Australian context.

### Responsible practices effectively monitored

The public sector already has ways in which it can help ensure it does business with responsible suppliers.

Underpinning most procurement frameworks is the concept of value for money. The Western Australian Procurement Rules prioritise the achievement of value for money. Rule

[10] For example, the *Taxation Administration Act 2003* (WA); *Modern Slavery Act 2018* (Commonwealth); *Workplace Gender Equality Act 2012* (Commonwealth).

11 For example, The Criminal Code Western Australia; *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Commonwealth).

A1 requires agencies to seek the best value for money outcome when procuring. This includes a consideration of cost, non-cost factors and the WA Government's social, economic, and environmental priorities.

Consequently, most tender requests require suppliers to detail things like how they intend to supply the goods or services; whether they have experience supplying like goods or services; and whether they or key personnel have criminal convictions.

Oftentimes, suppliers are required to provide evidence of appropriate insurances and financial statements with their offers.

In addition, suppliers might be asked to provide references; or agencies may be able to source any other information about the supplier upon which to make a judgment about their suitability and any risks posed to the successful delivery of the good or service. Agencies will also conduct due diligence to aid in these deliberations.

Agencies also manage risk in service delivery by ensuring contract terms require suppliers to comply with all laws applicable to the provision of the good or service, including adhering to industrial relations laws and environmental obligations.

This assessment of value for money is made on a case-by-case basis for each procurement activity, as each procurement activity might have a different balance of risk and may judge 'value' differently, just as we all do in our daily purchases.

## 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, is to exclude suppliers who do not from all government contracts

Both the public and the private sectors have an increased awareness that engaging suppliers that behave badly reflects poorly on the reputation of the entity engaging those suppliers—in this case the WA Government—and increases the risks of doing business more generally.

As the reputation of the WA Government as a whole is affected by an agency's poor choice in supplier, there is a need to take a whole of government approach to ensure that no agency engages a supplier who does not behave responsibly.

### Does excluding suppliers work?

#### Advantages of excluding suppliers

Governments have a fiduciary and economic obligation to their citizens. In addition, governments should be trustworthy. Engaging with suppliers who do not act ethically or responsibly undermines these obligations.

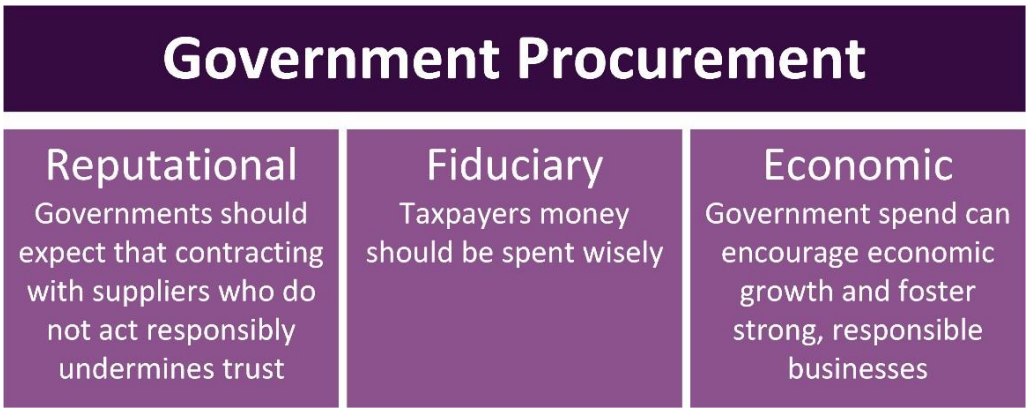


**Figure 1: Government procurement obligations**

It is difficult to measure exactly how well excluding suppliers satisfies these obligations.[12] Transparency International[13] claims that exclusion is effective in dissuading people considering wrongdoing but only when the process for exclusion is transparent and certain in its application.

The current approach (excluding suppliers through exercise of the common law right to decide who to contract with) is not transparent as there are no publicised processes to guide exclusion decisions—common law does not require them.

The recommended approach helps ensure consistency and equity in decision making in relation to exclusion, and this certainty and consistency of application itself can prevent

[12] What would success look like? A large number of suppliers excluded or no suppliers excluded? Alternatively, improving supplier behaviours is also an aim of a debarment regime, in which case, is the number of suppliers with whom the State is working to improve this behaviour the best measure?

