

# New dawn for Commonwealth procurement

22 November 2018

Authors: Ellen Williamson, Georgia Ellis

Explore more insights 

## In brief

The *Government Procurement (Judicial Review) Act 2018* (The Act) received assent on 19 October 2018 and will commence from April 2019, unless proclaimed sooner.

An aggrieved supplier claiming that the Commonwealth Procurement Rules (CPRs) have been, or may be, contravened by a Commonwealth entity now has new statutory rights to make a complaint and seek other forms of redress under a simple, expedited process. Such complaints will trigger an investigation and may result in the suspension or termination of the procurement process.

## In detail

### *How does the Act work?*

- The Act applies to ‘covered’ procurements undertaken by corporate or non-corporate Commonwealth entities – i.e. procurements above the relevant procurement threshold in the CPRs (unless exempt under the CPRs or in a class listed by Ministerial instrument).
- A supplier with reason to believe that there has been, is or will be, conduct in contravention of the CPRs, and whose interests are affected by such conduct, may make a written complaint to the relevant entity. The making of a written complaint will trigger:
  - an investigation and report by the Commonwealth entity.
  - suspension of the procurement process until the complaint is resolved or withdrawn or the Court makes a finding in respect of the contravention, except where the Commonwealth entity has obtained a ‘public interest certificate’
  - a right for the supplier to apply to the Federal Court or the Federal Circuit Court for an injunction to restrain or to compel performance by the Commonwealth entity, provided the injunction application is made within 10 days of the contravention and the Court is satisfied that the supplier has made a reasonable attempt to resolve the complaint.
- Even if a written complaint is not made, the supplier may apply to the Federal Court or the Federal Circuit Court for compensation for costs in relation to the procurement process and the written complaint (if any).

### *Does the Act apply to all Commonwealth procurement processes?*

No. However, it will apply to many procurement processes, because the definition of ‘procurement’ under the CPRs is broad (see CPRs 2.7-2.8), the exclusions are relatively narrow and the thresholds for ‘covered procurements’ are:

- 
- \$80,000 for non-construction services for non-corporate Commonwealth entities (non-construction services);
  - \$400,000 for corporate Commonwealth entities (non-construction services); and
  - \$7.5m for construction services.

In addition to procurements below the above thresholds, other key exclusions include:

- Appendix A exempt procurements - e.g. leases, services from a small-medium size enterprise with at least 50 per cent Indigenous ownership, government advertising services, labour hire, motor vehicles.
- Minister exempt procurements - procurements of a class listed in a determination by the Minister, as contemplated by s 5 of the Act.
- National interest procurements - procurements determined necessary 'for the maintenance or restoration of international peace and security, to protect human health, for the protection of essential security interests, or to protect national treasures of artistic, historical or archaeological value', under CPR 2.6 and contemplated by s 5 of the Act. Such procurements include the long list of specific Defence materiel procurements described in Defence Procurement Policy Directives D2 and D4.
- Certain financial procurements - procurements not included in CPR 2.9 (Div 1) such as loans, grants and investments.

***Can the operation of the Act be excluded?***

No, that is unlikely.

The CPRs do not permit contracting out (indeed, the CPRs require disclosure of non-compliance) and any attempt to contract out of the statutory rights and remedies granted by the Act may be challenged on the basis that such an attempt is inconsistent with Australia's international treaty obligations.

However, Commonwealth entities are likely to retain broadly drafted 'no tender process contract' clauses which seek to exclude claims for breach of the process contract.

***Can a contravention of Division 1 of the CPRs be challenged under the Act?***

Yes, but only if they are 'declared', and none have been declared yet.

If they are declared in the future and it becomes possible to challenge on the basis of contravention of the broad concepts underpinning Division 1 of the CPRs, it is likely that suppliers will find it more difficult to establish a breach and the Courts will find investigation and resolution equally difficult.

***Can a public interest certificate be issued?***

The Explanatory Memorandum noted that a public interest certificate should generally only be issued where a suspension would result in 'real adverse consequences' and that Commonwealth entities would receive guidance on how to strike an appropriate balance between the accountability/transparency objectives of each procurement process and the frustration of a procurement process/government work. If public interest certificates are either too easy or too difficult to obtain, the balance will be compromised.

The effect of issuing a public interest certificate is to safeguard the procurement from a suspension following the making of a written complaint, and also from the delay caused by an injunction where compensation is also being sought.

Section 20(b) of the Act suggests that to avoid a suspension of the procurement process, the public interest certificate must have been issued before the written complaint is made. However s 20(e)

---

contemplates that a public interest certificate can be issued after the written complaint is made, resulting in the lifting of any suspension.

### ***What constitutes a complaint by a supplier?***

Despite the serious consequences of making a written complaint under the Act, there is very little guidance in the Act with respect to content and timing requirements for such complaints. Commonwealth entities will need to rely on the Court's requirements for claims and evidentiary proof as safeguards against frivolous and vexatious complaints. As noted above, a supplier seeking injunctive relief is required to demonstrate that it has made a reasonable attempt to resolve the dispute.

### ***The takeaway***

The Act will impact on the internal processes of many Commonwealth entities, including procurement processes and complaints handling processes. Commonwealth entities should use the period before commencement of the Act to review their internal processes to ensure they are designed to minimise the risk of complaints and if a complaint is made, to identify, investigate and resolve it as efficiently and quickly as possible.

For example, the timing, content and conduct of debriefs should be reviewed, particularly in complex, multi-stage procurement processes. All debriefs should focus on providing evidence-based, constructive feedback consistent with a fair, transparent and accountable procurement process. Commonwealth entities might also consider pursuing more interactive tender processes (subject to probity controls) as a way of encouraging collaboration, minimising 'surprises' and reducing 'expectation gaps', the appointment of experienced tender contact officers and the engagement of proactive, visible probity advisors. These are measures which can improve suppliers' confidence in the procurement process and reduce the risks of complaints.

If a complaint is made under the Act, the requirements to investigate and report on the complaint, the uncertainty regarding the timing for the issue of any public interest certificate, and the 10 day period for bringing an injunction application mean that Commonwealth entities will need to act quickly. This will require streamlined and efficient investigation processes, and clear access to the relevant tender and procurement documentation. It will require procurement officials to have a detailed understanding of the CRPs and of the Act.

---

## ***Let's talk***

For a deeper discussion of how these issues might affect your business, please contact:

Cate Greene, Melbourne and Canberra  
+61 434 070 121  
[cate.greene@pwc.com](mailto:cate.greene@pwc.com)

Nicholas Tsirogiannis, Melbourne  
+61 409 570 044  
[nicholas.tsirogiannis@pwc.com](mailto:nicholas.tsirogiannis@pwc.com)

© 2018 PricewaterhouseCoopers. All rights reserved. In this document, "PwC" refers to PricewaterhouseCoopers a partnership formed in Australia, which is a member firm of PricewaterhouseCoopers International Limited, each member firm of which is a separate legal entity. This publication is a general summary. It is not legal or tax advice. Readers should not act on the basis of this publication before obtaining professional advice. PricewaterhouseCoopers is not licensed to provide financial product advice under the Corporations Act 2001 (Cth). Taxation is only one of the matters that you need to consider when making a decision on a financial product. You should consider taking advice from the holder of an Australian Financial Services License before making a decision on a financial product.

*Liability limited by a scheme approved under Professional Standards Legislation.*  
WL127057726