



# Express law

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31 MAY 2017

## Government Procurement (Judicial Review) Bill 2017 introduced into Parliament

**On 25 May 2017, the Government introduced the Government Procurement (Judicial Review) Bill 2017 into the House of Representatives. The Bill would establish a new independent complaints mechanism for Commonwealth procurement processes.**

The Bill will enable Australia to meet obligations under the World Trade Organization Agreement on Government Procurement and the Trans-Pacific Partnership Agreement relating to domestic review of procurement processes.

### *What the Bill would do*

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The Bill would enable the Federal Court of Australia and Federal Circuit Court to grant an injunction or order compensation for a contravention of relevant Commonwealth Procurement Rules (CPRs) (so far as they relate to a 'covered procurement') by a Commonwealth entity.

### ***Who can apply for an injunction or compensation?***

Applications can be made by 'suppliers' whose interests are affected by the relevant conduct. A 'supplier' is a person or group who supplies, or could supply, goods or services (eg potential bidders).

### ***Which procurements are covered?***

The Bill applies to procurements where **both Divisions 1 and 2 of the CPRs apply** (unless it is in a class of procurements that has been exempted in a determination made by the Finance Minister under the Bill). It will generally therefore apply where the estimated value of the procurement is at or above the relevant procurement threshold (as set out in the CPRs) and where it is not covered by the list of exemptions in Appendix A of the CPRs.

### ***What contraventions are covered?***

The Bill only applies to contraventions (or proposed contraventions) of provisions in **Division 2** of the CPRs. It could also apply in relation to a provision of Division 1 of the CPRs if the provision is declared by the CPRs to be a relevant provision for the purposes of the Bill.

### ***Injunction***

The court can issue a restraining injunction (eg restraining the relevant entity or official from engaging in conduct in contravention of the relevant CPRs) if the entity or official has engaged, is engaging or is proposing to engage in conduct in contravention of the CPRs. In cases where the contravention relates to a refusal to do an act or thing, a performance injunction can be granted requiring the entity or official to do that act or thing.

There are some limits on the circumstances in which an injunction can be granted. In particular, the supplier **must first have made a complaint** to the accountable authority of the relevant Commonwealth entity. The supplier must also make the application within 10

days of the relevant conduct occurring or the supplier becoming aware of the conduct (or within such longer period as the court allows).

Where a supplier has applied both for an injunction and for compensation, and a 'public interest certificate' is in force in relation to the procurement (see further below), the court is required to consider whether granting an injunction would result in a significant delay to the procurement and whether compensation would be a more appropriate remedy.

### ***Compensation***

The court may order compensation if a Commonwealth entity or official has contravened, is contravening or is proposing to contravene the relevant CPRs. The compensation payable is limited to reasonable expenditure incurred by the supplier in preparing a tender for the procurement, and in making a complaint to the accountable authority about the contravention and attempting to resolve the complaint. It does not cover loss of revenue that could have been gained under a contract were it not for the contravention.

### ***Suspension of procurements***

The Bill also provides for complaints to be made to the accountable authority of a relevant Commonwealth entity about a contravention of the relevant CPRs, which must be investigated.

When such a complaint is made, the accountable authority must **suspend the procurement** unless a **public interest certificate** has been issued in relation to the procurement.

A public interest certificate is a written certificate issued by the accountable authority stating that it is not in the public interest for a specified procurement to be suspended while applications for injunctions are being considered or complaints are being investigated. This provides a mechanism for avoiding significant adverse consequences that might otherwise result from a delay in a particular procurement process.

### ***Validity of contracts not affected***

The Bill makes it clear that a contravention of the CPRs does not affect the validity of any contract that may have been entered.

### ***Watch this space***

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The Bill, once enacted, will commence on a day to be fixed by Proclamation or 6 months after Royal Assent. The Act is not expected to commence until late 2017 at the earliest. The Department of Finance has indicated they will provide further guidance to entities prior to commencement.

*Copies of the Bill and its Explanatory Memorandum are available here:*

<https://www.legislation.gov.au/Details/C2017B00092>

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