13 Transparency International's Recommendations for the Development and Implementation of an Effective Debarment System in the EU. Source: https://www.eib.org/attachments/strategies/TI_EU_debarment_recommendations.pdf visited 10 March 2020.

fraudulent and corrupt behaviour. If suppliers have access to clear information about the behaviours for which they may be excluded; and these behaviours are consistently recognised through exclusion decisions, then the economic impact of exclusion becomes far greater than any advantage of engaging in fraud or corruption.

The Organisation for Economic Co-operation and Development (OECD) recommends that debarment regimes are adopted around the world to prevent bribery and corruption. In its 2017 report Implementing the OECD Anti-Bribery Convention: Phase 4 Report: Australia,[14] the OECD reiterates a previous recommendation that, '…Australian procuring agencies put in place transparent policies and guidelines on the exercise of their discretion on whether to debar companies or individuals convicted of foreign bribery'.

Following the OECD report, the Senate Economics References Committee released recommendations in relation to foreign bribery.[15] The Committee recommended that the Australian government implement such a regime. Only the Queensland Government has implemented a regime that could broadly be called a debarment regime[16] but has done so only for building, construction, maintenance, transport, and infrastructure.

In addition to the OECD recommendation, and the increasing number of countries that have implemented such a regime, the International Bar Association's Anti-Corruption Committee stated, 'In the Committee's experience, debarment is likely to have a far greater impact on corporations than a fine (or conviction assuming a company is ever criminally prosecuted)'.[17]

### Disadvantages of excluding suppliers

The main disadvantage of excluding suppliers is that it reduces the number of suppliers in the market, whether because a supplier is excluded or a supplier does not wish to do business with government because of the risk of exclusion.

It is difficult to forecast how many suppliers might be excluded should the WA Government adopt a debarment regime. This is because across the jurisdictions that currently have a regime, the numbers vary considerably.

In 2018, various agencies of the United States (US) Government together excluded 1,688 suppliers from their supply chains.[18] At the other extreme, the Government of Canada has only three ineligible suppliers.[19] The World Bank excluded 48 suppliers in 2019.[20] This large

14 Source: https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf visited 04 March 2020.

15 Source: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreignbribery45th/Report visited 26 August 2021.

16 The Queensland regime is largely reflective of the Supplier Demerit Scheme that is already in place in WA. This regime is currently applicable only to procurement by Building Management and Works, through the Department of Finance.

17 International Bar Association Anti-Corruption Committee, Submission, p25; in op. cit. 15

18 Source: https://www.crowell.com/files/20181030-Suspension-And-Debarment-FY-2018-By-The-Numbers.pdf visited 26 August 2021.

19 Source: https://www.tpsgc-pwgsc.gc.ca/ci-if/four-inel-eng.html visited 10 March 2020.

20 Source: http://documents.worldbank.org/curated/en/782941570732184391/pdf/World-Bank-Group-Sanctions-System-Annual-Report-FY19.pdf visited 04 March 2020.

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.

This risk might be exacerbated where:

- exclusion is too readily imposed for conduct that is not particularly severe
- exclusion is arbitrarily or mandatorily imposed for long periods of exclusion without the ability to remedy the behaviour
- exclusion decisions are inconsistent
- grounds for exclusion are not clear
- there is no opportunity for suppliers to present their case or appeal an exclusion decision.

There is a wealth of information on how to design an effective debarment regime to manage these risks.  Without a debarment regime, these risks would be difficult to manage.

## Excluding suppliers – an impact analysis of the options

There are two options for excluding suppliers from doing business with the WA Government:

- Option 1 – the current approach**:** excluding suppliers through exercise of the common law right to decide who to contract with
- Option 2 – the proposed approach: excluding suppliers through a debarment regime that establishes transparent processes that includes published grounds and robust governance.

These options were put to stakeholders in June 2020. The feedback referred to in the next section was received during that consultation period.

### Option 1: Rely on the common law rights

The WA Government may rely on a common law right to decide who it contracts with.

#### Stakeholder feedback

All respondents to the request for feedback in 2020 supported the creation of a debarment regime for the WA Government.

