PricewaterhouseCoopers (Australia)
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PwC International Business Reorganisations Network – Monthly Legal Update

Edition 3, March 2019

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Welcome

Welcome to the third edition of the PwC International Business Reorganisations (**IBR**) Network Monthly Legal Update for 2019.

The PwC IBR Network provides legal services to assist multinational organisations with their cross-border reorganisations. We focus on post-deal integration, pre-transaction separation and carve outs, single entity projects, and legal entity rationalisation and simplification as well as general business and corporate and commercial structuring.

Each month our global legal network brings you insights and updates on key legal issues multinational organisations.

We hope that you will find this publication helpful, and we look forward to hearing from you.

In this issue

In our March 2019 issue:

- PricewaterhouseCoopers (Australia) reports on the introduction of the *Government Procurement (Judicial Review) Act 2018*; and
- PwC Legal S.R.L. (Argentina) considers the income tax treatment of severance payments made to executives and directors.

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PricewaterhouseCoopers (Australia) – New dawn for Commonwealth procurement

At a glance

The *Government Procurement (Judicial Review) Act 2018* (**Act**) received assent on 19 October 2018 and will commence from April 2019, unless proclaimed sooner.

An aggrieved supplier claiming that the Commonwealth Procurement Rules (**CPRs**) have been, or may be, contravened by a Commonwealth entity now has new statutory rights to make a complaint and seek other forms of redress under a simple, expedited process. Such complaints will trigger an investigation and may result in the suspension or termination of the procurement process.

In detail

How does the Act work?

The Act applies to 'covered' procurements undertaken by corporate or non-corporate Commonwealth entities – i.e. procurements above the relevant procurement threshold in the CPRs (unless exempt under the CPRs or in a class listed by Ministerial instrument).

A supplier with reason to believe that there has been, is or will be, conduct in contravention of the CPRs, and whose interests are affected by such conduct, may make a written complaint to the relevant entity. The making of a written complaint will trigger:

a an investigation and report by the Commonwealth entity;

b suspension of the procurement process until the complaint is resolved or withdrawn or the Court makes a finding in respect of the contravention, except where the Commonwealth entity has obtained a 'public interest certificate'; and

c a right for the supplier to apply to the Federal Court or the Federal Circuit Court for an injunction to restrain or to compel performance by the Commonwealth entity, provided the injunction application is made within 10 days of the contravention and the Court is satisfied that the supplier has made a reasonable attempt to resolve the complaint.

Even if a written complaint is not made, the supplier may apply to the Federal Court or the Federal Circuit Court for compensation for costs in relation to the procurement process and the written complaint (if any).

Does the Act apply to all Commonwealth procurement processes?

No. However, it will apply to many procurement processes, because the definition of 'procurement' under the CPRs is broad (see CPRs 2.7-2.8), the exclusions are relatively narrow and the thresholds for 'covered procurements' are:

a $80,000 for non-construction services for non-corporate Commonwealth entities (non-construction services;

b $400,000 for corporate Commonwealth entities (non- construction services); and

c $7.5m for construction services.

In addition to procurements below the above thresholds, other key exclusions include:

a Appendix A exempt procurements - e.g. leases, services from a small-medium size enterprise with at least 50 per cent Indigenous ownership, government advertising services, labour hire, motor vehicles;

b Minister exempt procurements - procurements of a class listed in a determination by the Minister, as contemplated by s 5 of the Act;

c national interest procurements - procurements determined necessary 'for the maintenance or restoration of international peace and security, to protect human health, for the protection of essential security interests, or to protect national treasures of artistic, historical or archaeological value', under CPR 2.6 and contemplated by s 5 of the Act. Such procurements include the long list of specific Defence materiel procurements described in Defence Procurement Policy Directives D2 and D4; and

d certain financial procurements - procurements not included in CPR 2.9 (Div 1) such as loans, grants and investments.

Can the operation of the Act be excluded?

No, that is unlikely.

The CPRs do not permit contracting out (indeed, the CPRs require disclosure of non-compliance) and any attempt to contract out of the statutory rights and remedies granted by the Act may be challenged on the basis that such an attempt is inconsistent with Australia's international treaty obligations.

