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## BILLS DIGEST

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### Government Procurement (Judicial Review) Bill 2017

Juli Tomaras  
Law and Bills Digest Section

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**Date introduced:** 25 May 2017

**House:** House of Representatives

**Portfolio:** Finance

**Commencement:** The earlier of a single day to be fixed by Proclamation or six months after Royal Assent.

**Links:** The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill’s home page, or through the [Australian Parliament website](#).

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the [Federal Register of Legislation website](#).

**All hyperlinks in this Bills Digest are correct as at September 2018.**

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## Purpose of the Bill

The Government Procurement (Judicial Review) Bill 2017 (the Bill) proposes to fill a gap in the current arrangements in administrative law relating to Commonwealth procurement, and to address obligations under relevant free trade agreements,<sup>1</sup> by creating new rules for making and investigating complaints in relation to the contravention of relevant Commonwealth Procurement Rules (CPRs).<sup>2</sup>

Specifically, the Bill:

- provides domestic and foreign tenders/suppliers with a statutory basis to challenge an actual or apprehended Commonwealth procurement decision for a contravention of relevant parts of the CPRs by providing the Federal Court, and the Federal Circuit Court (the Courts) the power to deal with particular procurement disputes (relating to ‘covered procurements’), and grant injunctions or order compensation to aggrieved suppliers for a breach of the relevant CPRs<sup>3</sup>
- makes it mandatory for the aggrieved supplier at first instance, to refer the complaint for investigation by the accountable authority for the relevant Commonwealth entity, before the supplier can bring a complaint before the Courts and
- requires the accountable authority to suspend the procurement while the complaint is being investigated, unless the secretary of that authority has issued a ‘public interest certificate’ for that procurement.

## Structure of the Bill

The Bill comprises five parts:

**Part 1 (items 1–7)** contains definitions of key terms used throughout the Bill, and a provision about the application of the Bill.

**Part 2 (items 8–14)** confers jurisdiction on the Courts to hear government procurement complaints where the relevant CPRs are breached and to grant an injunction in relation to the contravention, where the supplier has first taken genuine steps to resolve the complaint. There is a ten day time limit for raising the complaint with the court, however this may be extended.

**Part 3 (items 15-16)** confers jurisdiction on the Courts to order the payment of compensation where there has been a contravention of the relevant CPRs. The ten day time limit does not apply to an application for compensation.

**Part 4 (items 17–20)** contains provisions enabling an aggrieved supplier to make a complaint to the accountable authority of a relevant Commonwealth entity, triggering an investigation of the

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1. Appeal mechanisms currently in place are adequate to satisfy Australia's obligations under existing bilateral Free Trade Agreements. However, they are insufficient to satisfy the requirements of particular future international trade agreements such as the [World Trade Organisation Agreement on Government Procurement \(GPA\)](#), or the [Comprehensive and Progressive Agreement for Trans-Pacific Partnership \(TPP-11\)](#). In challenging procurement decisions, the GPA emphasises that party states are obliged to provide for a review and appeal mechanism to be available before ‘an impartial administrative or judicial authority that is independent of the [relevant] procuring entity.’ The TPP-11 has similar requirements in relation to a transparent timely dispute review process. The proposed changes enable Australia to satisfy its obligations under the TPP-11 and as a proposed party to the GPA.
  2. The CPRs are the linchpin of the Commonwealth procurement framework and set out the rules for procuring goods and services for non-corporate Commonwealth entities (government departments) and prescribed corporate Commonwealth entities listed in section 30 of the [Public Governance, Performance and Accountability Rule 2014 \(PGPA Rule\)](#). These entities are referred to in the CPRs as ‘relevant entities’.
  3. The ‘relevant CPRs’ or ‘covered procurements’ are Division 2 of the CPRs (i.e., procurements over specified monetary thresholds) and a provision of Division 1 that is declared by the CPRs to be relevant. The proposed amendments do not apply to procurements that are exempt from Division 2 of the CPRs. It is notable that while this Bill makes reference to ‘covered procurements’ this term was deleted in the 2012 CPRs which were released on 10 April 2012 and came into effect on 1 July 2012, replacing the Commonwealth Procurement Guidelines. The current CPRs came into effect on 1 January 2018.

complaint. This step must be taken before an application is made with the Courts. The power of the ‘accountable authority’ to suspend a procurement pending the resolution of the complaint is described by this Part.

**Part 5 (items 21–25)** contains miscellaneous provisions most notably relating to the issuing of a public interest certificate, a clarification that a contravention of the CPRs does not affect the validity of a contract, and a transitional provision relating to contraventions of CPRs that occurred before the commencement of the Act.

## Background

The [Public Governance, Performance and Accountability Act 2013](#) (the *PGPA Act*) creates a framework dealing with issues of governance, accountability, performance and the use of resources across Commonwealth bodies. The *PGPA Act* imposes a number of duties on ‘accountable authorities’<sup>4</sup> of Commonwealth entities.

Most relevant to the subject matter of this Bill, accountable authorities of all Commonwealth entities must govern the entity in a way that promotes proper use and management of public resources, where ‘proper’ means efficient, effective, economical and ethical.<sup>5</sup> Accountable authorities of non-corporate Commonwealth entities must govern that entity in a way that is not inconsistent with the policies of the Australian Government.<sup>6</sup> Consistent with this duty, an accountable authority can establish controls to ensure that officials consider the proper use (i.e. efficient, effective, economical and ethical use) of public resources.

Procurement is not simply about purchasing goods and/or services for an entity. Procurement is often nuanced and intertwined with several core functions and deliverables of an entity, which may in turn impact on considerations used to undertake a procurement. Procurement involves a series of activities and processes that are necessary for an entity to make inquiries, source, identify, communicate with and strategically vet suppliers, negotiate and establish terms for acquiring goods, services or works vital to an entity’s operations, often via a tendering process.<sup>7</sup>

The [Commonwealth Procurement Rules](#) (CPRs) are the linchpin of the procurement framework and set out the rules for procuring goods and services for non-corporate Commonwealth entities (such as departments) and prescribed corporate Commonwealth entities listed in section 30 of the [Public Governance, Performance and Accountability Rule 2014](#) (PGPA Rule). These entities are referred to in the CPRs as **relevant entities**. The CPRs incorporate relevant obligations from Australia’s free trade agreements as well as reflecting Australian policy on those rules. The CPRs are in the form of a legislative instrument which is not subject to disallowance motions of either house.<sup>8</sup> The current CPRs were issued under section 105B of the *PGPA Act* and came into effect on 1 January 2018. Chapter 9 of the CPRs provides that Australian Government procurement is conducted by one of three methods—open tender, prequalified tender or limited tender. The CPRs require officials to maintain appropriate documentation for each procurement

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4. An **accountable authority** of an entity is the person or body responsible for managing the entity. The accountable authority of a department of State and a parliamentary department will be the secretary. The accountable authorities of non-corporate Commonwealth entities that are listed entities will be prescribed by the rules: [Public Governance, Performance and Accountability Act 2013](#) (*PGPA Act*), subsection 12(2).
  5. *PGPA Act*, sections 15 to 19.
  6. *Ibid.*, section 21.
  7. Such goods, services or works that are procured may include for example, office equipment, uniforms, vehicles, furniture and facilities, technical equipment and support, telecommunications, contingent worker recruitment, testing and training, and travel-related services.
  8. Under subsection 105B(2) of the *PGPA Act*, the Rules are not subject to section 42 (disallowance) of the *Legislative Instruments Act 2003*.

commensurate with the scale, scope and risk of the procurement. That documentation is required to provide accurate and concise information on the requirements for the procurement, the process that was followed, how value for money was considered and achieved, relevant decisions that were made and the bases for those decisions.

