

# Chapter 2

## Key issues

2.1 This chapter discusses the key issues in relation to the bill highlighted by submitters, namely:

- the adequacy of the timeframe in which a supplier must lodge an application for an injunction;<sup>1</sup>
- legal standing to seek an injunction and/or compensation;<sup>2</sup>
- access to justice for small and medium size business enterprises;<sup>3</sup> and,
- implementation and operational issues concerning the bill.<sup>4</sup>

### Time limit on applications for an injunction

2.2 The bill provides that a supplier whose interests are affected by conduct which contravenes the CPRs may make a written complaint to the 'accountable authority'<sup>5</sup> of the Commonwealth entity who must then undertake an investigation of the complaint.<sup>6</sup> If no public interest certificate is in place in relation to the particular procurement, the Commonwealth entity must suspend the procurement until the complaint is resolved.<sup>7</sup>

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1 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; Australian Chamber of Commerce and Industry, *Submission 4*, p. 1; Australian Manufacturing Workers' Union, *Submission 5* p. 2; Department of Defence, *Submission 6*, p. 2.

2 Dr Nick Seddon, *Submission 1*, pp. 2–3; Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, p. 2; Defence Teaming Centre, *Submission 8*, p. 1.

3 Chamber of Commerce Industry, Queensland, *Submission 2*, pp. 1–2; Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, p. 3; Australian Chamber of Commerce and Industry, *Submission 4*, p. 2; Australian Manufacturing Workers' Union, *Submission 4*, p. 2; Australian Fair Trade and Investment Network, *Submission 7*, p. 3; Australian Council of Trade Unions, *Submission 9*, p. 3.

4 Dr Nick Seddon, *Submission 1*; Chamber of Commerce and Industry, Queensland, *Submission 2*; Australian Small Business and Family Enterprise Ombudsman, *Submission 3*; Australian Chamber of Commerce and Industry, *Submission 4*; Australian Manufacturing Workers' Union, *Submission 5*; Department of Defence, *Submission 6*; Australian Fair Trade and Investment Network, *Submission 7*; Defence Teaming Centre, *Submission 8*; Australian Council of Trade Unions, *Submission 9*.

5 'Accountable authority' is defined in cl. 4. of the Bill as having the same meaning as in the *Public Governance, Performance and Accountability Act 2013*.

6 Government Procurement (Judicial Review) Bill 2017, cl. 19.

7 Government Procurement (Judicial Review) Bill 2017, cl. 20. See also, cl. 22.

2.3 Concurrently, the bill also provides that the FCC must not grant an injunction in relation to a contravention of the CPRs unless the application was made within 10 days after either the date the contravention, or the day the applicant for the injunction became aware, or ought to have become aware, of the contravention, or within such longer period as the court allows. The FCC must not allow a longer period unless the applicant's failure to lodge the application for an injunction was attributable to the applicant's reasonable attempt to resolve the complaint, or other special circumstances which would warrant a longer period to lodge the application.<sup>8</sup>

2.4 Several submissions expressed concern over the adequacy of the 10 day time limit in which a supplier must lodge an application for an injunction where a procurement entity breaches the CPRs in relation to a covered procurement process. The Chamber of Commerce and Industry Queensland (CCIQ) and the Australian Chamber of Commerce and Industry (ACCI) argued that the 10 day time limit 'is considered a very short timeframe for initiating court action for an injunction'.<sup>9</sup> Dr Nick Seddon was of the view that it would be impossible to comply with the 10 day time limit.<sup>10</sup> The Australian Manufacturers Workers Union (AMWU) said that the 10 day time limit 'is too short'.<sup>11</sup>

2.5 Some submissions contended that it is likely for the accountable authority to take more than 10 days to resolve a complaint.<sup>12</sup> The Department of Defence (Defence) highlighted the scale and complexity of Defence procurement, commenting:

Defence notes that complainants have ten days (or a longer period as determined by the court) to file an application for injunction. This gives agencies little time to investigate and address the complaint prior to the escalation to the courts, driving an adversarial rather than a collaborative relationship with industry.<sup>13</sup>

2.6 Dr Seddon suggested that the 10 day time limit should instead commence from the time it is clear that the attempt to resolve a complaint has failed, or that a complainant be required to submit a complaint within 10 days of the announcement of a contract being awarded.<sup>14</sup> Some submitters suggested that if there is to be a timeframe to lodge an injunction, there should also be a timeframe in which procuring entities must respond to a complaint.<sup>15</sup>

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8 Government Procurement (Judicial Review) Bill 2017, cl. 11.

