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President Gerardine (Ged) Kearney  
Secretary Sally McManus

14 July 2017

Secretary  
Senate Finance and Public Administration Committees  
Parliament House  
CANBERRA ACT 2601

Via Email: [fpa.sen@aph.gov.au](mailto:fpa.sen@aph.gov.au)

**Re: Submission in relation to the *Government Procurement (Judicial Review) Bill 2017***

We thank the Committee for the opportunity to make a submission in relation to the *Government Procurement (Judicial Review) Bill 2017* (the Bill).

The ACTU is the peak body for Australian unions. We represent more than 1.6 million working Australians and their families. The ACTU and affiliated unions have had a long and significant interest in the trade agenda on behalf of our members and workers generally.

Australian unions support fair, multi-lateral trade arrangements that result in shared prosperity and sustainable social and economic development. We believe that the true measures of success for trade policies are quality job creation, rising wages and more engaged and competitive businesses, not higher corporate profits, increased offshoring of Australian jobs and weakening labour market protections, wages, rules of law and democratic decision-making.

Australian unions support a transparent and easy to understand approach to procurement that puts Australian businesses first. We acknowledge that in order to ensure that the best possible outcomes are achieved within our domestic procurement framework, there is a proper place for appeals and dispute resolution processes.

Fortunately, we have an existing framework that is fit for purpose in this regard.

While ongoing improvements to any process must always be sought, we consider the Bill currently before the Committee to be a retrograde step for our procurement framework.

It is fundamentally unnecessary, and premature even if it was deemed to be required. It would also have serious negative impacts on small and medium sized businesses.

**Current Framework is Fit for Purpose**

We currently have a robust, accessible and effective framework for resolving procurement disputes.

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Suppliers in the first instance take their concerns to the procurement officer undertaking the tender process. If their concerns are not resolved, the supplier can then lodge a formal complaint to the Australian Government Procurement Coordinator who can act as an intermediary between the supplier and the entity. If a supplier is not satisfied with the outcome, they can approach the Commonwealth Ombudsman, who has extensive powers to investigate procurement related complaints.

In addition, the Australian Small Business Commissioner offers information and advice to small business, including referral to dispute resolution services, and the Small Business and Family Enterprise Ombudsman provides assistance to smaller businesses with issues, complaints and disputes, to find the best organisation to deal with their complaint, and can offer its own alternative dispute resolution service.

We also note that the inquiry into Commonwealth Procurement Procedures recommended in 2014:

*“following consultation with stakeholders, the Department of Finance establish an independent and effective complaints mechanism for procurement processes.”<sup>1</sup>*

To which the Government response in April 2015 was:

*“NOT Supported. There is an existing framework for suppliers to raise complaints regarding procurement processes. The CPR’s require Commonwealth entities to apply equitable and non-discriminatory complaints-handling procedures. Entities should aim to manage the complaint process internally, when possible, through communication and conciliation.”<sup>2</sup>*

### **The Bill is Premature**

Even if the view that this legislation is fundamentally unnecessary was rejected, bringing the Bill forward at this time is erroneously premature.

Firstly, as you will no doubt be aware, the negotiation process between Australia and the World Trade Organisation (WTO) in relation to Australia’s accession to the WTO Agreement on Government Procurement (GPA) is currently ongoing and has not been finalised.

Additionally, in light of the decision of the US to withdraw from negotiations from the Trans-Pacific Partnership it is now extremely unlikely it will ever come into force, and further, the related implementing legislation for any prospective agreement *sans* the US has not been passed within Australia.

Normally legislation of the nature would only be passed after relevant adjunct trade negotiations are complete and accompanying required legislation was passed by Parliament.

This is clearly not the case.

In this context, the government should wait for the outcome of these negotiations to ensure that any proposal for additional judicial review measures, if indeed they are required, are consistent with what may be negotiated.

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<sup>1</sup> Recommendation 11, Commonwealth procurement procedures, Senate Finance and Public Administration References Committee Report, 2014.

<sup>2</sup> Government Response to Recommendation 11, Commonwealth Procurement Procedures Report, 2015.

This would be consistent with the recent report of the Joint Select Committee on Government Procurement released only last month which made the following recommendation:

*“The Committee notes DFAT’s assurances that the CPRs comply with Australia’s current free trade agreements and that minimal changes will be required to accede to the WTO GPA. It notes the Australian Government’s recent introduction of the Government Procurement (Judicial Review) Bill 2017 into the House of Representatives which has now been referred to the Senate Standing Committee on Finance and Public Administration, due to report on 4 August 2017. The Committee has concerns about this enabling legislation and believes it should not be progressed until WTO GPA negotiations are finalised.”<sup>3</sup>*

To progress this Bill would be in clear contravention of the recent will of the Parliament as expressed through the Joint Select Committee on Government Procurement.

### **Disadvantages for local small and medium-size business**

A formal judicial appeal process may discourage small and medium-sized enterprises from tendering due to the additional cost and resource impost that comes with more layers of legal complexity.

The cost involved in bringing a proceeding to seek an injunction or compensation may well prove prohibitive for many Australian small and medium businesses. Any review or appeals process must be independent and provide the same access to justice for a SME in a regional town as it does to a multinational corporation.

Current processes already achieve this. Parties seeking resolution or remedy to disputes through the Australian Government Procurement Coordinator, Commonwealth Ombudsman or Small Business Ombudsman office can do so as a relatively inexpensive process which is accessible to small and medium-sized local businesses.

### **Conclusion**

There is no need to implement any judicial review under the international agreements to which Australia is party. We have a strong existing domestic process for dealing with disputes. A judicial review process would also be unduly onerous and exclusionary in its application to small and medium sized businesses.

Further, it is premature to be introducing any reforms to procurement dispute resolution processes given Australia is still in negotiations in its bid to accede the WTO Agreement on Government Procurement.

We recommend that the Committee reject the Bill in its entirety.

Yours sincerely

**Ged Kearney**  
President

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<sup>3</sup> ‘Buying into Our Future’, Joint Select Committee on Government Procurement, Recommendation 9.42, p135. June, 2017.