

## CLAUSE NOTES

### *Government Procurement Review (International Free Trade Agreements) Bill 2019*

#### PART 1 – PRELIMINARY

**Clause 1: Short title**

Cites the Bill as the Government Procurement Review (International Free Trade Agreements) Bill 2019.

**Clause 2: Commencement**

Provides for the Bill to commence on a day to be proclaimed.

**Clause 3: Interpretation**

This clause establishes definitions for terms used in the Act.

**Clause 4: Orders may declare relevant government agencies and accountable authorities**

This clause provides that the Governor has the ability to declare a relevant government agency and an accountable authority for the purposes of the Act.

**Clause 5: Enforceable procurement provisions**

This clause provides that the Treasurer's Instructions made under the *Financial Management Act 2016* may include or refer to guidelines that are specified to be enforceable procurement provisions.

The guidelines may apply to a relevant government agency, even though that agency is not otherwise required to comply with the Treasurer's Instructions that include or refer to those guidelines.

**Clause 6: Act binds Crown**

This clause provides that the Act binds the Crown.

#### PART 2 – COMPLAINTS

**Clause 7: Supplier may make complaint**

This clause provides that a supplier may make a complaint to the accountable authority of a relevant government entity with respect to past, present or proposed future conduct alleged to contravene an enforceable procurement provision. Such a complaint may be withdrawn.

**Clause 8: Investigation of complaint**

This clause provides that if a supplier makes a complaint to an accountable authority of a relevant government agency, the accountable authority must investigate the complaint and prepare a report.

It establishes the circumstances in which an investigation may be discontinued.

A complaint must be discontinued in the event that proceedings are instituted in the Supreme Court and continuation of the investigation would be likely to prejudice the proper administration of justice.

#### **Clause 9: Suspension of procurement where complaint made**

This clause provides that if a complaint is made to the accountable authority of a relevant government agency, the procurement which is the subject of the complaint must be suspended unless there is a public interest certificate in relation to the procurement.

It establishes the circumstances when the suspension can cease and the relevant procurement recommence.

### **PART 3 – DECLARATIONS, INJUNCTIONS AND COMPENSATION**

#### **Clause 10: Declarations and Injunctions**

This clause provides that a supplier may make an application to the Supreme Court for a declaration with respect to past, present or proposed future conduct alleged to contravene an enforceable procurement provision.

A supplier may also make an application to the Supreme Court for a declaration to be made that a refusal or failure to do an act or thing by a relevant government agency is or would be in contravention of the enforceable procurement provision.

Before an application is determined, the Supreme Court may grant an interlocutory or interim injunction restraining the relevant government agency from engaging or proposing to engage in conduct that is or would contravene an enforceable procurement provision.

An interlocutory or interim injunction may be addressed to the accountable officer of a relevant government agency, where the agency is not a corporation or body corporate.

The Supreme Court may discharge or vary an interlocutory or interim injunction granted.

#### **Clause 11: Limitation on power to issue declaration**

This clause provides that the Supreme Court must not issue a declaration unless it is satisfied that the applicant has made a complaint to the relevant government agency and if it considers that it would have been reasonable to attempt to resolve the complaint, the applicant has made a reasonable attempt to do so.

It establishes the time period within which an application for a declaration can be made with respect to alleged past, current and proposed contraventions of an enforceable procurement provision. The Supreme Court retains discretion to extend the time period.

#### **Clause 12: Determination of application for declaration where alternative remedy of compensation applied for**

This clause provides that if a supplier has made an application for compensation, there is a public interest certificate and the procurement has not reached a stage where a contract has been granted, the Supreme Court must consider whether issuing a declaration or the granting of an interlocutory or interim injunction would result in a significant delay to the relevant procurement and whether the granting of compensation would be a more appropriate remedy

than issuing a declaration. If so, the Court may refuse to issue the declaration or to grant an interlocutory or interim injunction.

The clause does not limit the power of the Court to grant an interlocutory or interim injunction.

**Clause 13: Certain limitations on issuing declarations or injunctions not to apply**

This clause sets out the circumstances when the Supreme Court can issue a declaration or grant an interim injunction.

**Clause 14: Compensation for contravention**

This clause provides that the Supreme Court may award compensation to a supplier upon its application to the Court where there is a past, present or proposed future contravention of an enforceable procurement provision.

Compensation is limited to reasonable expenditure incurred by the supplier in preparing a tender for the procurement, making a complaint to the relevant government agency and in connection with making a reasonable attempt to resolve the complaint.

#### **PART 4 – MISCELLANEOUS**

**Clause 15: Public interest certificate**

This clause sets out what is contained in a public interest certificate issued by a relevant government agency.

**Clause 16: Other powers of Supreme Court unaffected**

This clause provides that the powers conferred on the Supreme Court are in addition to any other powers of the Court.

**Clause 17: Contravention of enforceable procurement provision does not affect validity of contract**

This clause provides that a contract is not affected by a contravention of an enforceable procurement provision.

**Clause 18: Transitional**

This clause establishes that the Act, apart from clause 17, will not apply to the contravention of an enforceable procurement provision that occurred before the commencement of the Act.

**Clause 19: Regulations**

This clause provides that the Governor may make regulations for the purposes of the Act.

**Clause 20: Administration of Act**

This clause establishes that the administration of the Act is assigned to the Treasurer and the department responsible to that Minister in relation to administration of the Act is the Department of Treasury and Finance.