THE GOVERNMENT PROCUREMENT REVIEW

Fifth Edition

Editors
Jonathan Davey and Amy Gatenby

THE LAWREVIEWS

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This article was first published in The Government Procurement Law Review, - Edition 5

(published in May 2017 – editor Jonathan Davey and Amy Gatenby)

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-910813-59-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADAMS & ADAMS

ADDLESHAW GODDARD LLP

ALLEN & OVERY LLP

AUGUST DEBOUZY

BAKER McKENZIE

BENTSI-ENCHILL, LETSA & ANKOMAH

BIRD & BIRD (INTERNATIONAL) LLP

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PREFACE

Welcome to the fifth edition of *The Government Procurement Review*.

We noted in last year's preface the potentially momentous nature of a UK vote in favour of 'Brexit' (the UK's vote to exit the European Union) though at the time a 'leave' vote seemed the less likely outcome. Indeed, the past year has been one of momentous political events in the US and Europe. And, while the UK has voted to leave the EU, elections in France and Germany this year, involving populist contenders, have the potential to force further reform and reshaping of the EU.

Brexit will have significant consequences for the laws of the UK, with 10 per cent of all UK secondary legislation being derived from the EU, and procurement law is no exception: while the status quo on exit will be maintained for a period after that exit takes effect, procurement law reform is already in the sights of the UK's Prime Minister and Chancellor of the Exchequer, with both having referred to procurement law as a focus post-Brexit, pointing to a balance between encouraging the UK supply chain while not propping up uncompetitive domestic industries. Given the fact that the UK will seemingly not be signing up to the single market, it remains to be seen what accommodation (if any) the UK will make with the EU on procurement law. However, it must be remembered that, even if the UK were instead to opt to sign up to the WTO's Government Procurement Agreement (GPA), much of what many EU lawyers might consider the basic nuts and bolts of EU procurement law are actually also enshrined in the GPA, examples being the obligations to run a transparent, impartial and non-discriminatory process.

Last year's preface also contemplated ratification of the Trans-Pacific Partnership (TPP), involving 12 nations (including the US) responsible in aggregate for 40 per cent of global economic output, but the US withdrawal from the agreement, announced in January, has left the remaining TPP partners struggling to keep it alive. President Trump has also signalled the end of TTIP, the proposed trade deal between the EU and the US.

Elsewhere in the world, changes continue apace. While EU Member States have been adopting new national laws to give effect to the 2014 EU Directives, legislative changes have been made or are pending in many other countries. Among these, Mexico is introducing major reforms, particularly on combating corruption, and Australia is making changes in anticipation of joining the GPA. Meanwhile in Brazil, another country rocked by political upheaval, the government has been unable to pursue its procurement objectives in full, while in South Africa public procurement has been used as a policy tool to address economic and socio-economic issues.

When reading the chapters regarding European Union Member States, it is worth remembering that the underlying EU rules are set out at EU level. Readers may accordingly find it helpful to read the EU chapter first and then to read the relevant country chapter so as to gain a comprehensive understanding of the issues.

Last but not least, we would like to take this opportunity to acknowledge the efforts of all of the contributors to this edition as well as the tireless work of the publishers in ensuring that this work is published in good order and to time. We hope that you will find this edition a useful resource that adds value to your business or organisation.

Jonathan Davey and Amy Gatenby
Addleshaw Goddard LLP
London
May 2017

Chapter 2

AUSTRALIA

Geoff Wood and Anne Petterd[1]

I INTRODUCTION

i Legislation

Government procurement legislation exists for the Australian Commonwealth government, state and territory governments and local governments.

Commonwealth – key legislation and official guidance

At the Commonwealth level, the key legislation on government procurement is the Public Governance, Performance and Accountability Act 2013 (Cth) (the PGPA Act), which commenced on 1 July 2014. The PGPA Act brought the fundamental elements of the Commonwealth financial framework together under one piece of legislation.

Official guidance on Commonwealth procurement is primarily contained in the Commonwealth Procurement Rules (CPRs) and the Public Governance, Performance and Accountability Rule 2014, which are issued under the PGPA Act.

The Department of Finance is primarily responsible for setting Commonwealth government procurement rules. It issues policies and directions for procurement, such as resource management guides dealing with liability, indemnity, payment terms and other positions to be applied in procurement and for contracts.