9 Chamber of Commerce and Industry, *Submission 2*, p. 2; Australian Chamber of Commerce and Industry, *Submission 4*, p. 1.

10 Dr Nick Seddon, *Submission 1*, p. 2.

11 Australian Manufacturing Workers' Union, *Submission 5*, p. 2.

12 Chamber of Commerce and Industry, *Submission 2*, p. 2; Australian Chamber of Commerce and Industry, *Submission 4*, p. 2; Department of Defence, *Submission 6*, p. 2.

13 Department of Defence, *Submission 6*, pp 1–2.

14 Dr Nick Seddon, *Submission 1*, p. 2.

15 See, for example: Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, p. 2; Australian Manufacturing Workers' Union, *Submission 5*, p. 2

2.7 Despite the concerns raised around the 10 day time limit, it is clear that the bill provides a discretionary power to the FCC to 'allow longer periods' than the 10 days.<sup>16</sup> Dr Seddon described this process:

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.<sup>17</sup>

2.8 Dr Seddon also acknowledged that the 10 day limitation does not apply to a complainant's capacity to make a claim for compensation.<sup>18</sup> A claim for compensation does not require a concurrent application for an injunction, nor depend on success where such an application is made.

2.9 The Department of Finance (Finance) advised that Australia's potential obligations under the GPA require a timely, effective, transparent and non-discriminatory review procedure that provides for rapid interim measures to preserve a supplier's opportunity to participate in a procurement, and where a breach has occurred, for corrective action and compensation.<sup>19</sup> Finance elaborated:

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.<sup>20</sup>

2.10 As to the 10 day limit, Finance noted that a longer timeframe may apply if deemed appropriate by the FCC.<sup>21</sup> Finance acknowledged that in some circumstances 'complaint investigation[s] may take longer than 10 days'. In all cases where a complaint is lodged, Finance has advised that suppliers should keep detailed records of their interactions with the procuring entity. In the event that the 10 day time limit is exceeded, these records should be provided to the FCC 'to demonstrate that the delay in making the application was due to their attempt to resolve the complaint with the procuring entity'.<sup>22</sup>

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16 Dr Nick Seddon, *Submission 1*, p. 2. See also: Government Procurement (Judicial Review) Bill 2017, cl. 11(2)(b).

17 Dr Nick Seddon, *Submission 1*, p. 2.

18 Dr Nick Seddon, *Submission 1*, p. 2.

19 Answers to questions taken on notice on 22 June 2017 from the Department of Finance, received 13 July 2017, p. 2.

20 Answers to questions on notice taken on 18 July 2017 from the Department of Finance, received 2 August 2017, p. 1.

21 Answers to questions taken on notice on 22 June 2017 from the Department of Finance, received 13 July 2017, p. 2.

22 Answers to questions on notice taken on 18 July 2017 from the Department of Finance, received 2 August 2017, p. 2.

2.11 Finance also explained why special circumstances are not strictly defined in the bill:

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.<sup>23</sup>

2.12 Finance added that in the event that a supplier is not able to seek an injunction, the 10 day time limit does not preclude suppliers seeking a remedy of compensation.<sup>24</sup>

### **Legal standing**

2.13 The bill provides that a 'supplier whose interests are affected by the conduct' (being the breach of the CPRs) may make an application to the FCC for an injunction or compensation.<sup>25</sup> Dr Seddon expressed a view that the ground for legal standing is more stringent than Australia's actual or potential obligations under extant international trade agreements, and would therefore be inconsistent with the Australian United States Free Trade Agreement (AUSFTA) and the GPA. The wording of AUSFTA is a 'procurement in which the supplier has, or had, an interest'. The wording of the GPA is a 'procurement in which the supplier has, or has had, an interest'. This wording confers standing on any supplier that tendered for the procurement without the supplier being adversely affected by the breach of the CPRs.<sup>26</sup>

2.14 Dr Seddon said that the legal test that a supplier must establish that its interests 'are affected by' the breach of the CPRs raises the issue of causation and remoteness. The legal test does not address the circumstance of unfair procurement processes, irrespective of the outcome. Dr Seddon explained:

It could be argued that a complainant under proposed legislation must be able to show that the breach of the [CPRs] has impacted in some measurable 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

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23 Answers to questions on notice taken on 18 July 2017 from the Department of Finance, received 2 August 2017, p. 2.