### ***Current legal remedies for tenderers***

Currently, suppliers can make complaints to the procuring entity, the Procurement Coordinator within the Department of Finance, the Commonwealth Ombudsman, and the Federal Court.<sup>9</sup> The new arrangement will enable complaints to be made to the Federal Circuit Court (FCC).

### **Federal Court—Judicial review of procurement decisions**

A breach of the CPRs does not on its own give rise to a ‘private’ right of action under which the tenderer could seek damages. A tenderer may challenge the tender process under administrative law, seeking judicial review of a procurement decision, although procurement decisions may also be challenged on common law administrative law principles.

The *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the *ADJR Act*) sets out a framework for judicial review by the Federal Court of administrative decisions made under Commonwealth legislation. In simple terms, judicial review operates as a practical mechanism for resolving disputes between citizens and government by allowing ‘persons aggrieved’ by a decision (in this case a procurement decision) made by a government official, to have that decision scrutinised by an independent reviewer. However for an application to succeed under the *ADJR Act*, the tenderer must firstly show that the procurement decision was a decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion).<sup>10</sup> This requires two things: the empowering Act (in this case, the *PGPA Act*) authorises or requires the making of the particular procurement decision, and the Act must also govern the validity of the contract.

The seminal case on the first limb of the reviewability test is *Griffith University v Tang* [\(2005\) 221 CLR 99](#), in which the High Court clarified and settled earlier confusion about the proper construction of the phrase ‘under an enactment’ in the *ADJR Act*. The *ADJR Act* defines the term ‘enactment’ in terms which include Acts of Parliament and extends to instruments such as rules, regulations or by-laws made under an Act or ordinance. Tendering and contracting decisions made by a Commonwealth department do not satisfy this test because in normal case of government procurement, the decision to award the contract cannot be said to have been made ‘under an enactment’. So generally neither section 61 (which deals with executive power<sup>11</sup>) of *Commonwealth Constitution* or *PGPA Act* and its regulations will apply. The accepted view is that

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9. It is also possible to make a claim on the basis of breach of contract to the extent that it can be argued the tender documents constitute a ‘process contract’. However the Request for Tender documentation routinely excludes this possibility by inserting a clause purporting to exclude the possibility of a ‘process contract’ as there is no offer and no intention to create legally binding relations. As long as such clauses are drafted properly, they have legal force. Another possible basis is misleading or deceptive conduct during the procurement process. The relevant legislation in this regard would be the *Competition and Consumer Act 2010* (Cth). However section 2A of this legislation provides that it only binds the Crown in so far as it carries on a business. The case law since *Hughes Aircraft Systems International v Airservices Australia* [\[1997\] FCA 558](#) has held that procurement processes by government do not amount to carrying on a business but are part of the ordinary government business. There is also the possibility of raising negligent misrepresentation and estoppel arguments, but these would be very difficult arguments to run.
  10. *Administrative Decisions (Judicial Review) Act 1977* (Cth), sections 3, 5.
  11. Section 61 of the Commonwealth Constitution provides that:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

contracts made by Commonwealth departments are made under general executive power rather than legislative power.<sup>12</sup>

However, in some circumstances, there will be a statutory basis for the particular tendering or contracting action so that it can be said that the action concerned was taken under an enactment. This may be the case where the action is taken by a statutory authority. Unlike Departments, statutory authorities are creations of statute and they draw all their powers from statute. However, the problem still exists that while the empowering statute authorises or requires the making of a particular procurement decision, it is typically the case that the validity and effect of the contract is actually governed by the ordinary laws of contract, thus the fact that the legislation empowers the relevant entity to enter into contracts, is unlikely to be sufficient.

In short, the current laws provide limited recourse for aggrieved tenderers and would not satisfy Australia's obligations under the WTO's *GPA* or *TPP-11*.

While procurement has been an evolving area, the changes proposed in this Bill are significant as they provide a statutory basis for suppliers to challenge a tender decision for non-compliance with the relevant CPRs.<sup>13</sup> However, introducing a statutory mechanism for suppliers to challenge government tenders for breach of procurement rules is not novel. For example, in the USA, the Government Accountability Office which was established to provide an adjudicative process for the 'objective, independent, and impartial forum for the resolution of [bid] disputes concerning the awards of federal contracts', first published a bid protest decision that a solicitation was unlawful in 1926.<sup>14</sup>

### ***Basis for proposed amendments***

The proposed changes have arisen from three main sources:<sup>15</sup>

#### **2014 Senate Committee report into Commonwealth Procurement Procedures**

The Bill has been drafted partly in response to the 2014 recommendation by the Senate Finance and Public Administration Committee arising out of its inquiry into [Commonwealth Procurement Procedures](#). Recommendation 11 of that inquiry proposed that 'following consultation with stakeholders, the Department of Finance establish an independent and effective complaints mechanism for procurement processes.'<sup>16</sup> The recommendation was initially rejected by the Coalition Government. In the Government Senators' minority report, it was stated that in view of the avenues and opportunities available to suppliers to lodge complaints, and the low number of complaints received in relation to procurement processes, there did not appear to be sufficient

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12. See [Dardak v Minister for Regional Services, Territories and Local Government](#) (2002) 65 ALD 451 at 461.

13. The evolution of law in the procurement space is not confined to the changes proposed by this Bill. A couple of other notable changes to legislation and processes that will have an impact on the development of procurement are: the [Treasury Legislation Amendment \(Small Business and Unfair Contract Terms\) Act 2015](#) and the increasing use being made of Market Led Proposals (MLPs) for projects. A MLP is an unsolicited proposal or initiative from the private sector seeking an exclusive commercial arrangement with government to deliver a service or infrastructure to meet a community need. This is seen as an alternative to traditional government procurement. The Unfair Contract Terms legislation has been extended and now applies to a small category of business contracts. Unfair contract terms provisions apply to contracts with a Commonwealth, state or territory body to the extent that it is carrying on a business. A government body that engages in day to day procurement activities, but is not carrying on a business, is not subject to these laws.

14. Office of General Counsel, [Bid Protests at GAO: A Descriptive Guide](#), United States Government Accountability Office, ninth edn, 2009, p. 3.

15. M McCormack, '[Second reading speech: Government Procurement \(Judicial Review\) Bill 2017](#)', House of Representatives, *Debates*, 25 May 2017, p. 5136.

16. Senate Finance and Public Administration References Committee, [Commonwealth procurement procedures](#), The Senate, Canberra, July 2014, p. 53.

evidence to make the case for ‘the urgent need for a new complaints mechanism to be developed.’<sup>17</sup> Government Senators therefore did not support recommendation 11.<sup>18</sup>

On 30 April 2015, the Government tabled its response to the report and recommendations made by the Senate Committee. The Government stated that it did not support recommendation 11 and that there was an ‘existing framework for suppliers to raise complaints regarding procurement processes.’<sup>19</sup> Since then, the Government has changed its position.