However, Commonwealth entities are likely to retain broadly drafted 'no tender process contract' clauses which seek to exclude claims for breach of the process contract.

Can a contravention of Division 1 of the CPRs be challenged under the Act?

Yes, but only if they are 'declared', and none have been declared yet.

If they are declared in the future and it becomes possible to challenge on the basis of contravention of the broad concepts underpinning Division 1 of the CPRs, it is likely that suppliers will find it more difficult to establish a breach and the Courts will find investigation and resolution equally difficult.

Can a public interest certificate be issued?

The Explanatory Memorandum noted that a public interest certificate should generally only be issued where a suspension would result in 'real adverse consequences' and that Commonwealth entities would receive guidance on how to strike an appropriate balance between the accountability/transparency objectives of each procurement process and the frustration of a procurement process/government work. If public interest certificates are either too easy or too difficult to obtain, the balance will be compromised.

The effect of issuing a public interest certificate is to safeguard the procurement from a suspension following the making of a written complaint, and also from the delay caused by an injunction where compensation is also being sought.

Section 20(b) of the Act suggests that to avoid a suspension of the procurement process, the public interest certificate must have been issued before the written complaint is made. However s 20(e) contemplates that a public interest certificate can be issued after the written complaint is made, resulting in the lifting of any suspension.

What constitutes a complaint by a supplier?

Despite the serious consequences of making a written complaint under the Act, there is very little guidance in the Act with respect to content and timing requirements for such complaints. Commonwealth entities will need to rely on the Court's requirements for claims and evidentiary proof as safeguards against frivolous and vexatious complaints. As noted above, a supplier seeking injunctive relief is required to demonstrate that it has made a reasonable attempt to resolve the dispute.

The takeaway

The Act will impact on the internal processes of many Commonwealth entities, including procurement processes and complaints handling processes. Commonwealth entities should use the period before commencement of the Act to review their internal processes to ensure they are designed to minimise the risk of complaints and if a complaint is made, to identify, investigate and resolve it as efficiently and quickly as possible.

For example, the timing, content and conduct of debriefs should be reviewed, particularly in complex, multi-stage procurement processes. All debriefs should focus on providing evidence-based, constructive feedback consistent with a fair, transparent and accountable procurement process. Commonwealth entities might also consider pursuing more interactive tender processes (subject to probity controls) as a way of encouraging collaboration, minimising 'surprises' and reducing 'expectation gaps', the appointment of experienced tender contact officers and the engagement of proactive, visible probity advisors. These are measures which can improve suppliers' confidence in the procurement process and reduce the risks of complaints.

If a complaint is made under the Act, the requirements to investigate and report on the complaint, the uncertainty regarding the timing for the issue of any public interest certificate, and the 10 day period for bringing an injunction application mean that Commonwealth entities will need to act quickly. This will require streamlined and efficient investigation processes, and clear access to the relevant tender and procurement documentation. It will require procurement officials to have a detailed understanding of the CRPs and of the Act.

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PwC Legal S.R.L. (Argentina) – Income tax withholdings on severance payments to executives and directors

At a glance

Recently Decree N° 976/2018 has regulated Law N° 27430 regarding income tax treatment on severance payments made to executives and directors.

This regulation has somehow reopened an issue that was almost closed after court rulings from National Supreme Court of Justice.

As consequence of this regulation, severance payment based on seniority (an issue exempted from income tax withholdings) will be taxable in the amount exceeding from the one established by labor regulations only for executives or directors that fulfil certain requirements.

The current scenario generates uncertainty for income tax withholding Agents and will probably derive in future claims.

In detail

Introduction on labor matters

According to local regulations, in the event of the ending of a labor relationship without existing any cause (the most usual one), certain severance must be paid, which is composed of different issues:

a seniority;

b in lieu of notice;

c remaining monthly days;

d proportional vacation; and

e proportional annual statutory bonus.

Usually, the most relevant of these issues from a quantitative point of view is the severance paid based on seniority.

As established in Section 245 of Labor Contract Law, seniority severance payment is calculated based on one salary of the best monthly, habitual, remuneration per year worked or fraction higher than three months.

