Australian Government
Department of Finance

# Department of Finance

# Submission to the Finance and Public Administration Committee

## Public Governance, Performance and Accountability Amendment (Ban Unethical Contractors) Bill 2025

December 2025

# Contents

# Introduction

As policy stewards of the Commonwealth procurement framework, the Department of Finance (Finance) is committed to supporting the development of a positive procurement culture across the Commonwealth. The role of steward also encompasses engagement, advisory functions and leading procurement and contract management capability uplift to Commonwealth entities.

Strong contract management of suppliers is critical to the effective delivery of the Government's objectives. It is crucial that entities have appropriate oversight of their suppliers' activities and effective mechanisms for managing poor and/or unethical performance. Finance notes that there have been improvements in both tools and capability over the past three years and that the public service is much better placed to address issues of poor supplier performance into the future.

Finance notes that the *Public Governance, Performance and Accountability Amendment (Ban Unethical Contractors) Bill 2025* (the Bill) seeks to provide Government with an additional tool by implementing a debarment regime for suppliers (or potential suppliers) to Government. The Bill proposes that government procurement contracts are not entered into for a period of up to five years, with potential suppliers who have engaged in unethical conduct, and that a public register of suppliers excluded from government procurement contracts be established.

Finance's submission addresses: the operation of the Commonwealth procurement framework; existing mechanisms for engaging and managing suppliers; and issues raised by the Bill.

# Commonwealth Procurement Framework

The Commonwealth Resource Management Framework governs how officials in the Commonwealth public sector use and manage public resources. This framework establishes the overarching principles and legislative requirements for managing public resources, ensuring alignment with the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule). The PGPA Act establishes a coherent system of governance and accountability for public resources including the devolved nature of responsibilities. The PGPA Act requires the accountable authority of an entity to promote the proper use and management of public resources for which the authority is responsible. The PGPA Act defines 'proper' as meaning efficient, effective, economical and ethical, when used in relation to the use of management of public resources. The PGPA Act is the foundation of finance law and includes the legislation that governs how Commonwealth entities manage public money and resources and includes subordinate legislation under the PGPA Act and the Appropriation Acts.

Within this broader context, the Commonwealth procurement framework reflects the Australian Government's expectations for procurement and contract management activities. It governs how entities procure goods and services. It ensures that government procurement is conducted in a fair, transparent, efficient, effective economical and ethical manner and provides a structured approach that helps entities achieve value for money while upholding principles of accountability and integrity. The framework supports contract management best

practice, including monitoring supplier performance, as well as risk management and compliance activities, including ethical conduct.

Commonwealth procurement and contract management is both expansive and diverse. They are utilised to source and manage a broad range of goods and services required to support administration of Commonwealth entities and deliver outcomes and services to the Australian public.

## Devolved Framework

The PGPA Act establishes a devolved system whereby accountable authorities are responsible for the proper use of public resources. The Commonwealth procurement framework forms part of this devolved framework. Each entity is responsible for its own procurement processes and decisions to meet their purposes and objectives. Entities are expected to undertake due diligence activities commensurate with the scale, scope, risk, and nature of each procurement. The devolved nature of the Commonwealth procurement framework provides entities the flexibility they need to meet their business needs based on various factors such as entity size, business needs, risk, operational complexity, volume and value of procurements, and the type of goods and services required by the entity.

Section 15 of the PGPA Act requires the accountable authority of an entity to promote the proper use and management of public resources for which the authority is responsible.

The accountable authority of a Commonwealth entity may, by written instrument, issue Accountable Authority Instructions (AAIs) and policies regarding delegations, which ensure that procurement decisions are made in accordance with legislative and policy obligations. Accountable authorities are responsible for the governance and resources of entities and prioritise spending as required within the relevant rules to achieve the outcomes/purposes of the entity.

## Commonwealth Procurement Rules

The Commonwealth Procurement Rules (CPRs) are issued by the Minister for Finance under section 105B(1) of the PGPA Act. The CPRs are the cornerstone of the Commonwealth procurement framework and apply to all non-corporate Commonwealth entities (NCEs) and prescribed corporate Commonwealth entities (CCEs) listed in section 30 of the PGPA Rule. Under the CPRs, except where required by law, Ministers will not be involved in the conduct of procurement processes or direct officials about the conduct of procurement processes.

