

## THE SENATE

### SENATE FINANCE AND PUBLIC ADMINISTRATION LEGISLATION COMMITTEE

#### **Government Procurement (Judicial Review) Bill 2017** **Questions on Notice – Department of Foreign Affairs and Trade**

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Senator McAllister asked:

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

1. What are our current treaty obligations in relation to appeal arrangements?
  - a) What are the potential future obligations?

In relation to negotiations on the WTO Agreement on Government Procurement:

2. Does the published agreement set out all of the obligations that Australia would be required to meet?
  - a) Paragraph 24 of DFAT's submission to the Inquiry into the Commonwealth Procurement Framework appears to confirm this.
  - b) What would Australia need to do to be compliant?
3. This submission says the negotiations are focussing on the level of government procurement access we will commit to provide.
  - a) What is meant by this? Is this a proportion of procurement, a threshold of procurement and/or which sectors?
  - b) Do we do this bilaterally with each jurisdiction or multilaterally?
  - c) Does each country negotiate their own level either bilaterally or multilaterally?
  - d) What have other countries agreed in this regard?
4. Could you outline the benefits of the WTO Agreement on Government Procurement?
  - a) What are the potential risks and downsides of joining?
5. Has any modelling been undertaken on the benefit of joining this agreement?
  - a) If so, what were the results?

The Department of Foreign Affairs and Trade's response is as follows:

1. In terms of current treaty obligations, Australia's bilateral trade agreements with the United States, Chile, Japan and Korea provide for suppliers to have access to a domestic impartial administrative or judicial authority that is independent of

procuring entities to hear supplier complaints concerning tender processes in a timely and transparent manner.

On potential future obligations, the Agreement to Amend the Singapore-Australia Free Trade Agreement (agreed, but yet to enter into force) contains similar provisions to the FTAs listed previously. The Trans-Pacific Partnership (TPP) Agreement (agreed, but yet to enter into force) and the WTO Agreement on Government Procurement (GPA, accession negotiations ongoing) also contain obligations in relation to an independent domestic supplier review mechanism of tender processes, but at a greater level of specificity.

Currently, suppliers can appeal the conduct of a procurement process through the Federal Court of Australia. There is no specific jurisdiction or clearly defined legal basis for challenging government procurement decision-making processes. Depending on the nature of the procurement, suppliers must rely on other legal avenues such as contract law, or public law options including under the Administrative Decisions (Judicial Review) Act. The current appeal mechanism involving the Federal Court of Australia is sufficient to meet the obligations in Australia's existing FTAs, but would not be enough to meet the obligations set out in potential future agreements such as the GPA or the TPP. The *Government Procurement (Judicial Review) Bill 2017* would clarify and strengthen existing appeal arrangements in a way that would meet those potential future obligations, while also strengthening appeal provisions for Australian businesses.

2. Yes.
  - a) Confirmed.
  - b) Australia's procurement framework is largely compliant with the GPA. To be fully compliant at the Commonwealth level Australia will need to: improve the supplier complaint mechanism as set out in the *Government Procurement (Judicial Review) Bill 2017*; increase transparency by requiring procuring entities to report the basis for conducting a limited tender on AusTender where open tendering is not used; and, streamline and improve the transparency of procurement processes by removing the multi-use tender list method of procurement.
  
3.
  - a) The level of access each GPA party provides to its procurement markets is contained in the Annexes to the agreement. Australia's GPA accession negotiations are focused on the contents of Australia's Annexes, which would become part of the GPA once our accession is finalised. In the GPA Annexes, GPA parties set out the level of government procurement access they provide by listing: (1) the government entities that are covered by the agreement; (2) the thresholds (ie contract values) above which the obligations apply; (3) the types of goods and services to be covered; and (4) any exceptions. An example of a government procurement market access annex is Annex 13 to the Japan-Australia Economic Partnership Agreement (see link to [JAEPA text](#), on which Australia's GPA offer is based).
  - b) We negotiate access multilaterally. We cannot become party to the GPA until there is consensus for us to accede among GPA parties.
  - c) Each country negotiates multilaterally under the GPA.
  - d) The market access schedules of the current GPA Parties are available on the WTO website (see link to [GPA text and annexes](#), and selecting "Coverage

schedules” on the left hand side of the page).

4. The benefits of the WTO Agreement on Government Procurement are set out in detail in paragraphs 23-27 and 29-34 of DFAT’s submission to the Joint Select Committee on Government Procurement (see link to [JSCGOP submissions](#)).
  - a) We do not see any risks or downsides to joining the GPA. Australia’s government procurement market is already open to foreign suppliers.
5. No. Australia’s government procurement market is already open to foreign providers. Australia acceding to the GPA will secure market access to the government procurement market of the existing GPA parties, estimated by the WTO to be worth US\$1.7 trillion (A\$2.2 trillion) annually.