There are a number of Commonwealth government procurement connected policies. Different government agencies are responsible for these policies. For example, the Department of Industry and Science is responsible for the Australian industry participation policy, and the Department of Employment is responsible for the policy to apply the Building Code 2013 incorporating the Supporting Guidelines for Commonwealth Funding Entities.

At the Commonwealth level, substantial further official guidance is given for conducting defence procurement. Defence procurement is largely subject to the same legislation and official guidelines as other Commonwealth procurement. Additionally, the Department of Defence issues a Defence Procurement Policy Manual (DPPM) and other guidelines and policies applying to defence procurement.

The Department of Defence also issues its own contract terms for a range of supply categories.

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1 Geoff Wood is head of construction for the Australian offices of Baker McKenzie and Anne Petterd is a principal at the firm.

State, territory and local government – key legislation and official guidance

State and territory governments have all enacted legislation regulating how their respective government agencies are to conduct procurement. The approach applied across jurisdictions is broadly similar. States and territories have a central body that sets procurement rules and conducts most procurement. Government agencies that undertake a substantial amount of procurement (such as health departments) tend to have greater control over their own procurement. Similar to the approach at the Commonwealth level, there are Treasurer's Instructions or similar that provide further policy and guidance on conducting procurement.

State and territory governments tend to establish more whole-of-government purchasing arrangements than their Commonwealth counterparts. Some of these arrangements are expressed to be available for purchasing by agencies in other states and territories (or even by Commonwealth agencies), although there does not tend to be a large take-up by other governments.

Each state also has a local government structure. Legislation is enacted by each state setting rules for local government procurement. Local government bodies will set further rules that regulate their procurement activities.

World Trade Organization (WTO) Agreement on Government Procurement

In addition to the above, Australia has been an observer of the WTO Agreement on Government Procurement since 4 June 1996, but is not a member. The Commonwealth government has been working towards Australia's accession to the Agreement, and Australia submitted its accession offer for the Agreement on 16 September 2015. Australia submitted a revised offer on 30 September 2016.

ii Fundamental procurement principles

Procurement rules generally require that contracts be awarded to the bid demonstrating the best value for money and otherwise satisfying the conditions of participation. As an example, the principles for procurement set out in the CPRs are to apply the core rule of achieving value for money. This is supported by requirements in the CPRs to:

a encourage competition;
b make proper use of public resources by efficient, effective, economical and ethical procurement;
c ensure accountability and transparency in procurement activities;
d appropriately manage and address risks in procurement activities; and
e use an appropriate procurement method.

Other governments apply procurement principles largely consistent with those in the CPRs.

II YEAR IN REVIEW

i Key developments in legislation, case law, policy and guidance

Policy and guidance

Division 2 of the CPRs (see Section III, *infra*) has been amended to include additional requirements for 'covered' Commonwealth procurements with effect from 1 March 2017. In summary, these changes are as follows:

a where an Australian standard applies to goods or services being procured, tender responses must demonstrate the capability to meet that Australian standard and contracts must contain evidence of the applicable standard;

b officials must make reasonable inquiries to ensure that a procurement is carried out considering relevant regulations or regulatory frameworks (including labour regulations and occupational health and safety requirements); and

c for procurements above A$4 million in value, officials must consider the benefit of the procurement to the Australian economy in light of the various international trade agreements to which Australia is a party.

As part of Australia's accession to the WTO Agreement on Government Procurement, the Government Procurement (Judicial Review) Bill (the Bill) was proposed for introduction in the 2016 Spring Session of the Federal Parliament. While the Bill has yet to be introduced, it is understood that the intention is to enable the Federal Circuit Court and the Federal Court of Australia to grant an injunction or order payment of compensation in relation to a contravention of the CPRs (so far as the CPRs relate to 'covered procurements'). If passed, the Bill will provide suppliers with a statutory basis to challenge alleged non-compliance with the CPRs.

ii Case law

Litigation concerning government procurement is infrequent. Decisions in the past year have primarily reinforced existing principles.