24 Answers to questions on notice taken on 18 July 2017 from the Department of Finance, received 2 August 2017, p. 2.

25 Government Procurement (Judicial Review) Bill 2017, cl. 9, cl. 18.

26 Dr Nick Seddon, *Submission 1*, p. 2.

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it would have made no difference to you because your tender was not in the running". A court may be persuaded by this argument either in refusing an injunction or declining to award compensation.<sup>27</sup>

2.15 The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) and the Defence Teaming Centre (DTC) both observed that the bill is unclear as to whether subcontractor suppliers can bring an injunction against a prime contractor for a breach of the CPRs. The DTC suggested that subcontractor suppliers should have access to the complaints mechanism provided by the bill.<sup>28</sup>

2.16 In answers to questions taken on notice, Finance advised that 'the supplier does not need to demonstrate that they would have been awarded the contract had the breach not occurred'.<sup>29</sup>

2.17 Furthermore, Finance also noted that 'the new complaints mechanism is therefore available to any supplier whose interests are affected by the alleged breach of the relevant CPRs' including 'both primary contractors and subcontractors'.<sup>30</sup> Finance also clarified that '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', rather than a subcontractor making a complaint against a primary contractor.<sup>31</sup>

### **Access to justice for small and medium size business enterprises**

2.18 A number of submissions expressed concerns about the ability of small and medium size business enterprises to utilise the FCC as a complaint mechanism. The Australian Fair Trade and Investment Network Ltd (AFTINET) noted that the addition of a formal judicial appeal process may discourage small and medium-sized enterprises from tendering.<sup>32</sup> The Australian Council of Trade Unions agreed, adding that the process will bring an additional cost and resource impost that comes with layers of legal complexity.<sup>33</sup> The ACCI and the AMWU were concerned that the selection of the court as the body to hear applications for judicial review may restrict

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27 Dr Nick Seddon, *Submission 1*, p. 3.

28 See: Defence Teaming Centre, *Submission 8*, pp 1–2; Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, p. [2].

29 Answers to questions on notice taken on 18 July 2017 from the Department of Finance, received 2 August 2017, p. 2.

30 Answers to questions on notice taken on 18 July 2017 from the Department of Finance, received 2 August 2017, p. 3.

31 Answers to questions on notice taken on 18 July 2017 from the Department of Finance, received 2 August 2017, p. 3.

32 Australian Fair Trade and Investment Network, *Submission 7*, p. 3.

33 Australian Council of Trade Unions, *Submission 9*, p. 3.

access for some businesses who consider the procurement process to have been unfair.<sup>34</sup>

2.19 The CCIQ argued that the FCC, in having been granted substantial powers to determine the injunction and award compensation, has the result that preparation of the necessary documentation will fall in favour of large suppliers with legal capacity and/or funding over small and medium enterprises (SMEs) that may have limited funding and/or legal expertise. This will limit the capacity of those SMEs who lack internal legal expertise to raise and escalate concerns formally, or for those organisations which may require expensive legal expertise.<sup>35</sup>

2.20 The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) explained that a review process through the FCC:

[P]resents a costly and often complex pathway for redress for many small businesses due to the time and costs associated with the provision of legal advice and support necessary to realise a claim lodged with a court.<sup>36</sup>

2.21 Submitters contended that SME suppliers should have access to an ombudsman,<sup>37</sup> or an alternative dispute resolution mechanism as a step in the process,<sup>38</sup> or an industry advocate.<sup>39</sup> Alternatively, jurisdiction should vest with a lower court or tribunal such as the Administrative Appeals Tribunal rather than the FCC.<sup>40</sup>

2.22 In answers to questions on notice, Finance considered the FCC to be the appropriate forum as it can hear suppliers' complaints with greater timeliness, and it is the only court at the federal level with a continuous presence outside the major capital cities. This is particularly important for suppliers based in regional parts of Australia. Finance also noted that the FCC option to be about half the cost of other options, such as the FCA to which suppliers can currently take their complaints.<sup>41</sup> Finance noted its expectation that the impact of this bill on SMEs will be positive because suppliers:

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34 Australian Chamber of Commerce and Industry, *Submission 4*, p. 1; Australian Manufacturing Workers' Union, *Submission 5*, p. 2.