*International obligations from the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11) and WTO Agreement on Government Procurement (GPA)*

## TPP-11

The Bill also aims to make Australia compliant with our international obligations under [Article 15.19](#) of the [Comprehensive and Progressive Agreement for Trans-Pacific Partnership \(TPP-11\)](#) which, once it enters into force, will require Australia to provide an impartial administrative or judicial authority (review authority) that is independent of its procuring entities to review, in a non-discriminatory, timely, transparent and effective manner, a challenge or complaint by a supplier that there has been a breach of the CPRs arising in the context of a covered procurement, in which the supplier has, or had, an interest. There is also a requirement for the procedural rules for all complaints to be in writing and made generally available.

## GPA

The Bill would also place Australia in a better position for likely accession to the World Trade Organisation’s [Agreement on Government Procurement](#) (GPA), which has as one of its requirements a transparent dispute review process.<sup>20</sup>

The WTO’s GPA is a plurilateral deal among 19 parties which covers ‘47 WTO members (counting the European Union and its 28 member states, all of which are covered by the Agreement, as one party)’.<sup>21</sup> The basic aim of the GPA ‘is to mutually open government procurement markets among its parties’.<sup>22</sup> Stated in practical terms, becoming party to the GPA will mean that Australian suppliers will have the opportunity to access the government procurement markets of all member states, which include the 28 members of the European Union and the USA.<sup>23</sup> In turn, overseas suppliers will be able to sell goods and services generally to all levels of Australian government on the same basis as Australian suppliers. The GPA commits parties to open, fair, transparent and non-discriminatory conditions of competition in awarding public procurement contracts, thus treating bids by suppliers from GPA parties and local providers on an equal footing and requiring an independent transparent dispute review process.<sup>24</sup>

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17. Ibid., p. 87.

18. Ibid.

19. [Australian Government response](#) to the Senate Finance and Public Administration References Committee report: *Commonwealth procurement procedures*, April 2015, p. 8.

20. Implementation of the GPA will also require Australia to make a number of other adjustments to current procurement practices at the time of implementation, including having in place appropriate review procedures, making changes to procedures for pre-qualification and limited tendering.

21. World Trade Organisation (WTO), ‘[Agreement of Government Procurement: Parties, observers and accessions](#)’, WTO website.

22. WTO, ‘[Agreement on Government Procurement](#)’, WTO website.

23. Australia already has an FTA with the USA which enables Australia suppliers to access the US Government procurement market. See chapter 15 of [Australia-United States Free Trade Agreement](#).

24. WTO, ‘[Agreement on Government Procurement](#)’, op. cit.

Negotiations for the GPA commenced in 1981 and the original version of the GPA entered into force in 1996; it has since been expanded and renegotiated with the most recent revision entering into force in 2014. For years Australian Governments did not pursue becoming a party to the GPA. In November 2014 Australia announced a change to its position, following the revisions to the GPA in April 2014, which were considered to bring its content and terms into closer alignment ‘with the principles underlying Australia’s Government procurement regime and making GPA accession more beneficial’.<sup>25</sup> The substantive changes of interest to Australia included expanding the objectives of the Agreement to place an emphasis on value for money and encouraging greater accountability. The revisions also extended the coverage to include additional government entities, along with additional goods and services, while adding new provisions with a focus on anti-corruption. A general exception to the non-discrimination principle was inserted for circumstances where it is deemed ‘necessary to protect human, animal or plant life or health’, as well as international aid projects. It also provided for governments to be able to apply technical specifications for environmental protection. Changes to Australia’s procurement practices overtime have also put it in a position where it is already mostly compliant.<sup>26</sup>

#### **Timeline of Australia’s GPA accession**

**2015:** Australia launched negotiations to accede to the GPA.

**2015:** Australia submitted its first offer of accession to the WTO Committee on GPA.

**2017:** After feedback and questions, Australia presented its revised offer to the WTO Committee on GPA.

**2018:** Following further feedback and questions, Australia presented its final offer to the WTO Committee on GPA, with the offer discussed during the 12-14 March meeting of the GPA Committee.

**June 2018:** Australia receives notice support for its bid join the *World Trade Organization Agreement on Government Procurement (GPA)*.<sup>27</sup>

## **Committee consideration**

### ***Senate Finance and Public Administration Committee***

The Bill was referred to the Senate Finance and Public Administration Committee for inquiry in June 2017. Details can be found at the [inquiry homepage](#). The Committee tabled its report on 4 August 2017, concluding that the Bill should be passed in its current form as a necessary next step for Australia to meet its expected international obligations.<sup>28</sup> In particular, the Committee noted there is a lack of an independent, timely, effective complaints process for government procurement.<sup>29</sup>

Labor Senators issued Additional Comments, raising concern about prematurely passing such a Bill before negotiations and details for accession to the GPA are finalised. Postponing the passage of this Bill would provide the Parliament with the appropriate and necessary time to properly

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25. Department of Foreign Affairs and Trade (DFAT), ‘[Agreement on Government Procurement](#)’, DFAT website.

26. Ibid.

27. S Ciobo (Minister for Trade) [WTO Government Procurement Agreement accession](#), media release, 28 June 2018.

28. Senate Finance and Public Administration Committee, [Government Procurement \(Judicial Review\) Bill 2017 \[provisions\]](#), The Senate, Canberra, August 2017, p. 13.

29. Ibid.

consider the GPA in full. The Labor Senators concluded by stating the ALP's commitment to 'improving Australia's access to international markets in Australia's national interest.'<sup>30</sup>

The Greens Senators also issued a Dissenting Report in which they stated that they considered the legislation to be unnecessary as the Government has not yet acceded to the GPA. However, if the Government decided to pursue the passage of this Bill prior to negotiations for accession to the GPA being concluded, the Greens recommended that the ten day limit on bringing proceedings for an injunction be extended so as to avoid the courts being potentially inundated with applications for a waiver of this time limit. Finally the Greens emphasised that they supported a procurement regime that is transparent, easily comprehensible and advances the goal of expanding jobs in Australia.<sup>31</sup>

The concerns raised in the stakeholder submissions are discussed below under the relevant key issues.