Roo Roofing Pty Ltd v. Commonwealth[2] is an interlocutory decision in a class action proceeding concerning the Commonwealth's abandoned Home Insulation Program (HIP). The plantiffs in the action claim, *inter alia*, that the Commonwealth engaged in misleading or deceptive conduct under what was then the Trade Practices Act 1974 (Cth) in carrying on a business in trade or commerce through various statements and announcements it made regarding the HIP before its premature termination. The Commonwealth applied for summary judgment in relation to this claim, relying on Australian courts' traditionally narrow interpretation of when government will be regarded as 'carrying on a business'. Its application was rejected, with the Victorian Supreme Court concluding it was not 'fanciful' that some elements of the activities undertaken by the Commonwealth in connection with the HIP (including issuing work orders, selecting eligible tradespeople, setting terms on which work would be performed and paying contractors for that work) had a real connection with commercial activity and a context that bore a business or commercial character.[3] These comments are interesting given the view of some commentators that Australia's competition and consumer laws should be amended so that they apply to a broader range of Commonwealth commercial activity, including government procurement.

Aurukun Bauxite Development Pty Ltd v. State of Queensland[4] confirms that procurement decisions are generally not reviewable under principles of administrative law because such decisions are not made 'under an enactment'. In this case, the applicant was shortlisted by the Queensland government for participation in further phases of a competitive bid process for an Aurukun mining project. The government subsequently terminated the competitive

2 [2017] VSC 31.

3 Ibid., [114] and [115].

4 [2016] QSC 263.

bid process, before reinstating it and ultimately awarding the contract to develop the project to another corporation, Glencore. The Queensland Supreme Court rejected the applicant's submission that the decision to select Glencore to develop an Aurukun project was impliedly authorised by the Mineral Resources Act 1989 (QLD) (MRA), and therefore reviewable. The Court held that there was nothing in the MRA to support such a submission and that the selection of Glencore was ultimately made by the Queensland government in its capacity as the executive government of the State of Queensland.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

There are typically two types of regulated government bodies for procurement purposes:

a departments and agencies that do not have a legal identity separate from the Crown. Complying with the procurement laws and policies in most cases is mandatory for these bodies; and

b other government-created bodies that have a legal identity separate from the Crown (e.g., bodies created by statute or government-owned companies). Treatment of these bodies differs. Sometimes they may choose whether to subject themselves to the procurement laws and policies. In other cases they can be directed to comply.

ii Regulated contracts

Any contracts awarded by government bodies using public money or relating to public property will generally be regulated (or covered) by the procurement rules.

Under the CPRs, activities that are not considered to be 'covered' procurement activities are:

a grants;

b investments and divestments;

c sales by tender;

d loans;

e purchases of goods or services for resale, or of goods or services used in the production of goods for resale;

f any property right not acquired through the expenditure of public money (e.g., a right to make a claim for negligence);

g statutory or ministerial appointments; or

h engagement of employees.

Rules still apply to spending public funds on non-procurement activities. For example, the Commonwealth Grant Rules and Guidelines contain rules for grant programmes that are similar to the CPRs.

At the Commonwealth level, the CPRs contain rules in two divisions. Division 1 applies to all procurements regardless of value. Division 2 applies additional rules to procurements valued at or above the relevant procurement threshold (unless an exception applies). The Division 2 rules require a higher level of transparency (e.g., stronger requirements to conduct open tenders and to follow certain rules in conducting the procurement).

The procurement thresholds are:

a for non-corporate Commonwealth entities, other than for procurements of construction services, A$80,000;

b for prescribed corporate Commonwealth entities, other than for procurements of construction services, A$400,000; or

c for procurements of construction services by non-corporate Commonwealth entities and prescribed corporate Commonwealth entities, A$7.5 million (a reduction from A$9 million).

For states and territories, the financial threshold for a contract usually determines the procurement method that must be used.

There are some exceptions to the obligation to advertise or hold a competitive procedure. Sole sourcing (or direct sourcing) is permitted in limited circumstances, such as:

a where, in response to an approach to the market, no suitable submissions were received;

b for reasons of extreme urgency;

c for purchases made under exceptionally advantageous conditions that only arise in the very short term, such as from unusual disposals or unsolicited innovative proposals; or

d where the property or services can only be supplied by a particular business and there is no reasonable alternative.

Sole sourcing cannot be used to avoid competition or discriminate against any domestic or foreign supplier.