The respondents recognised that the lack of a process governing exclusion and absence of clear grounds for exclusion meant there was a great deal of uncertainty in relation to the State exercising its common law rights to exclude suppliers.

#### Finance's assessment of the feedback and this option.

##### *Advantages*

This option has the advantage of being relatively simple and inexpensive. The State does not have to dedicate resources to establish a robust process; nor does it have to give a right of response to a supplier who might be excluded. It is a broad right that gives the State the right to exclude suppliers for any reason; for any length of time; and without giving the supplier the opportunity to 'appeal' the decision.

##### *Disadvantages*

The primary disadvantage to this approach is that it is simply not effective in achieving the aim of doing business with responsible suppliers. It does not encourage suppliers to improve their business practices as there is no clear, articulated vision of what business practices are undesirable. In short, this approach does not transparently outline the grounds for which suppliers may be excluded, and therefore the standard to which suppliers will be consistently held.

In addition, the State may have an obligation to act in accordance with a higher standard than individuals. Inconsistent exclusion, without allowing excluded suppliers a right of response, and an opportunity to improve their business practices are not the hallmarks of a transparent, responsible government.

This option is also inconsistent with practices in a number of other jurisdictions; and with best practice guidance widely available.

#### Recommendation

This option is not recommended.

## Option 2: Implement a debarment regime

A debarment regime establishes grounds, process and governance that allows suppliers to be excluded from government contracts.

### Stakeholder Feedback

All respondents to the request for feedback in 2020 supported the creation of a debarment regime for the WA Government.

The respondents varied in their views on how the regime should work, and what grounds should be included. For this reason, Finance sought additional feedback from these respondents when it was able to share a draft copy of the Regulations.

### Finance's assessment of the feedback and this option

#### *Advantages*

The advantage of this approach is that the grounds for exclusion of suppliers are clear and transparent. If decisions are made centrally, there can be a high degree of consistency in this decision making.

This approach allows suppliers to engage with the decision maker, to demonstrate any practice improvement measures the supplier has put in place. In addition, the supplier has clear grounds for appealing the decision.

There is also a growing community of practice in this area, which will allow Finance to learn how best to implement such a regime from other jurisdictions.

#### *Disadvantages*

The disadvantage of this approach is that it requires a limited number of resources to establish appropriate governance and practices for the decision maker to apply.

In addition, the establishment of a public and transparent process may encourage agencies to report suppliers who do not act responsibly. This may lead to an increase in the number of suppliers excluded from doing business with the State. Some argue that this will constrict the already small Western Australian market leading to a reduction in competition.

There is evidence to suggest this may be true in the short term. However, in the longer-term, better business practices allow a greater number of suppliers to compete on an equal basis.

Even in the short term, Finance recognises most businesses conduct their business with a high degree of business ethics. Any short-term decrease in numbers of suppliers may actually be an advantage to these suppliers.

### Recommendation

Finance recommends that the State adopt a transparent, consistent debarment regime to exclude suppliers from doing business with the State.

The debarment regime should be consistent with international best practice.

## Elements of the WA Government's debarment regime – an impact analysis of the options

In December 2019 Finance released a discussion paper outlining examples and experience from debarment regimes around the world. This discussion paper sought feedback about the approach taken in other jurisdictions to assist us in defining a debarment regime for WA.

This feedback was used to inform the debarment regime discussion draft, that was then released for public comment in June 2020.

The feedback received in response to the public request for comment was then used to inform the draft Regulations, which were then shared with those who provided feedback in response to the June 2020 request.

This feedback was used to finalise the Regulations.

The following analysis:

- explains the elements typically included in debarment regimes;
- outlines the feedback received in relation to each of these elements; and
- articulates the position on each of these elements adopted in the draft Regulations.