### ***Senate Standing Committee for the Scrutiny of Bills***

The Senate Standing Committee for the Scrutiny of Bills reported on the Bill on 14 June 2017.<sup>32</sup> The Committee raised two particular concerns to which the Minister provided a response to the Committee's concerns on 19 July 2017, which the Committee responded to on 9 August 2017.<sup>33</sup>

#### **Broad Instrument-making power**

The Committee raised particular concern about the broad instrument-making power conferred on the Minister for Finance to determine, by way of legislative instrument, additional procurements which may be exempted from the definition of a 'covered procurement', without making transparent the criteria which may inform such a determination.<sup>34</sup> The Committee sought advice from the Minister as to the necessity of this broad power and also, if it is:

... appropriate for the bill to be amended to ensure that additional procurements could only be exempted from the definition if there are such provisions in Australia's free trade agreements (if this is the intention of the provision).<sup>35</sup>

#### **Minister's response**

The Minister stated that Australia is party to a large number of free trade agreements (FTAs), where the specific obligations under those FTAs may vary. The CPRs are intended to embody Australia's obligations under those FTAs as well as reflect Australian policy. Because 'government functions and entities can change from time to time', such a provision provides the flexibility to adjust to such change, and to do so consistent with our FTA obligations. The Minister stated that this power is not expected to be used often.<sup>36</sup>

#### **Committee response to the Minister**

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30. Australian Labor Party Senators, Additional Comments, Senate Finance and Public Administration Committee, [Government Procurement \(Judicial Review\) Bill 2017 \[provisions\]](#), The Senate, Canberra, August 2017, p. 15.
  31. Australian Greens, Dissenting Report, Senate Finance and Public Administration Committee, [Government Procurement \(Judicial Review\) Bill 2017 \[provisions\]](#), The Senate, Canberra, August 2017, p. 17.
  32. Senate Standing Committee for the Scrutiny of Bills, [Scrutiny digest](#), 6, 2017, The Senate, 14 June 2017, pp. 27–8.
  33. Senate Standing Committee for the Scrutiny of Bills, [Scrutiny digest](#), 8, 2017, The Senate, 9 August 2017, p. 70.
  34. Senate Standing Committee for the Scrutiny of Bills, [Scrutiny digest](#), 6, 2017, op. cit., pp. 27–8.
  35. Ibid.
  36. Senate Standing Committee for the Scrutiny of Bills, [Scrutiny digest](#), 8, 2017, op. cit., p. 70.

The Committee noted the Minister's reasoning and requested:

... the key information provided by the Minister be included in the explanatory memorandum, noting the importance of these documents as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.<sup>37</sup>

Because the instrument will be subject to disallowance, the Committee made no further comment.<sup>38</sup>

### **Review rights**

The Committee noted **clause 23** of the Bill provides that a contravention of the CPRs does not affect the validity of a contract, regardless of whether the contravention occurred before, at or after the commencement of the Act. The Committee raised concern and sought clarification as to whether the provision is intended to extinguish rights that an affected person might otherwise have to challenge the validity of a contract in circumstances where the CPRs are contravened. The uncertainty arises because **clause 14** of the Bill provides that the new powers conferred on the courts are in addition to, and not instead of, any other powers. Thus the Committee suggested the interaction between **clause 14** and **clause 23** appears to be in need of clarification.<sup>39</sup>

### **Minister's response**

The Minister responded that the 'intention of the clause is to provide certainty to both suppliers and the officials of relevant entities on the validity of contracts awarded following a procurement process' without being concerned that the contract would be rendered invalid. The Minister also stated that he had been advised a breach of the CPRs would be unlikely to affect the validity of a contract.<sup>40</sup>

### **Committee response to the Minister**

The Committee stated that it did not consider that this information responds directly and relevantly to the specific concern raised by the Committee, namely:

... whether clause 23 (which states that it is immaterial whether the contravention occurred before the commencement of the Act) could operate to extinguish existing legal rights relating to impugning the validity of a contract by way of proceedings brought under this legislation.<sup>41</sup>

The Committee reiterated its concern that:

... it would appear that the bill could extinguish existing legal rights, notwithstanding that it is considered 'unlikely' that the courts would view breach of the CPRs as affecting the validity of a contract.<sup>42</sup>

### **Policy position of non-government parties/independent**

As discussed in the Additional Comments to the Senate Committee's report, the ALP and the Greens do not support the passage of the Bill at this time, stating that it is more appropriate for the Bill to be considered when negotiations for the GPA are concluded.<sup>43</sup>

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37. Ibid., p. 71.

38. Ibid.

39. Senate Standing Committee for the Scrutiny of Bills, [Scrutiny digest](#), 6, 2017, op. cit., p. 28.

40. Senate Standing Committee for the Scrutiny of Bills, [Scrutiny digest](#), 8, 2017, op. cit., pp. 71–72.

41. Ibid., p. 72.

42. Ibid.

## Position of major interest groups

The views of major interest groups are set out in their submissions and evidence provided to the Senate Finance and Public Administration Committee's inquiry into the Bill, which received 9 submissions. Those views are summarised below under thematic headings in the *Key Issues and Provisions* part of this Digest.

## Financial implications

The Explanatory Memorandum states that the Government is committing \$2.9 million over four years for the Federal Circuit Court, with concurrent jurisdiction with the Federal Court to hear government procurement complaints. Funding is expected to be provided on an ongoing basis as efforts at cost recovery (through court filing fees) are not anticipated to be sufficient.<sup>44</sup>

### Comment

In its submission to the Senate inquiry into the Bill, the Department of Defence has raised the concern of the potential for an increase in individual department and thus budgetary costs from both delays in the procurement process due to a suspension of the process, and the impact of one successful claim for compensation inspiring additional claims for that particular breach event.<sup>45</sup>

## Statement of Compatibility with Human Rights

A Statement of Compatibility with Human Rights was not provided for this Bill in the accompanying Explanatory Memorandum.

The Parliamentary Joint Committee on Human Rights considers that the Bill does not raise human rights concerns.<sup>46</sup>

## Key issues and provisions

### Part 1—Preliminary

#### Key definitions

**Clauses 4 and 5** provide definitions of key terms used throughout the Bill. These include:

A procurement is a **covered procurement**, and therefore subject to the review scheme established by the Bill, if:

- the rules in Divisions 1 and 2 of the CPRs apply to the procurement and
- the procurement is not included in a class of procurements specified in a determination by the Minister for Finance.

Under the CPRs, Division 1 and 2 rules only apply when the value of the procurement is above a certain threshold. For non-corporate Commonwealth entities, this is \$80,000 and for prescribed corporate Commonwealth entities the threshold is \$400,000. For all relevant entities, the

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43. Senate Finance and Public Administration Committee, [Government Procurement \(Judicial Review\) Bill 2017 \[provisions\]](#), op. cit., pp. 15 and 17 respectively.

44. [Explanatory Memorandum](#), Government Procurement (Judicial Review) Bill 2017, p. 1.

45. Department of Defence, [Submission](#) to Senate Standing Committee on Finance and Public Administration, *Inquiry into the Government Procurement (Judicial Review) Bill 2017*, [submission no. 6], July 2017, p. 2.

46. Parliamentary Joint Committee on Human Rights, [Human Rights Scrutiny Report](#), 5, 2017, Canberra, 14 June 2017, p. 49.

procurement threshold for construction services is \$7.5 million. This means the Bill's measures will not apply to procurements where the value is below these thresholds.

The Bill will also not apply to procurements which are exempted from all, or part, of the Division 1 and 2 rules. This includes, for example, procurements involving the leasing of land or buildings; the procurement of goods or services from another government entity; procurements funded by grants from non-Commonwealth entities; or procurements where an official applies measures determined by their accountable authority to be necessary to maintain or restore international peace and security or to protect human health, essential security interests or national treasures of artistic, historic or archaeological value.

### **Comment**

This is a very broad definition of 'procurement' and seems to include all stages of a procurement, including the ongoing operation of a contract. In this case it may be possible to suspend an ongoing operational contract if no public interest certificate is in force.<sup>47</sup> The Explanatory Memorandum offers no guidance as to what happens when there are parallel procurements involving many contracts. Is it the case that the suspension of one affects or is intended to affect other related contracts?