35 CCIQ, *Submission 3*, pp. 2–3. See also: Australian Chamber of Commerce and Industry, *Submission 4*, p. 2.

36 Small Business and Family Enterprise Ombudsman, *Submission 3*, p. 3.

37 Chamber of Commerce and Industry, Queensland, *Submission 2*, p. 2; Australian Fair Trade and Investment Network Ltd, *Submission 7*, pp 2–3; Defence Teaming Centre, *Submission 8*, p. 1.

38 Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, p. 3.

39 Australian Small Business and Family Enterprise Ombudsman, *Submission 3*, p. 3; Australian Manufacturing Workers' Union, *Submission 5*, p. 2.

40 Australian Manufacturing Workers' Union, *Submission 4*, p. 2.

41 Answers to questions taken on notice on 22 June 2017 from the Department of Finance, received 13 July 2017, p. 2.

...will have access to a more timely and effective and lower cost complaints mechanism for government procurement. Guidance and information on the new complaints mechanism will be available to assist them in understanding with understanding how it will operate.<sup>42</sup>

2.23 Finance also observed that SMEs can access support through ASBFEO who can 'provide assistance with resolving disputes with government agencies', and that all existing complaints mechanisms will remain in place.<sup>43</sup>

### **Implementation and operational concerns**

2.24 Some submitters commented upon a number of issues concerning the implementation and operation of the complaints mechanism.

2.25 Defence noted its concerns, specifically:

- its preference that consideration be given to enabling departments to issue blanket public interest certificates for certain classes of or categories of procurements where it is against the public interest or the procurement to be suspended;<sup>44</sup>
- that other tenderers may lodge their own complaints for compensation on the basis of costs arising as a result of a suspended procurement.<sup>45</sup> As a consequence additional complaints may be received in the event a complainant is successful regarding a breach of the CPRs;<sup>46</sup>
- possible delays to procurement caused by the suspension of the procurement process may have the unintended consequence of significantly increasing the costs of tendering, or alternatively, resulting in the need for tenderers to update or review their pricing;<sup>47</sup> and
- the impact on departmental budgets of successful claims for compensation in the event of a breach of the CPRs.<sup>48</sup>

2.26 Defence indicated that it was discussing concerns with Finance and expected that many of questions would be addressed through Finance's implementation guidance and Defence's own policies, guidance and contract templates. It noted that

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42 Answers to questions taken on notice on 22 June 2017 from the Department of Finance, received 13 July 2017, p. 6.

43 Answers to questions on notice taken on 18 July 2017 from the Department of Finance, received 2 August 2017, p. 3.

44 Department of Defence, *Submission 6*, p. 2.

45 Department of Defence, *Submission 6*, p. 2.

46 Department of Defence, *Submission 6*, p. 2.

47 Department of Defence, *Submission 6*, p. 2.

48 Department of Defence, *Submission 6*, p. 1.

the six months allowed for commencement following Royal Assent were expected to be used to settle administrative detail and practices.<sup>49</sup>

2.27 In relation to Defence's concerns as to the quantum of compensation payable based on the reasonable expenditure incurred in preparing a tender, the Defence Teaming Centre (DTC) stated:

It is not clear from the Bill or Explanatory Memorandum what can be considered as the preparation of a tender. Defence procurement strategy seeks to minimise risk. This can mean that in order to contract with Defence, either directly or indirectly as a subcontractor through a Prime Defence Contractor, businesses will often have to demonstrate the required infrastructure is in place at the *tender* stage of the procurement. As such, a business can be required to make a significant investment *prior* to the awarding of a contract.<sup>50</sup>

2.28 DTC also expressed concern that the FCC has the power to suspend procurements, noting the adverse effect to industry not involved in the complaint through costly delays to the overall procurement. DTC contends the delay or suspension should only apply to the specific part of the procurement in question rather than the entire procurement.<sup>51</sup>

2.29 Finance indicated that covered procurements are typically procurements of a higher value than are conducted through open tenders. Based on other countries that have similar review arrangements, including Canada, Finance considered that the potential number of applications for injunctions or compensation will be low.<sup>52</sup>

2.30 Finance observed that to be successful in an application to the FCC a supplier must demonstrate a breach of the relevant CPRs occurred in relation to a covered procurement in which they have an interest. Finance's clear advice to procurement entities is to maintain clear records documenting their procurement processes, including decisions made, evaluation reports, delegate approvals, and communication with suppliers, all of which will assist in responding to any complaint from a supplier, and demonstrating to the FCC that the procurement entity has complied with the requirements.<sup>53</sup>

2.31 In response to Defence's concerns around the budgetary impacts of compensation claims, Finance noted that 'procuring entities need to be aware ' of the

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49 Department of Defence, *Submission 6*, p. 2.

