

Inquiry into the provisions of the *Government Procurement (Judicial Review) Bill 2017*

7 July, 2017

The purpose of an independent and effective complaints mechanism for procurement processes

The *Government Procurement (Judicial Review) Bill 2017* will vest the Federal Circuit Court of Australia (FCC) with jurisdiction to grant an injunction and/or order payment of compensation in relation to a contravention of the relevant Commonwealth Procurement Rules (CPRs). The Bill is aimed to meet international obligations via the WTO agreement on Government procurement (GPA). The obligation as stipulated requires the Commonwealth to establish or designate an impartial and independent body where suppliers can raise complaints about Government procurement processes and be awarded remedies and compensation. The aim of the Bill is also to ensure that regional suppliers and small and medium enterprises have timely access to justice to raise complaints about procurement processes and seek remedies.

In the initial inquiry, the Australian Chamber made two of several recommendations including:

- fit-for-purpose and simplified requirements and processes must for procurement contracts must be ensured and;
- that all decisions made should be consistent with Australia's international obligations including the WTO agreement on Government procurement (GPA).

The Australian Chamber has reviewed the provisions of the *Government Procurement (Judicial Review) Bill 2017* and has the following comments and recommendations.

The complaints mechanism for procurement process must be enhanced to ensure fairness

The Australian Chamber supports the creation of an independent body where suppliers can raise complaints regarding government procurement processes. We support the operation of the FCC outside of capital cities that enables regional and remote businesses easy access to proceedings. However, the Australian Chamber is of the view that the *Government Procurement (Judicial Review) Bill 2017* provides some significant barriers to effectively raise complaints regarding unfair procurement processes.

Concerns are expressed in relation to section 11 Injunctions including the 10-day limitation period. The Bill in our view, sets a very short timeframe for initiating court action for an injunction. It is recommended that the 10 day period for initiating court action be extended as the prerequisite for seeking an injunction requires a complaint with the procuring entity in the first instance. The initial

complaints process lodged with the procuring entity will, in most cases, take substantially longer than 10 days in which case waivers from the FCC will be required. This leaves significant exercising powers to the FCC as they decide whether to grant the request for an injunction on a case-by-case basis.

The Australian Chamber believes there should be a fair judicial process that allows injunctions to be processed in a reasonable time-frame that extends beyond the 10 day limitation period. The Australian Chamber is of the view that the FCC will be granted substantial powers to determine the injunction and compensation process and that the preparation of necessary documentation will fall in favour of large suppliers with the legal capacity and/or funding to do so over small suppliers that may have limited funding and/or legal expertise.

The statutory interpretation of some provisions also appears to be poorly defined in some cases. For example, Section 11 part 5(b) regarding the powers granted to the FCC in undertaking their decision to progress an application beyond the 10 day limitation period is only to be granted under special circumstances. However we don't view 'special circumstances' as sufficient for an appeal and this requires greater specificity as this provides the FCC substantial powers to decide and/or interpret circumstances on the basis of the quality of the application, that is, some circumstances may be favoured over others without fairness and transparency in process.

There is also no indication on the estimated timeframe to be used by the FCC in determining the special circumstances of the applicant. The Australian Chamber is of the view that this may limit the ability of SMEs to proceed with their expression of concerns formally. To do so, in the limited time mentioned above, may require legal expertise at the cost to the business owner.

The Australian Chamber recommends providing SME suppliers additional assistance through an ombudsman. Any rejections for claim to an unfair process should be escalated through an ombudsman, which will provide the supplier an alternative pathway to a fair outcome.

Funding should be split in accordance with projected expense requirements. Greater transparency on the envisaged allocation of funding is required.



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