Achieving value for money is the core rule of the CPRs as it is critical in ensuring that public resources are used properly and in accordance with the broader resource management framework.

## AusTender

AusTender is the Australian Government’s centralised procurement information system. AusTender provides a single portal to connect government entities with suppliers through the publication of business opportunities and provides transparency of contracts awarded following a procurement process.

## Procurement and Contract Management Capability

Finance has established an APS Procurement and Contract Management Profession under the APS Professions initiative to build a professional workforce capability through supporting specialist career development, encouraging adoption of innovative technology and providing connected networks and communities of practice.

Finance manages the Commonwealth Procurement and Contract Management Training Suite (Training Suite). The suite is a comprehensive program that promotes best practice, compliance, and capability uplift in procurement and contract management across the APS. It equips staff with essential knowledge and skills to deliver effective, compliant and value-driven procurement outcomes for the Commonwealth. The program assists APS staff to understand and apply the CPRs, relevant legislative frameworks, and fosters a culture of accountability and transparency in procurement. Over 11,500 attendees have participated in these training sessions.

Finance also provides training for SES officers, who are often procurement delegates, focusing on their responsibilities and obligations under the CPRs and the PGPA Act to promote the proper use and management of the public resources for which they are responsible. Training assists SES officers to consider the most appropriate procurement approach to achieve outcomes for the Australian Government and citizens. Over 500 SES officers have received the training in the past year.

# Existing mechanisms to support supplier's ethical conduct

The explanatory memorandum advises the purpose of the Bill is to "strengthen the Federal Government procurement framework by banning unethical contractors from getting government contracts when they have engaged in unethical conduct."

A number of mechanisms already exist which ensure that procurement decisions are robust, and deliver accountability, transparency and strengthen public confidence in government procurement and contract management. These mechanisms also impose clear expectations on suppliers and how the Commonwealth expects them to behave. These include legislation such as the *Modern Slavery Act 2018* and *Work Health and Safety Act 2011*, Australian sanctions, the Commonwealth Supplier Code of Conduct (Code), the Notification of the Significant Events (NOSE) clauses, and recent changes to the CPRs to confirm the requirement for officials to consider the ethical conduct and previous performance of a supplier.

In addition to the mechanisms within the CPRs, Commonwealth entities are also already subject to scrutiny of both their procurement and contracting arrangements. This includes through mechanisms such as AusTender reporting, ANAO audits, entities' own internal audit processes, parliamentary hearings including Senate Estimates processes, and independent assurance reviews under the Australian Government Assurance Review Framework.

Recent instances of unethical performance by suppliers have demonstrated that the contractual mechanisms available in a procurement context are appropriate to deal with issues such as unethical suppliers as they arise. The responses to these issues have been

able to be tailored to the situation and have demonstrated a willingness of the suppliers to work with the Government to ensure that the issues are addressed.

## Commonwealth Procurement Rules

The CPRs set out the rules that govern how relevant entities procure goods and services, ensuring that all procurement is conducted ethically, transparently, and achieves value for money. Officials responsible for a procurement must be satisfied that the procurement achieves a value for money outcome and complies with the CPRs. This includes ensuring the procurement, and therefore the resulting contract, uses public resources in an efficient, effective, economical and ethical manner. The CPRs set out requirements which allow for the exclusion of suppliers in certain circumstances. For example:

- paragraph 6.6 requires officials to make reasonable enquiries that the procurement is carried out considering relevant regulations and/or regulatory frameworks, including but not limited to tenderers' practices regarding: labour regulations, including ethical employment practices; workplace health and safety; and environmental impacts;
- paragraph 6.9 disallows entities from seeking to benefit from supplier practices that may be dishonest, unethical or unsafe. These supplier practices may include tax avoidance, fraud, corruption, exploitation, unmanaged conflicts of interest and modern slavery practices. For example, a procuring entity must not enter into contracts with tenderers who have had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and who have not satisfied any resulting order. When approaching the market officials should seek declarations from all tenderers confirming that they have no such unsettled orders against them; and
- paragraph 10.17 allows for a tenderer to be excluded on grounds such as bankruptcy, insolvency, false declarations, or significant deficiencies in performance of any substantive requirement or obligation under a prior contract.