There are many debarment regimes in place around the world. The most well-known regime is the World Bank's Suspension and Debarment, or 'sanctions' system. Other jurisdictions, including Canada, the US, Brazil, Chile, Germany, the United Kingdom, and the European Commission, all have varying types of exclusion regimes

A debarment regime is typically made up of the following elements:

| | |
|---|---|
| **Decision making governance** | Who makes the decision to debar, and what is the framework for doing so? |
| **Grounds for exclusion** | Why might a supplier be excluded? |
| **Scope of exclusion** | What type of exclusion might be imposed (suspension and/or debarment)? |
| | What might the length of exclusion be? |
| | Are there any exceptions to exclusion? |
| | What is the effect on current and future contracts? |
| | Does exclusion extend to affiliates or related entities? |
| **Rights of the supplier** | Is a notice of intent to debar given? |
| | Is the supplier given an option to provide information? |
| | Is there a right of appeal? |

The decisions each jurisdiction makes in relation to these elements of a debarment regime, speaks to the outcomes it wishes to achieve in implementing a regime, and the risks it wishes to manage.

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—only resorting to exclusion in the most egregious of circumstances.

The latter is widely considered the most effective model.

## Decision Making Governance

A well-functioning debarment regime must have an active referral process and dedicated staff, with appropriate resourcing to enable thorough and transparent decision making.

Decisions to exclude a supplier may be made at two different levels: centrally, or by an agency charged with making debarment decisions. In addition, some debarment regimes allow decisions to be made by officers within each agency. There are advantages and disadvantages to each approach.

Centre led decision making:

- Pros:
  - Decision making is more consistent.
  - Resourcing is funded and allocated centrally.
  - Investigative expertise is centrally developed with networks formed with integrity and specialist agencies.
- Cons:
  - Agencies don’t have the flexibility to exclude suppliers.
  - (Agencies are still encouraged to adopt performance management processes and may use these processes to terminate specific contracts if performance is poor. Agencies may still exclude suppliers from consideration in specific tendering processes on pre-qualification, or other grounds included in tender documentation.)

Agency led decision making:

- Pros:
  - Agencies have flexibility to exclude suppliers.
- Cons:
  - Each agency must establish their own processes and must resource an investigative function within its organisation.
  - These models are more focused on performance under specific contracts rather than a supplier’s organisation as a whole.
  - Exclusion is likely to be inconsistent from agency to agency.
  - Establishing and maintaining this framework may be onerous, especially for small agencies.
  - Limits the ability of an agency to work with suppliers to improve their organizational practices.

The recent World Bank World Survey on Debarment Regimes[21] 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 making—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 decision making.

### Feedback received

Respondents who provided feedback on the question of decision making supported the centralisation of decision making.

Several respondents suggested that the Commissioner of the Crime and Corruption Commission; the Industrial Relations Tribunal or a party external to government would be best placed to make a decision.  Another respondent suggested a decision made by a board would best promote public confidence.

In the August 2021 comment period, a respondent expressed discomfort with the lack of external (to Finance) adjudication in those cases where guilt of a supplier has not been established by an entity charged with investigating the grounds for conduct included in the Regulations.

There was also feedback on procedural matters.  This included a suggestion that:

- parties external to government should be enabled to give information on poorly performing suppliers to the exclusion decision maker;
- parties external to government should be able to comment on an exclusion decision;
- there should be an opportunity to review the Regulations; and
- Finance provide more guidance to suppliers and buyers in relation to the Regulations and how to apply them.

### Decision making in the draft Regulations

The draft Regulations include a centralised approach to decision making.

[21] The information in this section draws heavily from the World Bank's report A Global View of Debarment: Understanding Exclusion Systems Around the World, The World Bank, https://www.worldbank.org/content/dam/documents/sanctions/office-of-suspension-and-debarment/2019/may/SD_Survey_Results_(April_2019).pdf visited 26 August 2021.

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:

- 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;
- while the exclusion decision maker may request information and input from third parties when making a decision, it is not obliged to do so;
- the Regulations will be reviewed in accordance with the requirements in the *Procurement Act 2020* – that is before July 2026; and
- 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 poor performance or a general 'catch all' that allows a supplier to be excluded for any '…cause of so serious or compelling a nature' that it affects the supplier's 'present responsibility.'

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 Association[22] stated:

'To the extent the scope of debarment offences moves away from offences directly relevant 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 less competitive process and may pay more or receive lower quality services.'

[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 of their senior officers. The definition of senior officers is the same as in section 9 of the *Corporations Act 2001*.

Category A debarment conduct is serious conduct—generally conduct amounting to criminal offences. This category of conduct attracts a longer possible debarment period of up to five years. This category of conduct reflects legislative standards.

