

# Response to Question on Notice

## SENATE FINANCE AND PUBLIC ADMINISTRATION LEGISLATION COMMITTEE

### Inquiry into Government Procurement (Judicial Review) Bill 2017

#### SPECIFIC QUESTIONS ON NOTICE

Regarding the *Government Procurement (Judicial Review) Bill 2017*:

##### Question 1

What are the current appeal arrangements?

- a) What are the deficiencies in those arrangements?

##### Response

Currently, suppliers can make complaints to the procuring entity, the Procurement Coordinator within the Department of Finance (Finance), the Commonwealth Ombudsman, and the Federal Court. The new arrangement will enable complaints to be made to the Federal Circuit Court (FCC), which has a continuous presence outside of the major capital cities and involves a lower cost for suppliers and will be able to award legally-binding remedies and compensation. The arrangement will cover procurements where both Divisions 1 and 2 of the Commonwealth Procurement Rules (CPRs) apply, that is typically procurements of a higher value that are conducted through open tenders.

##### Question 2

What other models of independent review were considered?

- a) Why this model?
- b) What benefits will this have?
- c) What safeguards will exist?
- d) Has there been international examples of frivolous claims?
- e) Will this make procurement officers more risk-averse and delay procurement?
- f) Will additional training be provided to procurement officers?

##### Response

The objective of the new procurement review arrangement is to provide a timely, effective and independent mechanism for suppliers to raise complaints about potential breaches of the CPRs and be awarded remedies. In scoping the implementation of the new arrangement, Finance considered whether there was an existing entity that could undertake the function, or whether a new entity should be established.

- a) The potential workload for the review arrangement was estimated to be low, based on the experience in several other countries that have similar review arrangements. For example, in Canada, over the period 2011-2015, an average of 63 complaints was received each year, representing less than 0.4 percent of contracts eligible for domestic review. Of these complaints, on average, less than five were successful each year. Based on this estimate, establishing a new Commonwealth entity to review procurement complaints was not considered appropriate.

In considering existing bodies, the FCC was identified as suitable for the new review arrangements as it can hear supplier complaints with greater timeliness and at around half the cost of other options, such as the Federal Court, to which suppliers can currently take complaints. The FCC is also the only court at the federal level that has a continuous presence outside major capital cities.

- b) The new procurement review arrangement will ensure that small and medium enterprises have timely access to justice to raise complaints about procurement processes and seek remedies. Suppliers in rural and regional Australia will also have easier access to have their complaints heard without the need to attend major cities.

The new arrangement will enable Australia to meet international obligations on government procurement that require the Commonwealth to establish or designate an impartial and independent body where suppliers can raise complaints about government procurement processes and be awarded remedies. These obligations are found in the World Trade Organization Agreement on Government Procurement (WTO GPA) and the Trans Pacific Partnership Agreement.

In particular, Article XVIII of the WTO GPA requires a timely, effective, transparent and non-discriminatory procurement review procedure that provides for rapid interim measures to preserve a supplier's opportunity to participate in a procurement and, where a breach has occurred, for corrective action or compensation.

- c) It is a matter for the FCC to determine whether a complaint is frivolous. However, in making a complaint to the FCC, the supplier will need to provide evidence that a breach of the relevant CPRs has occurred. Before a supplier can make a complaint to the FCC about a breach of the relevant CPRs, the supplier will be required to attempt to resolve the complaint with the procuring entity.

The supplier must raise their complaint with the FCC within 10 days from when the breach of the relevant CPRs occurred or when the supplier should have reasonably become aware of the breach. A longer timeframe may apply if deemed appropriate by the FCC. The supplier will also need to pay a fee to file an application with the FCC. Further information on fees relating to the FCC is provided in response to Question 6.