In addition, the CPRs have recently been strengthened to include explicit consideration of ethical conduct as a key consideration when assessing value for money. This enables, where a supplier does not meet the requirements specifically identified in the CPRs but has a clear history of unethical behaviour, for that behaviour to be taken into account when assessing which supplier's proposal delivers greatest value for money. Significant prior unethical performance is likely to provide officials with sufficient evidence to result in that supplier failing to deliver the greatest value for money proposal, or ensure that any resulting contractual arrangements have appropriate mitigations built in to address the prior ethical issues.

## Commonwealth Supplier Code of Conduct and Notice of Significant Events Clauses

The Commonwealth Supplier Code of Conduct (Code[1]) was introduced in July 2024 and is mandated to be incorporated into all Commonwealth forms of contract (unless otherwise determined by an accountable authority) entered into from 1 July 2024.

[1] https://www.finance.gov.au/sites/default/files/2024-06/commonwealth-supplier-code-of-conduct.pdf

The Code includes requirements for suppliers to the Australian Government to uphold business integrity, demonstrate high standards of professional conduct and corporate citizenship, meet taxation obligations, undertake and cooperate with audits and assessments, act to prevent involuntary labour and human rights abuse, and respect employee rights.

The Code and Code clauses[2] provide structure to both suppliers and Commonwealth entities on how supplier misconduct will be handled and places a positive duty on suppliers to take proactive action to prevent and discourage breaches of the Code. Where requested by the Commonwealth, tenderers and suppliers must be able to demonstrate they have appropriate policies, frameworks, or similar, in place regarding ethics, governance and accountability to comply with the expectations in the Code. Failure to adhere to the Code may result in remedial action and/or termination in accordance with contractual provisions.

The NOSE[3] clauses were introduced in May 2023. They require a service provider to notify the entity managing the contract immediately upon becoming aware of a 'significant event'. Where the clauses have been incorporated into the standing offer head agreement or deed, the notification requirement applies to the entity that manages the standing offer as well as entities that may have contracts with the supplier under the standing offer. This ensures that, regardless of whether the supplier is engaged under contract, the supplier must make the notifications and appropriate actions can be taken.

The Commonwealth can then request a remediation plan from the supplier. Where the contract manager considers the supplier's proposed remediation activity unsatisfactory, the clause allows the Commonwealth to terminate the contract, or in the case of a standing offer, suspend or remove the supplier from the standing offer.

Under the clauses, a significant event includes:

- any adverse comments or findings made by a court, commission, tribunal or other statutory or professional body regarding the conduct or performance of the Supplier or its officers, employees, agents or Subcontractors that impacts or could be reasonably perceived to impact on their professional capacity, capability, fitness or reputation; or

- any other significant matters, including the commencement of legal, regulatory or disciplinary action involving the Supplier or its officers, employees, agents or Subcontractors, that may adversely impact on compliance with Commonwealth policy and legislation or the Commonwealth's reputation.

Inclusion of the Code and NOSE clauses in Commonwealth contracts allow contract managers to have greater access to information on the ethical behaviour of the contracted supplier and provide the contract manager with more options on how to manage the relationship with the supplier, should there be a notification of a significant event. An example of a typical process for consideration of a notification under the Code is provided at Attachment A.

Both the Code and NOSE clauses are included in major whole-of-government procurement arrangements, giving Finance significant flexibility in managing how those suppliers are engaged.

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[2] https://www.finance.gov.au/government/procurement/clausebank/supplier-code-conduct
[3] https://www.finance.gov.au/government/procurement/clausebank/notification-significant-events

Both the Code and NOSE clauses have proved effective in recent instances of suppliers facing allegations of unethical behaviour. The NOSE clauses have been used to ensure that the procuring entity is aware of (and in many instances, kept informed of developments) in relation to ethical or other serious issues being faced by a particular supplier, or potential supplier. In one instance, Finance suspended a supplier from the Management Advisory Services Panel, due to a failure to report allegations of professional misconduct, constituting a breach under the NOSE clause (see 'Examples of existing mechanisms in practice' section below).

