

First debarment and suspension regime introduced in Australia: what you need to know

The state of Western Australia (**WA**) has introduced Australia's first debarment and suspension regime. It establishes grounds and processes through which the WA government can work with suppliers to improve their business practices, and in the worst cases of wrongdoing exclude a supplier from doing business with the WA government. The regime will have effect from 1 January 2022. It further increases the complexity of the regulatory environment for companies by opening up a new potential form of government scrutiny and investigation while adding to the potential collateral consequences for companies found breaching the law.

This article describes the new WA regime and considers what practical steps companies might take to reduce the risks stemming from the operation of this regime.

What is a debarment regime?

Outside Australia, debarment and suspension is a regulatory tool employed by many governments and international organisations. Depending on the individual regime, debarment is designed to prevent suppliers from obtaining government contracts and work if the supplier is the subject of criminal conviction, certain types of civil judgment or in some instances allegations that do not result in either conviction or civil judgment. Importantly, in a number of jurisdictions around the world the conduct of officers of a supplier can also expose a supplier to suspension or debarment.

Governments cite a number of reasons for the adoption of debarment and suspension as a regulatory tool, including the ability to ensure that public funds are utilised for partnerships with ethical commercial partners, to maintain public confidence in government agencies and their work, and to punish suppliers who engage in corrupt or improper behaviour.¹

Debarment and suspension is also commonly cited as helping promote transparent and responsible business practices. The main mechanism by which this is achieved is the creation

of an incentive for suppliers to engage in proper and lawful business practices and by excluding irresponsible suppliers from having the ability to obtain government contracts. In talking about the WA regime, Western Australian Industrial Relations Minister Stephen Dawson noted that, "the WA government is one of the biggest suppliers of good and services in the State. The establishment of this debarment regime reflects the Government's commitment to good corporate responsibility."²

What are the new Western Australian laws?

The WA regime is established by the *Procurement Act 2020 (WA)* and the *Procurement (Debarment of Suppliers) Regulations 2021 (WA)*.

It applies to companies and individuals (together, suppliers) that supply, and subcontract to supply, goods, services and community services and works to the WA government, and establishes the notion of "exclusion", which means the suspension or debarment of a supplier or affiliate of the supplier. Importantly, suppliers may be excluded not just because of their own conduct. The conduct of senior officers³

¹ See, <https://www.wa.gov.au/government/publications/debarment-regime-frequently-asked-questions#why-have-a-debarment-regime> and Olivia Dixon, 'The Efficacy of Australia Adopting a Debarment Regime in Public Procurement' (2021) 49(1) Federal Law Review 122, 127.

² See, <https://www.mediastatements.wa.gov.au/Pages/McGowan/2021/11/McGowan-Government-introduces-Australias-first-debarment-regime.aspx>

³ The term "senior officer" includes people such as company directors and secretaries, other office holders, partners of a partnership, or a person who is responsible for or participates in decisions that affect the suppliers business or financial standing.

⁴ An affiliate under the WA regime is an entity that: controls or is controlled by the debarred supplier; is a related body corporate of the debarred supplier; has a senior officer who is also a senior officer of the debarred supplier; is the successor (whether immediate or not) to, or of the whole or part of the business of, the debarred supplier.

of a supplier can lead to exclusion. Affiliates⁴ of debarred suppliers may also be excluded from business with the WA government if it is determined to be in the public interest.

The Department of Finance is set to administer the regime on behalf of the WA government. The Director General of the Department of Finance is the designated decision maker responsible for debarment investigations and determining whether a supplier may be excluded or invited to enter a supplier undertaking with the state instead of being excluded.

What sort of conduct can give rise to debarment or suspension?

The WA regime establishes three categories of debarment conduct. Category A debarment conduct relates to the most serious form of misconduct, with Category B and “other debarment conduct” covering progressively less serious misconduct. Only Category A debarment conduct is ground for suspension. The table below describes the types of conduct in each category.

Categories of Debarment Conduct	
Category A debarment conduct	<p>Section 9 and Schedule 1, Procurement (Debarment of Suppliers) Regulations 2021, lists the specific offences under federal and state legislation falling into this category of debarment conduct.</p> <p>Category A debarment conduct includes bribery and corruption, embezzlement, theft and receiving stolen property, extortion, falsification of books and documents, forgery, fraud, laundering proceeds of crime, human trafficking, and insider trading. It also extends to non-compliance with certain specified sections of work health and safety legislation, environmental legislation, and taxation legislation.</p>
Category B debarment conduct	<p>Section 10 and Schedule 2, Procurement (Debarment of Suppliers) Regulations 2021 lists the specific offences under federal and state legislation falling into this category of debarment conduct.</p> <p>Category B debarment conduct includes, but is not limited to, non-compliance with certain sections of anti-discrimination legislation and gender equality reporting requirements, as well as non-compliance with modern slavery reporting requirements, non-compliance with certain sections of occupational safety and health legislation, and non-compliance with certain sections of workers’ compensation legislation.</p>
Other debarment conduct	<p>Section 11, Procurement (Debarment of Suppliers) Regulations 2021 defines “other debarment conduct” as any conduct of a supplier or senior officer of a supplier that is not Category A debarment conduct or Category B debarment conduct but that the government is satisfied is of such a nature that the procurement of goods, services or works by state agencies from the supplier will be likely to have a material adverse effect on (i) the integrity of, and public confidence in, the procurement activities of state agencies, (ii) the reputation of the state or (iii) the business risk to state agencies.</p>

Importantly, the reach of the new regime is broad. It captures conduct that is not related to the supply of goods, services or works to the WA government, as well as conduct that occurs overseas. It also captures conduct that occurred before the commencement of the WA regime, reaching back three years since the conduct occurred, or three years since a conviction or penalty was imposed or since the supplier was debarred under another regime.