- d) Canada is a member of the WTO GPA and has a procurement review arrangement that is similar to the new arrangement proposed for the Australian Government. As noted above, over the period 2011-2015, an average of 63 complaints was received each year in Canada. Two thirds of these complaints, on average, were not accepted for inquiry. The reasons that complaints were not accepted for inquiry include:
- lack of jurisdiction
  - not a potential supplier
  - late filing

- not a designated contract
  - no reasonable indication of a breach
  - premature complaint.
- e) There are currently several avenues for suppliers to make complaints regarding procurement processes. The new procurement complaints mechanism provides a clearer and timelier process for supplier complaints, which is of benefit to both suppliers and procuring entities. The key advice to procuring entities is to maintain clear records documenting their procurement processes, including decisions made, evaluation reports, delegate approvals, and communication with suppliers. If a complaint is received, this will assist entities in responding to the complaint and demonstrating to the FCC that they have complied with the relevant CPRs.
- f) Finance has been consulting with procuring entities, through our Senior Procurement Officials Reference Group, on the establishment of the new complaints mechanism. Guidance will be provided to procuring entities and their officials to assist them with understanding and applying the new requirements.

### **Question 3**

What grounds could a challenge be successful? Please provide scenarios.

### **Response**

To be successful, a supplier will need to demonstrate that a breach of the relevant CPRs occurred relating to a covered procurement in which they had an interest. Examples of breaches of the relevant CPRs are:

- A procuring entity publishes an approach to market with a time limit for responses of less than 25 days, and the procurement does not meet any of the conditions for shorter timeframes specified in paragraph 10.21 of the CPRs.
- A procuring entity accepts a late tender submission from a supplier, and the lateness was not caused by mishandling by the procuring entity (refer paragraph 10.26 of the CPRs).
- Following a request from a potential supplier, a procuring entity provides additional information to the supplier and that information provides them with an unfair advantage (refer paragraph 10.8 of the CPRs).

### **Question 4**

Who will have standing in the courts?

### **Response**

Suppliers whose interests are affected by the alleged breach of the relevant CPRs relating to a covered procurement can make an application to the courts for an injunction or

compensation. The intent of an injunction is to preserve a supplier's right to participate in a current procurement.

#### **Question 5**

Will suppliers only be able to appeal against the application of the rules, not against the actual rules themselves?

#### **Response**

Under the new mechanism, suppliers will be able to complain about a breach of the relevant CPRs. Suppliers will not be able to complain about the content of the CPRs. The content of the CPRs, while consistent with relevant Australian law, is the prerogative of the executive government as a matter of government administration.

#### **Question 6**

What are the potential costs to the Government of successful and unsuccessful appeals?

- a) What size could compensation reach?
  - Is the Government provisioning funding for this?
- b) What are the potential costs to businesses?
- c) What costs may be borne by the successful business that is later impacted by an injunction?

#### **Response**

The potential remedies for supplier complaints to the FCC are injunctions or compensation. The FCC may grant an injunction in relation to a breach of the relevant CPRs for a covered procurement. The intent of granting an injunction is to preserve a supplier's right to participate in a current procurement. Otherwise, the FCC may award compensation to the supplier.

- a) The potential compensation is limited to the reasonable costs incurred by the supplier in connection with preparing their tender, making a complaint, and attempting to resolve the complaint. The potential costs would therefore vary between procurements, as the complexity and scope of a procurement will impact on the costs to the supplier. Procuring entities will be responsible for paying any compensation ordered by the FCC.
- b) The general fees (and fee exemptions) applying to FCC proceedings are detailed on the FCC website at <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/fees-and-costs/fees-gfl/>. For example, the fee for filing an application is \$1485 for Corporations and \$615 for others. A body or person may be exempt from paying court fees in a range of circumstances, including financial hardship.
- c) Suppliers that have been awarded a contract following a procurement process will not be affected by any subsequent complaints to the FCC, as a contravention of the CPRs does not affect the validity of a contract.

## Question 7

What procurement would be exempt? Those which the CPRs do not apply (below threshold or in Appendix A)?

a) What aspects of Defence procurement may be exempt?