50 Defence Teaming Centre, *Submission 8*, p. 2.

51 Defence Teaming Centre, *Submission 8*, p. 2.

52 Answers to questions taken on notice on 22 June 2017 from the Department of Finance, received 13 July 2017, p. 2.

53 Answers to questions taken on notice on 22 June 2017 from the Department of Finance, received 13 July 2017, p. 3.



costs incurred by suppliers that 'participate in a procurement process'.<sup>54</sup> Finance also noted that:

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.<sup>55</sup>

2.32 Finance also explained that 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'.<sup>56</sup> A procurement may only remain suspended so long as the complaint is being dealt with by the procuring entity or the FCC.<sup>57</sup>

### **Committee view**

2.33 The committee supports the legislation as a necessary step to meet Australia's expected obligations at international law on the World Trade Organisation Agreement on Government Procurement (GPA), and the Trans-Pacific Partnership Agreement (TPP) entering into force. The GPA is an important opportunity to expand market access for Australian businesses, to enable the sale of goods and services to foreign governments. Further, the bill recognises the Senate Finance and Public Administration References Committee's finding that there is a 'lack of effective complaints process' for government procurement and a need to 'establish an independent and effective complaints mechanism for procurement processes'.<sup>58</sup> This is particularly important for Australian small businesses, who can obtain more affordable access to justice through the FCC.

#### ***Time limit for applications for an injunction***

2.34 The committee is satisfied that the 10 day time limit is appropriate to ensure that complaints are lodged in a timely manner. When suppliers are presented with genuine circumstances that prevent them from lodging their complaint within 10 days of the alleged infringement of the CPR's, the court has a very wide discretionary power to grant exemptions.

2.35 The committee also notes Finance's advice to procurement entities is to maintain clear records documenting their procurement processes, including decisions made, evaluation reports, delegate approvals, and communication with suppliers,<sup>59</sup> all

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54 Answers to questions on notice taken on 18 July 2017 from the Department of Finance, received 2 August 2017, p. 5.

55 Answers to questions on notice taken on 18 July 2017 from the Department of Finance, received 2 August 2017, p. 5.

56 Answers to questions on notice taken on 18 July 2017 from the Department of Finance, received 2 August 2017, p. 4.

57 Answers to questions on notice taken on 18 July 2017 from the Department of Finance, received 2 August 2017, p. 5.

58 Senate Finance and Public Administration References Committee, *Inquiry into Commonwealth procurement procedures*, July 2014, pp. 52–54.

59 Answers to questions taken on notice on 22 June 2017 from the Department of Finance, received 13 July 2017, p. 3.

of which will assist in responding to any complaint from a supplier in a timely manner.

### ***Legal standing***

2.36 The committee considers the legal test for standing in the bill to be appropriate to the circumstances. In limiting applications for judicial review to those suppliers who have a direct and meaningful interest in a procurement, the process avoids spurious applications. The committee notes Finance's advice that suppliers do not need to demonstrate that they would have been awarded the contract, but simply that a breach of the CPRs has occurred. The committee also highlights that both primary contractors and subcontractors are able to make complaints directly to the procuring entity, both prior to, and as part of complaint to the FCC. The content of the CPRs as they relate to fair processes appropriately remains a matter for the executive government.

### ***Access to justice for small and medium enterprises***

2.37 The committee agrees that the FCA and FCC provides an accessible, cost-effective and timely mechanism for procurement complaint resolution for all businesses involved in Australian Government procurement. The judicial review mechanism is in addition to, and not in substitution of, existing mechanisms. The mechanism is cost effective compared to existing avenues for redress, and therefore to the benefit of SMEs in respect of accessibility, cost and timeliness. The committee highlights that the resources of the ASBFEO will continue to be available to SMEs who require assistance lodging complaints relating to government procurement.

### ***Implementation and operational concerns***

2.38 The committee notes that there are implementation issues which require further consultation, however, these issues are machinery matters. It is appropriate that issues with respect to implementation are addressed after the passage of the bill. The committee strongly encourages Finance to consult closely with the broader public service on the implementation and operation of the complaints mechanism.

### **Recommendation 1**

**2.39 The committee recommends that the Senate pass the bill.**

**Senator James Paterson**

**Chair**