Category B debarment conduct is less serious conduct and has a maximum debarment period of up to two years. It is likely that suppliers whose conduct falls into this category will be offered an undertaking to remedy the conduct, rather than being debarred in the first instance. This category of conduct reflects legislative standards.

Some of the legislation suggested in the feedback has been included in the Category A and B tables included in the Regulations. This includes provisions relating to phoenixing, sham contracting and those offences mentioned above.

The third category of conduct is a ‘catch all’ ground— ‘other debarment conduct’—that allows the exclusion decision maker to exclude a supplier for up to two years if satisfied that the conduct is of such a nature that the procurement of goods, services or works would be likely to have a material adverse effect on any of the following:

- the integrity of, and public confidence in, the procurement activities of State agencies
- the reputation of the State
- the business risk to State agencies.

‘Other debarment conduct’ does not rely on non-compliance with legislation as a ground to exclude suppliers.

While the draft Regulations do not include contract performance under individual contracts as a ground for debarment, protracted poor performance or poor performance on several contracts across the sector, may trigger this ‘catch all’ ground. Failure to cooperate with an investigation conducted by the exclusion decision maker or debarment under a corresponding debarment regime are also captured.

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 right of response during the exclusion process. This approach is usually used in cases where suppliers are proven to have broken the law by a court or tribunal. As a judicial process has already been followed, an exclusion decision may be made on the basis of the right of response available to the supplier during the judicial process.

Suspension is a type of immediate exclusion and may be used where a supplier has been charged with an offence but not yet found guilty or where a debarring body is considering criminal charges.

Discretionary exclusion is where exclusion is only decided after the supplier is afforded a right of response through the exclusion process itself. This approach is typically used in cases where suppliers have not yet been found guilty of a crime, where an integrity agency (for example the Corruption and Crime Commission) reports unfavourably on a supplier, or where a supplier is not upholding other standards established by the State.

Typically, a decision to debar on discretionary grounds may be deferred to allow a supplier to put in place measures that remedy the behaviour or business practice that would otherwise allow the State to exclude that supplier. These ‘make good’ measures could, for example, be an agreement between the parties to pay outstanding taxes; put processes in place to reach gender parity; or to ensure sustainability in its supply chain.

### Feedback received

Several respondents felt that the exclusion decision maker should not be empowered to suspend suppliers. The feedback suggested that suppliers should not be excluded for anything other than a finding of guilt/imposition of a penalty by a government agency.

Other feedback suggested that the exclusion decision maker should, in all instances, work with suppliers to rectify issues of non-compliance before deciding to exclude.

### Scope of Exclusion in the draft Regulations

The draft Regulations include two different exclusion processes.

The first process is debarment. Suppliers can be debarred (or excluded from government contracts) on the grounds of Category A debarment conduct, Category B debarment conduct, or ‘other debarment conduct’. Where the exclusion decision maker has commenced an investigation into whether a supplier should be debarred, that supplier is offered a right of response.

The second process is suspension. Suppliers can be suspended (or excluded from government contracts) on the grounds of Category A debarment conduct only. Suppliers are not offered a right of response.

In response to the feedback, the Regulations only allow suspension where the conduct in question is Category A debarment conduct. The conduct must also be of such a nature

that the exclusion decision maker believes it is in the public interest to suspend the supplier.

The exclusion decision maker may offer a supplier undertaking to a supplier who is under investigation or has been suspended or debarred. A supplier undertaking is essentially a binding agreement that gives the supplier an opportunity to remedy or mitigate the conduct that gave rise to the investigation, suspension or debarment.

A supplier undertaking may mean that the consequences of exclusion may be avoided if the supplier complies with the undertaking.

A supplier undertaking may be offered for any type of debarment conduct however the exclusion decision maker is not *required* to offer an undertaking to work with a supplier to remedy non-compliance. There will be times when the conduct is so serious, and incapable of being remedied that a supplier undertaking should not be offered – this will generally be the case for Category A conduct.

A supplier undertaking is most likely to be offered for Category B debarment conduct. This reflects the less serious nature of that conduct and the likelihood that conduct of this nature may be remedied, mitigated, or prevented in the future.

In all cases, a decision to suspend or debar may be reviewed by the State Administrative Tribunal.