## Contractor Reporting, Integrity Information Solution

Finance introduced the Contractor Reporting, Integrity Information Solution (CRIIS) in June 2025. The CRIIS assists entities with the procurement due diligence process, providing an additional source of verified information on individual workers as well as information on the individual's work history.

CRIIS provides aggregated data on workforce engagements across the Commonwealth under panel arrangements (in the first instance this applies to the People Panel Phase 2 and the Management Advisory Services (MAS) Panel and will expand to include both the People Panel Phase 1 and 3).

The CRIIS will be expanded to capture the reasons for which an individual is removed from a specific work order. This may include, among others, where the individual has disobeyed or disregarded a lawful direction given by the entity; failed to comply with a relevant law, or otherwise engaged in serious misconduct; or failed to act in accordance with the APS Values, APS Code of Conduct, or other policies in a contract. Suppliers and contractors will be aware of the reason being recorded and will have a right of response.

## Conflicts of interest and confidentiality with non-government sector

Finance introduced guidance in September 2025 regarding 'Managing conflicts of interest and confidentiality with the non-government sector' (Resource Management Guide 208[4]). The guide improves due diligence by standardising conflict of interest management, including during procurement processes and management of the contract. The guide also helps entities prevent, identify and address unethical behaviour early, such as undisclosed relationships, and compromised decision-making. Combined with enhanced CPR requirements, they embed transparency, accountability and ethical engagement across supplier relationships.

## Modern Slavery Act 2018

The *Modern Slavery Act 2018* established the requirement for an annual Modern Slavery Statement for large businesses and other entities (such as the Australian Government) in the Australian market with an annual consolidated revenue of at least $100 million. The reporting requirement supports the Australian business community, including the Government, to identify and address their modern slavery risks and maintain responsible and transparent

[4] Managing conflicts of interest and confidentiality with the non-government sector (RMG 208) | Department of Finance

supply chains. Under the Act, the Australian Government must submit an annual Commonwealth Modern Slavery Statement (Commonwealth Statement) detailing its actions to identify, assess and address modern slavery risks in its operations and supply chains.

# Independent oversight

In addition to the mechanisms within the Commonwealth procurement framework, entities are also subject to various mechanisms that provide independent oversight.

Entities must report contracts entered into on AusTender within 42 days of signature, providing transparency in contracting.

The Australian National Audit Office (ANAO) undertake performance audits of entities' procurement practices to ensure entity compliance with the CPRs. The ANAO have completed 28 such audits over the last three years, examining procurement practices directly or indirectly and have five more underway for 2025-26. These audits have made recommendations specific to the entity, along with broader recommendations for the consideration of all CPR entities.

Further, Parliamentary committees such as the Joint Committee of Public Accounts and Audit (JCPAA) and the Finance and Public Administration (F&PA) References Committee, undertake inquiries on procurements, and the underlying policies that support them. Since 2021, the JCPAA and the F&PA References Committee have undertaken 12 inquiries related to procurement or contract management.

# Examples of existing mechanisms in practice

Following the PricewaterhouseCoopers (PwC) Australia issue, Finance strengthened the existing safeguards, to further prevent and address unethical behaviour in suppliers that contract with the Commonwealth. The following examples demonstrate how the mechanisms in the Commonwealth procurement framework have been used to manage suppliers who have acted unethically, both from a framework, and contractual perspective. The responses to these issues have been able to be tailored to the situation, and have demonstrated a willingness of the suppliers to work with the Government to ensure that the issues are addressed.

## Example 1 – McNair yellowSquare

In late August 2024, The Guardian published three articles detailing allegations that McNair yellowSquare (McNair) had falsified data relating to campaign evaluation research for the Australian Electoral Commission's Indigenous Voice campaign and the Department of Defence's ADF Careers Campaign. These articles detailed that an employee of McNair was told to falsify data (modifying ages and locations) for interviews conducted with culturally and linguistically diverse and First Nations audiences involving campaign evaluation projects conducted on behalf of the Australian Electoral Commission (AEC) and the Department of Defence (Defence).

On 23 August 2024, following the Guardian's publications Finance formally notified McNair of its immediate suspension from the MAS Panel due to its failure to report a breach under the NOSE Clause of the MAS Panel Head Agreement.