In any sole or direct sourcing arrangement, the general procurement policy framework still applies, including the requirement to achieve value for money.

Free trade agreements containing a non-discrimination in procurement obligation may also allow certain procurements to be conducted without being advertised or on a sole sourcing basis. For example, Australia's free trade agreements in many cases do not cover defence procurement or the procurement of health and welfare services, education services, utility services or motor vehicles.

For defence procurement, there is further policy guidance issued about the basis upon which defence procurement might be conducted on a sole sourcing basis.

Contracting parties are generally free to agree to vary a contract or transfer the contract to a different supplier. However, in the case of contract variations, the customer will need to consider whether the extent of the variations is so substantial as to constitute a different procurement to the one already conducted. If so, the variation may fall outside the sole sourcing rules and require a new approach to the market.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

One agency is usually appointed as the lead agency to conduct a coordinated or whole-of-government procurement. At the Commonwealth level, the lead agency is usually the Department of Finance.

The Commonwealth, state and territory governments all use whole-of-government procurement arrangements for certain types of supplies. Where there is such an arrangement for a type of supply, it is usually mandatory for government customers to purchase under the arrangement (unless an exemption applies). In some jurisdictions, local governments participate in joint procurement arrangements where they appoint a party to conduct procurement for a number of local government bodies.

The supplies typically subject to whole-of-government arrangements are items routinely purchased by government bodies without the need to be further customised prior to use (e.g., supplies for hospitals, computer equipment, telecommunications services, cleaning services).

Some panel arrangements are established for more bespoke services, such as to pre-qualify suppliers able to provide certain IT services. From the pre-qualified list, government bodies may then conduct a further procurement to select a provider for particular projects (e.g., to select a systems integrator to implement a new system).

Defence establishes panel arrangements for some types of supplies (such as IT services or to pre-qualify to participate in defence research programmes).

ii Joint ventures

Government-owned bodies (regardless of whether they are part of a joint venture) are typically subject to less procurement rules than government departments. However, in practice they tend to apply procurement rules consistent with those applying to government bodies. Most of these bodies will be subject to requirements to make effective and efficient use of public resources and other requirements that usually result in them having policies requiring that they conduct open procurements in much the same way as other government bodies.

Public-private partnerships (PPPs) are not typically established with a requirement that they be bound by government procurement rules when buying, but accountability for use of public resources will still influence how the PPP conducts procurement. At the Commonwealth level, guidance issued under the PGPA Act includes accountability obligations on officials to cooperate with others (including participants in PPPs) to achieve common objectives, where practicable.

The National Public Private Partnership Policy and Guidelines, endorsed by the Council of Australian Governments on 29 November 2008, address partnering with the private sector for the provision of public infrastructure and related services, including on procurement. The Commonwealth and state and territory governments have agreed that PPPs must be considered for any project with a value in excess of A$50 million.

PPPs typically incorporate a significant consideration of whole-of-life costs, allowing the government to lock in long-term allowances for project maintenance, asset and quality control. In most PPPs, the government allocates the risk of additional future costs to the private sector concessionaire. This impacts the procurement approach. For example, the concessionaire usually has discretion to determine how to best manage these risks (e.g., by subcontracting them to a builder or operator, pricing for risks or building in contract measures to give relief for risks).

V THE BIDDING PROCESS

i Notice

The Commonwealth government and each state and territory government maintain public websites where procurement opportunities must be advertised.

At the Commonwealth level, as part of the CPRs' requirement to show accountability and transparency in procurement, the CPRs require that that each agency publish, by 1 July each year, the agency's annual procurement plan containing details about planned approaches to market on the AusTender website. AusTender must also be used to publish multi-use list opportunities, open tenders above the procurement threshold and, where practicable, request documentation.

The CPRs also require details about awarded and amended contracts to be published on AusTender if the contract is valued at or over the reporting threshold, which is A$10,000 for non-corporate Commonwealth entities. For prescribed Commonwealth entities bound by the CPRs, the reporting threshold is A$400,000 for procurements other than procurement of construction services, or A$7.5 million (reduced from A$9 million) for procurement of construction services.

ii Procedures

Procurement rules generally require that contracts be awarded to the bid demonstrating the best value for money and otherwise satisfying the conditions of participation.

