



7 July 2017

Senator James Paterson
Legislative Committee Chairperson
Senate Finance and Public Administration Committees
PO Box 6100
Parliament House
Canberra ACT 2600

By email: fpa.sen@aph.gov.au

Dear Senator Paterson,

RE: GOVERNMENT PROCUREMENT (JUDICIAL REVIEW) BILL 2017

Thank you for the opportunity to make a submission to the Legislative Committee on Government Procurement (Judicial Review) Bill 2017.

The Australian Small Business and Family Enterprise Ombudsman (the Ombudsman) was established in March 2016 to advocate for and assist small business and family enterprise. Across both our advocacy and assistance functions, we have found that federal government procurement processes generate multiple issues of concern to Australian small businesses. Our comments below are based on the issues referred to our Office.

We note the bill goes in part to satisfying requirements for Australia's ascension to the World Trade Organization Agreement on Government Procurement, the Trans-Pacific Partnership Agreement and recommendations from the 2014 Senate Finance and Public Administration References Committee's report into the Commonwealth procurement procedures. We commend the intent of the bill but note several issues which will affect the ability of small businesses to use the process outlined in the draft bill.

Small Business and Government procurement

Australian Government procurement is one of the largest procurement spends in Australia. Between \$50 billion to \$60 billion is spent annually by the government on procurement exercises (anywhere between 65,000 to 80,000 contracts).¹ In 2015-16, Small and Medium sized Enterprises (SME) accounted for 24 per cent of Australian Government procurement by value (\$13.7 billion). However this percentage, as a share of overall total value spent, has been steadily declining over the last three years. Significantly, SMEs also appear to have a substantial involvement in

¹ Department of Finance, Statistics on Australian Government Procurement Contracts, <http://www.finance.gov.au/procurement/statistics-on-commonwealth-purchasing-contracts/>

government supply chains as sub-contractors, although official data on this participation is limited.

The Ombudsman is interested in addressing the declining share of direct SME procurement spend as well as the treatment of SMEs in the Government supply chain. Our research and interactions with small businesses have highlighted a number of barriers to small business participation in government procurement processes. This has included significant issues associated with lack of an independent and effective complaints mechanism for procurement processes.

Elements of the Judicial Review bill

The draft legislation allows the Federal Circuit Court of Australia with jurisdiction (concurrently with the Federal Court of Australia) to grant an injunction and/or order payment of compensation with respect to a contravention of the Commonwealth Procurement Rules (CPRs) for certain 'covered procurements'. There are a range of exemptions to procurements which are considered 'covered procurement'. We welcome the intent of the bill and the inclusion of a compensation remedy for contraventions of the CPRs.

The bill's current form allows a supplier to lodge a complaint regarding a breach of the CPRs with the accountable authority of the relevant Commonwealth entity undertaking the procurement. This must occur as a first step before a supplier can apply to the court for an injunction or other remedy. We welcome this step but note that there is a time limit imposed on filing with the court (of 10 days) which can be waived in certain circumstances. Our concern is that the interplay of the timeframes here could lead to confusion for small businesses. We would recommend that the timeframe for lodgement takes into account the requirement for the accountable authority to investigate the complaint. Alternatively, we would recommend that a timeframe be placed on the accountable authority to investigate and report on a complaint though this may not be practical for certain procurements.

Similarly, it is not clear if the bill allows subcontractor suppliers to access the complaints mechanism. The definition of a supplier presently limited to a "supplier whose interests are affected" and the definition of supplier meaning:

- (a) a person who supplies, or could supply, goods or services; or
- (b) a partnership (or other group) of 2 or more persons that supplies, or could supply, goods or services.

It is not clear in the bill or explanatory memorandum if the complaint mechanism would allow an existing or proposed subcontracted supplier to bring a complaint or file for an injunction against a prime contractor for a breach of the CPRs.

Access to justice

Another prominent concern relates to access by small businesses to judicial remedies for breach of the CPRs. This presents 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. We recognise that the court presents an effective mechanism for the proposed complaints process but would highlight the opportunity to include alternative dispute resolution (ADR) as an effective step in the process, like the assistance services the Ombudsman provides to small businesses. ADR processes offer lower costs and a practical access to justice mechanism for small business. This could be provided by formalising the Ombudsman's existing role and functions as a complaint avenue or alternatively through the Industry advocate position proposed by the recent report² by the Joint Standing Committee on Government Procurement.

We welcome this bill as a first step in the right direction to provide small businesses with a legislated mechanism to raise complaints. In the meantime, we will continue to assist small businesses to resolve any disputes they may encounter in this area.

Should you wish to discuss this submission further, please contact me or James Strachan on or

Yours sincerely,

Kate Carnell AO

Australian Small Business and Family Enterprise Ombudsman

² Buying into our Future, Joint Select Committee Inquiry into the Commonwealth Procurement Framework.
http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Government_Procurement/CommProcurementFramework/Report