### Effects of debarment on contracts and subcontracts

In the US, contracting bodies may continue with current contracts, but cannot add new work to a contract, exercise extension options, or extend the contract. In addition, no new orders can be placed under panel arrangements.

No jurisdictions require or mandate that contracts terminate immediately upon an exclusion decision being made. This may reflect a practical problem—each contracting body is subject to the existing contract and its terms, which may not include an ability to terminate for this reason. In addition, at a minimum, agencies need time to put in place alternative supply arrangements; and, in some instances, changing suppliers might be exceedingly impractical. This is particularly true where delivery of a long-term project is nearly at completion or where switching suppliers is not possible due to intellectual property ownership issues.

In practice, it would be a brave contracting authority that pursues or continues a contract with an excluded supplier. However, through policy the State can direct agencies and ensure consistent treatment of excluded suppliers by:

- including in all WA Government contracts (and/or legislation) a clause that allows termination in the event a supplier is excluded
- including in State supply policy, the requirement to terminate all contracts with excluded suppliers, except where permission has been given by the exclusion decision maker or the accountable authority of the agency concerned.

In addition, most jurisdictions do not allow excluded suppliers to subcontract to a party who has a contract with the State.

In most jurisdictions the names of debarred and suspended suppliers are published. In some jurisdictions, the names of suppliers subject to a supplier undertaking are also published.

### Feedback received

Feedback varied on the publication of debarred suppliers. Some feedback indicated that the list of debarred suppliers should not be made public at all. Others felt the public list should include not only debarred suppliers, but suspended suppliers and suppliers with whom the State has a supplier undertaking.

There was no other feedback on the consequences of exclusion, except in relation to expenses should a contract be terminated.

### Effects of debarment on contracts and subcontracts in the draft Regulations

The draft Regulations preclude a debarred or suspended supplier from:

- seeking, or being awarded, a new contract (including customer contracts under a panel arrangement)
- being an agent or representative of a supplier to the State
- seeking or being awarded an extension to a contract, or to increase the scope of any contract.

Non-excluded suppliers are also precluded from seeking or being awarded a new contract if they have a subcontracting arrangement with an excluded supplier.

An agency may also terminate a contract with a debarred supplier. However, it is not mandatory to do so. This includes terminating a panel arrangement, with a debarred supplier.

Only the names of debarred suppliers will be published. The names of suspended suppliers will not be published but will, instead be sent to the accountable authorities of each government agency. Where a supplier has been debarred but also offered a supplier undertaking, the exclusion decision maker may decide whether to publish the name of that supplier.

## Length of exclusion and exceptions

In most jurisdictions, the length of exclusion is generally between one and five years, depending on the type of exclusion ground. In Canada, the grounds requiring ‘immediate’ exclusion attract an exclusion length of 5 to 10 years. These periods can be reduced where ‘make good provisions’ are in place, but only for some grounds. For example, there is no reduction allowed for fraud.

Regardless of length of exclusion, about half of the jurisdictions allow exceptions to a decision to exclude.

Germany allows contracting bodies to engage excluded suppliers in emergency situations, while others, including Canada allow a ‘public interest’ exception. The United Kingdom allows exceptions on the basis of both public interest and ‘disproportionate burden’; the US on the basis of ‘urgent and compelling circumstances’.

### Feedback received

Some respondents felt that the discretion to award to an excluded supplier should not be included in the debarment regime.

A few respondents suggested that ten years was an excessive amount of time to be excluded. Some recommended five years was more appropriate as a maximum exclusion period for serious conduct.

### Length of exclusion and exceptions in the draft Regulations

The maximum period of debarment under the draft Regulations depends on the nature of the conduct. Category A debarment conduct has a maximum debarment period of five years. Category B debarment conduct and 'other debarment conduct' has a maximum debarment period of two years.

Suppliers may also be suspended for a maximum period of 12 months. However, this period may be renewed after further consideration, in increments of six months up to a maximum cumulative period of five years.

The draft Regulations do contain a provision that allows an excluded supplier to be awarded new contracts where there are exceptional circumstances and where it is in the public interest to do so.