At the Commonwealth level, if a procurement is above the procurement threshold, the CPRs require that, unless contrary to the public interest, an agency must award a contract to the bidder that the agency has determined:

a satisfies the conditions for participation;

b is fully capable of undertaking the contract; and

c will provide the best value for money, in accordance with the essential requirements and evaluation criteria specified in the approach to market and tender documentation.

It is common for tender terms to give the agency some flexibility in awarding contracts. Tender terms will typically state that the lowest price bid will not necessarily be accepted, and that the customer may exercise discretion to accept a non-compliant or alternate bid, or decide not to proceed at all.

The majority of procurements conducted have online lodgement requirements. For example, at the Commonwealth level most tenders are required to be lodged via AusTender.

Defence procurements will require lodgement via AusTender or other electronic means where appropriate. If, for example, the request for tender documents involves security classified or other sensitive information, then lodgement via hard copy or physical delivery to a tender box may be used.

iii Amending bids

At the Commonwealth level, the CPRs permit customers to change terms applying to the procurement provided all bidders are treated equitably. Where a procurement is above the procurement threshold, additional change notification requirements apply.

The tender terms will usually define the basis upon which final tenders may be changed pre-award. Tender terms will typically give the customer flexibility to discuss proposals with one or more short-listed bidders and seek further responses from them without needing to go back to excluded bidders.

It could be more difficult for a customer to justify that a significant change made during the preferred bidder stage does not breach procurement rules. For example, if the issued tender terms stated a requirement was mandatory and bidders were excluded for not meeting that requirement, it could be problematic for the customer to keep dealing with a preferred tenderer who, at the preferred bidder stage, said it did not meet the mandatory requirement. This could be unfair to the excluded bidders (and, if so, could breach the procurement rules).

VI ELIGIBILITY

i Qualification to bid

The tender terms will typically give the customer discretion to exclude a bidder for breach of the tender conditions or inappropriate behaviour in connection with the tender.

If a party has been involved in an earlier stage of the project being tendered (e.g., in preparing the requirements document), such party may find itself excluded from competing in the later tender. Alternatively, the party may need to implement measures to quarantine its staff involved in that earlier work from the tender. This issue often arises for large defence procurement and in PPPs (partly because they can take place over several years).

Bidders can be excluded through conditions for participation or for failing to meet the mandatory requirements. A bidder might also be excluded for failing to comply with mandatory procurement policy.

Procurement frameworks usually enable government agencies to exclude bidders on grounds such as insolvency, false declarations or significant deficiencies in performance under a prior contract.

It is not uncommon, particularly in PPPs and large defence projects, where tendering costs can be very high, for the initial selection phase to be an 'expression of interest' process where those consortia interested in tendering are reduced to a small number (often two or three) on the basis of demonstrated technical experience and financial capacity, with only those selected invited to continue in the next 'request for proposal' phase.

ii Conflicts of interest

Tender terms usually require tenderers, to avoid an actual or apparent conflict of interest arising, to promptly report any such conflict and to comply with any directions issued for how the conflict is handled.

Defence procurements and PPPs usually contain more detailed terms for handling conflicts of interest. Procurement terms will typically contain a prohibition on improper assistance, and on a bidder using recently departed customer personnel or a contractor who may have been involved with the project. What is an actual or apparent conflict of interest is typically left as a matter for the judgement of the customer.

iii Foreign suppliers

Foreign suppliers may bid for government procurement opportunities. Foreign suppliers are not required to set up a local branch or subsidiary or have local tax permanent establishment presence to do business with public authorities.

Government bodies are required to comply with Australia's sanctions regime, which applies the United Nations Security Council as well as autonomous sanctions. As a result, a government customer would be unable to do business with a foreign supplier if that would breach Australian sanctions.

Free trade agreements (FTAs) have impacted Australia's procurement rules and requirements. Australia has agreed several FTAs containing requirements to eliminate preferential treatment of local suppliers and provide transparency in the government procurement process. These goals have been incorporated into procurement frameworks across all Australian governments. For example, the CPRs prohibit discrimination that would otherwise favour local suppliers. However, the FTA non-discrimination in government procurement requirements contain exemptions, for example, to allow Australian governments

to apply preferences to small to medium-sized enterprises. Moreover, it is not yet clear how the FTA non-discrimination requirement will interact with the new requirement in Division 2 of the CPRs that officials must consider the benefit of a procurement above A$4 million in value to the Australian economy in light of the various international trade agreements to which Australia is a party.