What is suspension, and how is it different to debarment?

Suspension acts as a temporary measure that can be taken pending a decision about debarment for suppliers (or affiliates of suppliers) who are potentially involved in the most serious form of debarment conduct (i.e. Category A debarment conduct) where the decision maker is of the view the suspension is in the public interest pending the conclusion of proceedings.

Suspension operates by suspending a supplier for an initial period of 12 months. The decision maker may extend the suspension by 6 month increments, up to a maximum of 5 years if an official investigation or proceedings in relation to the underlying conduct is pending or still in progress, and the decision maker has not yet made a debarment decision.

How does the suspension and debarment system work?

Mechanics of the system

The table below summarises the grounds and preconditions for suspension and debarment under the WA regime, as well as setting out the time to make a suspension or debarment decision, and the maximum duration of suspension or debarment.

Suspension: very serious offences and contravention of specified provisions

Grounds for suspension	Precondition to decision	Time to make decision	Maximum duration
<ul style="list-style-type: none"> - Category A debarment conduct by the supplier or a senior officer, and - suspension is in the public interest. 	A debarment investigation into Category A conduct is underway.	While the investigation is underway and before a decision is made to debar or not debar.	5 years (12 months, with 6 month extensions)

Category A debarment conduct: very serious offences and contravention of specified provisions

Grounds for debarment	Precondition to decision	Time to make decision	Maximum duration
<ul style="list-style-type: none"> - Category A debarment conduct by the supplier or a senior officer, and - debarment is in the public interest. 	Conviction for an offence, imposition of a penalty, or the decision maker is otherwise satisfied that the conduct occurred.	<ul style="list-style-type: none"> - Within 3 years of the conduct or the conviction or imposition of a penalty, or - when debaring an affiliate, within 3 years of the debarment of the principal supplier. 	5 years

Category B debarment conduct: offences and contravention of listed legislation

Grounds for debarment	Precondition to decision	Time to make decision	Maximum duration
<ul style="list-style-type: none"> - Category B debarment conduct by the supplier or a senior officer, and - debarment is in the public interest. 	Not applicable	<ul style="list-style-type: none"> - Within 3 years of the conduct or the conviction or imposition of a penalty, or - when debaring an affiliate, within 3 years of the debarment of the principal supplier. 	2 years

Other debarment conduct: conduct likely to have a material adverse effect on integrity/public confidence in government procurement.

Grounds for debarment	Precondition to decision	Time to make decision	Maximum duration
<ul style="list-style-type: none"> - Conduct that is not Category A or B conduct and is likely to have a material adverse effect on government procurement. - Failure to cooperate with a debarment investigation. - Debarment under another debarment regime. 	Not applicable	<ul style="list-style-type: none"> - Within 3 years of debarment under another regime, or - within 3 years of the conduct or the conviction or imposition of a penalty, or - when debaring an affiliate, within 3 years of the debarment of the principal supplier. 	2 years

What are the consequences of suspension or debarment?

Suspension or debarment under the WA regime creates consequences and obligations for both suppliers and agencies of the WA government.

For an agency of the WA government, if it has contract(s) with a debarred supplier, the governing legislation states the agency may terminate the contract(s). If it has contract(s) with a suspended or debarred supplier or affiliate, they must not extend the scope or duration of the contract while the supplier is excluded.

The WA regime does not speak to any rights of an excluded supplier to compensation if a contract is terminated, though guidance on the matter notes that termination is optional, and WA government agencies are encouraged to review their contractual rights and approach to contract management.

The consequences of exclusion for suppliers include that they will be named on the Debarment Register on **Tenders WA**, and that any existing contracts with government agencies may be terminated (if the supplier is debarred) and must not be extended, and excluded suppliers must not seek or be awarded new contracts in their own right or as an agent or representative of another supplier.

What are supplier undertakings?

As an alternative to suspension or debarment, the WA regime offers the possibility of a supplier undertaking. A supplier undertaking is an arrangement between the supplier and government which may be offered to 'stay' any of the consequences of exclusion or suspension when a supplier is under investigation.

A supplier undertaking is likely to be offered where the conduct by the supplier may be mitigated or remedied. The WA government has stated that supplier undertakings are less likely to be used for Category A debarment conduct.⁵

A supplier undertaking may contain any provisions, but is likely to contain provisions relating to the removal of particular employees, remediation of particular conduct, and implementation or extension of compliance or employee training programs.

A supplier undertaking may also require the supplier to furnish particular documents or information to the decision maker, report to third parties, or be subject to external auditing.

