



Government Procurement (Judicial Review) Act 2018

No. 129, 2018

An Act about government procurement, and for related purposes

Note: An electronic version of this Act is available on the Federal Register of Legislation (<https://www.legislation.gov.au/>)

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No. 129, 2018

An Act about government procurement, and for related purposes

[Assented to 19 October 2018]

The Parliament of Australia enacts:

Part 1—Preliminary

1 Short title

This Act is the *Government Procurement (Judicial Review) Act 2018*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this Act	A single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	19 April 2019

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Simplified outline of this Act

- The Federal Court or the Federal Circuit Court may grant an injunction in relation to a contravention of the relevant Commonwealth Procurement Rules (so far as those rules relate to a covered procurement).

- The Federal Court or the Federal Circuit Court may order the payment of compensation for a contravention of the relevant Commonwealth Procurement Rules (so far as those rules relate to a covered procurement).
- A supplier may complain to the accountable authority of a relevant Commonwealth entity about a contravention of the relevant Commonwealth Procurement Rules (so far as those rules relate to a covered procurement).
- If a supplier makes a complaint, the accountable authority must:
 - (a) investigate the conduct the subject of the complaint; and
 - (b) if no public interest certificate is in force in relation to the procurement—suspend the procurement.
- A contravention of the Commonwealth Procurement Rules does not affect the validity of a contract.

Note: For *relevant Commonwealth Procurement Rules*, see section 4.

4 Definitions

In this Act:

accountable authority has the same meaning as in the *Public Governance, Performance and Accountability Act 2013*.

Commonwealth Procurement Rules means the Commonwealth Procurement Rules in force under subsection 105B(1) of the *Public Governance, Performance and Accountability Act 2013*.

corporate Commonwealth entity has the same meaning as in the *Public Governance, Performance and Accountability Act 2013*.

covered procurement has the meaning given by section 5.

Federal Circuit Court means the Federal Circuit Court of Australia.

Federal Court means the Federal Court of Australia.

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goods has the same meaning as in the Commonwealth Procurement Rules.

non-corporate Commonwealth entity has the same meaning as in the *Public Governance, Performance and Accountability Act 2013*.

official has the same meaning as in the *Public Governance, Performance and Accountability Act 2013*.

procurement has the same meaning as in the Commonwealth Procurement Rules.

public interest certificate has the meaning given by section 22.

relevant Commonwealth entity means:

- (a) a non-corporate Commonwealth entity; or
- (b) a corporate Commonwealth entity prescribed by rules made for the purposes of paragraph 105B(1)(b) of the *Public Governance, Performance and Accountability Act 2013*.

relevant Commonwealth Procurement Rules means:

- (a) a provision of Division 1 of the Commonwealth Procurement Rules that is declared by those rules to be a relevant provision for the purposes of this paragraph; or
- (b) Division 2 of the Commonwealth Procurement Rules.

supplier means:

- (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.

5 Covered procurement

- (1) For the purposes of this Act, a procurement is a **covered procurement** if:
 - (a) the rules in Divisions 1 and 2 of the Commonwealth Procurement Rules apply to the procurement; and
 - (b) the procurement is not included in a class of procurements specified in a determination under subsection (2).

Note: The rules in Divisions 1 and 2 of the Commonwealth Procurement Rules do not to apply to a procurement for a purpose set out in paragraph 2.6 of the Commonwealth Procurement Rules.

- (2) The Minister may, by legislative instrument, make a determination for the purposes of paragraph (1)(b).

6 Crown to be bound

This Act binds the Crown in each of its capacities.

7 Application of this Act

- (1) This Act extends to every external Territory.
- (2) This Act extends to acts, omissions, matters and things outside Australia.

Part 2—Injunctions

8 Simplified outline of this Part

- The Federal Court or the Federal Circuit Court may grant an injunction in relation to a contravention of the relevant Commonwealth Procurement Rules (so far as those rules relate to a covered procurement).