On 23 October 2024, McNair provided Finance with a copy of an independent report into the allegations, commissioned by McNair. The report confirmed that research data was intentionally compromised for projects conducted for the AEC and Defence, and that no evidence suggested broader impact to other projects.

Finance maintained ongoing engagement with McNair, including meeting with McNair regularly, as it implemented the report's recommendations. Finance also engaged with the Australian Data and Insights Association and the Research Society, as the key industry bodies, to understand the impacts to industry.

On 1 September 2025, McNair was reinstated to the MAS Panel, following Finance's determination that McNair had taken reasonable and appropriate actions to introduce systems and processes to reduce the risk of an incident occurring again.

During the suspension period, McNair was not awarded a single government contract.

## Example 2 – Jones Lang LaSalle Australia

In August 2025, there were a number of claims made in the media about the unethical behaviour at, and culture of, Jones Lang LaSalle Australia (JLL), leading to the termination of its Australian Chief Executive Officer. JLL notified Finance, as required under the NOSE clauses in the Deed, outlining that personnel involved were not connected to the delivery of the Property Services Coordinated Procurement Arrangements (Arrangements). It also outlined its commitment to ethics, that JLL Global is initiating an independent investigation into the matters and that it did not anticipate any disruption to services delivered under the Arrangements.

Finance requested that it continue to be kept informed of JLL's management of the incident and any findings from investigations that are occurring. Finance concluded that there was no justification, based on the available information, for the suspension or termination of the Arrangement with JLL.

Finance continues to monitor the situation.

# Analysis and Impact of the Proposed Bill

Finance considers that the current drafting of the Bill raises several issues that affect its operation and will likely create confusion for both suppliers and officials. The Bill lacks detail in how it is intended to function, leaving many of the decisions to the Minister or Department of Finance to determine. While this lack of detail may allow flexibility for many of the issues raised to be addressed through implementation, this risks undermining the intent of the Bill and it would be better to have these clarified before the Bill is considered further. Issues include that the Bill:

- includes definitional issues which would impact its operation
- duplicates existing mechanisms in place to prevent and address unethical behaviour
- introduces uncertainty in its scope, operation and application,
- imposes a substantial administrative burden on the Australian Government to ensure correct application of the regime,
- creates increased legal risk for the Australian Government, and
- is potentially inconsistent with Australia's international obligations.

Noting these issues Finance considers that, should the Parliament intend to introduce a debarment mechanism, broader public and industry consultation on the model is critical.

## Definition and authority lack clarity

Finance considers there are a number of areas of the Bill where the definition is ambiguous, where the Bill does not provide a definition, or the intent of the section is unclear.

The definition of 'unethical conduct' in the Bill is ambiguous and will create confusion for procuring and contracting entities and suppliers in understanding the scope of the Bill in practice.

Unethical conduct is defined to include convictions or pecuniary penalties under a law in any of the Australian jurisdictions (within the last three years), a proven record of poor labour practices or tax avoidance, or any other conduct that has, or is likely to have, an adverse impact on the integrity of, or public confidence in, the Commonwealth. While convictions under law provides a clear basis for exclusion, the additional parameters included in the Bill (i.e. poor labour practices, adverse impact on the Commonwealth) are vague. This, combined with the lack of clarity about what constitutes a 'related entity' creates further ambiguity and potential inconsistency in the expectations set by the Bill. Where a potential supplier is debarred on these grounds, it may leave the Commonwealth open to litigation.

The Bill also lacks provision for oversight and governance. It leaves the development of any criteria to assess potential unethical conduct to the discretion of Finance or the Minister for Finance. It also does not include any detail on any requirements to document decisions or publicly report information to support public or parliamentary scrutiny.

The Bill is unclear whether exclusion decisions are only to be based on a decision by a judicial or administrative appeals body. For example, the assessment of "adverse impact on the integrity of, or public confidence in, the Commonwealth" appears to allow for subjective assessment of a supplier's performance. Allowing for such subjectivity may lead to calls for the debarment power to be used in circumstances where it is either unclear or not appropriate but there is significant public interest in the matter. This may include cases

without legal findings and/or a strong evidentiary basis. The Bill states that exclusion could result from offences within the last three years. However, it is unclear if the application of the Bill is intended to apply retrospectively or only apply to future ethical misconduct, following implementation.