How does a debarment investigation work?

Investigations under the WA regime may be carried out if the decision maker reasonably suspects that a supplier or a senior officer of the supplier has engaged in conduct for which a supplier might be excluded, or if proceedings have been taken against a supplier or senior officer for conduct for which the supplier may be debarred.

The decision maker must simply be satisfied that the conduct is a ground for exclusion and that it is in the public

interest to exclude the supplier. The WA regime does not anticipate that the decision maker will carry out their own investigation. Instead the WA regime is based on the idea the decision maker will rely on other entities responsible for the oversight and enforcement of legislation (such as the Australian Securities and Investment Commission or Australian Federal Police) that is included in the regime.

Before making a debarment decision, the decision maker must issue a show cause notice to the relevant supplier and give them at least 7 days to make submissions. The decision maker must consider any submissions before making the debarment decision.

The decision maker must take public interest into account when making suspension or debarment decisions and the duration of the debarment. Regulation 7 sets out a number of factors the decision maker may consider, including the seriousness of the conduct, any remedial measures taken by the supplier, any mitigating circumstances, whether the supplier had effective internal control systems in place, whether the supplier voluntarily disclosed the matter, and levels of cooperation with the government.

At the conclusion of every debarment investigation, the decision maker must give the supplier notice of their decision, and provide reasons for the decision.

An excluded supplier may apply to the State Administrative Tribunal for review of a suspension or debarment decision, or refusal by the decision maker to revoke or amend a suspension or debarment decision after a request for reconsideration has been made. Suppliers that have been excluded are able to ask the decision maker to review a suspension or debarment decision in certain defined limited circumstances.

How do debarment regimes operate in other jurisdictions?

Although the WA laws represent the introduction of the first debarment regime in the Australian jurisdiction, debarment regimes are utilised across other nations and organisations. Notable nations and organisations which have debarment regimes include; the United States of America, the United Kingdom, Germany, Canada, the World Bank and the European Union.

In the United States, suspension or debarment at the federal level can occur when a government contractor is convicted of, or found civilly liable for an integrity offence – which can include fraud, embezzlement, theft, forgery, and tax evasion.⁶ The decision whether to debar or not is discretionary and rests with the officials within any given agency with agency officials required to prioritise the public interest when making decisions on debarment. In addition, consideration will be given to standards of conduct and internal controls, self-reporting in a timely manner, internal investigations, cooperation with external investigation, payment of fines, disciplinary actions and remedial measures in their decision making calculus.

5 See, <https://www.wa.gov.au/government/publications/debarment-regime-frequently-asked-questions#when-can-suppliers-be-suspended>

6 See, <https://www.gsa.gov/policy-regulations/policy/acquisition-policy/office-of-acquisition-policy/gsa-acq-policy-integrity-workforce/suspension-and-debarment-division>.

7 See, <https://www.worldbank.org/en/about/unit/sanctions-system#2>

8 See, <https://www.worldbank.org/en/projects-operations/procurement/debarred-firms>

The World Bank has also established a system of administrative sanctions designed for use against companies or individuals who have engaged in fraud, corruption, coercion, collusion or obstruction in connection with World Bank-financed projects.⁷ Similar to the WA regime, the World Bank sanctions regime is designed to protect the funds entrusted to the World Bank, while offering the companies and individuals involved an opportunity to respond to the allegations against them. The World Bank regime establishes five potential administrative sanctions: debarment, debarment with conditional release, conditional non-debarment, public letter of reprimand, and restitution. A public register is maintained by the World Bank of ineligible companies and individuals.⁸

What are the ramifications for companies of the new WA regime?

The introduction of Australia's first debarment regime has the potential to have significant consequences for companies and individuals looking to participate in procurement processes in Western Australia. Notably:

1. It will place the actions and behaviour of companies and individuals under the microscope, not just for their Australian commercial activities, but conduct worldwide.
2. Companies will need to be mindful of what proactive steps they could be taking to reduce the risk of

suspension or debarment. In particular, companies should consider the adequacy of their existing internal controls and compliance policies and procedures and the effectiveness of those systems in preventing and detecting potential violations of law. The effectiveness of internal controls will be a consideration in debarment and suspension decisions.

The adoption of the WA regime could also have follow on effects at a national level and in other Australian states. In 2020 the Australian Law Reform Commission (**ALRC**) recommended that the Australian Government, together with state and territory governments, develop a national debarment regime.⁹ The ALRC considered that the argument might be made the development of an Australian debarment regime is unnecessary, as criminal convictions can already be taken into account in government and private sector procurement processes. Yet the ALRC noted there is currently no clear guidance on the relevance of criminal convictions to Commonwealth procurement decisions in the Procurement Rules,¹⁰ and certainly nothing in the way now set out in the WA regime. The WA regime may provide the impetus for the Commonwealth and other states to follow suit.

⁹ See Australian Law Reform Commission, Final Report, Corporate Criminal Responsibility, ALRC Report 136, April 2020 at 362 and Recommendation 15.

¹⁰ Department of Finance (Cth), Commonwealth Procurement Rules (20 April 2019)

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