Foreign suppliers are generally eligible to bid for defence contracts, but may face restrictions where the project would involve access to classified information. For example, the DPPM reflects that in the case of a foreign tenderer or contractor, under most circumstances, only companies from those countries with which Australia has a bilateral security instrument for the reciprocal exchange of classified information are eligible for access to Australian security classified information.

VII AWARD

i Evaluating tenders

Most tender terms will set out evaluation criteria (sometimes, however, stated to be not necessarily exhaustive).

At the Commonwealth level, the CPRs require agencies to include relevant evaluation criteria in tender documentation to enable the evaluation of bids on a fair, common and appropriately transparent basis. If a procurement is above the relevant procurement threshold, the CPRs require that the tender requirements include evaluation criteria to be considered in assessing submissions. Value for money is usually the over-arching criterion.

ii National interest and public policy considerations

National interest and local, social and environmental considerations are taken into account in different ways in procurement. Some public policy requirements are included in tender evaluation criteria. Others operate as a bar to doing business with the government. Examples of those requirements at the Commonwealth level are:

a for procurements over A$4 million, the new requirement in Division 2 of the CPRs that officials must consider the benefit of the procurement to the Australian economy in light of the various international trade agreements to which Australia is a party;

b the Australian Industry Participation (AIP) National Framework, which applies to major Commonwealth government procurements (generally above A$20 million): tenderers for certain Commonwealth procurements are required to prepare and implement an AIP Plan; and

c the Workplace Gender Equality Procurement Principles and User Guide require government agencies to obtain a letter of compliance from certain tenderers (employers with 100 or more employees) that indicates compliance with their obligations under the Workplace Gender Equality Act 2012 (Cth).

VIII INFORMATION FLOW

The tender terms will usually contain a term giving bidders the opportunity for a debriefing.

The CPRs require that after the rejection of a bid, officials must promptly inform affected bidders of the decision. Debriefings must be made available, on request, to

unsuccessful bidders, outlining the reasons their submissions were unsuccessful. There are mixed approaches by government bodies as to whether they are willing to provide a debrief before a contract is executed or afterwards.

Confidentiality obligations for tenders are governed by the tender terms. There is usually an obligation on each party to use and disclose each other's confidential information only for the purpose of conducting the procurement.

IX CHALLENGING AWARDS

There is no specific legislation or court system for challenging public procurement decisions. However, as noted in Section II, *supra*, this may shortly change due to Australia's accession to the WTO Agreement on Government Procurement. Historically, legal challenges to procurement decisions have been infrequent and, in the absence of serious wrongful conduct by a government body, challenges do not tend to succeed.

Procurement decisions are unlikely to be undone unless the complainant acts quickly (and usually before a contract is entered into between the government body and the preferred bidder).

i Procedures

There are processes for handling procurement complaints. They are purely administrative, and the complainant has no legal rights. However, they can provide a quick solution.

At a Commonwealth level, the CPRs require government bodies to have a fair, equitable and non-discriminatory procurement complaint handling procedure.

There is an administrative process run through the Department of Finance allowing some types of complaints to be made to the Procurement Coordinator. Complaints about current tenders will only be considered where the Procurement Coordinator determines the issue raised is sufficiently material and relevant to warrant being raised with the procuring government body, and if there is sufficient time to deal adequately with the complaint before the tender closes.

The Procurement Coordinator has no authority to compel a government body to reconsider the conduct or outcome of tender processes for which that body is accountable.

Legislation also allows a complaint about procurement to be made to the Commonwealth Ombudsman. The Ombudsman has powers to investigate and make a recommendation but no power to change a decision.

The person with standing to bring the relevant legal cause of action may commence litigation to challenge the award of a tender. Usually this will be an aggrieved tenderer. The party will need to find a public or private law cause of action.

The limitation period for applying for a remedy will usually be set out in the limitation legislation for the relevant jurisdiction. Some causes of action found under legislation will specify a limitation period in that piece of legislation (e.g., the Competition and Consumer Act 2010 (Cth), and usually legislation giving administrative law remedies).