9 Injunctions

Restraining injunctions

- (1) If:
 - (a) a relevant Commonwealth entity; or
 - (b) an official of a relevant Commonwealth entity;has engaged, is engaging or is proposing to engage, in any conduct in contravention of the relevant Commonwealth Procurement Rules (so far as those rules relate to a covered procurement), the Federal Court or the Federal Circuit Court may, on the application of a supplier whose interests are affected by the conduct, grant an injunction:
 - (c) restraining the entity or official from engaging in the conduct; and
 - (d) if, in the court's opinion, it is desirable to do so—requiring the entity or official to do something.

Performance injunctions

- (2) If:
 - (a) either:
 - (i) a relevant Commonwealth entity; or
 - (ii) an official of a relevant Commonwealth entity;has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do an act or thing; and

(b) the refusal or failure was, is or would be in contravention of the relevant Commonwealth Procurement Rules (so far as those rules relate to a covered procurement);
the Federal Court or the Federal Circuit Court may, on the application of a supplier whose interests are affected by the refusal or failure, grant an injunction requiring the entity or official to do that act or thing.

10 Availability of alternative remedy of compensation

(1) If:

- (a) a supplier has made an application to the Federal Court or the Federal Circuit Court for an injunction under this Part in relation to a contravention or proposed contravention; and
- (b) the supplier has made an application to the court for an order under section 16 (compensation) in relation to the contravention or proposed contravention; and
- (c) a public interest certificate is in force in relation to the procurement concerned; and
- (d) the procurement concerned has not reached the stage where a contract has been entered into with a supplier;

then:

- (e) the court must consider:
 - (i) whether the grant of the injunction would result in a significant delay to the procurement concerned; and
 - (ii) if so, whether the making of an order under section 16 would be a more appropriate remedy for the contravention or proposed contravention than the grant of the injunction; and
- (f) if the court is satisfied that:
 - (i) the grant of the injunction would result in a significant delay to the procurement concerned; and
 - (ii) the making of an order under section 16 would be a more appropriate remedy for the contravention or proposed contravention than the grant of the injunction;the court may refuse to grant the injunction.

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- (2) Subsection (1) does not, by implication, limit the power of a court to refuse to grant an injunction.

11 Limits on power to grant an injunction

Complaint made by applicant to relevant Commonwealth entity

- (1) The Federal Court or the Federal Circuit Court must not grant an injunction under this Part in relation to a contravention, or proposed contravention, by:
- (a) a relevant Commonwealth entity; or
 - (b) an official of a relevant Commonwealth entity;
- unless:
- (c) the court is satisfied that the applicant for the injunction has made a complaint under section 18 to the accountable authority of the relevant Commonwealth entity about the contravention or proposed contravention; and
 - (d) if the court considers that it would have been reasonable for the applicant for the injunction to have attempted to resolve the complaint—the court is satisfied that the applicant has made a reasonable attempt to resolve the complaint.

Time limits for application

- (2) The Federal Court or the Federal Circuit Court must not grant an injunction under this Part in relation to a contravention that has occurred unless the court is satisfied that the application for the injunction was made:
- (a) within 10 days after the later of the following days:
 - (i) the day on which the contravention occurred;
 - (ii) the day on which the applicant became aware, or ought reasonably to have become aware, of the contravention;or
 - (b) within such longer period as the court allows.
- (3) The Federal Court or the Federal Circuit Court must not grant an injunction under this Part in relation to a contravention that is occurring unless the court is satisfied that the application for the injunction was made:

- (a) within 10 days after the day on which the applicant became aware, or ought reasonably to have become aware, of the contravention; or
 - (b) within such longer period as the court allows.
- (4) The Federal Court or the Federal Circuit Court must not grant an injunction under this Part in relation to a proposed contravention unless the court is satisfied that the application for the injunction was made:
- (a) within 10 days after the day on which the applicant became aware, or ought reasonably to have become aware, of the proposed contravention; or
 - (b) within such longer period as the court allows.
- (5) The Federal Court or the Federal Circuit Court must not allow a longer period under paragraph (2)(b), (3)(b) or (4)(b) unless the court is satisfied that:
- (a) the applicant's failure to make the application within the 10-day period mentioned in paragraph (2)(a), (3)(a) or (4)(a) is attributable to the applicant's reasonable attempt to resolve the complaint mentioned in paragraph (1)(c); or
 - (b) there are special circumstances that warrant allowing a longer period.

12 Discharge or variation of an injunction

A court may discharge or vary an injunction granted by it under this Part.