Finance has included this provision, despite the feedback suggesting otherwise, because we recognise there may be situations in which a good, service or work can only be procured from an excluded supplier. To prevent excessive reliance on this discretion to award contracts to excluded suppliers, in all cases the exclusion decision maker must approve the award of these contracts.

## Extension to affiliated individuals or corporations

All but one jurisdiction surveyed by the World Bank allow debarment to extend to related entities and/or affiliated individuals (for example officer, director, or shareholder). Jurisdictions do vary, however, on whether these exclusions are immediate or discretionary.

Many other jurisdictions extend exclusion to both affiliated individuals and corporations but only on a discretionary basis. This gives the decision maker the ability to investigate the culpability of the affiliates in the activity that gave rise to the exclusion, and to make decisions that do not unfairly exclude suppliers for behaviour about which they did not have knowledge, nor could reasonably be expected to have such knowledge.

Table 1: Exclusion of affiliates around the world

| Status | Jurisdiction |
|---|---|
| Can extend to affiliated corporations | • Germany<br>• Spain<br>• Tunisia<br>• US<br>• World Bank |
| Must extend to affiliated corporations | • European Union |
| Must not extend to affiliated corporations | • Brazil |

| | |
|---|---|
| Can extend to affiliated individuals | • European Union<br>• Germany<br>• United Kingdom<br>• US |
| Must extend to affiliated individuals | • Chile<br>• Spain |
| Must not extend to affiliated individuals | • Brazil<br>• 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. 'Affiliate' is defined in the draft Regulations and includes, 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 across the jurisdictions, where there is a mix of administrative processes to address appeals and judicial processes.

Table 2: Appeal rights of suppliers

| Process | Jurisdiction |
|---|---|
| Judicial and administrative | • Chile<br>• Germany<br>• Spain<br>• US |
| Judicial | • European Commission<br>• Italy<br>• United Kingdom |
| Administrative | • Brazil<br>• Tunisia<br>• World Bank |

### Feedback received

Most feedback reiterated the importance of a right to appeal a decision made by the exclusion decision maker.

Most feedback also strongly supported the supplier's right to make a submission to the exclusion decision maker. There was also a suggestion that the decision-making process should be clearly articulated, and that Finance should provide guidance on the expectations, responsibilities and rights of each party during the investigative process.

### Rights of the Supplier in the draft Regulations

The draft Regulations allow the supplier being investigated to make submissions prior to the making of a debarment decision. The exclusion decision maker must consider those submissions before making a decision to debar.

The draft Regulations and the Act also provide opportunities for the review of exclusion decisions. An excluded supplier may refer the decision to suspend or debar to the State Administrative Tribunal.

In addition, where a suppler has been suspended or debarred but has then had a change in circumstance, the supplier may ask the exclusion decision maker to reconsider the decision.

Finance will publish guidance to help suppliers understand how the Regulations operate, and will ensure that further guidance is given to suppliers, in relation to their rights and responsibilities, should they participate in a debarment investigation. In addition, Finance will publish guidance for buyers.

## 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:

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

The Regulations will be reviewed concurrently with the Finance's review of the *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. This will include Guidelines, and Frequently Asked Questions.

For further information please contact procurementassurance@finance.wa.gov.au.

# Glossary

| Term | Meaning |
|---|---|
| Act | *Procurement Act 2020* |
| Agency, agencies | State agencies as defined by section 5 of the Act. |
| Category A conduct | Category A debarment conduct is serious conduct—generally conduct amounting to criminal offences. This category of conduct attracts a longer possible debarment period of up to five years. |
| Category B conduct | Category B debarment conduct is less serious conduct and has a maximum debarment period of up to two years. |
| Draft Regulations | The draft version of the *Procurement (Debarment of Suppliers) Regulations 2021.* |
| DRIS | Decision Regulatory Impact Statement |
| Exclusion | Where a supplier is prevented from supplying to the WA Government as a result of being suspended or debarred. |
| Exclusion decision maker | The chief executive officer:<br>• of the Department responsible for administering the Act (currently the Director General of the Department of Finance)<br>• responsible for making decisions to exclude suppliers under the draft Regulations. |
| Finance | Department of Finance |
| Framework | The proposal to develop an Ethical Procurement Framework approved by the WA Government in February 2019. |
| OECD | Organisation for Economic Co-operation and Development |
| US | United States of America |