

TASMANIA

**GOVERNMENT PROCUREMENT REVIEW
(INTERNATIONAL FREE TRADE AGREEMENTS)
BILL 2019**

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**GOVERNMENT PROCUREMENT REVIEW
(INTERNATIONAL FREE TRADE AGREEMENTS)
BILL 2019**

This Public Bill originated in the House of Assembly, and, having this day passed, is now ready for presentation to the Legislative Council for its concurrence.

SHANE DONNELLY, *Clerk of the House*
1 August 2019

*(Brought in by the Minister for Justice, the Honourable Elise
Nicole Archer)*

A BILL FOR

**An Act in relation to government procurement and for
related purposes**

Be it enacted by Her Excellency the Governor of Tasmania, by
and with the advice and consent of the Legislative Council and
House of Assembly, in Parliament assembled, as follows:

PART 1 – PRELIMINARY

1. Short title

This Act may be cited as the *Government
Procurement Review (International Free Trade
Agreements) Act 2019*.

2. Commencement

This Act commences on a day to be proclaimed.

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3. Interpretation

(1) In this Act, unless the contrary intention appears –

accountable authority means –

- (a) in relation to an entity to which paragraph (a) of the definition of *relevant government agency* applies – the accountable authority, under the *Financial Management Act 2016*, in relation to that entity; and
- (b) in relation to an entity to which paragraph (b) or (c) of the definition of *relevant government agency* applies –
 - (i) if the entity is specified in Part 2 of Schedule 1 to the *Financial Management Act 2016* – the accountable authority, under the *Financial Management Act 2016*, in relation to that entity; or
 - (ii) if subparagraph (i) does not apply in relation to the entity – the person specified in an order under section 4 to be the accountable authority in relation to that entity;

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applicable international procurement agreement means an international agreement that –

- (a) applies to procurements by Australian Governments; and
- (b) the State has agreed with the Commonwealth to apply to Tasmania;

covered procurement means a procurement to which an enforceable procurement provision applies;

enforceable procurement provision – see section 5;

excluded category means –

- (a) health and welfare services; and
- (b) education services; and
- (c) advertising services; and
- (d) plasma fractionation services; and
- (e) any goods and services specified in an enforceable procurement provision to be an excluded category for the purposes of this paragraph;

goods includes a right, interest or thing that is legally capable of being owned;

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procurement, in relation to goods and services, means the process of acquiring goods and services by –

- (a) identifying the need to purchase goods and services; and
- (b) selecting suppliers for goods and services –

and includes the disposal of goods that are unserviceable or no longer required but does not include any process, or part of a process, in relation to goods and services within an excluded category;

public interest certificate, in relation to a procurement, means a certificate issued under section 15 in relation to the procurement;

relevant government agency means –

- (a) an entity specified in Part 1 of Schedule 1 to the *Financial Management Act 2016*; and
- (b) an entity, to which paragraph (a) does not apply, that is within a class of entities that is specified in an applicable international procurement agreement as a class of entities to which that agreement is to relate; and

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- (c) an entity declared in an order under section 4 to be a relevant government agency for the purposes of this Act –

and includes a person acting on behalf of such an entity;

supplier means a person who supplies, or could supply, goods and services.

- (2) A reference in this Act to goods and services includes a reference to –
 - (a) goods or services; and
 - (b) physical objects and intangibles such as intellectual property, contract options or goodwill; and
 - (c) construction and works –

but does not include real property.

4. Orders may declare relevant government agencies and accountable authorities

- (1) The Governor, by order, may declare a person, statutory authority or entity to be a relevant government agency for the purposes of this Act.
- (2) The Governor, by order, may declare a person to be, for the purposes of this Act, the accountable authority of a relevant government agency specified in the order, if there is not an accountable authority in relation to the entity by

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virtue of paragraph (a) of the
definition of *accountable authority* in
section 3(1) or paragraph (b)(i) of that definition.

5. Enforceable procurement provisions

- (1) Treasurer's Instructions made under the *Financial Management Act 2016* for the purpose of giving effect to applicable international procurement agreements may include or refer to guidelines, made by the Secretary of the Department of Treasury and Finance, that are specified in those Treasurer's Instructions to be enforceable procurement provisions for the purposes of this Act.
- (2) Guidelines referred to in subsection (1) may specify that they apply to a relevant government agency even though the agency is not otherwise required under the *Financial Management Act 2016* to comply with the Treasurer's Instructions that include or refer to the guidelines.

6. Act binds Crown

This Act binds the Crown in right of Tasmania and, so far as the legislative power of Parliament permits, in all its other capacities.

PART 2 – COMPLAINTS

7. Supplier may make complaint

- (1) A supplier who has reason to believe that a relevant government agency has engaged, is engaging, or is proposing to engage, in relation to a covered procurement, in conduct in contravention of an enforceable procurement provision may, if the interests of the supplier are affected by the conduct or proposed conduct, make to the accountable authority of the relevant government agency a written complaint about the conduct.
- (2) A supplier may withdraw a complaint made by the supplier under subsection (1).