#### ***Relevant Commonwealth entity means:***

- (a) a non-corporate Commonwealth entity; or
- (b) a corporate Commonwealth entity prescribed by rules made for the purposes of paragraph 105B(1)(b) of the *Public Governance, Performance and Accountability Act 2013*.<sup>48</sup>

#### ***Relevant Commonwealth Procurement Rules means:***

- (a) a provision of Division 1 of the Commonwealth Procurement Rules that is declared by those rules to be a relevant CPR for the purposes of this paragraph; or
- (b) all of Division 2 of the Commonwealth Procurement Rules.

### **Comment**

Division 2 rules are rather straightforward, relating to conditions for limited tender,<sup>49</sup> time limits for lodging tender submissions and so forth. It would be rather easy to establish as to whether an entity has complied with the requirements under Division 2 as this would be evident from the request documentation itself. In contrast, the provisions in Division 1 are arguably more imprecise and relate to probity-type issues such as the ethical behaviour requirement<sup>50</sup> which may be more difficult to ascertain. There has not been any indication as to which provisions the Government intends to include from Division 1 of the CPRs.

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47. 'Public interest certificates' are created by subclause 22(1)—see discussion below.

48. The list of those entities can be found at Rule 30 (Procurement by corporate Commonwealth entities) in the [PGPA Rules 2014](#).

49. A limited tender involves an agency approaching one or more potential suppliers to make submissions where the process does not meet the rules for open tender or prequalified tender. Chapter 9 of the CPRs provides that Australian Government procurement is conducted by one of three methods – open tender, prequalified tender or limited tender.

50. CPR, Division 1, [rules 6.6 -6.8](#), Department of Finance website.

The WTO GPA makes it a requirement that the signatories to the Agreement provide a list of sub-central government entities that are going to be bound by the GPA.<sup>51</sup> This means state governments and possibly statutory corporations. However **clause 6** of the Bill states that the legislation binds the Crown in each of its capacities. This does not seem of relevance in terms of binding the states because the target of the legislation is breaches of the CPRs. In this respect it is unclear as to whether this drafting will satisfy the WTO requirements or whether there will be a side letter drawn up.

## Part 4—Complaints, investigation and suspension of procurement process

### *Legal standing: who may make a complaint?*

A ‘supplier’ can make a written complaint to the accountable authority if the supplier has reason to believe (and this is a subjective formulation) that the relevant commonwealth entity has engaged or is proposing to engage in conduct in breach of the relevant CPRs (so far as those rules related to a covered procurement), and the ‘interests of the supplier are affected’ by that conduct (**clause 18(1)**). The Bill defines a **supplier as a person, partnership or other group who supplies, or could supply, goods or services.**<sup>52</sup>

Perhaps problematically, when a supplier’s interests will be affected by the conduct (that is, a breach of the relevant CPRs) is left undefined in the Bill, and the Explanatory Memorandum also does not provide any guidance.<sup>53</sup> This may therefore pose problems in using the legislation in terms of standing and causation. For example, the relevant entity may be able to argue that even though they have not complied with the CPRs, the applicant’s interests are not affected because they would not have won the tender in any event.

Nonetheless the potential scope of who can complain is broad and could include for example, an activist group who object to some aspect of the procurement, as long as they do or could provide goods or services and can show that their interests are affected by the breach.

### Comment

Professor Nick Seddon noted that the drafting in the GPA and AUSFTA is made in the context of a ‘procurement in which the supplier has, or has had, an interest’, whereas the drafting in the Bill refers to a supplier ‘whose interests are affected’ by the conduct.<sup>54</sup> This therefore makes the test for standing (who may make a complaint) stricter by raising the problem of causation.<sup>55</sup>

In its report the Senate Finance and Public Administration Committee responded by saying that they considered the test for standing to be appropriate as it avoids spurious applications by confining applications for review to those suppliers who ‘have a direct and meaningful interest in a

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51. World Trade Organization (WTO), [WTO GPA](#), Article 1(1) provides that the Agreement only covers procurement by entities covered by the Agreement, as specified in Annexes 1-3 of Appendix I, relating respectively to central government entities, sub-central government entities...

52. **Clause 4.**

53. Parts 2 and 3 of the Bill make use of the phrase a supplier ‘whose interests are affected’ and in those parts there is also no corresponding guidance as to what this phrase may mean.

54. Professor Nick Seddon is an Adjunct Professor at the ANU College of Law and a leading authority on government contracts: federal state and local.

55. Professor N Seddon, [Submission](#) to the Senate Standing Committee on Finance and Public Administration, *Inquiry into the Government Procurement (Judicial Review) Bill 2017*, op. cit., p. 2.

procurement process' without requiring them to show that they would have been awarded the contract. Demonstration of a breach of the CPRs is sufficient.<sup>56</sup>

The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) and the Defence Teaming Centre (DTC) both expressed the view that the scope of the term 'supplier' needed clarification. In particular, clarification was sought as to whether subcontractor suppliers may be able to apply for an injunction against a prime contractor for a breach of CPRs, with the DTC arguing that this should be permitted.<sup>57</sup>

In answers to questions taken on notice, the Department of Finance clarified that a complaint of a breach of the relevant CPRs by a sub-contractor needs to be made to the responsible authority.<sup>58</sup> It also confirmed that 'the supplier does not need to demonstrate that they would have been awarded the contract had the breach not occurred'.<sup>59</sup> They only need to demonstrate that their interests are affected by the alleged breach, and this is intended to apply to both contractors and subcontractors.<sup>60</sup>

### ***Meaningful access to justice for small and medium size business enterprises***

It is notable that the Bill will provide regional suppliers and small and medium enterprises (SMEs) with easier, timely access to raise complaints about breaches of CPRs and seek remedies without the need to attend major cities. This is because the FCC is the only court at the federal level which has a continuous presence outside major capital cities. However, access to justice is not simply about geographical proximity. Six of the submissions received by the Senate Committee Inquiry into the Bill raised concern about issues of cost associated with a formal judicial process in terms of preparation of relevant documentation and the necessity for sufficient legal resources. The proposed arrangement may therefore discourage small and medium enterprises from applying for tenders or challenging them. The net result may be to undermine competition by having a process which favours large suppliers.<sup>61</sup>

In order to address the cost-access challenge for small and medium businesses, a few of the submissions proposed the addition of other less costly steps in the process. Submitters contended that SME suppliers should have access to an ombudsman,<sup>62</sup> or an alternative dispute resolution mechanism as a step in the process,<sup>63</sup> or an industry advocate.<sup>64</sup> Alternatively, jurisdiction should

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56. Senate Finance and Public Administration Committee, [Government Procurement \(Judicial Review\) Bill 2017 \[provisions\]](#), op. cit., p. 14.

57. Australian Small Business and Family Enterprise Ombudsman (ASBFEO), [Submission](#) to the Senate Standing Committee on Finance and Public Administration, *Inquiry into the Government Procurement (Judicial Review) Bill 2017*, [submission no. 3], 7 July 2017, p. 2; Defence Teaming Centre, [Submission](#) to the Senate Standing Committee on Finance and Public Administration, *Inquiry into the Government Procurement (Judicial Review) Bill 2017*, [submission no. 8], 12 July 2017, p. 2.

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

59. *Ibid.*, p. 2.

60. *Ibid.*, p. 3.