The general limitation period is six years from the date the cause of action accrued. Different periods are set for particular causes of action. If the cause of action arose under an agreement executed as a deed, the limitation period could be 12 or 15 years from the date the cause of action accrued, depending on the jurisdiction.

ii Grounds for challenge

In practice, challenging procurement decisions can be difficult in the absence of serious wrongful conduct.

Administrative and private law actions may be available to provide a remedy for a procurement complaint. For example, administrative law may allow a claim based on denial of natural justice, a lack of procedural fairness or on the legitimate expectation doctrine; or legislation allowing the review of administrative decisions made under an enactment. However, these cases are rare, as procurement decisions are not usually found to have been made under an enactment.

Depending on the circumstances, private law remedies may be available. For example:

a most procurements will be conducted under a tender process contract. Where a process contract has been created, an action in breach of contract may be available if the government body fails to follow the procurement process;

b if the government body has acted in a misleading manner in conducting the procurement, it may be liable for misleading conduct in breach of the Competition and Consumer Act 2010 (Cth), or under corresponding state and territory fair trading legislation. However, there are differences between jurisdictions in whether the government can be liable under the legislation; or

c the doctrine of estoppel may be available to provide redress for a tendering complaint where representation, reliance and detriment can be shown to have occurred.

There are few cases where remedies have been obtained against the government for procurement practices.

Hughes Aircraft Systems International v. Airservices Australia[5] established that under Australian law, a public tender could be governed by a 'process contract'. In Hughes, the process contract contained the express tender terms (which relevantly included confidentiality obligations that were found to have been breached) and the implied term that the government body was to evaluate all tenders fairly and in good faith (which was breached as tenderers were not treated fairly).

JS McMillan Pty Ltd v. Commonwealth[6] is the leading Australian authority for procurement disputes based on misleading conduct by government. In *McMillan*, the Commonwealth government conducted a procurement to outsource its printing operations. McMillan accused the government of having engaged in misleading conduct under the predecessor to the Competition and Consumer Act 2010 (Cth). For the government to be liable, the test for applying the Act to the Crown's activities needed to be satisfied. The test was whether the government could be treated as carrying on a business. It was held that outsourcing printing operations was not carrying on a business, and so the Act did not apply.

iii Remedies

For private law causes of action, the courts may grant injunctions, set aside contracts, order new tenders and award damages for breach of tender process contracts. However, contracts are rarely undone. If a bidder obtains a court decision in its favour concerning the conduct of the procurement, the most likely remedy is damages to compensate the bidder for loss.

5 (1997) 146 ALR 1.

6 (1997) 147 ALR 419.

There is no separate body of procurement law under which damages can be awarded.

No fines are available for breach of procurement procedures.

For private law causes of action, the remedies may be quite limited. For example, powers to review an administrative law decision may only grant the court the power to require that the decision be remade (which may not change the outcome). Damages are also not available for all administrative law remedies.

X OUTLOOK

The focus in government procurement over the next few years is likely to remain on Australia's accession to membership of the WTO Agreement on Government Procurement. The proposed implementation of a formal review procedure for suppliers aggrieved by a procurement decision is the most significant change expected as a result of this agreement. It is not clear what effect (if any) the changes to the CPRs regarding 'consideration of Australia's national interest' will have on Australia's accession process.

Appendix 1

ABOUT THE AUTHORS

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Geoff Wood leads the construction team at Baker McKenzie, Sydney. He has over 30 years' experience in the design and construction and operations and maintenance aspects of major projects. His areas of expertise include all legal aspects of construction, infrastructure, public-private partnerships, water, alliancing and defence material procurement.

He is recognised as one of Australia's leading projects lawyers and has extensive experience in all aspects of the tendering for, and the negotiation, documentation and administration of, major construction, civil engineering, resources, defence, power and privately funded infrastructure projects. He is experienced in alliancing and outsourcing of maintenance and other functions, and in dispute resolution techniques for construction and engineering and operation and maintenance disputes.

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Anne Petterd is a principal in the technology, communications and commercial team. She is currently based in Singapore at Baker McKenzie and was formerly a partner in the Sydney office. She advises on major defence and government projects and procurement requirements, focusing on the telecommunications industry, and advises on telecommunications regulatory and transactional matters. She regularly advises on Australian consumer law requirements, and customs and export control requirements.

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