

Chapter 1

Introduction

Referral

1.1 On 25 May 2017, the Government Procurement (Judicial Review) Bill 2017 (the bill) was introduced into the House of Representatives by the Minister for Small Business the Hon Michael McCormack MP.¹

1.2 On 15 June 2017, pursuant to the Senate Selection of Bills Report, the provisions of the bill were referred to the Senate Finance and Public Administration Legislation Committee for inquiry and report by 4 August 2017.²

Conduct of the inquiry

1.3 Details of the inquiry, including links to the bill and associated documents were placed on the committee website at: www.aph.gov.au/senate_fpa.

1.4 The committee directly contacted a number of relevant organisations and individuals to notify them of the inquiry and invite submissions by 7 July 2017. Submissions received by the committee are listed at Appendix 1.

1.5 The committee decided to prepare its report on the basis of submissions received. The committee thanks those who made submissions.

Background—Commonwealth Procurement Rules

1.6 The Commonwealth Procurement Rules (CPRs) are 'the basic rule set for all Commonwealth procurements and govern the way in which entities undertake their own processes'.³

1.7 The CPRs are a regulation made under section 105B of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and are not subject to disallowance motions in either House of the Parliament.⁴ The current CPRs have been in place since 1 March 2017.⁵

Key provisions and purpose of the bill

1.8 The bill seeks to 'establish an independent and effective complaints mechanism for procurement processes'. The main beneficiaries of the bill will be

1 House of Representatives, *Votes and Proceedings*, No. 53—25 May 2017, p. 777.

2 *Journals of the Senate*, No. 44—15 June 2017, p. 1432.

3 Department of Finance, *Commonwealth Procurement Rules*, <https://www.finance.gov.au/procurement/procurement-policy-and-guidance/commonwealth-procurement-rules/> (accessed 20 June 2017).

4 *Public Governance, Performance and Accountability Act 2013*, s. 105B.

5 Department of Finance, *Commonwealth Procurement Rules*, <https://www.finance.gov.au/procurement/procurement-policy-and-guidance/commonwealth-procurement-rules/> (accessed 20 June 2017).

Australian businesses, in particular small business, which would enjoy improved access to justice in the event of a dispute. The changes also enable Australia to satisfy its obligations as a proposed party to the World Trade Organisation Agreement on Government Procurement (GPA), and in return gain access to significant Government procurement markets in other countries.⁶ The bill is also in line with commitments in the proposed Trans Pacific Partnership (TPP), in the event that such an agreement is approved at a future time. Appeal mechanisms currently in place are sufficient to meet the obligations arising under Australia's existing Free Trade Agreements, but are insufficient to meet any future international agreement such as the GPA or the TPP.⁷

1.9 The establishment of the 'complaints mechanism' also implements Recommendation 11 of the July 2014 Senate Finance and Public Administration References Committee's report into Commonwealth procurement procedures.⁸

1.10 The bill 'designates the Federal Circuit Court (FCC) with jurisdiction (concurrently with the Federal Court of Australia) to receive and review local and international supplier complaints in relation to a breach of the Commonwealth Procurement Rules'.⁹

1.11 This bill is comprised of five parts.

Part 1—Preliminary

1.12 Clause 5 of the bill provides that a procurement is a covered procurement if Divisions 1 and 2 of the CPR apply to the procurement. The Finance Minister may, by regulation, determine that a procurement otherwise in a class of covered procurements is not a covered procurement.¹⁰

Part 2—Injunctions

1.13 Clause 9 provides for the FCC to issue an injunction as a preventative or corrective remedy to ensure compliance with the CPRs.¹¹

1.14 Clause 11 describes limits on the power to grant injunctions, with the intent of ensuring that a 'supplier should seek to raise the complaint with the courts within 10 days on which the contravention of the relevant CPRs occurred'. Subsection 5 of

6 Mr Michael McCormack MP, Minister for Small Business, *Second Reading Speech*, p. 1.

7 Answers to questions taken on notice on 22 June 2017 from the Department of Foreign Affairs and Trade, received 6 July 2017, p. 2.

