

SUBMISSION TO THE SENATE FINANCE AND PUBLIC ADMINISTRATION LEGISLATION COMMITTEE

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

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This submission is made in my personal capacity and is not intended to reflect the views of either the ANU College of Law or Ashurst.

BACKGROUND

In December 2013 I made a written submission to the Senate Standing Committee on Finance and Public Administration References Committee Inquiry into Commonwealth Procurement Procedures. The focus of that submission was that the inquiry appeared to be considering ways to encourage local preference (Buy Australian). I pointed out that such an aim appeared to be inconsistent with Australia's obligations under various free trade agreements. I mentioned in passing that the system for challenging the conduct of Commonwealth government procurement tenders did not comply with the requirements of Chapter 15 of the Australia United States Free Trade Agreement (AUSFTA).

In April 2014 I was invited to provide oral testimony to the Committee which I did on 28 April. In these hearings I was asked, among other things, to expand on the topic of tender challenges. The Commonwealth Procurement Rules, which are closely based on Chapter 15 of AUSFTA, do not provide for a specific process for tender challenges. In Australia a tenderer must use litigation to mount a challenge and, even then, the legal bases for doing this are sparse. And, of course, litigation is expensive and takes a long time.

The Committee recommended that the Department of Finance establish an independent and effective complaints mechanism for procurement processes (Recommendation 11). This recommendation was initially rejected by the Commonwealth government. However, the Government Procurement (Judicial Review) Bill 2017 has now responded to Recommendation 11. This is explained as being prompted by Australia seeking to join the WTO Agreement on Government Procurement (GPA).

GOVERNMENT PROCUREMENT (JUDICIAL REVIEW) BILL 2017

The Bill provides for

- Complaint to the procuring entity;
- Resort to the Federal Circuit Court or the Federal Court to obtain an injunction;
- Resort to the Federal Circuit Court or the Federal Court to obtain compensation.

The complaint must be based on a establishing a breach of the relevant Commonwealth Procurement Rules (selected Division 1 rules still to be determined and the Division 2 rules).

The 10-day limitation period

It is a pre-requisite for obtaining an injunction, but not compensation, that the complainant has attempted to settle the complaint with the procuring entity. The Bill sets a very tight time line (10 days from discovery of a breach) for initiating court action for an injunction (but not for an action for compensation).

Given that it is a pre-requisite for seeking an injunction that the complainant has lodged a complaint with the procuring entity and that the attempt to settle has not succeeded, it would be impossible to comply with the 10-day time limit. The court is given a discretion to waive the failure to meet the 10-day deadline so long as the court is satisfied that the reason for the delay was the attempt to sort out the dispute with the procuring entity. So, in every case where an injunction is sought, time will be taken up at the outset of the case with seeking a waiver and the court exercising its discretion whether to grant the request.

It is submitted that the 10-day period for initiating court action should start to run from the time when it is clear that the attempt to settle has failed. It is suggested that the court should still have a general discretion to overlook non-compliance to accommodate cases where the applicant can show cause as to why the deadline was not met.

A time limit could be added to require a complainant to lodge a complaint with the procuring entity within, say, 10 days of the announcement of the contract award. A complainant could lodge at an earlier date (for example, during the conduct of the tender process) but the suggested 10-day limit would fulfil the need for quick action. Again, it is suggested that the procuring entity should have a general discretion to accept a late lodgement on being satisfied that the applicant had an acceptable reason for late lodgement.

Reversing the contract award

The Bill does not provide for the possibility of the court ordering that performance of a contract already awarded be suspended. This is a required feature of the tender challenge procedure set out in AUSFTA (see Art 15.11(4)).

Further, it is not clear whether a court can suspend the award of a *contract*. The Bill provides for suspending the *procurement*. This could be interpreted as prohibiting the award of a contract but the Bill should make this clear for the avoidance of doubt.

Standing

A complainant must be a supplier “whose interests are affected by the conduct” (that is, a breach of the Commonwealth Procurement Rules). The wording in the GPA is that the complaint is made in the context of a “procurement in which the supplier has, or has had, an interest” and in the AUSFTA “procurement in which the supplier has or had an interest”. The Bill’s requirement is more stringent than the 2 international agreements.

It could be argued that a complainant under the proposed legislation must be able to show that the breach of the Rules has impacted in some measureable way on the complainant. This could raise some difficult issues of causation. It could be argued that the complainant's interests were not affected by the breach the subject of the complaint unless the complainant can demonstrate that it would have won, or at least had a good chance of winning, the tender absent the breach. This would be a very difficult burden to discharge. In short, it would be possible for the procuring entity to respond to the complaint by saying "Yes we failed to follow the Rules, but it made no difference to you because your tender was not in the running." A court may be persuaded to apply this argument either in refusing an injunction or declining to award compensation.

The wording in the two international agreements confers standing on any supplier who participated in the tender. It would not be necessary for that supplier to show that it was adversely affected by the breach. It would only have to show that it was one of the tenderers.

It is submitted that the wording in the Bill should conform to the wording in the international agreements.