13 Certain limits on granting injunctions not to apply

Restraining injunctions

- (1) The power of a court under this Part to grant an injunction restraining:
- (a) a relevant Commonwealth entity; or
 - (b) an official of a relevant Commonwealth entity;
- from engaging in conduct of a particular kind may be exercised:

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- (c) if the court is satisfied that the entity or official has engaged in conduct of that kind—whether or not it appears to the court that the entity or official intends to engage again, or to continue to engage, in conduct of that kind; or
- (d) if it appears to the court that, if an injunction is not granted, it is likely that the entity or official will engage in conduct of that kind:
 - (i) whether or not the entity or official has previously engaged in conduct of that kind; and
 - (ii) whether or not there is an imminent danger of substantial damage to any person if the entity or official engages in conduct of that kind.

Performance injunctions

- (2) The power of a court under this Part to grant an injunction requiring:
 - (a) a relevant Commonwealth entity; or
 - (b) an official of a relevant Commonwealth entity;to do an act or thing may be exercised:
 - (c) if the court is satisfied that the entity or official has refused or failed to do that act or thing—whether or not it appears to the court that the entity or official intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; or
 - (d) if it appears to the court that, if an injunction is not granted, it is likely that the entity or official will refuse or fail to do that act or thing:
 - (i) whether or not the entity or official has previously refused or failed to do that act or thing; and
 - (ii) whether or not there is an imminent danger of substantial damage to any person if the entity or official refuses or fails to do that act or thing.

14 Other powers of a court unaffected

The powers conferred on the Federal Court or the Federal Circuit Court under this Part are in addition to, and not instead of, any other powers of the court.

Part 3—Compensation

15 Simplified outline of this Part

- The Federal Court or the Federal Circuit Court may order the payment of compensation for a contravention of the relevant Commonwealth Procurement Rules (so far as those rules relate to a covered procurement).

16 Compensation for a contravention of the relevant Commonwealth Procurement Rules

If:

- (a) a relevant Commonwealth entity; or
- (b) an official of a relevant Commonwealth entity;

has contravened, is contravening, or is proposing to contravene, the relevant Commonwealth Procurement Rules (so far as those rules relate to a covered procurement), the Federal Court or the Federal Circuit Court may, on the application of a supplier whose interests are affected by the contravention or proposed contravention, make whichever of the following orders is applicable:

- (c) if the relevant Commonwealth entity is a non-corporate Commonwealth entity—an order directing the Commonwealth to pay to the supplier, by way of compensation, an amount not exceeding the sum of:
 - (i) reasonable expenditure incurred by the supplier in preparing a tender for the procurement; and
 - (ii) reasonable expenditure incurred by the supplier in connection with making a complaint under section 18 to the accountable authority of the relevant Commonwealth entity about the contravention or proposed contravention; and
 - (iii) reasonable expenditure incurred by the supplier in connection with making a reasonable attempt to resolve such a complaint;

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- (d) if the relevant Commonwealth entity is a corporate Commonwealth entity—an order directing the corporate Commonwealth entity to pay to the supplier, by way of compensation, an amount not exceeding the sum of:
 - (i) reasonable expenditure incurred by the supplier in preparing a tender for the procurement; and
 - (ii) reasonable expenditure incurred by the supplier in connection with making a complaint under section 18 to the accountable authority of the relevant Commonwealth entity about the contravention or proposed contravention; and
 - (iii) reasonable expenditure incurred by the supplier in connection with making a reasonable attempt to resolve such a complaint.

Part 4—Complaints

17 Simplified outline of this Part

- A supplier may complain to the accountable authority of a relevant Commonwealth entity about a contravention of the relevant Commonwealth Procurement Rules (so far as those rules relate to a covered procurement).
- If a supplier makes a complaint, the accountable authority must:
 - (a) investigate the conduct the subject of the complaint; and
 - (b) if no public interest certificate is in force in relation to the procurement—suspend the procurement.