8 Mr Michael McCormack MP, Minister for Small Business, *Second Reading Speech*, p. 1. See also: Senate Finance and Public Administration References Committee, *Inquiry into Commonwealth Procurement Rules*, July 2014, p. x, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Commonwealth_procurement_procedures/Report/index (accessed 28 June 2017).

9 Mr Michael McCormack MP, Minister for Small Business, *Second Reading Speech*, p. 1.

10 Explanatory Memorandum (EM), pp 4–5.

11 EM, p. 6.

the clause provides a discretionary power to the FCC to consider an extension of the 10 day limit in circumstances where:

- (a) the supplier has taken genuine steps to resolve the complaint with the procuring entity in the first instance;¹² or
- (b) special circumstances warrant allowing a longer period.¹³

1.15 Clause 10 provides for alternative remedies in the event that disruption to the procurement process is against the public interest.¹⁴ Clause 14 provides that the injunction powers are 'additional to, not in replacement of, any other powers of the courts'.¹⁵

Part 3—Compensation

1.16 Clause 16 provides for the courts to order a remedy of compensation in instances where a supplier procurement complaint is upheld. This remedy remains available including where a supplier did not apply for an injunction, did not apply in time, or was not provided by the courts with an extension for an injunction.¹⁶

Part 4—Complaints

1.17 Part 4 outlines the process by which a supplier procurement complaint must be lodged prior to an application being made to the FCC. Clauses 18 and 19 outline how and to whom (accountable authorities) a complaint should be made, and the obligation on accountable authorities to investigate such complaints. Clause 20 describes the accountable authority's power to suspend a procurement pending the resolution of the complaint.¹⁷

Part 5—Miscellaneous

1.18 Part 5 describes miscellaneous elements of the bill. Importantly, clause 22 provides that a 'public interest certificate' may be issued by a procuring entity where suspension of the procurement would cause real adverse consequences to the public interest.¹⁸ Clause 23 limits the power of the FCC to invalidate awarded contracts even if the 'CPRs have been contravened'.¹⁹ Clause 25 sets out that this bill does not provide for retrospective powers prior to the commencement date of the Act.²⁰

12 EM, pp 6–7.

13 EM, p. 6.

14 EM, p. 6.

15 EM, p. 7.

16 EM, p. 8.

17 EM, pp 8–9.

18 EM, pp 9–10.

19 EM, p. 10.

20 EM, p. 10.

Financial implications

1.19 The Explanatory Memorandum notes that some cost-recovery will occur through the collection of court filing fees; however, this will not provide for full cost-recovery. Accordingly, the government has indicated that it will provide \$2.9 million over four years to the FCC 'to hear government procurement complaints'.²¹

Consideration by the Scrutiny of Bills Committee

1.20 The Senate Standing Committee for the Scrutiny of Bills has sought further comment from the Minister in relation to two elements of the bill.

1.21 The first relates to the Minister's power, in clause 5 of the bill, 'to make, by legislative instrument, a determination that additional procurements may be exempted from the definition of a covered procurement'.²²

1.22 The second element relates to review rights and the interaction between clauses 14 and 23 of the bill. Clause 14 of the bill provides that:

The powers conferred on the courts under the bill are in addition to, and not instead of, any other powers.²³

1.23 In contrast, clause 23 states that:

Subclause 23(1) of the bill provides that a contravention of the Commonwealth Procurement Rules does not affect the validity of a contract and subclause 23(2) provides that it is immaterial whether the contravention occurred before, at or after the commencement of the Act.²⁴

1.24 The committee suggests that the Senate consider the responses provided by the Minister, when the Scrutiny of Bills Committee tables this response and its comments during the next sitting period.

21 EM, p.1.

22 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2017*, 14 June 2017, p. 27.

23 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2017*, 14 June 2017, p. 28.

24 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2017*, 14 June 2017, p. 28.