This calculation basis has a cap as, in no case shall exceed from three times the average of salaries of the collective bargaining agreement applicable to the company or the most favourable to the employee in case that more than one applies.

National Supreme Court of Justice has established in ruling “Vizzoti, Carlos c/AMSA” that the mentioned cap shall not lead to a diminish in calculation basis higher than 33% of the best monthly, habitual salary.

Income tax regulations

As established on Section 20(i) of the Income Tax Law, severance payment based on seniority in case of dismissal is exempted.

This has been confirmed by Tax Authorities in General Resolution N° 4003/2018, which provides Withholding Agent (employer in this case) with rules that should be applied when acting as such.

Tax authorities have also accepted "Vizzoti" court ruling in order to determine the amount not subject to tax.

On the contrary, all other severance issues are subject to income tax.

In consequence, if paying according to legal standards, tax treatment of severance issues is quite clear: only severance based in seniority is exempted.

Court rulings

Since 2005 we assisted to certain court rulings (specially Labor Courts) in favor of employees that were paid seniority severance in excess from legal standards and that claimed that no amount should have been withheld.

Labor judges understood that the severance based in Seniority is an exempted issue itself not depending on the amount that was paid, situation that obliged employers that have acted as withholding agents to reimburse to the former employee the amount withheld plus interest.

Other court rulings considered these amounts tax exempted based on the lack of periodicity that implies the permanence of the source that produces the income, as established in Section 2 of the Income Tax Law.

Finally, National Supreme Court of Justice in ruling "Negri, Fernando c/AFIP", sustained that a bonus for cease of labor relationship (in spite of its amount) is not subject to income tax, due to the lack of periodicity that implies permanence of the source as previously mentioned.

This decision was also accepted by tax authorities in the event of similar cases.

In case of severance payment based on seniority, although not specifically mentioned, same arguments as "Negri" court ruling apply.

Under this scenario, potential conflictive situations were almost closed.

New scenario

Law N° 27.430 (published on December 29, 2017) changed the scenario described above.

It disposes that for those who hold directive or executive positions the amounts that are generated exclusively due to the end of the labor relationship, **should be subject to income tax** in the sum exceeding from the minimum indemnity amounts as established in the applicable labor regulations.

Same solution provides when sums are originated in a consensual agreement, regarding the minimum indemnity amounts provided for in the applicable labor regulations for the case of dismissal without cause.

The abovementioned was not in force until it was regulated by Decree N° 976/2018.

As establish in it, sums exceeding labor regulations will be taxed only for directives or executives as long as the following situations are met:

a that they have occupied or performed effectively, continuously or discontinuously, within the last twelve months immediately prior to the date of separation, positions in boards or corporate bodies that can be assimilated, or management positions that involve decision-making or the execution of policies and directives adopted by the aforementioned shareholders, partners or bodies; and

b that gross monthly remuneration taken as a basis for calculating the severance compensation provided for by the applicable labor legislation exceeds the minimum, vital and mobile wage in force (currently AR$ 10.700; approx., USD 280), at least fifteen times at the date of disengagement.

If one of these conditions is not met, this disposition does not apply.

Consequences and uncertainties

The current scenario implies that certain employees, in the event of the termination of their labor relationship will be taxed an amount that others will be not.

Consequently, this situation reopens an issue that was almost closed after court ruling “Negri” of the National Supreme Court of Justice and leads to uncertainties.

The definition of the employees included in this category is not as clear and concrete as it should be. Who does it include when referring to management positions involving decision making and execution of policies?

It is essential to get a definition in this regard as soon as possible.

The employer acts as withholding agent under a legal disposition and should not be guessing what to do.

Also, this becomes again a situation that might lead to claims:

a the employee might base himself in the lack of periodicity and permanence of the source in this payment in order to get a favourable ruling. At the end of the day, this might lead to a ruling similar to “Negri”; and

b the employee might also consider this regulation not to be constitutional as it establishes a different tax treatment depending salary and function of the employee.

Should any of these claims move forward, the employer might be obliged to return amount withheld plus interest.

So, considering all these uncertainties, only one thing is sure: The employer is once again under an uncomfortable scenario in which, whatever it does, claims by tax authorities or former employees might occur.

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