

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*:

Can the department please address the following concerns raised in submissions to the inquiry?

Question 1

Given that an initial complaint to the procuring entity needs to be resolved within the 10 days prior to a case being filed in the Federal Court.¹

- a) Adequacy of the 10-day limitation period.
- b) Impediments to requiring procuring entities to resolve complaints relating to a procurement process within 10 days (to align with the 10 day limitation period).

Response

The Bill does not require the complaint with the procuring entity to be resolved within 10 days.

The Bill specifies that the supplier must make an application for an injunction to the Federal Circuit Court (FCC) *within 10 days after the later of the following days*:

- *the day on which the contravention occurred, or*
 - *the day on which the applicant became aware, or ought reasonably to have become aware, of the contravention or proposed contravention,*
- or within such longer period as the FCC allows.*

The Bill provides that the FCC may allow a period longer than 10 days if the delay resulted from the supplier trying to resolve the complaint with the procuring entity, or if there are special circumstances that warrant a longer period.

Australia's international obligations specify that suppliers should be allowed a sufficient period of time to prepare and submit a challenge, which should be no less than 10 days from the time when the basis of the challenge became known or reasonably should have become known to the supplier. The default timeframe of 10 days was chosen to encourage timely efforts, by both suppliers and the procuring entity, to resolve any concerns about the process. The choice of a 10 day default strikes an appropriate balance between the interests of both sides and minimises disruption to other parties involved in the same process. Also, the Australian public has an interest in Commonwealth procurement processes running efficiently and at low cost with minimum disruption.

When a supplier has concerns regarding a procurement process, they should ensure that there are no undue delays in making their complaint to the procuring entity. Depending on the complexity of the complaint, the investigation by the procuring entity may take more than 10 days. The supplier should keep records of their interactions with the procuring entity regarding the complaint.

If the supplier is unsatisfied with the entity's response to the complaint, they can make an application to the FCC. If the complaint to the FCC is made outside the 10 day period, the supplier should provide the FCC with details of their interactions with the procuring entity to demonstrate that the delay in making the application was due to their attempt to resolve the complaint with the procuring entity. Alternatively, the supplier may provide details to the FCC of other special circumstances that warrant allowing a longer period.

The Bill does not define the 'special circumstances' required for a longer period, because to do so would narrow the anticipated grounds where it might be reasonable to allow extended time to apply for an injunction. The FCC is in the best position to determine access to time extensions in the unique circumstances of each procurement, consistent with the fair administration of justice.

If a supplier is out of time to make an injunction and/or was not allowed further time to apply, then they may still seek the remedy of compensation under section 16.

Question 2

That the standing of complainants is too narrowly based.²

Response

The new complaints mechanism applies to suppliers whose interests are affected by the alleged contravention of the relevant Commonwealth Procurement Rules (CPRs). For example, the alleged contravention of the CPRs could have affected the supplier's ability to fairly participate in the procurement process. The supplier does not need to demonstrate that they would have been awarded the contract had the breach not occurred.

See also the response to question 3.

Question 3

Uncertainty as to whether this bill applies to both primary contractors and sub-contractors.³

Response

The Bill includes a general definition for a supplier, which is:

supplier means:

- (a) a person who supplies, or could supply, goods or services; or
- (b) a partnership (or other group) of 2 or more persons that supplies, or could supply, goods or services.

The new complaints mechanism is therefore available to any supplier whose interests are affected by the alleged breach of the relevant CPRs. This may include both primary contractors and subcontractors.

The Bill does not establish a mechanism for subcontractors to make complaints against primary contractors. Rather a complaint or action must be made against the procuring entity, because they are responsible for the procurement process and whether it adheres to the CPRs.

Question 4

That the process does not address unfair tendering processes.⁴

Response

The new additional procurement complaints mechanism provides a clearer and timelier process for suppliers to raise complaints regarding procurement processes, and seek remedies. The potential remedies for supplier complaints to the FCC are injunctions or compensation. 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 covering the reasonable costs incurred by the supplier in connection with preparing their tender, making a complaint, and attempting to resolve the complaint.

All existing complaints mechanisms will remain in place (see Question 5 for more detail).

Question 5

Concerns about the cost to small business of court based processes and the need for an alternative dispute resolution process or similar.⁵

Response

The Bill establishes a clearer, timelier and lower cost process for suppliers to make complaints to a court. There will continue to be non-judicial options for suppliers to raise complaints regarding procurement processes, such as making a complaint to the procuring entity, the Procurement Coordinator within the Department of Finance, or the Commonwealth Ombudsman, all of which are free. Also, for small businesses and family enterprises, the Australian Small Business and Family Enterprise Ombudsman is able to provide assistance with resolving disputes with government agencies.