## Response

Covered procurements under the complaints mechanism are those where both Divisions 1 and 2 of the CPRs apply. Exempt procurements include the following:

- Procurements undertaken by entities that are not subject to the CPRs.
  - Most Commonwealth entities are subject to the CPRs.
  - The CPRs apply to all non-corporate Commonwealth entities, being the departments and other central government entities such as the Australian Tax office, Australian National Audit Office, and the Australian Bureau of Statistics.
  - The CPRs also apply to 20 prescribed corporate Commonwealth entities, such as the Reserve Bank of Australia, Australian War Memorial, the National Gallery of Australia, and Comcare.
  - The CPRs do not apply to other corporate Commonwealth entities and Commonwealth companies. This includes the Government Business Enterprises, such as Australia Post and ASC Pty Ltd, which operate in commercial environments.
  - A list of the non-corporate Commonwealth entities, prescribed corporate Commonwealth entities, other corporate Commonwealth entities and Commonwealth companies can be found on the *Flipchart of PGPA Act Commonwealth entities and companies* available from the Finance website at <http://www.finance.gov.au/resource-management/governance/#flipchart>.
- Procurements valued below the thresholds specified in paragraph 9.7 of the CPRs.
  - For non-corporate Commonwealth entities, other than for procurements of construction services, the procurement threshold is \$80,000.
  - For prescribed corporate Commonwealth entities, other than for procurements of construction services, the procurement threshold is \$400,000.
  - For procurements of construction services by non-corporate Commonwealth entities or prescribed corporate Commonwealth entities, the procurement threshold is \$7.5 million.
- Procurements that utilise an exemption in Appendix A of the CPRs, which species that Division 2 does not apply to:
  - procurement including leasing of land, existing buildings or other immovable property or any associated rights (note: the procurement of construction services is not exempt);
  - procurement of goods and services by a relevant entity from another Commonwealth, state, territory or local government entity;
  - procurements funded by international grants, loans or other assistance, when the provision of such assistance is subject to conditions inconsistent with this document;
  - procurements funded by grants and sponsorship payments from non-Commonwealth entities;
  - procurement for the direct purpose of providing foreign assistance;

- procurement of research and development services, but not the procurement of inputs to research and development undertaken by a relevant entity;
  - the engagement of an expert or neutral person, including engaging counsel or barristers, for any current or anticipated litigation or dispute;
  - procurement of goods and services (including construction) outside Australian territory, for consumption outside Australian territory;
  - acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, and sale and distribution services for government debt;
  - procurement of motor vehicles;
  - procurement by the Future Fund Management Agency of investment management, investment advisory, or master custody and safekeeping services for the purposes of managing and investing the assets of the Future Fund;
  - procurement of blood plasma products or plasma fractionation services;
  - procurement of government advertising services;
  - procurement of goods and services by, or on behalf of, the Defence Intelligence Organisation, the Australian Signals Directorate, or the Australian Geospatial Intelligence Organisation;
  - contracts for labour hire;
  - procurement of goods and services from a business that primarily exists to provide the services of persons with a disability; and
  - procurement of goods and services from an SME with at least 50 per cent Indigenous ownership.
- Procurements where, under paragraph 2.6 of the CPRs, an official applies measures determined by their Accountable Authority to be necessary 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, historic or archaeological value.

The *Defence Procurement Policy Manual* includes information regarding the use of paragraph 2.6 of the CPRs for Defence procurements. Any further information regarding Defence procurements should be sought from Defence.

### **Question 8**

What is the expected impact on Small and Medium Enterprises (SMEs)?

- a) Will there be any support to assist SMEs in challenging outcomes?

### **Response**

The impact on SMEs is expected to be positive as they will have access to a more timely, effective and lower cost complaints mechanism for government procurement. Guidance and information on the new complaints mechanism will be available for suppliers to assist them with understanding how it will operate.

**Question 9**

Do the procurement rules have to change based on the negotiated level?

**Response**

If the final agreed level of government procurement access in Australia's annex in the WTO GPA goes beyond the commitments in our existing free trade agreements, the procurement rules may need to change.