61. See in particular: Australian Chamber of Commerce and Industry, [Submission](#) to the Senate Standing Committee on Finance and Public Administration, *Inquiry into the Government Procurement (Judicial Review) Bill 2017*, [submission no. 4], 7 July 2017, p. 1; Australian Fair Trade and Investment Network Ltd, [Submission](#) to the Senate Standing Committee on Finance and Public Administration, *Inquiry into the Government Procurement (Judicial Review) Bill 2017*, [submission no. 7], p. 3, n.d; Australian Council of Trade Unions, [Submission](#) to the Senate Standing Committee on Finance and Public Administration, *Inquiry into the Government Procurement (Judicial Review) Bill 2017*, [submission no. 9], 14 July 2017, p. 3; Australian Manufacturing Workers' Union, [Submission](#) to the Senate Standing Committee on Finance and Public Administration, *Inquiry into the Government Procurement (Judicial Review) Bill 2017*, [submission no. 5], 7 July 2017, p. 2; ASBFEO, op. cit., p. 3; Chamber of Commerce and Industry Queensland, [Submission](#) to the Senate Standing Committee on Finance and Public Administration, *Inquiry into the Government Procurement (Judicial Review) Bill 2017*, [submission no. 2], July 2017, pp. 2–3.

62. Australian Fair Trade and Investment Network Ltd, op. cit., pp. 2–3; Chamber of Commerce and Industry Queensland, op. cit., p. 2; Defence Teaming Centre, op. cit., p. 1.

63. ASBFEO, op. cit., p. 3.

vest with a lower court or tribunal such as the Administrative Appeals Tribunal rather than the FCC.<sup>65</sup>

In answers to questions on notice, the Department of Finance argued that the FCC is the most appropriate forum for handling complaints in a timely manner and highlighted the fact that it is the only court with an ongoing presence outside major cities, thus providing regional areas with greater geographical access. It is stated that the cost of the FCC is around only half the cost of an option like the FCA.<sup>66</sup>

### ***Investigation by accountable authority***

If a complaint is made, then the accountable authority is under an obligation to investigate the complaint and must prepare a report into the investigation (**subclause 19(1)**). This is not dissimilar to the current complaints handling procedures.<sup>67</sup>

### **Discontinuation of investigation**

**Subclause 19(2)** provides that the accountable authority may discontinue the investigation if one of the following circumstances applies:

- the supplier withdraws the complaint
- the supplier informs the authority that the complaint has been resolved or
- the Court makes either of the following findings:
  - the conduct was in contravention of the CPRs (so far as those rules related to a covered procurement) or
  - the conduct was not in contravention of the CPRs (so far as those rules related to a covered procurement).

### ***Suspension of procurement***

As part of the complaints procedure, there requirement that the accountable authority ‘suspend’ the procurement process on receipt of the complaint (if there is no **public interest certificate** in force)<sup>68</sup> until the earliest of the following times:

- the time at which the supplier informs the accountable authority that they consider the complaint to be resolved<sup>69</sup>
- the time at which the supplier withdraws the complaint<sup>70</sup>
- the time at which the accountable authority issues a **public interest certificate** in relation to the procurement<sup>71</sup> or
- the time at which the Court makes either of the following findings:

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64. Australian Manufacturing Workers' Union, op. cit., p. 2; ASBFEO, op. cit., p. 3.

65. Australian Manufacturing Workers' Union, op. cit., p. 2.

66. Senate Standing Committee on Finance and Public Administration, [‘Answers to questions taken on notice on 22 June 2017’](#), Department of Finance, *Inquiry into the Government Procurement (Judicial Review) Bill 2017*, 13 July 2017, p. 2.

67. See heading ‘Current remedies for tenderers’ on page 5 of this Bills Digest.

68. This requirement is introduced by **paragraphs 20(a) and (b)**. **Clause 22** of the Bill provides that the accountable authority of the relevant commonwealth entity may issue a public interest certificate in relation to a specified procurement.

69. **Paragraph 20(c)**.

70. **Paragraph 20(d)**.

71. **Paragraph 20(e)**.

- the conduct was in contravention of the CPRs (so far as those rules related to a covered procurement)<sup>72</sup> or
- the conduct was not in contravention of the CPRs (so far as those rules related to a covered procurement).<sup>73</sup>

## Comment

Neither the Bill nor the Explanatory Memorandum articulate what is meant by ‘suspending’ the procurement process. It would seem to mean that a contract cannot be awarded during a suspension of the procurement process, but it is unclear as to whether it means that other bids cannot be considered and that the whole process grinds to a halt.

## Remedies

The Bill provides for two types of remedies, a statutory injunction or compensation. A claim for compensation can be made in conjunction with an application for an injunction or each application can be made separately.

## Part 2—Injunctions

**Clause 9** provides that the Court may grant an injunction in relation to a contravention of the relevant CPRs, so far as those rules relate to a covered procurement. Two types of injunctions are available: a restraining injunction or a performance injunction. The Explanatory Memorandum states that injunctions provide the courts with ‘a corrective measure to ensure that the procuring entity complies with the relevant CPRs’.<sup>74</sup>

**Subclause 9(1)** provides that a **restraining injunction** may be granted in circumstances where there has been, or there is proposed to be, conduct which will amount to a contravention of the CPRs (so far as those rules related to a covered procurement). In these circumstances the court may, on the application of the supplier ‘whose interests are affected by the conduct’, grant an injunction:

- restraining the entity or official from engaging in the conduct and
- if, in the Court’s opinion it is desirable to do so—requiring the entity or official to do something.

**Subclause 9(2)** provides that a **performance injunction** may be granted in circumstances where a relevant Commonwealth entity or an official of that entity has refused or failed, or is refusing or failing, or is proposing to refuse or failed to do an act or thing which will amount to a contravention of the CPRs (so far as those rules related to a covered procurement). In these circumstances the court may, on the application of the supplier ‘whose interests are affected by the conduct’, grant an injunction requiring the entity or official to do that act or thing.

## Availability of alternative remedy of compensation

**Clause 10** basically provides a court with the discretion to refuse to grant an injunction where a public interest certificate has been issued, and the court considers that the granting of compensation would be a more appropriate remedy given the circumstances. According to the

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72. Paragraph 20(f)(i).

73. Paragraph 20(f)(ii).

74. Explanatory Memorandum, op. cit., p. 6.

Explanatory Memorandum, this is intended to provide for ‘the balance of interests being in favour of compensatory remedies rather than disruption to the procurement process.’<sup>75</sup>

Where:

- an application has been made to the court for an injunction in relation to a contravention of the relevant CPRs (**paragraph 10(1)(a)**) and
- the supplier/tenderer has made an application to the court for compensation (**paragraph 10(1)(b)**) and
- a public interest certificate has been issued in relation to the procurement (**paragraph 10(1)(c)**) and
- the procurement concerned has not reached the stage where a contract has been entered into with the supplier (**paragraph 10(1)(d)**)

then:

**paragraph 10(1)(e)** requires the court to consider whether the granting of an injunction would result in significant delay/disruption to the procurement, and if the granting of compensation would thus be a more appropriate remedy. If so, then the court may refuse to grant an injunction (**paragraphs 10(1)(f)(i)** and **(ii)**).