Without clear guidance on the decision-making body, the register is likely to rely on decentralised data input from multiple relevant entities. Under a devolved procurement framework this is likely to result in inconsistent application of the Bill. Further, delays to data provision may result in entities entering contracts with banned suppliers before they are publicly listed on the register.

The Bill does not appear to allow for discretion in the application of its scope or differentiate between a summary offence and that which may be considered systemic or more serious misconduct such as an indictable offence.

Finance expects that where an employee is found to have engaged in unethical or illegal activities, the appropriate provisions in their employment contract are likely to be triggered. Suppliers should have the ability to enact these provisions, without placing the broader business at risk of debarment. Without consideration to these employer contracting rights, the Bill may create disproportionate outcomes and unfairly impact a business's enduring viability. Such actions by the Commonwealth may risk legal proceedings for commercial loss by the supplier. For example: A single employee of a national cleaning company is caught drink driving in an unregistered vehicle and loses their drivers licence, as a result the cleaning company terminates the employee. We do not believe this is the intention behind the Bill, but under the definition of this Bill the employee's conduct may be considered unethical and a business could potentially face mandatory or discretionary exclusion under the Bill, despite appropriate action being taken to address the employee's actions.

Due to the ambiguity of the definition and the absence of any detail regarding decision making processes, the Bill also risks unfair treatment of potential suppliers or tenderers who have acknowledged unethical behaviour or identified past events and are taking steps to address them. By failing to consider reforms or practices implemented by these suppliers, such as employee training, compliance programs, and remedial measures developed to address specific corruption risks, the Bill overlooks efforts to prevent future offences within the business community.

## Duplication with existing requirements

It is important to note the effectiveness of current safeguards available to procurers through the CPRs and Code, and to contract managers through the NOSE clauses. Introducing a new debarment regime without addressing overlaps could lead to duplication, unnecessary operational complexity and unintended consequences for both the Commonwealth and suppliers.

Existing mechanisms provide the Government with strong safeguards to manage ethical risk in procurement and contracting. The updated CPRs, together with the Code and NOSE clauses, combined with supporting tools such as the Commonwealth Contracting Suite, the Contract Management Guide, and Guidelines for Procurement and Outsourcing[5], establish clear expectations for entities, potential tenderers and suppliers that have proven effective in

[5] Guidelines for procurement and outsourcing | Cyber.gov.au

preventing, detecting and addressing ethical conduct infractions. Importantly, the Code covers not only the business but also their officers, employees, agents and subcontractors. Introducing a new debarment regime risks duplication of these existing mechanisms, creating additional requirements and potential conflict for procurers and contract managers within an already robust and complex procurement framework.

Finance's experience is that suppliers have cooperated with requests for information, including when NOSE clauses have been triggered. Since their introduction, there have been a number of instances through the MAS and People Panels where a supplier has voluntarily notified Finance of an event that may trigger a NOSE clause, only to later to have confirmed that no breach occurred. Further, providers under the Property Services Coordinated Procurement Arrangements have also made notifications under the clauses, and where relevant, have provided information to Finance regarding improved internal policies and procedures, supporting compliance with the contract/deed. This positive supplier behaviour demonstrates a willingness to be open and to work through concerns with Finance/relevant entities.

This collaborative approach, combined with subsequent rectifications such as strengthening processes and implementing targeted training, should be encouraged and fostered. Introducing mandatory and discretionary exclusion periods under a debarment regime may inadvertently discourage this positive behaviour. Suppliers may become reluctant to voluntarily notify of events early and instead wait until full legal processes have been exhausted, harbouring concerns that disclosure may lead to debarment. This risk is compounded by the Bill's lack of consideration of remediation activities undertaken by suppliers or employees.

Clarification would be required to address the distinct overlap between the Bill's proposed debarment regime, and existing requirements under the CPRs, the Code, NOSE and the CRIIS. Where there is overlap, it is unclear whether the Bill is intended to apply before or after these other existing requirements are considered. Consequently, this may include additional changes to contracting processes and existing contracts particularly where the Code and NOSE clauses have been incorporated.