Question 6

That the complaint mechanism increases the level of complexity in government procurement and may prove to be a disincentive to choosing best value.⁶

Response

Procuring entity obligations under this Bill are upheld by acting in accordance with the CPRs. Entities are already required to do this under the *Public Governance, Performance and Accountability Act 2013*. There are no changes to procurement process requirements as a result of the new complaints mechanism.

There are existing mechanisms for suppliers to make complaints regarding procurement processes. This includes making a complaint to the Commonwealth Ombudsman or Federal Court. The new complaints mechanism will provide a clearer and timelier process for supplier complaints, which is of benefit to both suppliers and procuring entities.

Small businesses are not obliged to use the FCC instead of non-judicial options like the Ombudsman, or Procurement Coordinator. Those other channels remain available as adjunct or alternative points of resolution.

Question 7

What remedies are open to the FCC to award, in relation to a contract covered by the US FTA?

Response

The potential remedies available to the FCC, in relation to a contravention of the relevant CPRs, are injunctions and compensation. These remedies, in relation to a contravention of the relevant CPRs, are also applicable to procurements covered under the US FTA.

Question 8

That the Bill is unclear as whether the power to suspend a procurement could have the effect of allowing a prohibition on the awarding of a contract.⁷

Response

If a supplier makes a complaint to the procuring entity regarding a breach of the relevant CPRs, and a public interest certificate is not in force, the procuring entity must suspend the procurement. The purpose of the suspension is to preserve the supplier's ability to participate in the procurement if the outcome of the complaint is in their favour. When a procurement is suspended, the procuring entity could not award the contract or take any other steps that might impact on the supplier's ability to participate in the procurement.

The procurement must remain suspended until:

- the complaint is resolved with the supplier, or
- the supplier withdraws the complaint, or
- a public interest certificate is issued, or
- if the complaint is taken to the FCC, the FCC makes a finding.

Question 9

The detrimental budgetary impact of successful claims for compensation in the event of a breach of the CPRs.⁸

Response

Suppliers incur costs associated with participating in a procurement process. Procuring entities need to be aware of this in developing and undertaking their procurements. If a procuring entity does not comply with the CPRs, this can affect the ability of suppliers to fairly participate in the process.

The new complaints mechanism provides that the FCC may award compensation for a breach of the relevant CPRs. 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 Commonwealth has a devolved procurement framework, and entities are responsible for funding and undertaking their own procurement processes.

Question 10

The unintended consequences for industry and agencies arising from the suspension of procurements.⁹

Response

The purpose of suspending a procurement is to preserve the supplier's ability to participate in the procurement if the outcome of the complaint is in their favour. When a procurement is suspended, the procuring entity could not award the contract or take any other steps that might impact on the supplier's ability to participate in the procurement.

It is in the interest of all potential suppliers that the procurement process is conducted in a fair and equitable manner consistent with the requirements in the CPRs. A breach of the relevant CPRs could impact on some or all of the potential suppliers and therefore the resulting corrective action could also be of benefit to these suppliers.

If a procuring entity has concerns regarding the suspension of a procurement and does not consider that the suspension is in the public interest, it may issue a public interest certificate. Following the issuing of the certificate, the procuring entity would be able to continue the procurement process while the complaint is being considered.

¹ See, for example: Dr Nick Seddon, *Submission 1*, p. 2; Chamber of Commerce and Industry, Queensland, *Submission 2*, p. 1; Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, p. 2; AMWU, *Submission 5*, p. 2.

² See, for example: Chamber of Commerce and Industry, Queensland, *Submission 2*, p. 1; Dr Nick Seddon, *Submission 1*, pp. 2–3.

³ See, for example: Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, p. 2;

⁴ See, for example: Chamber of Commerce and Industry, Queensland, *Submission 2*, p.2.

⁵ See, for example: Chamber of Commerce and Industry, Queensland, *Submission 2*, p. 2.

⁶ See, for example: AMWU, *Submission 5*, pp 1–2.

⁷ See, for example: Dr Nick Seddon, *Submission 1*, pp 2-3.

⁸ See, for example: Department of Defence, *Submission 6*, pp 1–2.

⁹ See, for example: Department of Defence, *Submission 6*, p. 2.