**Subclause 10(2)** clarifies that this does not limit or confine the power of a court to refuse to grant an injunction to those considerations in **subclause 10(1)**. The grant of an injunction is therefore discretionary and other possible examples of considerations which the court may take into account in deciding whether to grant an injunction include the conduct of the supplier and also the nature and degree of the contravention.

### **Procedural limits on power to grant an injunction**

#### *Requirement to first lodge a complaint with the accountable authority*

**Clause 11** imposes certain limits on the court’s power to grant an injunction in relation to a contravention or proposed contravention of the CPRs.

**Paragraphs 11(1)(a)** and **(b)** provide that the court must not grant an injunction in relation to a contravention or proposed contravention of the CPRs by a relevant Commonwealth entity or an official of that entity, unless:

- the court is satisfied that the applicant for the injunction has made a complaint under **clause 18** to the relevant authority (**paragraph 11(1)(c)**) and
- if the court considers that it would have been reasonable for the applicant for the injunction to have attempted to resolve the complaint, the court is satisfied that the applicant has made a reasonable attempt to resolve the complaint (**paragraph 11(1)(d)**).

### **Comment**

This is consistent with [Articles 15.19\(2\)-\(3\)](#) of TPP-11 which encourage the supplier and procuring entity to seek a resolution to the complaint at first instance, and where this fails then the supplier may seek redress through a review authority which is independent of the procuring entity that is the subject of the complaint.

### **10 day limit for Application**

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75. Ibid.

The Bill provides that the Court must not grant an injunction in relation to either a:

- contravention that has occurred<sup>76</sup>
- contravention that is occurring<sup>77</sup> or
- proposed contravention<sup>78</sup>

by a relevant Commonwealth entity or an official of that entity, unless the court is satisfied that the application for the injunction was made within ten days, either of the contravention (or proposed contravention) occurring or the supplier becoming aware/or reasonably aware of the contravention (or proposed contravention).

The Court has discretion to allow a longer period for the application to have been made.<sup>79</sup>

**Subclause 11(5)** provides that the court must not allow a longer period of time for the application of an injunction unless the court is satisfied that the reason for the delay relates to:

- the applicant's failure to make the application within the ten day period being due to the applicant's reasonable attempt to resolve the complaint (**paragraph 11(5)(b)**) or
- there are special circumstances that warrant allowing a longer period to lodge an complaint and thus injunction (**paragraph 11(5)(a)**).

## Comment

In the case where an attempt at settlement has been made but no resolution has been reached in ten days and this has caused the delay in applying for an injunction, the Court would grant an extension of time. In this case, an extension of time will probably be granted in the majority of cases as it is unlikely that complaints will be resolved in a ten day period. Indeed, a number of submissions to the Senate Inquiry into this Bill expressed concern and dissatisfaction about the adequacy of the ten day time limit for seeking an application for an injunction, especially in complex procurement processes.<sup>80</sup>

Dr Seddon proposed that ten day time limit should instead commence from the time it is clear that efforts to resolve a complaint have failed, or that a complainant be required to submit a complaint within ten days of the announcement of a contract being awarded.<sup>81</sup>

An alternative suggestion was that if the ten day limit was to apply to the lodgement of an application by an aggrieved supplier, then a time limit for responding to a complaint should also be imposed on a procuring entity.<sup>82</sup>

It seems that the ten day time limit requirement may have been informed by the norms relating to provisions dealing with procurements set out in FTAs which require there to be a timely complaints handling process in place.

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76. **Paragraph 11(2)(a).**

77. **Paragraph 11(3)(a).**

78. **Paragraph 11(4)(a).**

79. **Paragraphs 11(2)(b), 11(3)(b) and 11(4)(b).**

80. See for example, Australian Chamber of Commerce and Industry, op. cit., p. 1; Chamber of Commerce and Industry Queensland, op. cit., p.2; Australian Manufacturers Workers Union, op. cit., p. 2.

81. Dr Seddon, op. cit., p. 2.

82. Australian Manufacturing Workers' Union, op. cit., p. 2.

## Discharge or variation of an injunction

**Clause 12** provides that that the Court may discharge or vary an injunction granted by it, thus suggesting that this allows for final and interlocutory injunctions to be granted.

## Certain limits on granting injunctions not to apply

### *Restraining injunctions*

**Paragraphs 13(1)(a)** and **(b)** provide that a court may grant an injunction restraining a relevant Commonwealth entity or an official of that entity from engaging in a conduct of a particular kind:

- if the court is satisfied that the entity or official of the entity *has* engaged in conduct of that kind, regardless of whether it appears the entity intends to engage again, or continue to engage in that conduct (**paragraph 13(1)(c)**) or
- where it appears that if an injunction is not granted, it is likely that the entity or official will engage in conduct of that kind: regardless of whether the entity has previously engaged in that kind of conduct, and regardless of whether there is any imminent danger of substantial damage to any person if the entity or official engages in conduct of that kind (**paragraph 13(1)(d)**).

### *Performance injunctions*

**Paragraphs 13(2)(a)** and **(b)** provide that a court may grant an injunction requiring a relevant Commonwealth entity or an official to do an act or thing:

- if the court is satisfied that the entity or official *has* refused or failed to do that act or thing— whether or not it appears to the court that the entity or official intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing (**paragraph 13(2)(c)**) or
- if it appears to the court that, if an injunction is not granted, it is likely that the entity or official has previously refused or failed to do that act or thing, and regardless of whether there is any imminent danger of substantial damage to any person if the entity or official refuses or fails to do that act or thing (**paragraph 13(2)(d)**).

## Comment

Given that action for an injunction may be taken in respect of the action or failure to act by an official in the relevant entity, it may not be unreasonable to expect that the relevant part (Appendix E) of the [Legal Services Directions 2017](#) would be come into play and that the official would be provided with support and indemnity.<sup>83</sup> However, the Explanatory Memorandum does not raise this issue.

**Clause 14** provides that the powers conferred on the courts under Part 2 are in addition to, and not instead of, any other powers of the court. It is arguable that **clause 14** is intended to convey that the proposed amendments are an adjunct to and do not displace other existing forms of review, even though those avenues are rather weak.

## Part 3—Compensation

The Courts may order payment of compensation to a *supplier whose interests are affected* by the contravention of the relevant CPRs (so far as those rules related to a covered procurement). The power to grant compensation is limited in scope to reasonable expenditure incurred by the

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83. The [Legal Services Directions 2017](#) are a set of binding rules issued by the Attorney-General setting out requirements for the provision of legal services to Commonwealth or Australian Government agencies. Appendix E makes provision and outlines the criteria for Assistance to Commonwealth employees for legal proceedings.

supplier in preparing for the tender, making a complaint to the relevant authority, and in making a reasonable attempt to resolve the complaint. Thus the power to grant compensation notably does not extend to the loss of profit or opportunity on the part of the supplier.