# Operation of the Bill

The lack of clarity regarding definitions and the application and cross over of clauses in the Bill, will create confusion in giving effect to, and the ongoing operation of, the Bill.

The Bill requires that suppliers on the exclusion list are prevented from entering into contracts with the Commonwealth (section 105BB(1a)), however, section 105BB(1b) requires that entities record any contract that is entered into with suppliers on the list. This appears to imply that inclusion on the list does not preclude the Australian Government contracting with that organisation, thereby weakening the Bill's purpose and desired effect. Should the intent be that the Commonwealth be excluded from entering contracts, flexibility for limited exemptions from the exclusion would need to be considered (for instance where a relevant entity cannot immediately suspend a supplier due to a lack of capability in other potential suppliers, as to do so would introduce unacceptable risk for the Commonwealth).

Finance notes that debarment schemes operating in other jurisdictions have greater flexibility, allowing for discretion as to the length of any debarment period and whether the supplier is excluded from all, or a subset of, government procurement. The Bill does not

distinguish between what constitutes mandatory (automatic) exclusion versus discretionary exclusion, nor does it clarify whether separate assessment criteria and/or separate timeframes should be applied to either exclusion approach. Further, section 105B(1) (1A) requires consideration of the conduct of related entities of potential suppliers or tenderers during a procurement process, and that this must be taken into consideration when applying discretionary exclusion. However, the Bill does not require that the conduct of 'related entities' be considered as part of the mandatory exclusion period. This inconsistency and the lack of a definition of a 'related entity' is likely to create confusion in the operation of the Bill.

The requirement to consider staff of the debarred supplier (as outlined in the Bill) will require the Commonwealth to track significant numbers of key personnel as they move from an organisation that is debarred to another. This creates a high level of complexity, administrative burden and, in the absence of a whole of government register that tracked individuals, would be a significant challenge for entities to implement. Establishing such a register would raise a series of further privacy and administrative issues that would require careful consideration.

Implementing an approach which requires the potential debarment of those businesses will have significant and unreasonable impacts on those businesses. Finance considers that such an approach potentially penalises businesses for their employment decisions and what they could not reasonably foresee. For example, a Chief Risk Officer from Firm A moves to Firm B three years before the CEO of Firm A is convicted of white-collar crime. There is no evidence that the CRO was involved. Firm B could not foresee Firm A's actions and should not be penalised for their employment decision.

Finance considers that a more appropriate approach is akin to the approach it took with PwC Australia, in which it directed the organisation to ensure that no staff that were involved in the TPB matter were engaged in contracts with the Commonwealth.

Further, the Bill does not provide the Commonwealth with any additional powers to investigate or compel suppliers to provide information relevant to the assessment of its ethical conduct. Given the broad definition of unethical conduct appears to extend beyond the findings of a judicial or administrative appeals body, assessments regarding the conduct of the employee, the broader business, and/or related businesses of the potential supplier or tenderer will need to be made. Under existing contractual arrangements, requests by the entity for information to investigate an ethical performance matter, which are denied by the supplier give rise to contract cancellation. Under a debarment regime, there is no penalty for a supplier that does not to provide information to the Commonwealth. Lacking this information, the Commonwealth may not have sufficient basis to debar an organisation, limiting the impact of the Bill.

The Bill raises a further issue around the extent of its coverage to suppliers. In order to ensure that no contract is awarded to a business that meets the definitions under the Bill, the Australian Government will need to assess all businesses, regardless of whether those businesses intend to tender for Australian Government contracts. This would be resource intensive to monitor and could give rise to situations where entities enter into contracts with suppliers who meet the requirement for mandatory debarment, immediately putting them in breach of the Bill.

In addition, the Bill also does not give any consideration to the requirements of a supplier at the conclusion of their exclusion period. Finance anticipates that there would be an expectation that an excluded supplier would be required to demonstrate the actions they

have taken, or the policies and procedures that have been put in place, to address the issues that had them excluded, and that they are now suitable to contract with the Commonwealth.

