

Secretary
Senate Finance and Public Administration Committees
Parliament House
CANBERRA ACT 2601

Via Email: fpa.sen@aph.gov.au

To the Secretary,

Government Procurement (Judicial Review) Bill 2017

Thank you for providing the opportunity for us to make a submission on behalf of our more than 70,000 members who create and make manufactured goods in Australia.

Government procurement, when done correctly, provides a significant boost to local businesses and industries. It supports jobs, innovation and growth – particularly for small and medium businesses as they try to grow and tap into new markets.

Change is currently unnecessary

The AMWU supports a transparent and easy to understand approach to procurement that puts Australian businesses first. We understand the need for judicial review to ensure that the best outcomes are achieved and that proper processes are followed.

However, at this time there is no specific need to implement any judicial review under the international agreements to which Australia is a party. The Trans-Pacific Partnership is extremely unlikely to come into force, given the decision of the US to withdraw and the Senate has so far refused to agree to the implementation legislation in any case. Further, while Australia has submitted a bid to accede the Agreement on Government Procurement, that process is still underway.

As such, it would be wise to wait until there is a clear requirement for Australia to develop judicial review before such a measure was put in place. This is the only way to ensure that the mechanism that is developed actually meets the requirements set out in any future agreement we may reach.

Problems with procurement culture in Australia

We believe that our procurement culture is much less willing to put Australia's long term nation interests ahead of short term financial concerns than is the case in our major trading partners.

As such, we express a note of caution that adding more layers of legal complexity may make procurement decision makers even less likely to choose the bidder that provides the "best value" to Australian taxpayers, rather than the one with the lowest price. This is explored in great detail in our submission to the Joint Select Committee on Government Procurement, which recently tabled its report.

Without significant reform to the culture of procurement in Australia, this change is likely to further entrench a short term, short sighted approach to government procurement which is already evident in Australia.

Access to justice

The AMWU is also concerned that the decision to select the Federal Circuit Court (FCC) as the body to hear these appeals may restrict access for some businesses, who feel that a procurement process has been unfair.

The cost involved in bringing a proceeding to seek an injunction or compensation may well prove prohibitive for many Australia Small and Medium businesses. The judicial review process must provide the same access to justice for a SME in a regional town as it does to a multinational corporation. It is the view of the union that cost is likely to present a much greater barrier to participation in this process than physical proximity to a court, which can be easily overcome with modern technology.

As such, it may be more appropriate for the AAT, or another similar, lower cost court be selected as the appropriate venue for these complaints to be lodged.

Ensuring that Australian businesses get a fair go in the procurement process is one of the many reasons why the AMWU supports the creation of a properly funded Industry Participation Advocate (IPA). The IPA would be tasked with representing the interest of Australian businesses in government procurement, including bringing actions on their behalf where a procurement process has been unfair, or if it does not deliver “best value” for Australia.

Timing windows too tight

The AMWU believes that the 10 day limit on bringing proceedings to seek an injunction is too short. This is likely to result in most court proceedings beginning with an unnecessary process of seeking a waiver.

A fairer process would be to include legislated guidelines as to the processes that should be followed, rather than setting hard deadlines that may rule out parties that genuinely sought to reach agreement with the procuring entity before commencing legal action.

If there are to be limits placed on the ability of injured parties to seek an injunction, there should also be limits placed on the time procuring entities are allowed to respond to complaints that are raised with them. The legislation clearly acknowledges that these situations are time sensitive. As such, the procuring entity should be required to respond in a timely manner to facilitate resolution of complaints when they arise, hopefully before the courts are involved.

If you require any additional information in relation to this submission, please contact Warren Tegg on (02) 8868 1500 in the first instance.

Regards,

ANDREW DETTMER
AMWU National President