**Clause 16** provides that if a relevant Commonwealth entity or an official of that entity has contravened, is contravening or is proposing to contravene the relevant CPRs (so far as those rules related to a covered procurement), the courts may, on the application of a *supplier whose interests are affected* by the contravention or proposed contravention, make whichever of the following orders is applicable:

- in the case of a **non-corporate Commonwealth entity**, an order directing the Commonwealth to pay the supplier compensation<sup>84</sup> or
- in the case of a **corporate Commonwealth entity**, an order directing the entity to pay the supplier compensation.<sup>85</sup>

In either case, the compensation amount must not exceed the sum of the reasonable expenditure incurred by the supplier in connection with: preparing a tender for the procurement; making a complaint to the accountable authority of the relevant Commonwealth entity; and making a reasonable attempt to resolve such a complaint.<sup>86</sup>

The parameters around the ward compensation are consistent with [Article 15.19\(4\)](#) of TPP-11. The scope of the compensation clause does not explicitly mention legal costs, but it is arguable that if a tenderer had to engage a lawyer to assist them, then such costs may be recoverable.

### **Pre-requisites to apply for compensation**

Unlike the ten day time limit for a supplier to make an application for an injunction, there is no mention in the Bill or Explanatory Memorandum of a ten day time limit applicable to lodging a claim for compensation. There is also no mention of a requirement that the applicant must have tried to settle or resolve the issue with the relevant Commonwealth entity.

## **Part 5—Miscellaneous**

### ***An exception to the suspension requirement—Public interest certificate***

An obligation to suspend the procurement process under Part 2 while applications for an injunction are being considered, or while complaints under **clause 18** are being investigated, does not apply if a public interest certificate has been issued by the secretary or other accountable authority of a relevant Commonwealth entity (**subclause 22(1)**).<sup>87</sup>

The public interest certificate is an administrative law overlay that has been introduced into the procurement process as a result of the changes made by the Bill. It is designed as a counter to balance out the ‘real adverse consequences’ of a suspension of the procurement process which can occur when a complaint is made and is being investigated, or when an application for an injunction is made. The Explanatory Memorandum states that a public interest certificate is designed to allow for particular circumstances where a procurement process should be allowed to continue despite the Bill’s proposed amendments, which would otherwise require the process to

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84. **Subclause 16(c)**.

85. **Subclause 16(d)**.

86. **Paragraphs 16(c)(i)–(iii), 16(d)(i)–(iii)**.

87. A delegation is also provided under **clause 24**, so officials within the relevant agency may also be empowered to issue a public interest certificate.

be suspended, because 'it is not in the public interest for that procurement to be delayed.'<sup>88</sup> Thus, a complaint is made and a public interest certificate can be issued at that point to allow the procurement process to continue, while the application or complaint is being considered.<sup>89</sup>

The Explanatory Memorandum does not provide further discussion or elaboration on the test for issuing a public interest certificate. However it is stated that 'procuring entities will receive guidance on the circumstances where a public interest certificate can be issued.'<sup>90</sup>

## Comment

The Department of Defence suggested that consideration be given to allowing certain special categories of procurements with a particular public interest at stake, to issue blanket public interest certificates, or for the procurement to be suspended.<sup>91</sup>

### What might 'in the public interest to be suspended' mean?

Generally, when looking at a public interest, the courts have said that it is a matter of discretionary value judgement on the part of the decision-maker and that the parameters of 'public interest' is really determined by the confines of the Act in which that public interest test is situated.<sup>92</sup>

Some of the considerations may involve consideration of what is the nature and purpose of the procurement. For example:

- does the procurement involve a national security issue?
- is there some particular urgency in relation to what is being procured?
- what is the nature of the complaint being made and how serious is the complaint?
- is the complaint broad in its effect, extending to many suppliers or is it limited to one particular supplier? and
- generally, the purpose for which the Bill is being introduced, .i.e., to respond to international obligations.

The abovementioned factors are possible considerations in relation to whether a public interest certificate is issued. However because it is a discretionary value judgement, much will turn on the particular circumstances of the case. Each circumstance may therefore give rise to its own considerations.

### *Timing for issuing a public interest certificate*

Although the Bill seems to contemplate the issuance of a public interest certificate when the particular issue or grievance arises, consideration may be given to at least in some particular types of procurement processes (for example, relating to national security or urgent circumstances) of having the certificate issued at the start of the procurement process.

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88. Explanatory Memorandum, op. cit., p. 9.

89. Ibid., p. 10.

90. Ibid.

91. Department of Defence, [Submission](#) to the Senate Standing Committee on Finance and Public Administration, op. cit., p. 2.

92. In general statement of principle the High Court has said:

Indeed, the expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and purpose of the statutory enactments may enable..."

See *O'Sullivan v Farrer* [1989] HCA 61.

### *Scope of the public interest certificate?*

The Bill is silent as to what the scope of the public interest certificate might be. It is unclear as to whether it is intended to apply to any complaint or injunction raised in relation to procurement process, or whether it is to be confined to particular complaints or issues, or can be made to apply to only a certain complaint.

It is notable that while the issuance of a public interest certificate is an administrative decision, the Explanatory Memorandum states that ‘it is not intended that the decision would be subject to a merits review’ in the Administrative Appeals Tribunal.<sup>93</sup> However, there does not appear to be anything in the Bill excluding the possibility of judicial review under the *Administrative Decisions Judicial Review Act (ADJR Act)*, or review under section 39B of the *Judiciary Act* and section 75(v) of the *Constitution*.<sup>94</sup> As the issuance of a public interest certificate appears to be reviewable under the *ADJR Act*, section 13 allows an aggrieved person of a decision to seek a statement of reasons.

In the case of review under the *ADJR Act*, the court may form their own views about relevant considerations in issuing a public interest certificate and also procedural fairness. It is notable that ‘public interest’ is a flexible concept that can deal with a range of different situations and some circumstances where it is an urgency about the procurement process continuing, there may be no requirement for procedural fairness continuing, but at least some consideration may need to be given as to whether a person who is affected by the decision, should have an opportunity to comment on whether a PIC should be issued.

Thus although a public interest certificate is intended to provide a counter to the complaint process, it seems that there may be a number of issues to work through.

### ***Contravention of CPRs does not affect validity of a contract***

**Clause 23** provides that a breach of the CPRs does not affect the validity of a contract, regardless of whether the contravention occurred before or after the commencement of this Bill.

#### **Comment**

As mentioned above, the operation of this clause attracted the attention of the Scrutiny of Bills Committee. This clause may be interpreted as meaning that an injunction cannot be granted once a contract has been awarded. If this is the case, then this provision may be in breach of Article 15.11(4) of the [Australia-US Free Trade Agreement](#) which states that the setting aside of an awarded contract is one of the remedies in the Agreement. However, this would be consistent with the WTO GPA which does not include such a requirement.

This is arguably not an insignificant point as at least in some cases, the tenderer will not be in a position to be aware that there has been a breach of the CPRs until after the contract has been awarded and there is a debriefing session in which this may come to light. An applicant in that situation would be able to apply for compensation. However, they may still face the problem of standing and causation mentioned earlier if the matter went to court.

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93. Explanatory Memorandum, op. cit., p. 10.

94. Section 75(v) of the *Commonwealth Constitution* provides the High Court with original jurisdiction to hear all matters ‘in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth’. The High Court’s jurisdiction cannot be removed by legislation. The [Judiciary Act 1903](#) confers on the Federal Court the same original jurisdiction as the High Court under section 75(v).

### ***No retrospective application***

**Clause 25** provides that the Bill does not apply to contraventions of the CPRs which occur before the Act commences. However, it is arguable that there is the potential for it to apply to a procurement process which is midstream for breaches of the relevant CPRs after the Bill does come into effect.

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