18 Complaint made by supplier

- (1) If:
 - (a) a supplier has reason to believe that:
 - (i) a relevant Commonwealth entity; or
 - (ii) an official of a relevant Commonwealth entity; has engaged, is engaging or is proposing to engage, in any conduct in contravention of the relevant Commonwealth Procurement Rules (so far as those rules relate to a covered procurement); and
 - (b) the interests of the supplier are affected by the conduct; the supplier may make a written complaint about the conduct to the accountable authority of the entity.
- (2) A supplier may withdraw a complaint made by the supplier under subsection (1).

19 Investigation by accountable authority

- (1) If a supplier makes a complaint under section 18 to the accountable authority of a relevant Commonwealth entity, the accountable authority must:
 - (a) investigate the conduct the subject of the complaint; and
 - (b) prepare a report of the investigation.
- (2) The accountable authority may discontinue the investigation if:
 - (a) the supplier withdraws the complaint; or
 - (b) the supplier informs the accountable authority that the supplier considers the complaint to be resolved; or
 - (c) in proceedings instituted in a court under this Act in relation to the conduct the subject of the complaint, the court makes either of the following findings:
 - (i) that the conduct was in contravention of the relevant Commonwealth Procurement Rules (so far as those rules relate to a covered procurement);
 - (ii) that the conduct was not in contravention of the relevant Commonwealth Procurement Rules (so far as those rules relate to a covered procurement).
- (3) If:
 - (a) proceedings are instituted in a court under this Act in relation to the conduct the subject of the complaint; and
 - (b) the continuation of the investigation would be likely to result in prejudice to the proper administration of justice;the accountable authority must discontinue the investigation.

20 Suspension of procurement

- If:
- (a) a supplier makes a complaint under section 18 to the accountable authority of a relevant Commonwealth entity about conduct in relation to a procurement; and
 - (b) when the complaint is made, no public interest certificate is in force in relation to the procurement;

the accountable authority must suspend the procurement until the earliest of the following times:

- (c) if the supplier informs the accountable authority that the supplier considers the complaint to be resolved—the time when the supplier so informs the accountable authority;
- (d) if the supplier withdraws the complaint—the time when the supplier withdraws the complaint;
- (e) if the accountable authority issues a public interest certificate in relation to the procurement—the time when the accountable authority issues the certificate;
- (f) if, in proceedings instituted in a court under this Act in relation to the conduct, the court makes either of the following findings:
 - (i) that the conduct was in contravention of the relevant Commonwealth Procurement Rules (so far as those rules relate to a covered procurement);
 - (ii) that the conduct was not in contravention of the relevant Commonwealth Procurement Rules (so far as those rules relate to a covered procurement);the time when the court makes the finding concerned.

Part 5—Miscellaneous

21 Simplified outline of this Part

- The accountable authority of a relevant Commonwealth entity may issue a public interest certificate in relation to a specified procurement.
- A contravention of the Commonwealth Procurement Rules does not affect the validity of a contract.
- The delegation provisions in the *Public Governance, Performance and Accountability Act 2013* apply in relation to the functions and powers conferred on the accountable authority of a non-corporate Commonwealth entity by this Act.
- Parts 2, 3 and 4 do not apply to a contravention of the relevant Commonwealth Procurement Rules that occurred before the commencement of this Act.

22 Public interest certificate

- (1) The accountable authority of a relevant Commonwealth entity may issue a written certificate stating that it is not in the public interest for a specified procurement by the entity to be suspended while:
 - (a) applications for injunctions under Part 2 are being considered; or
 - (b) complaints under section 18 are being investigated.
- (2) A certificate issued under subsection (1) is to be known as a ***public interest certificate***.

23 Contravention of the Commonwealth Procurement Rules does not affect the validity of a contract

- (1) A contravention of the Commonwealth Procurement Rules does not affect the validity of a contract.
- (2) For the purposes of subsection (1), it is immaterial whether the contravention occurred before, at or after the commencement of this Act.

24 Delegation by accountable authority

Section 110 of the *Public Governance, Performance and Accountability Act 2013* has effect as if the functions and powers conferred on the accountable authority of a non-corporate Commonwealth entity by this Act were functions or powers conferred by that Act.

25 Transitional

Parts 2, 3 and 4 do not apply to a contravention of the relevant Commonwealth Procurement Rules that occurred before the commencement of this Act.

[*Minister's second reading speech made in—
House of Representatives on 25 May 2017
Senate on 20 September 2018*]

(89/17)