8. Investigation of complaint

- (1) If a supplier makes a complaint under section 7 to the accountable authority of a relevant government agency, the accountable authority must –
 - (a) investigate the conduct that is the subject of the complaint; and
 - (b) prepare a report in relation to the investigation.
- (2) The accountable authority of the relevant government agency to which a complaint is

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made may discontinue the investigation in relation to the complaint 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 under this Act in the Supreme Court in relation to the conduct that is the subject of the complaint, the Supreme Court makes either of the following findings:
 - (i) that the conduct was in contravention, in relation to a covered procurement, of an enforceable procurement provision;
 - (ii) that the conduct was not in contravention, in relation to a covered procurement, of an enforceable procurement provision.
- (3) If –
- (a) proceedings are instituted under this Act in the Supreme Court in relation to conduct that is the subject of the complaint; and

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- (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.

9. Suspension of procurement where complaint made

(1) If –

- (a) a supplier makes under section 7 a complaint to the accountable authority of a relevant government agency about conduct in relation to a procurement; and
- (b) when the complaint is made, there is no public interest certificate in relation to the procurement –

the accountable authority must suspend the procurement until the relevant time.

(2) For the purposes of subsection (1), the relevant time is the earliest of the following times:

- (a) the time, if any, when the supplier informs the accountable authority that the supplier considers the complaint in relation to the conduct to be resolved;
- (b) the time when the supplier withdraws the complaint, if at all;

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- (c) the time, if any, when the accountable authority issues a public interest certificate in relation to the procurement;
- (d) the time, if any, when the Supreme Court, in proceedings under this Act in relation to the conduct, makes either of the following findings:
 - (i) that the conduct was in contravention of an enforceable procurement provision;
 - (ii) that the conduct was not in contravention of an enforceable procurement provision.

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

10. Declarations and injunctions

(1) If a relevant government agency has engaged, is engaging, or is proposing to engage, in conduct in contravention, in relation to a covered procurement, of an enforceable procurement provision, the Supreme Court may, on the application of a supplier whose interests are affected by the conduct or proposed conduct, declare that the conduct is or would be in contravention of the enforceable procurement provision.

(2) If –

(a) a relevant government agency has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing; and

(b) the refusal or failure is or would be conduct in contravention, in relation to a covered procurement, of an enforceable procurement provision –

the Supreme Court may, on the application of a supplier whose interests are affected by the refusal or failure, declare that the conduct is or would be in contravention of the enforceable procurement provision.

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- (3) Pending determination of an application under subsection (1) or (2) in relation to a relevant government agency, the Supreme Court may grant an interlocutory or interim injunction restraining the agency from engaging or proposing to engage in conduct that is or would be in contravention of an enforceable procurement provision.
- (4) If the relevant government agency is not a corporation sole or body corporate, the interlocutory or interim injunction may be addressed to the accountable authority in relation to the agency.
- (5) The Supreme Court may discharge or vary an interlocutory or interim injunction granted by it under this section.

11. Limitation on power to issue declaration

- (1) The Supreme Court must not issue a declaration under section 10 in relation to a contravention, or a proposed contravention, in relation to a covered procurement, by a relevant government agency unless –
 - (a) the Court is satisfied that the applicant for the declaration has made a complaint under section 7 in relation to the contravention or proposed contravention; and
 - (b) if the Court considers that it would have been reasonable for the applicant to have

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attempted to resolve the complaint – the Court is satisfied that the applicant has made a reasonable attempt to resolve the complaint.

- (2) The Supreme Court must not issue a declaration under section 10 in relation to a contravention that has occurred unless the Court is satisfied that the application for the declaration was made –
- (a) within 10 days after the later of –
 - (i) the day on which the contravention occurred; or
 - (ii) the day on which the applicant became aware, or ought reasonably to have become aware, of the contravention; or
 - (b) within a longer period that the Court allows.
- (3) The Supreme Court must not issue a declaration under section 10 in relation to a contravention that is occurring unless the Court is satisfied that the application for the declaration 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 a longer period that the Court allows.

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- (4) The Supreme Court must not issue a declaration under section 10 in relation to a proposed contravention unless the Court is satisfied that the application for the declaration 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 a longer period that the Court allows.
- (5) The Supreme Court must not allow a longer period under subsection (2)(b), subsection (3)(b) or subsection (4)(b), unless the Court is satisfied that –
- (a) the applicant’s failure to make the application within the 10-day period referred to in subsection (2)(a), subsection (3)(a), or subsection (4)(a), respectively, is attributable to the applicant’s reasonable attempt to resolve the complaint referred to in subsection (1)(a); or
 - (b) there are special circumstances that warrant allowing a longer period.

12. Determination of application for declaration where alternative remedy of compensation applied for

- (1) Subsection (2) applies to an application under section 10 to the Supreme Court for a declaration

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made by a supplier in respect of a contravention, or a proposed contravention, in relation to a covered procurement, if –

- (a) the supplier has made an application for an order under section 14 in relation to the contravention or proposed contravention; and
 - (b) there is a public interest certificate in relation to the procurement; and
 - (c) the procurement has not reached the stage where a contract, or other arrangement, in relation to the covered procurement has been entered into with a supplier.
- (2) If this subsection applies to an application in respect of a contravention, or a proposed contravention, in relation to a covered procurement, the Supreme Court must consider –
- (a) whether the issue of the declaration, or the grant of an interlocutory or interim injunction, would result in a significant delay to the covered procurement; and
 - (b) if so, whether the making of an order under section 14(1) in relation to the contravention would be a more appropriate remedy for the contravention, or proposed contravention, than the issue of the declaration.