## Review Process

Section 105BA of the Bill requires that the Finance Minister establish a review process for decisions to place a supplier on the exclusion list. Finance is concerned that the review process, as set out in this Bill is too broad in its application. This lack of detail, combined with the broad definition of unethical conduct, the lack of a power to compel information and the ambiguity of who the decision-making body is, creates significant implementation challenges.

## Potential conflict with international obligations

The scope of the draft Bill may conflict with Australia's international government procurement obligations. For instance, the World Trade Organization Agreement on Government Procurement, requires that suppliers are only excluded from a procurement for reasons such as (amongst others) false declarations, significant or persistent deficiencies in performance, final judgements in respect of serious crimes or other serious offices, or professional misconduct that adversely reflects on the commercial integrity of the supplier.

However, more recent agreements, such as the Australia-United Kingdom Free Trade Agreement, and the Indo-Pacific Economic Framework for Prosperity Agreement Relating to a Fair Economy (signed, but not yet in force) require that any suspension or debarment from eligibility to participate in government procurement be due to that supplier having been engaged in corrupt, fraudulent, or other illegal acts. These agreements also require consideration be given to the gravity of the supplier's acts or omissions, and any remedial measures or mitigating factors in decisions related to suspension or exclusion of a supplier. While the Bill makes provisions for a review process, it does not make provisions for considering these factors in assessing the outcome for a supplier.

## The implementation of the Bill

The Bill leaves several aspects related to the introduction and administration of the proposed debarment regime unclear, requiring the Government to determine those elements within three months of royal assent.

The provisions in the Bill requires the development of substantial supporting guidance to help entities and suppliers to understand how the debarment scheme would operate and what their rights are under, including clear pathways to review. The Bill imposes significant obligations on both procuring entities and Finance (as the entity charged with responsibility for introducing and administering this regime). An excluded entities register will need to be established, maintained and published publicly by Finance. This will require system development and ongoing maintenance, with careful consideration of the content to ensure alignment with the privacy principles. Systems and processes will also need to be implemented to support robust and defensible decision making before publication can occur. These processes should incorporate natural justice principles, including right of reply and right to review of any findings, both of which may require ongoing investigation, resources and management. Development and introduction of these systems and processes will take time, thus delaying the commencement of the Bill.

# Conclusion

Finance supports contracting with suppliers that act with integrity and demonstrate high standards of professional conduct and corporate citizenship. There have been significant improvements in the clarity and messaging regarding the Government's expectations of its suppliers over the last few years, including numerous instances where the Government has taken action against suppliers that have not demonstrated these values. The contractual mechanisms available in a procurement context have been demonstrated to be appropriate to deal with the issues as they arise, including by allowing the government to suspend new contracts with suppliers. The responses to these issues have been able to be tailored to the situation and have demonstrated a willingness of the suppliers to work with the Government to ensure that the issues are addressed.

Finance welcomes the opportunity to contribute to this inquiry and remains committed to supporting transparency, accountability and value for money in public procurement including through contracting with suppliers that conduct themselves with high standards of ethics, integrity and accountability.

# Attachment A: Process for responding to a notification of a significant event or a breach of the Commonwealth Supplier Code of Conduct:

| | |
|---|---|
| **Phase 1**<br>Identify and assess | • **Request** notification (if required)<br>• **Receive** notification<br>• **Assess** severity |
| **Phase 2**<br>Initial action | • Request additional information<br>• **Watch and monitor**, reassess if necessary<br>• Issue a **warning**<br>• Request **remediation** plan (proceed to phase 3) and consider ***restricting*** *or* ***suspending*** *the supplier thoughout remediation process*<br>• If applicable, **contact** entities that have active contracts or RFQs with the supplier. Entities may be instructed to suspend all work with the supplier while Finance investigates<br>• Upfront **termination** for particularly severe incidents |
| **Phase 3**<br>Remediation | • **Review** remediation plan<br>• **Determine** next course of action:<br>  ○ Accept remediation plan in its current state (proceed to phase 4)<br>  ○ Request revised remediation plan<br>  ○ Termination if deemed necessary |
| **Ongoing**<br>Communicate and monitor | • **Ongoing communication** with the supplier on the implementation of the agreed course of action<br>• **Ongoing monitoring** of the supplier's actions through regular communication and media monitoring<br>• **Follow up** to ensure adherence and compliance to agreed remediation plan |