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- (3) If the Supreme Court, after considering under subsection (2) whether the making of an order under section 14(1) in relation to the contravention, or proposed contravention, in respect of which an application under that section is made would be a more appropriate remedy for the contravention or proposed contravention than the issue of the declaration to which the application relates, is satisfied that –
- (a) the issue of the declaration, or the grant of an interlocutory or interim injunction, would result in a significant delay to the procurement to which the contravention, or proposed contravention, relates; and
 - (b) the making of an order under section 14(1) in relation to the contravention would be a more appropriate remedy for the contravention, or proposed contravention, than the issue of the declaration –

the Supreme Court may refuse to issue the declaration or to grant an interlocutory or interim injunction.

- (4) Nothing in this section is to be taken to limit the power of the Supreme Court to issue a declaration or the grant of an interlocutory or interim injunction.

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13. Certain limitations on issue or grant of declarations or injunctions not to apply

- (1) The power of the Supreme Court to issue a declaration or to grant an interlocutory or interim injunction under section 10 in relation to a contravention, or a proposed contravention, of an enforceable procurement provision may be exercised –
- (a) if the Court is satisfied, to the degree that is applicable to the making of a declaration or an interlocutory or interim injunction, as the case may be, that the agency has engaged in conduct of a kind that constitutes, or may constitute, the contravention or proposed contravention – whether or not it appears to the Court that the agency intends to engage again, or to continue to engage, in conduct of that kind; or
 - (b) if it appears to the Court that, if a declaration is not issued or an interlocutory or interim injunction is not granted, it is likely that the agency will engage in conduct of that kind –
 - (i) whether or not the agency 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

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agency engages in conduct of that kind.

- (2) The power of the Supreme Court to issue a declaration under section 10 in relation to conduct that constitutes, or may constitute, a contravention or proposed contravention of an enforceable procurement provision may be exercised –
- (a) if the Court is satisfied that the agency has refused or failed to do an act or thing – whether or not it appears to the Court that the agency intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; or
 - (b) if it appears to the Court that, if a declaration is not issued, it is likely that the agency will refuse or fail to do that act or thing –
 - (i) whether or not the agency 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 agency refuses or fails to do that act or thing.

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14. Compensation for contravention

(1) If a relevant government agency has contravened, is contravening, or is proposing to contravene, in relation to a covered procurement, an enforceable procurement provision, the Supreme Court may, on the application of a supplier whose interests are affected by the contravention or proposed contravention, make an order –

(a) if the relevant government agency is not a corporation sole or a body corporate – against the State; or

(b) if the relevant government agency is a corporation sole or body corporate – against the relevant government agency –

to pay to the supplier, by way of compensation, the relevant amount in respect of the contravention, or proposed contravention, in relation to a covered procurement.

(2) For the purposes of subsection (1), the relevant amount in respect of a contravention or proposed contravention, in relation to a covered procurement, is an amount that is not more than the sum of –

(a) reasonable expenditure incurred by the supplier in preparing a tender for the procurement; and

(b) reasonable expenditure incurred by the supplier in connection with making a

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complaint under section 7 about the
contravention or proposed contravention;
and

- (c) reasonable expenditure incurred by the
supplier in connection with making a
reasonable attempt to resolve the
complaint.

PART 4 – MISCELLANEOUS

15. Public interest certificate

A relevant government agency may issue a written certificate stating that it is not in the public interest for a procurement specified in the certificate to be suspended while –

- (a) an application for a declaration under section 10 is being considered; or
- (b) a complaint under section 7 is being investigated.

16. Other powers of Supreme Court unaffected

The powers conferred on the Supreme Court under this Act are in addition to, and not in derogation of, any other powers of the Court to grant relief to a party in proceeding before it otherwise than under this Act.

17. Contravention of enforceable procurement provision does not affect validity of contract

- (1) A contravention of an enforceable procurement provision 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.

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Part 4 – Miscellaneous

18. Transitional

This Act, apart from section 17, does not apply to a contravention of an enforceable procurement provision that occurred before the commencement of this Act.

19. Regulations

- (1) The Governor may make regulations for the purposes of this Act.
- (2) The regulations may be made so as to apply differently according to matters, limitations or restrictions, whether as to time, circumstance or otherwise, specified in the regulations.
- (3) The regulations may authorise any matter to be from time to time determined, applied or regulated by any person or body specified in the regulations.

20. Administration of Act

Until provision is made in relation to this Act by order under section 4 of the *Administrative Arrangements Act 1990* –

- (a) the administration of this Act is assigned to the Treasurer; and
- (b) the department responsible to the Treasurer in relation to the administration of this Act is the Department of Treasury and Finance.